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Hon. Speaker, You may approve for tabling.
23/11/23

HARAMBEE

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT – SECOND SESSION – 2023

THE DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING

REPORT ON THE CONSIDERATION OF THE NATIONAL TAX POLICY.

THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 23 NOV 2023 DAY: Thurs
TABLED BY: Hon. (CPA) Kiria Kimani, MP Chairperson, Finance & National Planning
CLERK-AT THE-TABLE: A. Shibuko

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LIST OF ABBREVIATIONS AND ACRONYMS

LIST OF ACRONYMS

REIT	- Real Estate Investment Trust
PAYE	- Pay as You Earn
KEPSA	- Kenya Private Sector Alliance
AGOK	- Association of Gaming Operators Kenya
ICPAK	- The Institute of Certified Public Accountant Kenya
AKI	- Association of Kenya Insurers
KAM	- Kenya Association of Manufacturers
BETA	- Bottom-Up Economic Transformation Agenda
KASIB	- Kenya Association Of Stock Broker and Investment Banks

LIST OF ABBREVIATIONS

NSE	- Nairobi Security Exchange
ALN	- Anjarwalla and Khanna
KBA	- Kenya Bakers Association
PWC	- Price Waterhouse Coopers
LSK	- The Law Society of Kenya
IDF	- Import Declaration Fee
ADR	- Alternative Dispute Resolution
JSC	- Judicial Service Commission
IEA	- Institute of Economic Affairs
NTP	- National Tax Policy
VAT	- Value Added Tax
EAC	- East Africa Community
CSR	- Corporate Social Responsibility
MSMEs	- Micro-Small and Medium-Sized Enterprises
M & A	- Mergers and Acquisitions
CS	- Cabinet Secretary
MDAs	- Ministries, Departments, and Agencies

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CHAIRPERSON'S FOREWORD

The National Tax Policy was laid on the Table of the House by the Leader of the Majority Party on 27th April 2023 and thereafter committed to the Departmental Committee on Finance and National Planning for consideration.

The principal object of the policy is to facilitate revenue mobilization to facilitate the implementation of government priority programs under the BETA. Other objectives include income redistribution, regulation of the consumption of goods or services with negative externalities, employment creation, price stability, economic development through investment promotion and local value addition.

The key challenges identified in the tax system by the policy include: a growing tax expenditure, complexities in taxation of emerging economies such as online business, low tax compliance, challenges in international taxation, lack of guidelines for treaty negotiation and delay in settlement tax disputes. To address the unpredictability of tax rates, the policy recommends a comprehensive review of taxes every five years

The Committee held stakeholder meetings with twenty-two stakeholders. Many stakeholders lauded the policy noting that stability and predictability of taxes is key to supporting the growth of business and investment in the country. Stakeholders called for the development of criteria for granting exemptions and tax incentives. In relation to tax refunds, stakeholders proposed the establishment of a Tax Refund Fund to provide a solution for the perennial problem of tax refund backlog. The need for Double taxation agreements(DTAs) that take the interest of Kenya was canvased with stakeholders calling for re-negotiation of the old DTAs to bring them to par with business realities.

May I take this opportunity to express my gratitude to the Committee Members for their resilience and devotion to duty, which made the consideration of the draft National Tax Policy. May I also appreciate the Offices of the Speaker and Clerk of the National Assembly for always providing guidance and direction to the Committee. Finally, I commend the secretariat for exemplary performance in providing technical and logistical support to the Committee.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to Standing Order 199, it is my pleasant duty to present to the House the report of the Committee on its consideration of the National Tax Policy.

Hon. CPA Kimani Kuria, MP
Chairperson, Departmental Committee on Finance and National Planning

PART I

1.0 PREFACE

1.1 MANDATE OF THE COMMITTEE

1. The Departmental Committee on Finance and National Planning is one of the twenty Departmental Committees of the National Assembly established under ***Standing Order 216*** whose mandates pursuant to the ***Standing Order 216 (5)*** are as follows:
   i) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
   ii) To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;
   iii) on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;
   iv) To study and review all legislation referred to it;
   v) To study, assess and analyze the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
   vi) To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;
   vii) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);
   viii) To examine treaties, agreements and conventions;
   ix) To make reports and recommendations to the House as often as possible, including the recommendation of proposed legislation;
   x) To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
   xi) To examine any questions raised by Members on a matter within its mandate.
2. In executing its mandate, the Committee oversees the State Department for National Treasury, State Department for Economic Planning, Commission on Revenue Allocation and Office of the Controller of Budget

1.2 MEMBERSHIP OF THE COMMITTEE

3. The Committee comprises the following Members

Chairperson
Hon. CPA. Kimani Kuria, MP
Molo Constituency
UDA Party

Vice-Chairperson
Hon. Amb. Benjamin Langat, CBS, MP
Ainamoi Constituency
UDA Party

Hon. (Dr.) Adan Keynan, MP
Eldas Constituency
Jubilee Party

Hon. David Mboni, MP
Kitui Rural Constituency
Wiper Party

Hon. Joseph Kipkoros Makilap, MP
Baringo North Constituency
UDA Party

Hon. CPA Julius Rutto, MP
Kesses Constituency
UDA Party

Hon. Paul Biego, MP
Chesumei Constituency
UDA Party

Hon. (Dr.) John Ariko, MP
Turkana South Constituency
ODM Party

Hon. George Sunkuya, MP
Kajiado West Constituency
UDA Party

Hon Andrew Okuome, MP
Karachuonyo Constituency
ODM Party

Hon. Joseph Oyula, MP
Butula Constituency
ODM Party

Hon. Umul Ker Kassim, MP
Mandera County
UDM Party

Hon. (Dr.) Shadrack Ithinji, MP
South Imenti Constituency
Jubilee Party

Hon. Joseph Munyoro, MP
Kigumo Constituency
UDA Party

Hon. Mohamed Machele, MP
Mvita Constituency
ODM Party

1.3 COMMITTEE SECRETARIAT

4. The Committee is facilitated by the following staff

Mr. Benjamin Magut
Principal Clerk Assistant II /Head of Secretariat

Ms. Jeniffer Ndeto
Deputy Director Legal Services

Mr. Nebert Ikai
Clerk Assistant I

Mr. Salem Lorot
Legal Counsel I

Mr. George Ndenjeshe
Fiscal Analyst III

Mr. James Macharia
Media Relations Officer

Ms. Shamsa A. Abdi
Research Officer III

Mr. Andrew Jumanne Shangarai
Principal Serjeant-At-Arms

Mr. Benson Kamande
Clerk Assistant III

Ms. Joyce Wachera
Hansard Reporter III

Ms. Nelly W.N Ondieki
Research Officer III

Mr. Simon Ouko
Assistant Serjeant-At-Arms

PART II

2.0 OVERVIEW OF THE NATIONAL TAX POLICY

2.1 INTRODUCTION

5. The National Tax Policy is a government policy aimed at enhancing transparency in the tax policies forming a basis of tax reforms in the existing tax laws. It identifies and analyses the challenges in the current tax regime and sets guidelines on how the said challenges are addressed. Kenya does not have a specific tax policy which has created challenges in relation to the applicability of tax reforms and legislations. The policy is key in revenue mobilization to help facilitate the implementation of the government's Bottom-Up Economic Transformation Agenda (BETA).

2.2 OBJECTIVES OF THE POLICY

6. The overall objective of this Policy is to guide the progressive development and administration of Kenya's tax system. The specific objectives include:

    i. To offer policy guidance on tax administration and enforcement of tax and customs laws;
    ii. Promote investment and enhance regional and international trade;
    iii. Enhance compliance with tax and customs legislations;
    iv. Provide the basis for review and development of tax laws;
    v. To guide stakeholders including investors on tax policy;
    vi. Provide a basis for institutionalizing progressive tax culture;
    vii. Provide principles for negotiation of bilateral, multilateral, regional and international agreements on tax and Customs matters;
    viii. Provide guiding principles for the Kenyan tax system;
    ix. Provide guidelines for the development of a framework for granting tax incentives and concessions to various sectors of the economy; and
    x. Define the roles and responsibilities of key players in the tax administration.

2.3 RATIONALE OF THE POLICY

7. The policy aims to achieve the country's development agenda hence resource mobilization is critical. This will be achieved by;

    I. Growing the tax revenue: there is a need to have tax reforms within the confines of the policy which will enhance domestic revenue mobilization to finance the government development agenda.
    II. Providing guidelines for the development of a framework to grant tax incentives: Over the years the government has provided tax incentives and exemptions to support government projects. There is a need to monitor the effectiveness of the tax incentives and the policy will be key in guiding the management and monitoring of the tax incentives to spur economic growth.
    III. Provide guidance, ensure certainty, and establish consistency in future amendments to national tax laws; The Kenyan tax policies are contained in tax laws which are amended every year during the budget-making process. This creates unpredictability in the tax

systems causing distortions that create additional costs to taxpayers. The policy will create stability in the tax system and enhance certainty and consistency.

IV. Enhance structures for information gathering and sharing: the policy provides guidelines for enhancing information gathering and sharing to support revenue mobilization and protect the tax base by mitigating tax avoidance and evasion.

V. Efficiently manage tax refunds: the policy provides guidelines for enhancing the timely processing of tax refunds to avoid withholding capital for taxpayers.

VI. Addressing complexities in tax legislation and administration: the policy provides guidelines to address complexities in tax legislation and administration.

VII. To enhance public participation and accountability in the formulation of tax laws: the policy will specify the role of key institutions in tax policy formulation.

PART III

3.0 SUBMISSIONS BY THE STAKEHOLDERS ON THE NATIONAL TAX POLICY.

3.1 LEGAL FRAMEWORK ON PUBLIC PARTICIPATION

8. Article 118 (1)(b) of the Constitution provides that:

> *"Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees."*

9. Pursuant to the aforementioned provision of the law, the Committee vide letter Ref. No. NA/DDC/F&NP/2023/123 dated 27th September 2023 and letter Ref. No. NA/DDC/F&NP/2023/125 dated 9th October 2023 invited key stakeholders to submit views on the National Tax Policy and attend a public participation forum that was held on 5th October 2023 and 12th October 2023.

10. The Committee received written memoranda from the following twenty-one entities who were all invited by the Committee to make oral submissions:

I. The Institute of Certified Public Accountants of Kenya (ICPAK).
II. Deloitte and Touche.
III. Westminster Consulting.
IV. Institute of Economic Affairs.
V. Kenya Bankers Association (KBA)/ KPMG International Limited.
VI. Nairobi Securities Exchange (NSE)/ Kenya Association of Stockbrokers and Investment Banks (KASIB)/ Real Estate Investment Trusts (REITS)
VII. PricewaterhouseCoopers (PwC).
VIII. Kenya Private Sector Alliance. (KEPSA).
IX. RSM (Eastern Africa) Consulting Ltd.
X. Association Of Gaming Operators Kenya (AGOK).
XI. Association of Kenya Insurers (AKI).
XII. Ichiban Tax & Business Advisory LLP.
XIII. Ernest & Young.
XIV. KPMG East Africa
XV. Law Society of Kenya (LSK)
XVI. Anjarwalla & Khanna.
XVII. Bowmans LLP.
XVIII. East Africa Private Equity & Venture Capital Association (EAVCA)
XIX. Okoa Uchumi.
XX. Kenya Association of Manufacturers (KAM)
XXI. Ernest & Martin.

3.2 STAKEHOLDERS SUBMISSIONS

3.2.1 THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK).

In a meeting held with the Committee on 5th October 2023, ICPAK submitted as follows:

Proposed Structure of the Policy

11. Under the *policy guidelines* in Chapter 4 of the policy be structured to include Policy Objectives, Rationale/Key Concerns, Policy Actions, Policy Outcomes and

Policy Risks. This is to ensure that best practice in the development of the Policy is adhered to and to enhance the logical flow of the Policy.

New Section on Definition, Glossary of Terms and Reasons for Taxation

12. They noted that the design of the Policy lacked definitions/glossary of critical terms and concepts and the rationale for governments imposing taxes which is a critical area that sets the stage for the policy pronouncements. To address this, they proposed the inclusion of basic and critical terms such as: Tax, Fee, Levy, Charge, Income, Tax yield, Tariff, Tax Evasion, Tax avoidance, Tax Rate, Tax Band/Scale, Tax Buoyancy, Tax Service, Taxpayer, Tax Incentive, Tax Exemption and Tax Rebate.

Section 1.3 - Rationale of the National Tax Policy

13. Regarding the Rationale of the NTP, ICPAK felt that the Policy rationale was insufficient and narrowly centers on tax collection and revenue augmentation rather than addressing the broader economic objectives. In their view, the NTP's justification should be driven by the need of Kenya to attain stability in revenue collection, promote economic diversification, ensure value for money and businesses and establish tax incentives and exemptions. The proposed adjustment to the rationale aims to bring it in line with the Guiding Principles and the specified Policy Measures.

Section 1.4 - Objectives of the Tax Policy

14. The policy's objectives currently have an internal focus and necessitate a redirection to actively involve the taxpayer as a crucial partner, considering the impact of taxes on socio-economic development. As a remedy, they propose an amendment to introduce specific objectives, namely: To provide the basis, function, rationale, outcomes, and risks of Kenya's tax system; To allow/create a simplified tax system that enables taxpayers to understand, compute and comply with their tax obligations and To provide a framework that promotes accountability and transparency by the taxpayer, other government agencies, and tax administrator. The existing objectives are skewed towards the government, emphasizing tax enforcement and collection clauses, while neglecting essential aspects such as taxpayer involvement, tax accountability, and productivity.

Section 1.5 - Guiding Principles

15. They propose the inclusion of additional important principles in line with technology and recent advancements in data protection. This guarantees data protection in line with the Data Protection Act, 2019.

16. The information provided on the disclosure of tax information is limiting and thus in their view, the description of Transparency and accountability be amended to read: "*The tax system shall enhance disclosure of information on revenues collected and expenditures, types of taxes, total tax liabilities and time of payment*". The proposal would enhance accountability and compliance.

Section 2.3.3 - Tax Administration Functions

17. Under the Registration of Taxable Persons functions in Chapter two (2) of the NTP, ICPACK proposes that the section be amended to include: Lack of precision in the identification of taxpayers; Narrow tax base; Inefficient registration of taxpayers and Lack of effective updating function to tax obligations to facilitate compliance. This is to ensure that there is completeness.

18. Concerning Section 2.2.3 (IV) on Processing of Tax refunds, ICPACK proposes that the Tax Refunds section be amended to mitigate the challenges of tax refunds and assist taxpayers in better managing cash flow constraints.

19. Under Section 2.2.3 (V) on Fostering and Upgrading a Tax Collection System ICPAK recommends that an advance PAYE of 15%-20% be introduced to be reconciled quarterly. This will deal with the perennial problem where Government related agencies fail to remit the PAYE despite the same being deducted from employees.

Section 2.4.1 - Direct Taxes

20. ICPAK proposes that the Eighth Schedule be amended to allow indexation of CGT. Their justification is that an increase in the value of property is eroded by the inflationary changes year- on-year. Therefore, CGT should aim to tax only the actual gains arising on the property by adjusting the change in property value and eliminating the inflation effect on the value. Failure to adjust the inflationary changes creates inequity since a transferor is taxed on unearned income.

Section 4.1 - Hard to Tax sectors

21. They opine that the tax policy guideline is limiting the scope and propose that the policy objective explore better innovative ways to broaden the tax base and to enhance compliance in Kenya's tax system since it is not economical to follow up on small-scale traders in the informal sector, therefore, a tax threshold be introduced in the policy.

Section 4.2 - Tax Incentives & Management of Tax Expenditure

22. ICPACK noted that the lack of an objective criterion to determine eligibility for tax incentives in Kenya has resulted in the abuse of the incentives on account of influence by political and private interests and as a result, incentive schemes do not get aligned to the overall economic agenda of the country. Therefore, to provide investors with information beforehand for transparency and certainty purposes, they proposed alternative Policy Objectives, Policy Actions, Policy Outcomes and Policy Risks.

23. They noted that Mwananchi and the Business Community have consistently identified several distortions that grant some firms preferential treatment in the payment of taxes. To address this, they proposed that the policy should provide a comprehensive Framework for introducing, awarding and basis for review of tax incentives.

Section 4.3 - Increase in Tax Compliance Level

24. ICPAK proposes that, the NTP be amended to ensure best practices on promotion tax compliance deployed by countries such as South Africa, OECD and Australia, among others adopted and further encourage taxpayers to comply with payment of taxes and ensure punitive measures are put in place for misuse of tax revenue.

Chapter Four (4) - Personal Income Tax, Corporate Income Tax, Value Added Tax, Excise Duty, Customs Administration and Tax Administration

25. ICPAK notes that, the Policy guidelines as contained in Chapter four (4) do not provide policy concerns, objectives, actions, outcomes and expected risks and thus propose that the sections be included to enhance logical flow.

Section 4.12 - Predictability in Tax rates and tax bases

26. It observed that, Section 4.12 of the NTP misses key aspects such as policy concerns, policy objectives, policy outcomes and policy risks and thus requires to be amended and allow for flexibility to deal with any emerging issues in case of unforeseen changes in the economy or a public outcry due to crafting of the law.

Chapter Six (6) - Monitoring & Evaluation

27. ICPAK observed that, the NTP does not specify which branch of government or specify the entity that will be responsible for the implementation and coordination framework for the NTP. To this end, they proposed the creation of a Tax Policy Committee in the National Treasury with membership from both the National Treasury, Private Sector and Kenya Revenue Authority to oversee the effective coordination and implementation of the policy.

New Chapter 7 - Risk Management and Mitigation Framework

28. ICPAK proposes a new chapter on Risk Management. This Chapter shall provide the framework that shall guide the handling and mitigation of associated with the implementation of the NTP.

3.2.2 DELOITTE AND TOUCHE LLP

Deloitte & Touche LLP appeared before the committee on 5th October 2023 and submitted as follows:

29. Paragraph ii, Subchapter 4.6 (Corporate Income Tax) should be amended to provide for the deductibility of expenditure incurred by businesses in the production of taxable income even where the income is not taxed in the same year. Specifically, they recommended the replacement of the word '*that income* with *taxable income*. The matching principal established by the phrase 'that income' presents practical difficulties with respect to certain businesses that incur expenditure in relation to income earned in subsequent fiscal periods.

30. Paragraph iii, Subchapter 4.6 (Corporate Income Tax) be amended to confirm that capital deductions may be enhanced in excess of 100% to the extent that measurable benefits accrue to the economy or the general public in line with the Government of Kenya's policy initiatives.

31.The Policy proposal to cap investment allowances at 100% of the actual cost of an investment or asset would unnecessarily limit the possibility of the Government to provide investment allowances at rates higher than 100% based on emergent needs to incentivize investment or spur growth and development in certain sectors or regions.

32.Paragraph iii, Subchapter 4.5 (Personal Income Tax) tax bands be widened and the marginal tax rate is reduced to safeguard individuals from excessive taxation and erosion of their purchasing power.

33.The marginal rate of 35% is 5% higher than the corporate income tax rate of 30%. This means that not only are individuals taxed at rates higher than corporations, but also have a higher tax base considering that individuals are taxed on their gross earnings, while corporations can claim deductions for the expenses incurred in the production of their income. They recommend expansion of tax bands and capping of the marginal tax rate for individuals so that it remains below the corporate income tax rate.

34.Paragraph iv, Subchapter 4.5 (Personal Income Tax) proposes an increase in the deductible contributions to savings for retirement.

35.Whilst inflation has continued to erode the value of money year-on-year, deductible contributions to savings for retirement have remained the same for over 15 years, with the current cap of KES 240,000 per annum having come into effect from 1 January 2006. This has not kept pace with inflation, the rising cost of living, the increasing tax burden, and other payroll-related levies that individuals, particularly those who are in formal employment, are required to bear. They recommend an increase in the deductible contributions to savings for retirement by at least 50% to offer some reprieve to employees.

New proposal

36.Deloitte proposes to allow statutory deductions against taxable income

37.On VAT Deloitte proposes that the proposal be amended to allow for the possibility of preferential rates with the limitation that such rates shall not be lower than 50 percent of the general rate.

Justification

With the general rate of VAT currently at 16%, the proposal to have only one general VAT rate would mean that even for sensitive products, such as petroleum products, any opportunity to alter the rate as a way to cushion the economy against shocks occasioned by global trends and the adverse effects of price increases of these products would be blocked. They recommend that the proposal be amended to allow for the possibility of preferential rates with the limitation that such rates shall not be lower than 50 percent of the general rate.
Further, the proposal to restrict VAT exemptions to supplies whose exemption is warranted by compliance and administrative costs. rationalization of VAT exemptions to cover specific essential sectors or supplies. VAT exemption of these supplies will result in a reduction of the cost of accessing these services and will

go a long way in supporting efforts towards universal healthcare and food security.

38.Under subchapter 4.6 (Value Added Tax), Paragraph (ii), the stakeholder proposes the rationalization of VAT exemptions to cover specific essential sectors or supplies including the following: healthcare services for both humans including nursing, dentistry, and other similar services; healthcare services for animals including veterinary services and similar services; agricultural extension and inspection services and similar services, and; essential goods and services including food, housing, education, among others.

Justification

VAT exemption of these supplies will result in a reduction of the cost of accessing these services and will go a long way in supporting efforts towards universal healthcare and food security.

39.They proposed a structured, strategic, and medium to long-term viewpoint when making changes to the VAT law

Justification

The VAT regime in Kenya remains one of the most volatile. The fiscal budget cycle presents the government with an opportunity every year to make changes to the VAT laws perhaps with the objective of, among others, enhancing revenue collection, incentivizing investment in certain sectors or cushioning Kenyans from economic shocks.

40.On Excise Duty, Subchapter 4.7 Paragraph ii and iii, Deloitte proposes that the Policy provides for the criteria of determining excisable goods and services. The criteria should be based on international best practice.

Justification

Some of the excisable goods under the Excise Duty Act are essential goods with no negative externalities e.g., water, eggs. Potatoes etc. In addition to setting out the categories of excisable goods, it would be prudent to spell out the criteria that will govern the scope of excisable goods and services. This will ensure that excise duty is only imposed on the intended limited range of products in line with international best practices.

41.Additionally, on the determination of excise duty rates, they proposed that the policy introduce the following paragraphs as the basis for determining excise duty rates:

I. Excise duty rates imposed on products shall not exceed the optimal excise duty rate.
II. The optimal rate shall be based on studies conducted by the Kenya National Bureau of Statistics.
III. The optimal excise duty rates undergo public participation and approval by the National Assembly.
IV. The optimal tax rate shall be reviewed every three years.

Justification

The introduction of a basis for determining excise duty rates will ensure certainty amongst the taxpayers and promote revenue growth.

42.In Subchapter 4.7 Paragraph viii, they proposed that the Policy be amended to include categories of other essential items that are currently listed in the Second Schedule of the Excise Duty Act e.g., persons with disability, aid-funded projects.

Justification

The Second Schedule of the Excise Duty Act provides for the exemption of excise duty on a number of products. The excluded exemptions are key from a social and economic perspective and should be included in the tax policy.

43.On Tax Administration, the stakeholder proposed that Subchapter 4.9 Paragraph iv is broadly worded and lacks the much-needed clarity of the specific action to make the process effective and efficient. They recommended enhancement of this proposal to provide as follows: -

"There shall be an efficient funding structure by the National Treasury for the timely settlement of approved tax refunds within a maximum period of six months. This will provide certainty on the availability of resources to settle approved refunds in a timely manner."

Justification

The inclusion of a requirement within the Policy for the adoption of an efficient funding structure with respect to approved refunds will serve to ensure the availability of resources to settle approved refunds in a timely manner. This recommendation would also be in line with the policy of other countries.

44.Under Subchapter 4.10 Paragraph iii, the stakeholder proposed that this paragraph be enhanced to guarantee the autonomy of the Alternative Dispute Resolution ("ADR") process in tax disputes.

Justification

An ADR process that is independent of the KRA and National Treasury will guarantee equality of the parties to the dispute, without which the outcomes of the ADR process could be unfair and amount to a miscarriage of justice. The expansion of the ADR mechanisms mandates include the resolution of matters of law on a without-prejudice basis.

New Proposal

45. The proposed introduction of Paragraph ix and Paragraph x under Subchapter 4.9 of the Policy to provide as follows: -

Paragraph ix – *The National Treasury shall, in consultation with the relevant stakeholders, formulate, implement, and publish guidelines and mechanisms for the application and processing of waivers of penalties and interest issued in accordance with the TPA.*

Paragraph x - The *Legislature shall review and pass the necessary regulations to expressly provide the criteria for evaluating applications for waiver of penalties and interest and provide an appeal or review mechanism where a taxpayer feels that their grounds of waiver were not duly considered.*

Justification

The proposed inclusions will support the attainment of key guiding principles of the Policy being simplicity, certainty and clarity, ensure impartiality in the approval of *bona fide* waiver applications and align the Policy to international best practice captured in other Commonwealth jurisdictions in Africa and beyond.

46. On the protection of taxpayers' rights in tax administration and enforcement, they proposed to introduce a preamble to Subchapter 4.9 of the Policy to read as follows:

"The administration and enforcement of tax legislation shall observe the Guiding Principles of this Policy subject to Chapter 4 of the Constitution of Kenya, 2010, and in particular the rights and fundamental freedoms so guaranteed. For the avoidance of doubt, the enforcement of tax legislation shall ensure reasonable notice be issued and take cognizance of dispute resolution mechanisms available to taxpayers."

Justification

The incorporation of the rights and fundamental freedoms guaranteed under Chapter 4 of the Constitution of Kenya, 2010 in the Policy will aid in codifying the same within Kenya's taxation framework. This will bring to the forefront and support the protection and guarantee of taxpayers' rights in tax revenue administration and enforcement, bringing critical stakeholders in revenue administration.

47. Additionally, they proposed the inclusion of Paragraph xi of Subchapter 4.9 of the Policy compelling the KRA to formulate and publish a tax audit process framework purposed at ensuring the conduct of tax audits by the KRA is efficient, effective, and predictable with clearly stipulated timelines, and further is guided by conventional audit standards, methods and processes, including sampling.

Justification

The proposed inclusions will increase certainty and predictability amongst taxpayers with respect to the tax audit process therefore enabling the efficient collaboration between taxpayers and the KRA. The proposal will also aid in the attainment of administrative efficiency, a core Guiding Principle of the Policy, through time and cost savings by both the KRA and taxpayers.

New Proposal

48. Under Legislative Power, the proposed introduction of Subchapter 1.6 reads *"To give legislative effect to the Policy as a guiding tool governing the tax legislative framework applicable in Kenya, the Legislature is urged to codify the Policy in legislation."*

Justification

This will ensure the Policy is entrenched and provides effective direction in the formulation/amendment of tax legislation in Kenya.

3.2.3 WESTMINSTER CONSULTING.

Westminster Consulting appeared before the Committee on 5th October 2023 and submitted as follows;

49.The National Tax Policy will be a crucial tool to support the Government's Bottom-up Economic Transition Agenda (BETA).

50.The practicality of achieving the Policy objectives through the implementation of the NTP, which heavily seeks to increase revenue collection, demands meticulous evaluation. While increased tax revenue can indeed be a means to finance government initiatives, it is imperative to consider the potential impact on the wider economy and the population.

Chapter Four - Policy Guidelines

51.The National Tax Policy mentions that a comprehensive review of tax laws would take place every five years, it's crucial to provide clear guidelines on how this process should unfold. The suggestion raises a valid concern about the dynamic nature of laws and economic activities. To address this, it may be more practical to amend the provision to state that tax laws should be reviewed every five years but with flexibility for special circumstances.

52.The guiding principles of taxation as per the policy should be amended to include the principle of diversity. Overreliance on a narrow tax base can lead to overtaxing a particular segment of the population or economic activity.

53.The Tax policy framework is notably silent on the crucial aspects of trade remedies and countervailing measures. The policy must address these issues comprehensively to safeguard and promote local manufacturing and local businesses.

54.The policy also lacks clear and comprehensive guidelines regarding miscellaneous fees collected alongside customs duty, such as the Railway Development Levy and the Import Declaration Funds (IDF).

55.There is a need to set up the Tax Appeal Tribunals all across the country because of logistic and financial concerns. At the moment, it is only based in Nairobi. ADR for tax-related disputes should be entrusted to Facilitators appointed and gazetted by the Judicial Service Commission (JSC).

Section 4.11 - International Taxation and Tax Treaties

56.Double Tax Agreements that are currently in effect should be regularly reviewed to accurately reflect international best practices. In introducing policy guidelines to facilitate negotiations of bilateral, multilateral, regional and international tax agreements, the policy should be cognizant of Article 37 of the Protocol Creating the Customs Union which guides how bilateral and multilateral policies in the region will be handled.

57.New reliefs should be introduced that will take into account instances of persons with families, persons with special needs and any other considerations that would affect their income.

Chapter Five - Implementation Framework

58.There should also be established dedicated Fiscal Policy Units in both the National Treasury and the National Assembly to improve the development of National Fiscal Policies.

59.The National Assembly/ The National Treasury Fiscal Policy Unit can do the Monitoring and Evaluation or engage external entities, such as third-party auditors, which can offer an unbiased perspective on the level of implementation and impact of the fiscal policies.

3.2.4 INSTITUTE OF ECONOMIC AFFAIRS (IEA).

The Institute of Economic Affairs appeared before the Committee on 5th October 2023 and submitted as follows:

60.The NTP is indeed timely and a major step in the realization of the country's dream of having an efficient and fair tax system that promotes equity in tax administration and a predictable tax environment for citizens, households and firms/markets.

61.The objectives of the NTP are rather inward-looking and narrow towards revenue generation. On the contrary, the objectives should be cognizant of other roles of tax systems including facilitating economic growth and development.

Composition of Tax structure and design

62.The NTP is not explicit on whether the focus as a country is to tax income (direct taxes), PAYE overburdened salaried taxpayers (increase in PAYE component from 24% in 2010/11 to 40.5% in 2020/21) in the context of a large informal sector (83.2% in 2021) vis a vis a small formal sector or shift reliance to taxation of consumption (indirect taxes) by contrast VAT component has plateaued.

Section 1.5 - Guiding Principles by Tax Head

63.The Income Tax Act in Kenya is too long and thus complicated. Income tax policy should be driven by the design of an efficient mechanism for raising revenues while causing minimum distortions in the markets, firms and households, from which the revenue is paid.

64.IEA proposes a maximum of three tax bands for the medium term and imposition of a flat tax rate for all PAYE at 22% from an established income threshold of about Kshs.40,000 monthly with no reliefs and exemptions.

65.The excise tax model in Kenya is not built on firm, credible and consistent economic logic. Parliament should establish the principle in the excise tax law that this tax is applicable for harmful economic activities consumed by individuals and firms. All revenue generated from excise tax must be isolated and used directly to correct the harm caused by the activities for which it was imposed.

66. Further, VAT is the most complicated tax in the taxation regime in Kenya and this complexity creates severe distortions. The National Assembly should establish the principle of VAT taxation as a simple, modest standard rate with no exemptions and widen it to all goods and services throughout the republic. The quest to justify raising the standard rate to match EAC countries is not a legitimate reason for changes in the design. The alternative to a simple and direct system for the collection of consumption taxes is a modest sales tax that applies to all goods and services with a few exceptions for selected goods.

Section 2.1 - Legal and Regulatory Framework.

67. The legal and regulatory framework should be expanded to take cognizant of the context of a devolved system of government. This is important because the administration of Kenya's tax system affects the functionality of intergovernmental fiscal relations.

68. The revenue performance section could be beefed up and made richer by not only providing information on revenue performance in real terms but also an assessment of the composition of tax revenue against basic tax concepts and principles of efficiency and equity.

69. There is a need to democratize tax forecasting tools and transparency as this will foster increased civil society engagement in fiscal policy affairs.

70. According to the IEA Kenya, Parliament should obligate the National Treasury to publicize reports with comprehensive tax expenditure analysis and estimates as part of the Budget Policy Statement and Budget Estimates for improved budget transparency. Public availability of such reports will facilitate more meaningful engagement and scrutiny by citizens on the justification for granting tax incentives.

Chapter Four - Policy Guidelines

71. IEA-Kenya proposes the need for adequate focus and commitment by the government towards prudent utilization of revenue, thus improved service delivery as this is ostensibly correlated to a rise in levels of tax compliance. They note that the National Tax policy should have a specific programme with dedicated resources to ensure continuous taxpayer engagement, education, and awareness.

72. The huge backlog of tax refund claims is difficult to administer. The Institute proposes that the National Treasury should reconsider the funding model of refunds as the current state of funding has proven to be inadequate to enable KRA's monthly settlement of tax refund arrears. Further, KRA should in the future separate revenue collection functions from the processing of the fund.

3.2.5 KENYA BANKERS ASSOCIATION (KBA)

The Kenya Bankers Association (KBA) appeared before the Committee on 5th October 2023 and submitted as follows:

73.The draft National Tax Policy under Chapter 4, 4.6 paragraph V proposes to phase out preferential corporate tax rates. The justification is that these preferential taxes have contributed to tax loss through tax base erosion and preferential treatment to businesspersons by the government. In the implementation of this proposal, the government should consider maintaining the preferential rates for Special Economic Zones (SEZs) and Export Processing Zones (EPZs). The government should also not phase out the tax breaks that are meant to bring in FDI. Just like there are different PAYE bands for taxation of a range of incomes, the Treasury should consider adopting a similarly tiered CIT system for companies, depending on their profile and sector

Justification

The preferential tax rates especially in the SEZ and EPZ often put in place to encourage economic growth and job creation. Lower tax rates can incentivize businesses to invest, expand, and hire more employees. By phasing out these preferential rates, the government might discourage such economic activities, which could ultimately harm the overall economy.
These changes proposed by the National Tax Policy will also go against the Finance Act, 2023 changes that sought to improve market access for goods originating from SEZs and EPZs.

The government has stated that they are implementing a targeted approach to investment in certain sectors. The government has stated that they are implementing a targeted approach to investment in certain sectors.

Preferential rates can make a country more attractive to multinational corporations, leading to foreign direct investment and economic development. If a government eliminates preferential rates, it may put itself at a disadvantage compared to other countries that continue to offer lower tax rates, potentially leading to a loss of business to other nations.

Section 1.5 - Simplicity in Administration and Transparency

74.The administration of taxes should also be streamlined to facilitate enforcement and compliance, ultimately fostering transparency and benefiting all stakeholders. Kenya's national tax policy should encourage the simplification of administration which will enable both tax authorities and taxpayers to collaborate effectively. This will further ensure efficient revenue collection without imposing undue administrative challenges on taxpayers when it comes to collecting and remitting taxes to the tax authorities.

Justification

The NTP should emphasize that Kenya operates a self-assessment regime. Over the years, the tax legislation has moved away from this founding principle with an emphasis on the deployment of the agency model for the collection of taxes.

While the KRA has the mandate for the enforcement of the legislation on the collection of taxes and is handsomely funded to carry out this mandate, the deployment of the agency model is an abrogation of this mandate, resulting in taxpayers being overburdened with the responsibility for collection of taxes for which there is no reward yet the penalties for omissions are grave.

An example is the latest requirement to remit withholding tax to the revenue authority within a 5-day period which poses a huge administrative challenge for banks. Banks accrue interest on customer deposits daily and given the requirement to account for withholding on the earlier date of payment or accrual, the five-day deadline for remittance of tax is a nightmare.

The KRA's investments in technology should be accompanied by a reduction in agency taxes since the KRA can track transactions and uncover potential revenue leakage loopholes. The NTP should provide a timeframe for the elimination of the local agency taxes to ease the administrative burden on taxpayers.

Certainty and Predictability

75. Certainty and predictability in tax policies provide a stable and consistent environment for businesses and investors. When tax laws and regulations remain relatively unchanged over time, it allows businesses to plan their investments, expansions, and long-term strategies with confidence. Investors are more likely to commit capital when they can anticipate the tax implications of their investments.

Justifications

The NTP should insist on certainty within the tax policies being put forward. An example of frequent changes in the tax policy is clear from the changes to the VAT legislation on the taxation of exported services which have evolved as follows:

I. Prior to the Finance Act 2021, the exported services were zero-rated for VAT purposes. Under this regime, exporters of services were eligible for refunds of input VAT incurred to provide their services. The Finance Act 2021, removed the services from the zero-rated to the exempt category. Under this regime, the service providers could not claim the input VAT and were expected to deregister from VAT.
II. Finance Act 2022, transferred the export of services from exempt to taxable at 16%.
III. The service providers were not expected to register for VAT and start charging VAT on their services.
IV. Finance Act 2023, the export of services has now reverted to the zero-rated category

For a country that aims to be the regional base for services, such inconsistencies in tax policy are a big red flag. The National Tax Policy still does not clearly state that the export of services is zero-rated. The policy should provide for equity in the treatment of services and goods and also be consistent with Government policy to position Kenya as a regional hub.

Public Engagement

76. The national tax policy should ensure public participation in the process of proposing changes to tax legislation as this is essential for transparency, accountability, and democratic governance. The national tax policy should prioritize active involvement and careful consideration of stakeholder input during the public participation stage as one of its fundamental principles.

Justification

While stakeholder participation is provided under the constitution of Kenya, the same has not been very saucerful due to a lack of proper structures and accountability. Currently, the Government engages stakeholders in enacting tax laws, but most of the suggestions are ignored without any justification.

Responsibilities of Stakeholders – Outsize role of the KRA in tax policy Formulation

77. For the orderly and sustainable development of Kenya's tax system, the National Treasury has the primary responsibility for tax policy matters, including initiating proposals for amendments to tax laws. This arm of government should collaborate with relevant stakeholders in carrying out their mandate responsibly. This ensures that the tax policy is consistent with the economic policies and priorities of the Government. The role of the KRA, like other stakeholders in the tax ecosystem, should be limited to submitting views for consideration. However, most of the policies are formulated by the KRA which explains the shift in taxation to tax collection without adequate consideration of the impact of the tax measures on the economy.

Justification

When reviewing new policies based on stakeholder comments, the KRA should not play a dominant role, given their inherent bias towards tax collection. Instead, a balanced perspective from all stakeholders should be sought, with all inputs receiving due consideration. This principle should be prominently emphasized in the national tax policy. Furthermore, to enhance the collection of tax responsibly, tax incentives or waivers should not be arbitrarily terminated except as provided in the enabling legal framework or treaties at the time of creation.

Finally, within the national tax policy, when it comes to defining responsibilities in tax collection, a clear position should be established regarding the necessity of allowing a reasonable transition period, typically ranging from three to six months, before the implementation of a new tax.

Limiting reformation of the scope of excise duty and controlling of multiplicity of taxes and levies

78. Expanding the scope of excise duties and levies without clear limits can lead to excessive taxation, burdening taxpayers with additional financial obligations. By restricting the scope, policymakers can ensure that taxation remains fair and equitable. The National Tax Policy should define the role of the excise tax regime and restrict it to specific goods and services.

Justifications

This concern arises from the expansion of excise duty, which originally targeted the regulation of harmful goods but has evolved to encompass various goods, services, and notably, fees earned by financial institutions. The National Tax Policy should establish a clear framework for the excise tax regime, confining its application to specific categories of goods and services.

Additionally, the imposition of multiple taxes on the same income, such as VAT, withholding tax, and excise duty on credit card services, can be seen as excessive taxation as well as a move that increases the administrative burden on taxpayers. A tax policy should encourage tax compliance by promoting fair and reasonable taxation which will in turn promote investment in the country.

Global best practice

79. Another important aspect that the National Tax Policy should emphasize is the adoption of global best practices in shaping tax legislation in Kenya. It is imperative that, as Kenya strives to become a progressive economic hub, we align our tax regime with international standards and remain responsive to global developments.

Justification

This can be exemplified through various instances, such as the implementation of local transfer pricing rules based on the OECD Transfer Pricing Guidelines, the courts' utilization of the OECD VAT guidelines in resolving cases related to the export of services, and the incorporation of the OECD Model Tax Convention in Kenya's double tax agreements.

Regional competitiveness

80. The National Tax Policy should assertively advocate for the Government to consistently undertake reviews of domestic tax policies, with the overarching aim of sustaining the most competitive tax legislation in the region, ultimately fortifying Kenya's role as a pivotal regional hub.

Justification

These periodic reviews are essential to guarantee that Kenya maintains a tax framework that remains competitive within the regional context, contributing significantly to its stature as a hub for diverse economic activities.

3.2.6 NAIROBI SECURITIES EXCHANGE (NSE)/ KENYA ASSOCIATION OF STOCKBROKERS AND INVESTMENT BANKS (KASIB)/ REAL ESTATE INVESTMENT TRUSTS (REITS)

Nairobi Security Exchange (NSE), Real Estate Investment Trust (REITs) and Kenya Association of Stockbrokers and Investment Banks (KASIB) appeared before the Committee on 12th October 2023 and submitted as follows:

81. They support the proposed National Tax Policy there is a need for a National Tax policy to enhance consistency. The lack of a policy is perhaps the biggest challenge facing the capital markets industry today. The lack of consistency and predictability in the taxation of services and products in the industry makes the capital market very unattractive to investors. Implementation of this policy shall spur the growth of the capital markets in Kenya. \

82. The country needs to attract foreign inflows of capital and one such avenue is by making Kenya a regional financial hub. The Policy captures this in the Objectives

in Clause 1.4(ii) "to promote investment and enhance regional and international trade".

83.The National Tax Policy could consider implementing taxes that incentivize and promote investment and make the Kenyan capital markets the choice destination for capital in Africa.

84.The Tax Policy could further consider identifying the support that shall be extended towards actualizing the pillars to be delivered by the Government.

I. Affordable Housing is one such pillar that can be delivered by the capital markets industry through Real Estate Investment Trusts (REITs). However, heavy taxation on REITs discourages their growth and implementation.

II. The Government's Privatization agenda is intended to generate revenue and democratize ownership of state-owned entities. Favorable tax policy could support this Government agenda.

85.The tax policy recommends a "comprehensive review of tax laws to be done after every five years". The five-year cycle to reviewing the tax policy is welcome. However, there should be an express provision that allows for mid-stream tax reduction when it is evident that a tax that has been introduced/amended is counterproductive.

86.Clause 4.5(iv) promotes and encourages a savings culture while Clause 4.5(v) encourages investment through investment pooling vehicles that shall be treated as "pass-thru". These policies shall have a positive impact on savings and investment. However, to further promote savings and investment, the policy could consider extending incentives to the specific vehicles through which these investments are made.

87.To help cure the wealth inequity and encourage the sharing of wealth with the bottom of the pyramid, the Policy can give incentives or disincentives that could encourage wealth re-distribution.

88.The National Tax Policy should allow tax incentives that are granted at the national level to also cascade to the county level.

3.2.7 PRICEWATERHOUSECOOPERS (PWC).

The PWC appeared before the Committee on 12th October 2023 and presented as follows:

Chapter One - Proposed policy guidelines on general challenges

89.PWC noted that there is a need for tax legislation to be simplified, public awareness, and public participation in the introduction of technology because Investment in appropriate administratively efficient technology is key in enhancing compliance.

Section 4.1 - Hard to Tax sectors

90.Delete the requirement for farmers and other informal sector players to register with the subsector associations and cooperative societies. Requiring sector players to register with subsector associations and cooperative societies will not drive tax compliance without any other business rationale.

91.PWC also noted that there is a need for a simplified tax regime to tax informal and small business traders. The following are some examples of the proposed measures:

I. Business permit fees should be taken as an advance tax to incentivize the filing of returns.

II. A taxpayer with no documentation to support expenditure should be allowed a deduction of at least 60% of the expenditure to promote the informal sector.

Tax incentives

92.It is highly recommended to incorporate the incentive framework proposed in the National Tax Policy directly within the policy itself. This is important to avoid any misalignment and inconsistency that may arise from having a separate incentive framework. The focus should primarily be on expenditure-based incentives such as allowances, VAT deferment on specific goods, accelerated depreciation, and tax credits for research and development. These types of incentives reward investment rather than profit-based incentives like tax holidays and significantly reduced rates.

Section 4.6 - Corporate Income Tax (Consolidation of Income Tax Exemptions (page 33, Section 4.6, para vii))

93.PWC proposes that, any exemptions from income tax should be incorporated within the Income Tax Act itself. Although consolidating these exemptions is a positive step, aligning all income tax exemptions may prove challenging in practice. This difficulty arises because exemptions may have been granted through various legal instruments, such as the Privileges and Immunities Act, Treaties, and Host Country Agreements.

Section 4.6 - Corporate Income Tax (Relief from international double taxation)

94.As a guiding principle, the Income Tax Act should as far as possible eliminate double taxation on the income of resident companies and in particular, where Kenya offers unilateral relief from double taxation, the credit method rather than the deduction method should be prioritized as the form of relief.

Justifications

Unilateral tax credits should be provided to Kenyan resident entities whose income is subject to foreign taxes. Under the credit method, the foreign taxes paid by the Kenyan resident taxpayer on their foreign income generally reduce domestic taxes payable on the same income by the amount of the foreign tax. Giving unilateral tax credits will encourage Kenyan residents to provide services to non-residents and promote Kenya being a service center and a holding company jurisdiction.

Section 4.5 - Personal Income Tax

95.PAYE tax bands are to be reviewed and designed for progressive taxation and a tax-free threshold or personal relief (Section 4.5 Para iii., pg 32). The widening of tax bands and the trigger point for PAYE should be elevated on an annual basis based on the inflation statistics and forex depreciation rates.

Justification

I. The tax bands are narrow and an individual reaches the top bracket at a very low income
II. Rising inflation rates and cost of living
III. Increase of statutory employment contributions
IV. The Kenyan shilling has depreciated by 25% since 2020 when the lower threshold of KES 24,000 was set

96.Review all financial limits and the tax bands every five years for an inflation adjustment to minimize bracket creep (Section 4.5 Paras vii. pg 32). Review the tax exemption thresholds and personal income tax reliefs every three years – MTRS proposes a 5-year review of tax reliefs and bands. In addition, align the tax-exempt threshold for per diems to the Salaries and Remuneration Commission ("SRC") rates.

Justification

Because of the dynamic nature of the Kenyan economy and rising inflation

Align the National Tax Policy to Medium Term Revenue Strategy (MTRS)

97.The newly launched MTRS provides for the exemption from tax of all pension withdrawals irrespective of a taxpayer's age contrary to the policy guidelines that provide for the taxation of pension withdrawals. There is a need for the Policy to be aligned to this proposal.

98.Exemption, if any, from VAT will only be on consideration of Costs compliance and administration costs. (Sec. 4.6 Para ii, pg. 34). In addition to the consideration of the costs compliance and the administration cost, the NTP should include guidelines that are beneficial to the salient sectors of the economy such as the manufacturers, agriculture, and exportations.

Justification:

This guideline might deny VAT exemptions on salient sectors of the economy. The overall impact is a decline in investments and a decline in revenue for the Government.

99.Delete the proposal for a single general rate of VAT and allow for multiple general rates.

Justification:

The Tax Policy should address the need for adjustments of tax rates to reflect prevailing economic conditions to account for inflation and any other unforeseen circumstances e.g., COVID-19 and global events like the Russia-Ukraine crisis. A single general rate for VAT will deny the NT the opportunity to amend the VAT rate with preferential rates in the event of a need for the same such as during global pandemics.

Section 4.6 – Value Added Tax (VAT) (Charged VAT at par with domestically produced goods and taxable services).

100. Delete the guideline that provides that all imports whether goods or services shall be charged VAT at par with domestically produced goods and taxable services.

Justification:

Where importing is necessitated by the lack of the product or services in the Kenyan industry, it will be unfair to tax the importation of the same. The increased cost of importation may discourage the growth of the industries and negatively affect the economy.

Section 4.7 - Excise Duty

101. Delete the words "*other goods*" and include items that should not be charged. Excise Duties such as food items whether imported or locally made, medicaments, or agricultural-related products among others.

Justification

This particular clause in the guidelines is ambiguous and as such may lead to amendments to the Excise Duty Act that are detrimental to Kenyan citizens, investors, and the economy at large. As such, an amendment to the same will allow for the Excise Duty to be charged only on the sin items and safeguard additional taxation on the basic commodities such as food and water.

Further, the guideline is not aligned with the National Tax Policy objectives of easing compliance with the tax laws as it's not explicit and simple to interpret. As such, we propose an amendment to the guideline to improve the cost of living for Kenyan citizens, increase compliance with the Excise Duty, and reduce the cost of Tax Administration for the Government.

Section 4.7 - Excise Duty (Excise Duty paid on raw materials used in the manufacture of excisable products shall be offset against the excise duty payable on the finished goods)

102. Include a definition of raw materials in the Excise Duty Act.

Justification:

As is, some manufacturers of excisable products are not able to claim the relief of the Excise Duty paid on raw materials as there is no definition of the term raw materials in the Excise Duty Act. The lack of a definition of a raw material and may lead to disputes between the KRA and manufacturers of excisable products.

Section 4.12 - Predictability in tax rates and tax bases

103. Tax laws should be applied prospectively rather than retrospectively.

Justification

Changes in tax laws should not be applied retrospectively. In the past, we have seen retroactive taxes introduced that have subsequently been ruled unconstitutional on grounds of unfairness.

Section 4.12 - Predictability in tax rates and tax bases (Stakeholder engagement during the review of tax laws and assessment of the impact of the proposed changes on tax revenue and investment)

104. Amend the NTP to include a sufficient timeline for public participation, such as three (3) months before the assent of the bills into law.

Justification

The involvement of the stakeholders will allow for public participation. However, the Policy has not indicated the timelines for the same; we note there are instances where public participation is rushed due to lack of sufficient time for the same.

Section 4.4 - Taxation of the emerging digital economy

105. Amend the NTP to provide a new paragraph (VI) *"Review tax laws to align them with international best practices on the taxation of the emerging digital economy"*.

Justification

Taxation of the digital economy can only be addressed collaboratively with the rest of the world. Unilateral measures should be avoided as they result in unnecessary complexity and dissuade FDI. Kenya must participate in global and African forums in respect of taxation of the digital economy. As far as possible, Kenya should align the local legislation with global agreements and precedents in this area and should avoid unnecessary attempts at re-inventing the wheel

3.2.8 KENYA PRIVATE SECTOR ALLIANCE. (KEPSA).

Kenya Private Sector Alliance. (KEPSA) appeared before the Committee on 12th October 2023 and submitted as follows;

Chapter Four – Policy Guidelines

106. Subchapter 4.1 be amended to introduce an element of predictability by substituting the term *'exploring'* with *alternative methods* to enhance tax collection in the hard-to-tax sectors like the use of; Simplified tax systems for less formal sectors, Data Analytics and Artificial Intelligence, Whistleblower Programs, Collaboration with Industry Experts and Tax Amnesties and Voluntary Disclosure Programs

Justification

The Policy must embrace innovative methodologies and decisive wording to address the unique challenges associated with taxation in hard-to-tax sectors. The outlined methods offer a practical and moral foundation for pursuing enhanced tax.

107. Subchapter 4.1 Paragraph (vi) should be rephrased to read *'Enhance collaborations and exchange of information on taxpayers between the National Government and County Governments by, and within the limitations of, the Data Protection Act and related Data Protection Regulations.'*

Justification

It is vital to follow the Data Protection Act, which requires the minimization of data collection.

108. Amend Subchapter 4.5 to widen the tax bands and reduce the marginal tax rate to safeguard individuals from excessive taxation and erosion of their purchasing power and also to reintroduce family relief.

Justification

Head B of the Third Schedule to the ITA subjects income individuals earn to PAYE at rates ranging from 10% to 35%. However, the bands are narrow when assessed against comparable countries. In addition, the marginal PAYE tax rate is high. For instance, the PAYE rate of 30% in Kenya applies to individuals earning over KES 32,333 per month, compared to the equivalent of KES 255,000* in Ghana, and approximately KES 237,000** in South Africa. This points to excessive taxation, eroding individuals' purchasing power and ability to save and invest to spur economic growth. It also reduces Kenya's attractiveness as a destination for top talent who transfer skills to Kenyans, ultimately detrimental to our country.
In addition, the marginal rate of 35% is 5% higher than the corporate income tax rate of 30%. This means that individuals are taxed at rates higher than corporations and have a higher tax base, considering that individuals are taxed on their gross earnings. In contrast, corporations can claim deductions for the expenses incurred in producing their income.

109. Amend Subchapter 4.5, Paragraph iv to increase the deductible contributions to savings for retirement.

Justification

I. Section 22A of the Income Tax Act provides that the deduction in respect of contributions of an employee in a year shall be limited to the lesser of the sum of contributions made by the employee to registered funds in the year, 30% of the employee's pensionable income in the year, or KES 240,000 per annum (or part thereof in case of a part year of service).
II. Whilst inflation has continued to erode the value of money year-on-year, deductible contributions to retirement savings have remained the same for over 15 years, with the current cap of KES 240,000 per annum having come into effect from 1 January 2006. This has not kept pace with inflation, the rising cost of living, the increasing tax burden, and other

payroll-related levies that individuals, particularly those in formal employment, must bear.

110. Amend Subchapter 4.6 paragraph (ii) to provide for the deductibility of expenditure incurred by businesses in producing taxable income, even where the payment is not taxed in the same year. Specifically, the replacement of the word *'that income'* with *'taxable income'*. Further, the same provision should be amended for outright recognition of necessary capital expenses currently allowable under the current section 15 of ITA.

Justification.

The proposal under Paragraph ii, Subchapter 4.6 (Corporate Income Tax) of the Policy, which mirrors the language applied in Section 15 (1) of the ITA, confirms that in the ascertainment of the total income of a person in a given fiscal year, only expenditure incurred in the production of that income shall be deductible.

The matching principle established by the phrase *'that income'* presents practical difficulties concerning certain businesses that incur expenditure on income earned in subsequent fiscal periods. A practical example is evidenced in the agricultural sector, whereby expenses incurred in a specific year of income may not necessarily be matched to income earned.

111. Amend Subchapter 4.6 Paragraph iii to confirm that capital deductions may be enhanced more than 100% to the extent that measurable benefits accrue to the economy or the general public in line with the Government of Kenya's policy initiatives, for instance, among other things, the attraction of FDI in specific sectors or the creation of employment opportunities in particular areas/localities.

Justification.

The Policy proposal to cap investment allowances at 100% of the actual cost of an investment or asset would unnecessarily limit the possibility of the Government to provide investment allowances at rates higher than 100% based on emergent needs to incentivize investment or spur growth and development in specific sectors or regions.

112. Amend Subchapter 4.6 Paragraphs (i), be reworded to read; "*The tax base for VAT shall be on domestic consumption for all goods and taxable services*".

113. Amend Subchapter 4.6 Paragraphs Paragraph (ii) to be reworded to include VAT exemptions below;

I. Projects financed by development partners;
II. Persons with privileges and immunities (in line with international agreements and conventions);
III. Supplies to armed security forces;
IV. Raw farm produce that has not undergone any processing or value addition;
V. Live animals, fish and poultry;
VI. Medicaments;

VII. Financial services, educational services and social services supplied by Government or NGOs
VIII. Goods imported by persons living with disability;
IX. Projects targeting low-income earners and vulnerable groups in society

Justification.

The proposals will effectively delete the First and Second Schedules to the VAT Act, as there will be no exempt or zero-rated supplies (apart from exports). This move will significantly increase the costs of basic/essential commodities critical to the economy's growth and sustainability, such as education, healthcare and agriculture (among others). Additionally, they will make Kenya unattractive for investments, especially for foreign manufacturers, which often set up production units in countries in Asia and Africa.

114. Amend Subchapter 4.6, Paragraph IV to provide that *"There shall be a single standard rate of VAT. Where a preferential rate is granted, it shall be at least 50 per cent of the standard rate". Even with the above, allowance can be made for multiple VAT rates, at most three, for specific products in sectors of national importance, like agriculture.*

Justification

With the general rate of VAT currently at 16%, the proposal to have only one prevailing VAT rate would mean that even for sensitive products, such as petroleum products, any opportunity to alter the rate as a way to cushion the economy against shocks occasioned by global trends and the adverse effects of price increases of these products would be blocked. Further, considering the economic significance of specific sectors, such as agriculture, it may be necessary to have multiple VAT rates for products from these sectors. Such a move would not be peculiar or against international best practices, with several countries across the globe having various VAT rates for different goods and services.

115. Reword Subchapter 4.6, Paragraph ix to read that the criterion for determining whether a business firm or other entity is liable to VAT will be the VAT registration threshold, which will be aligned to the Turnover Tax threshold, which will be determined based on the cost-benefit of collecting VAT from small firms or entities.

Justification

The alignment of TOT and VAT registration thresholds represents a progressive step towards creating an environment where businesses can thrive while ensuring robust tax compliance and revenue growth.

116. On Excise Duty under Chapter 4; Subchapter 4.7; KEPSA recommends that the Policy provides criteria for determining excisable goods and services. The requirements should be based on international best practices. For instance, the Policy can provide as follows:

A. Excisable products shall meet the following criteria:
I. Harmful goods and services whose excessive consumption harms the health of consumers, the environment,
II. Luxurious products, and

III. Goods and services whose demand is largely inelastic.

B. Goods and services shall only be subjected to excise if it is demonstrated through objective and quantifiable evidence that the preceding criteria have been met. The evidence shall be tabled in parliament with the bill proposing introducing the excise duty.

Justification.

In addition to setting out the categories of excisable goods, it would be prudent to spell out the criteria governing the scope of excisable goods and services. This will ensure that excise duty is only imposed on the intended limited range of products in line with international best practices. The restriction of inclusion of products outside these categories will promote certainty amongst the taxpayers and ensure fairness and simplicity in the administration of the excise duty law.

Communication services are not suitable for excise duty. If they are to be taxed, they should be taxed through regular taxation purposes, not excise duties that focus on reducing usage and generating revenues to compensate for harm. Communication services have minimal negative impacts on society and almost entirely positive effects, facilitating trade, education, healthcare, government services, etc. They should be encouraged, not discouraged. Additionally, communication services are now essential instead of a luxury service available to a select few in the current environment.

117. Amend Subchapter 4.7 (Excise duty), Paragraph viii to include categories of other essential items currently listed in the Second Schedule of the Excise Duty Act, e.g., persons with disabilities, aid-funded projects, etc. The Policy should also state the criteria for exempting excise duty.

Justification

The Second Schedule of the Excise Duty Act exempts excise duty on many products. The excluded exemptions are critical from a social and economic perspective and should be included in the tax policy.

118. Insert the following new paragraphs in Chapter 4 Subchapter 4.7, Paragraphs iii on which guidelines shall guide excise duty;

I. Excise duty rates imposed on products shall not exceed the optimal excise duty rate.

II. The optimal rate shall be based on studies conducted by the Kenya National Bureau of Statistics.

III. The optimal excise duty rates undergo public participation and approval by the National Assembly.

IV. The optimal tax rate shall be reviewed every three years.

Justification.

The current excise duty law needs to provide a basis for determining excise duty rates, leaving it open for lawmakers to impose excise duty seemingly haphazardly. This practice poses a risk of negatively impacting revenue collection growth/survival of the affected industries, which may adversely affect employment and economic development. Introducing a basis for determining excise duty rates will ensure certainty amongst the taxpayers and promote revenue growth.

119. Introduce a new paragraph ix under Subchapter 4.9 on Tax Administration to cater to the predictability of tax audits as the Policy lacks a statement speaking to the applicable framework concerning the tax audit process. The Policy will compel KRA to formulate and publish a tax audit process framework purposed at ensuring the conduct of tax audits by the KRA is efficient, effective, and predictable with clearly stipulated timelines, and further is guided by conventional audit standards, methods and processes, including sampling. Such a framework should stipulate that taxpayers may not simultaneously be subjected to multiple audits.

Audits should be carried out after 3 years or once every 5 years. Periods that have already been audited should be retained. There should be legislation governing the process and justification for re-audits, which the KRA must strictly adhere to. The taxpayer must be issued an audit closure letter where the KRA has not found anything. Audit teams should remain the same during the pendency of the audit due to internal staff reshuffling at the KRA. Once a team commences an audit, it must conclude the same, even if they have been stationed elsewhere.

Justification

Under its mandate under Section 5 of the KRA Act and as empowered by Section 59 of the TPA, the KRA regularly conducts compliance, verification and investigation exercises indicating the commencement of the tax audit process. Through this process, KRA, among other things, monitors compliance, identifies instances of non-compliance, verifies refund claims, and ultimately assesses and collects unpaid revenue. This notwithstanding, past and current experiences indicate that the tax audit process lacks a transparent, efficient, effective and predictable framework that taxpayers can rely on with certainty throughout the tax audit process.

As an integral component of tax administration and enforcement and given its potential time and financial cost to businesses if ineffectively managed, the proposed inclusions will:

I. Increase certainty and predictability amongst taxpayers concerning the tax audit process, enabling efficient collaboration between taxpayers and the KRA.
II. Aid in attaining administrative efficiency, a core Guiding Principle of the Policy, through time and cost savings by both the KRA and taxpayers.
III. In addition, incorporating and applying conventional audit standards and principles will maintain simplicity, certainty, and clarity concerning the tax audit process. Adopting sampling as an audit methodology and implementing intelligent information and document management practices, for instance, will reduce back and forth between taxpayers and the KRA audit team, particularly in the information provision stage, which tends to delay the conclusion of audit processes.

120. The Policy be amended to introduce a preamble to Subchapter 4.9 (Tax administration) of the Policy to provide for the fair and reasonable exercise of the KRA's tax administration and enforcement mandate. Specifically, the preamble to Subchapter 4.9 (Tax administration) of the Policy should read as follows:

"The administration and enforcement of tax legislation shall observe the Guiding Principles of this Policy subject to Chapter 4 of the Constitution of Kenya, 2010, and in particular the rights and fundamental freedoms so guaranteed. To avoid doubt, enforcing tax legislation shall ensure reasonable notice be issued and take cognizance of dispute resolution mechanisms available to taxpayers."

Justification

Article 20 of the Constitution of Kenya, 2010 confirms that the Bill of Rights applies to all laws and binds all State organs and all persons. This includes the KRA, the regulatory body mandated with collecting, administering, and enforcing tax legislation by Section 5 of the Kenya Revenue Authority Act, 1995 ("the KRA Act").

Incorporating the rights and fundamental freedoms guaranteed under Chapter 4 of the Constitution of Kenya, 2010, in the Policy will aid in codifying the same within Kenya's taxation framework. This will bring to the forefront and support the protection and guarantee of taxpayers' rights in tax revenue administration and enforcement, bringing critical stakeholders in revenue administration.

121. Insert sub-chapter 4.11 paragraph iv a sub-paragraph I that reads;

"Negotiate bilateral, multilateral, regional and international tax agreements based on a model tax treaty developed by The National Treasury in consultation with key stake holders including LSK. ICPAK, KEPSA, KAM and subjected to a rigorous public participation process".

The process should be guided by the following principles;

" (ii) Old DTAs, should be renegotiated to keep pace with the current business realities".

Justification

Kenya's tax treaty network is shallow and inconsistent. Currently, there are no more than 20 DTA's in force. The bulk of the old crop of DTA's gives up a lot of taxing rights. For instance, all DTA's fashioned along the OECD model allocate taxing rights to the country of residence which cannot be Kenya. DTA's fashioned along the UN Model provide for shared rights and an elaborate methodology of elimination of double taxation while sharing the taxation rights.

Kenya being a service and technology-receiving country requires strong and clear provisions on withholding tax. A lot of payments are made in the form of Management and Professional fees. The model tax treaty must as a matter of policy contain articles on Professional and management fees, and Other Income articles fashioned along the UN Model tax convention

3.2.9 RSM (EASTERN AFRICA) CONSULTING LTD.

RSM (Eastern Africa) Consulting Ltd appeared before the Committee on 12th October 2023 and submitted as follows;

122. Section 1.3(vii) Acknowledges the need for public participation in the formulation of tax laws and principles. The NTP however, does not provide any mechanisms for the implementation of the same, nor does it provide any guidance on the importance of public participation in formation. For example, the recently introduced Finance Act 2023, underwent discussions with relevant stakeholders before being debated in the National Assembly. However, when the resulting Finance Act was enacted, the stakeholder engagements were not considered, especially on the issues of the removal of the preferential rate of VAT on petroleum products, and the introduction of the Affordable Housing Levy.

123. Section 1.5(viii) adopts the tax canon of neutrality, wherein the tax system shall minimize discrimination in favor of any economic choice. The stakeholder is of the view that the current legislative changes and proposals placed before the National Assembly, put a large portion of the tax burden on employers and employees to fund various government projects. This goes against the tenet of neutrality.

Section 4.1 - Hard to tax sector.

124. This is not in line with the purpose of the NTP, which is to create certainty and offer guidance on tax measures.

Section 4.5 – Personal Income Tax.

125. Section 4.5(iii) be amended to include the expansion of tax bands, revision of personal relief/tax-free amount and review of income tax every 3 years.

Justification.

The current bands for PAYE are too narrow, with individuals quickly graduating from one band to another without much relief. While the policy allows for reviews of the bands and rates every 5 years, the stakeholder recommends 3 years as it would cushion individuals against the adverse effects of inflation.

126. Section 4.5(iv) be amended to add after *"EET method of taxation as well as "cap"* for improving progressivity to be reviewed every 3 years. Delete *"progressive rate structure"* and replace it with "preferential rate structure, subject to attainment of retirement age"

Justification

Regularly reviewing the caps will make the sector more attractive thus promoting a saving culture. Excess pension contributions have already been taxed at the point of contribution and therefore taxing them again at the point of withdrawal would amount to double taxation of the same income..

Section 4.6 – Corporate Income Tax.

127. Section 4.6(iii) be amended to add the following proviso:

"Save in instances where there is a need to promote investment in the public sector"

Justification.

By restricting capital allowances to not exceed 100% of the investment, the government will not be able to offer measures to promote investments in sectors that it wants to grow.

128. Delete Section 4.6(v)

Justification

Allowing preferential tax rates for entities in the sectors in which the government wishes to grow would encourage increased investments.

129. Section 4.6(viii) be amended to include the following proviso;

"In the event that there is a DTA in place between Kenya and the domicile country of the non-resident the rates prescribed in the DTA will prevail"

Justification.

This will align it with the treatment of dividends paid to non-residents.

130. Delete Section 4.6(ii), (iv) and (v).

Justification

Exemptions to be granted only on consideration of costs of compliance and administration costs make it too ambiguous and vague as what cost is considered high will leave taxpayers in confusion. Further, putting this in place will effectively delete the First and Second Schedules of the VAT Act.

This move will significantly increase the costs of basic commodities that are critical to the growth and sustainability of the economy such as education, healthcare and agriculture.

Section 4.7 – Excise Duty.

131. Section 4.7(iii) be amended to read;

"In addition to the above general principle of charging excise duty, excise duty shall be charged on luxury goods and other harmful goods to public health to raise revenue to facilitate the government funds the budgeted priorities programs"

Delete "*the Government may from time to time review the goods and services subject to excise duty*" and replace it with:

"*The government may review the goods and services subject to excise duty every 5 years"*

Justification

Introducing excise duty on communication services in this global of technology and digitalization defeats the purpose of tax, and goes against the Government's ICT promotion principles. Additionally, having a proviso enabling the chargeability of excise duty on any goods to raise Government revenues leaves the chargeability of excise duty open to abuse and defeats the purpose of both tax and policy by creating ambiguity and uncertainty.

The term luxury goods needs to be defined, as the term is highly subjective leaving it open to misinterpretation.

The review period needs to be specified to promote certainty and stability in the tax system.

3.2.10 ASSOCIATION OF GAMING OPERATORS KENYA (AGOK).

In a meeting held on 12th October 2023, the Association of Gaming Operators in Kenya submitted as follows concerning the National Tax Policy.

132. AGOK recommends that, the government adopt a single tax called the betting and gaming tax and abolish the withholding tax. Further, the government should increase betting and gaming by 9% to cap it at 24% to accommodate the abolished taxes. A comprehensive reform of the Gambling Industry tax policy in Kenya is proposed by the Association of Gaming Operators of Kenya (AGOK), to introduce a straightforward and transparent tax system for the Gambling Industry operators, which in turn would allow them to operate more profitably and generate greater state budget revenues combined with more job posts and stronger CSR practices in the local market. 2

133. The following are the proposed amendments to NTP that would benefit the industry and the national economy in the short term.
    I. Abolishment Withholding of the Tax and Excise Tax proves to be uncommon in most tax-friendly markets.
    II. Introduction of a straight forward and transparent tax policy with the Gambling Industry operators taxed at the single GGR Tax rate of between 20% and 24%.
    III. This will take care of all the abolished taxes and taxed once and easily to resolve the perpetual taxation challenges faced by the industry

Justification

The gambling and betting industry in Kenya is already burdened with excessive tax obligations, thus the increasing excise taxes will lead to the shutting down of business activities by legal gambling and betting operators, encourage the boom of the illegal market and consequently result in a reduction in revenues of State treasury. Players are already switching to Off-shore betting and gambling activities.

3.2.11 ASSOCIATION OF KENYA INSURERS (AKI).

The Association of Kenya Insurers (AKI) appeared before the Committee on 12th October 2023 and submitted as follows;

Section 4.6 – Corporate Income Tax.

134. Section 4.6(i) indicates that the tax base for Value Added Tax (VAT) shall be domestic consumption of all goods and taxable services. The Stakeholder sought to amend the section indicating that, under the Medium-Term Revenue Strategy (MTRS) by deleting section (e) that seeks to introduce VAT on insurance services.

Justification.

It is noteworthy that VAT is a consumption tax and the ultimate consumers in this case are the policyholders. The stakeholder recommends that the above proposal would significantly hurt the insurance industry and will become counterproductive due to an increase in the pricing of insurance products, low level of insurance penetration, capital solvency ratios and Administrative complications in the Implementation

Section 4.7 – Excise Duty.

135. Section 4.7 subsection (ii) speaks to charging excise duty to various aspects but is silent on Financial Services. The Association recommends that the existing provisions with respect to Excise Duty on Financial Services be maintained.

Justification.

The insurance reliefs allowed have a multiplier effect on the economy as the growth of the insurance sector creates direct and indirect employment, more taxes from businesses and above all protection of the insuring public from any unforeseen risks. Therefore, the Government should not only maintain but also consider an increase in the current relief on life/health/education covers as well as consider the inclusion of other equally important insurance covers such as funeral insurance and personal accident covers.

3.2.12 ICHIBAN TAX & BUSINESS ADVISORY LLP.

ICHIBAN Tax and Business Advisory LLP appeared before the Committee on 12th October 2023 and submitted as follows:

136. The National Tax Policy is a good step in realizing the country's dream of having an efficient and fair tax system that promotes equity in tax administration and a predictable tax environment.

137. Frequent and unpredictable changes to the tax law violate the principles of certainty and simplicity of tax. It makes compliance and enforcement an expensive and daunting affair, both for taxpayers and the Kenya Revenue Authority (KRA).

Basis of Taxation for Gaming Operators

138. The basis of taxation for operators in the betting sector should be the Net Gaming Revenue (NGR) which is the positive difference between stakes and winning payouts to the punters. An NGR-based taxation regime means that the sector will attract multiple operators in the local market and channel resident players to these operators, securing revenues for the tax administration.

139. Due to the vast variety of gaming products on offer, there is no practical way to legislate for stake tax that would provide uniform taxation between operators and clear application of taxes. Any implementation of stake tax is bound to not work or

140. decimate a major part of the industry.

Tax Rate

141. In line with the stated objective of achieving tax parity in EAC and to avoid the deleterious tax arbitrage effect, Kenya should align to the NGR tax base and the rate of between 15 and 20% of the NGR.

Tax on Winnings

142. International best practice is that punters are either not taxed on their winnings, as is the case in the UK, or if they are taxed, then the winning is deemed to be income for which the punter has incurred expenses and losses. This would align with the fundamental concept and principle of taxing the income earned after granting credit for expenses and losses incurred in earning that income.

143. Eliminating taxes on winnings in favor of NGR has the added advantage of eliminating disputes arising from interpretation of "winnings" which depend on the game or bet under consideration.

3.2.13 ERNEST & YOUNG (EY).

Ernest & Young appeared before the Committee on 12th October 2023 and submitted as follows;

Chapter Four – Policy Guidelines

144. In relation to Chapter 4- Policy Guidelines, the stakeholder proposes to Introduce a new subparagraph as follows:

"(vii). Explore ways of enhancing taxation in the agricultural sector by conducting extensive research to determine the optimal tax structure for different fields/scale of agriculture".

Justification

In the agriculture industry, the agricultural sector is not a hard-to-tax sector. There is already a tax regime for taxation of income from agricultural activities Therefore, the policy should be accurate on the target. The government should also conduct extensive research to establish how to cluster agricultural by scale/ nature in a bid to improve productivity for tax considerations.

New Proposal

145. They proposed an introduction of a new subparagraph xiii to read as follows:

"Tax payers encouraged to take up voluntary tax disclosure procedure on all taxes every three years where penalty and interest will be waived"

Justification

With the repealing of the provision of application of waiver of penalties and interest under the Tax Procedures Act, 2015, a periodic waiver of penalties and interest will be a welcome move for the government to allow taxpayers with justifiable or erroneous penalties and interest to have an avenue to seek exemption. In addition, a waiver programme encourages revenue collection.

146. On Tax bands and rates, to promote progressivity, they proposed that the policy should provide for more tax brackets at lower rates with a maximum of 30%. The current rates seem to dump all income on the highest tax bands which would be deemed non-progressive and un-just to lower income earners.

Justification

This reduces the propensity to save and consume and indirectly affects consumption tax. In addition, the relief amount can be restructured to have a minimum amount and an allowance for higher relief this can be supported by work-related expenses, subject to a certain ceiling.

147. Under the Excise duty, Ernst & Young proposed for inclusion of fees on financial services. The policy highlights the goods and services subject to excise duty but does not include financial services.

Justification

To provide clarity on the goods and services subject to excise duty.

148. Additionally, on Tax Administration they proposed that the Government should be required to publish, on an annual basis, the revenue collection based on sector performance and how the money was applied.

Justification

This will create transparency.

149. On predictable tax rates and tax bases, they proposed the amendment of subparagraph (i) as follows:

> *"Undertake a comprehensive review of tax laws every three years to align with other Government policies. The comprehensive review should be restricted to items such as investment allowances/incentives and targeted sectorial incentives among others which require a substantial period to make a return after the initial investment. The review by the government should be accompanied by a report detailing the considered impact of the proposed changes in terms of tax revenue, development, investment, employment and economic growth. Every year, minimal tax changes guided and within the expectation as set in the policy should be introduced. This is on the understanding that the economic situation may be volatile requiring intervention through tax change."*

Justification

Five years is a long time. The policy guidelines should give room for downward interim adjustments /medium-term budget in exceptional circumstances or reduce the number of years to 3 years. Tax laws are always changing and with the economic outlook continuing to be more unpredictable, a three-year period is a more flexible adjustment framework.

150. They proposed a new paragraph – Environmental intervention.

Justification

A healthy ecosystem is the bedrock for sustainable economic growth. We are living in an era where matters of environmental sustainability cannot be left to the periphery. The tax measures should be aimed at reducing emissions, encouraging carbon neutrality, tackling climate change as well as raising revenue.

151. On the Implementation Framework, they proposed that the National Treasury section should be expanded to include the following additional roles:

- Conduct studies/research and impact assessment of any proposed tax changes before they are tabled before the National Assembly for discussions.
- Identify gaps/conflicts within the tax laws.

Justification

Conducting research and studies will aid the National Treasury in determining whether a certain tax measure will be an externality in the economy as much as it is a move to increase revenue for the government.

152. Additionally, the Section under the Kenya Revenue Authority should be amended to include the following new paragraphs under the roles of the KRA.

- To ensure proper record keeping and efficient handover when there is a change in KRA officers.
- KRA should put in place a system that facilitates upgrading/updating of taxpayers' data.
- Ensure that it maintains a centralized information repository of tax matters affecting a specific taxpayer for reference by all officers.

Justification

To enhance tax administration and tax compliance and minimize duplication of efforts and multiple requests for information from different KRA officers from the same taxpayer.

153. Under the Ministries, Departments and Agencies, the stakeholder proposed the expansion of the roles of the Ministries, departments and agencies to include; the Ministry of Education (MOE) should introduce taxation curriculum from intermediate/ primary to tertiary institutions.

Justification

This will lead to the early inculcation of appreciation of tax compliance and its long-term contribution to economic growth and development. As it stands, a majority of citizens and residents may not appreciate the importance of tax compliance.

154. Under the Judiciary they proposed that there be an alignment of the tax dispute resolution process with international tax processes such as the adoption of Mutual Agreement Procedure

Justification

The BEPS Action 14 Minimum Standard (MAP) seeks to improve the resolution of tax-related disputes between jurisdictions. Adoption of MAP will increase efficiencies and improve the timeliness of the resolution of double taxation disputes.

3.2.14 KPMG EAST AFRICA.

KPMG East Africa appeared before the Committee on 12th October 2023 and submitted as follows;

155. The draft National Tax Policy under Chapter 4, 4.6 paragraph V proposes to phase out preferential corporate tax rates. The justification is that these preferential taxes have contributed to tax loss through tax base erosion and preferential treatment to businesspersons by the government. In the implementation of this proposal, the government should consider maintaining the preferential rates for Special Economic Zones (SEZs) and Export Processing Zones (EPZs). The government should also not phase out the tax breaks that are meant to bring in FDI. Just like there are different PAYE bands for taxation of a range of incomes, the Treasury should consider adopting a similarly tiered CIT system for companies, depending on their profile and sector

Justification

The preferential tax rates especially in the SEZ and EPZ often put in place to encourage economic growth and job creation. Lower tax rates can incentivize businesses to invest, expand, and hire more employees. By phasing out these preferential rates, the government might discourage such economic activities, which could ultimately harm the overall economy.
These changes proposed by the National Tax Policy will also go against the Finance Act, 2023 changes that sought to improve market access for goods originating from SEZs and EPZs.

The government has stated that they are implementing a targeted approach to investment in certain sectors. The government has stated that they are implementing a targeted approach to investment in certain sectors.

Preferential rates can make a country more attractive to multinational corporations, leading to foreign direct investment and economic development. If a government eliminates preferential rates, it may put itself at a disadvantage compared to other countries that continue to offer lower tax rates, potentially leading to a loss of business to other nations.

Section 1.5 - Simplicity in Administration and Transparency

156. The administration of taxes should also be streamlined to facilitate enforcement and compliance, ultimately fostering transparency and benefiting all stakeholders. Kenya's national tax policy should encourage the simplification of administration

which will enable both tax authorities and taxpayers to collaborate effectively. This will further ensure efficient revenue collection without imposing undue administrative challenges on taxpayers when it comes to collecting and remitting taxes to the tax authorities.

Justification

The NTP should emphasize that Kenya operates a self-assessment regime. Over the years, the tax legislation has moved away from this founding principle with an emphasis on the deployment of the agency model for the collection of taxes.

While the KRA has the mandate for the enforcement of the legislation on the collection of taxes and is handsomely funded to carry out this mandate, the deployment of the agency model is an abrogation of this mandate, resulting in taxpayers being overburdened with the responsibility for collection of taxes for which there is no reward yet the penalties for omissions are grave.

An example is the latest requirement to remit withholding tax to the revenue authority within a 5-day period which poses a huge administrative challenge for banks. Banks accrue interest on customer deposits daily and given the requirement to account for withholding on the earlier date of payment or accrual, the five-day deadline for remittance of tax is a nightmare.

The KRA's investments in technology should be accompanied by a reduction in agency taxes since the KRA can track transactions and uncover potential revenue leakage loopholes. The NTP should provide a timeframe for the elimination of the local agency taxes to ease the administrative burden on taxpayers.

Certainty and Predictability

157. Certainty and predictability in tax policies provide a stable and consistent environment for businesses and investors. When tax laws and regulations remain relatively unchanged over time, it allows businesses to plan their investments, expansions, and long-term strategies with confidence. Investors are more likely to commit capital when they can anticipate the tax implications of their investments.

Justifications

The NTP should insist on certainty within the tax policies being put forward. An example of frequent changes in the tax policy is clear from the changes to the VAT legislation on the taxation of exported services which have evolved as follows:

V. Prior to the Finance Act 2021, the exported services were zero-rated for VAT purposes. Under this regime, exporters of services were eligible for refunds of input VAT incurred to provide their services. The Finance Act 2021, removed the services from the zero-rated to the exempt category. Under this regime, the service providers could not claim the input VAT and were expected to deregister from VAT.

VI. Finance Act 2022, transferred the export of services from exempt to taxable at 16%.

VII. The service providers were not expected to register for VAT and start charging VAT on their services.

VIII. Finance Act 2023, the export of services has now reverted to the zero-rated category

For a country that aims to be the regional base for services, such inconsistencies in tax policy are a big red flag. The National Tax Policy still does not clearly state that the export of services is zero-rated. The policy should provide for equity in the treatment of services and goods and also be consistent with Government policy to position Kenya as a regional hub.

Public Engagement

158. The national tax policy should ensure public participation in the process of proposing changes to tax legislation as this is essential for transparency, accountability, and democratic governance. The national tax policy should prioritize active involvement and careful consideration of stakeholder input during the public participation stage as one of its fundamental principles.

Justification

While stakeholder participation is provided under the constitution of Kenya, the same has not been very saucerful due to a lack of proper structures and accountability. Currently, the Government engages stakeholders in enacting tax laws, but most of the suggestions are ignored without any justification.

Responsibilities of Stakeholders – Outsize role of the KRA in tax policy Formulation

159. For the orderly and sustainable development of Kenya's tax system, the National Treasury has the primary responsibility for tax policy matters, including initiating proposals for amendments to tax laws. This arm of government should collaborate with relevant stakeholders in carrying out their mandate responsibly. This ensures that the tax policy is consistent with the economic policies and priorities of the Government. The role of the KRA, like other stakeholders in the tax ecosystem, should be limited to submitting views for consideration. However, most of the policies are formulated by the KRA which explains the shift in taxation to tax collection without adequate consideration of the impact of the tax measures on the economy.

Justification

When reviewing new policies based on stakeholder comments, the KRA should not play a dominant role, given their inherent bias towards tax collection. Instead, a balanced perspective from all stakeholders should be sought, with all inputs receiving due consideration. This principle should be prominently emphasized in the national tax policy. Furthermore, to enhance the collection of tax responsibly, tax incentives or waivers should not be arbitrarily terminated except as provided in the enabling legal framework or treaties at the time of creation.

Finally, within the national tax policy, when it comes to defining responsibilities in tax collection, a clear position should be established regarding the necessity of allowing a reasonable transition period, typically ranging from three to six months, before the implementation of a new tax.

Limiting reformation of the scope of excise duty and controlling of multiplicity of taxes and levies

160. Expanding the scope of excise duties and levies without clear limits can lead to excessive taxation, burdening taxpayers with additional financial obligations. By restricting the scope, policymakers can ensure that taxation remains fair and equitable. The National Tax Policy should define the role of the excise tax regime and restrict it to specific goods and services.

Justifications

This concern arises from the expansion of excise duty, which originally targeted the regulation of harmful goods but has evolved to encompass various goods, services, and notably, fees earned by financial institutions. The National Tax Policy should establish a clear framework for the excise tax regime, confining its application to specific categories of goods and services.

Additionally, the imposition of multiple taxes on the same income, such as VAT, withholding tax, and excise duty on credit card services, can be seen as excessive taxation as well as a move that increases the administrative burden on taxpayers. A tax policy should encourage tax compliance by promoting fair and reasonable taxation which will in turn promote investment in the country.

Global best practice

161. Another important aspect that the National Tax Policy should emphasize is the adoption of global best practices in shaping tax legislation in Kenya. It is imperative that, as Kenya strives to become a progressive economic hub, we align our tax regime with international standards and remain responsive to global developments.

Justification

This can be exemplified through various instances, such as the implementation of local transfer pricing rules based on the OECD Transfer Pricing Guidelines, the courts' utilization of the OECD VAT guidelines in resolving cases related to the export of services, and the incorporation of the OECD Model Tax Convention in Kenya's double tax agreements.

Regional competitiveness

162. The National Tax Policy should assertively advocate for the Government to consistently undertake reviews of domestic tax policies, with the overarching aim of sustaining the most competitive tax legislation in the region, ultimately fortifying Kenya's role as a pivotal regional hub.

Justification

These periodic reviews are essential to guarantee that Kenya maintains a tax framework that remains competitive within the regional context, contributing significantly to its stature as a hub for diverse economic activities.

3.2.15LAW SOCIETY OF KENYA (LSK)

Law Society of Kenya appeared before the Committee on 12th October 2023 and submitted as follows;

163. Amend the NTP under the Executive Summary to include taxpayers as Stakeholders.

164. Section 1.4 be amended to include "(vii) to facilitate collection of taxes in a manner that allows business to thrive as a means of enhancing collection".

Justification.

When revenue administration is too harsh with enforcement mechanisms, they make investors stop investing thus causing businesses to shut down.

165. Section 2.2 be amended to include tax awareness and sensitization programs as the role of the Tax Administration.

Justification.

The section only captures the goal of the collection but does not take the role of education and awareness.

166. Section 2.21 be amended to include Taxpayers as key players in the Tax Administration.

Justification

The Policy does not recognize that the taxpayer in self-assessment participates in tax administration.

167. Section 2.2.1 (c) be amended to include the role of the National Assembly as the watchdog for checks and balances.

Justification.

The National Assembly does not oversee the administration of tax laws, but through their Select Committees, they ought to play an oversight role.

168. Section 2.2.1(d) be amended to include the definition that the Tax Appeals Tribunal plays a highly specialized role and a more informal forum for ease of taxpayer access. Further proposes to include that the Judiciary creates jurisprudence on tax laws thus lends clarity to legislative interpretation.

Justification

Limits the description and the role of the Tribunal. The role of the policy is not exhaustive.

169. Section 2.2.3(ii) be amended by deleting the statistics for FY 2020/21 and the compliance percentage. Further, the section be amended to ensure that tax administration tools and technology are user-friendly and easily accessible to

taxpayers and ensure rationalization of taxes to avoid 'double taxation' on the same items.

Justification.

The Statistics contained therein may not be relevant to the policy document in the subsequent years since the document is for posterity. There is an element of illiteracy, and some forms and online tools are not user-friendly. This is to encourage compliance.

170. Section 2.2.3(iii) be amended to include a role in tax administration for ensuring capacity development, Tax sensitization and provision of technology tools to taxpayers.

171. Section 2.2.3(iv) be amended to include the following provisions;

I. Ensure the refund process is clearly understood by taxpayers.
II. Ensure the refunds are paid within the shortest period not exceeding 6 months.
III. National Treasury and KRA to set a designated account for processing and settling refunds.

Justification.

Businesses suffer from the lack of cash flow that is caused by the Revenue authority holding on to colossal amounts of money that could be invested back into the business and facilitate expansion.

172. Section 2.2.3 be amended by deleting the paragraph that begins 'The average time taken ...89 days in FY 2019/20.....Billion revenue. Additionally, the section be amended by introducing a new provision that states the Alternative Dispute Resolution Mechanism that is provided under tax legislation to have an independent facilitator rather than KRA facilitators.

Justification

The current ADR, KRA facilitators do not demonstrate independence or have the necessary neutrality to facilitate the process.

173. Section 2.3 be amended by introducing a new statement that "Article 2(5) and (6) of the Constitution of Kenya 2010 states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".

Justification.

The Tax Administration shall treat the tax treaties with the sanctity they deserve because they are binding to Kenya.

174. Section 2.5 be amended by deleting the whole section

Justification.

These numbers and statistics will soon no longer be relevant as this is a policy document that is to provide guidelines for posterity and reports that are specific to a particular period may not be relevant since the document is subject to amendments to reflect the latest trends.

175. Section 2.6(ii) be amended by introducing a new Paragraph;

> *"Tax incentives can attract investment to a country. Other benefits of tax incentives include increased employment, a higher number of capital transfers, research and technology development, and also an improvement to less developed areas"*

Justification.

This Policy document seems to frown on tax incentives, yet they are positive stimulators of investment and growth of the economy. Among the positive, if implemented and designed properly, tax incentives can attract investment to a country.

176. Section 2.6 be amended by including a new Clause (vi) Lack of taxpayer awareness of rights and obligation and clause (vii) lack of skilled representatives in negotiations for tax treaties.

Justification.

Taxpayer is neglected in terms of awareness. Those who attend the conferences to create the Treaties may not be tax experts.

177. Section 3.2(i) be amended by deleting the Section. *"Explore ways of enhancing"*

Justification.

The agricultural sector is fragile and needs to be supported with incentives thus more tax breaks to encourage growth in the Sector.

178. Section 3.7(ii) be amended to give more clarity to the tax bands issue to specify the benefits or give reasons for the increase in the bands.

179. Section 3.7(iii) be redrafted to give clarity and benefit.

180. Under section 3.7(iv), the mischief to be resolved should be stated so that the cure this presents is understood.

181. Section 3.7(vi) (vii) be amended by deleting the paragraph (vi) and (vii).

Justification.

It may not be possible to have all exemptions under the income tax act, for example, Double Taxation Agreements and other treaties may grant exemptions and the Constitution of Kenya 2020 recognizes treaties as forming part of Kenyan law. These provisions would appear to be overriding any other laws which may also be valid.

182. Amend Section 3.8 (v) (VI) to provide for the definition of the terms *'Use and Consume'* which are the terms used to define the term 'service exported out of Kenya'.

Justification.

This has been the backbone of disputes in matters touching on exported services.

183. Section 3.9(iii, d, e) be amended by deleting "fuel and Communication" from the general list of goods subject to excise.

Justification.

Fuel is an essential commodity. It should not come under the same classification as harmful goods. Communication is also an essential product or service and is also a necessity.

Chapter Four – Implementation

184. Under chapter four on the subject of Implementation of the NTP, KRA and Treasury ought to enhance Taxpayer education and sensitization.

3.2.16ANJARWALLA & KHANNA.

Anjarwalla & Khanna (ALN) appeared before the Committee on 12th October 2023 and submitted as follows:

153. The Policy as drafted does not articulate the issues of all the diverse stakeholders. The draft Policy articulates the issues only from the perspective of the revenue collector. Not much focus has been given to the taxpayer and the challenges they have faced with the current tax system.

154. The Policy should try to espouse the taxpayer as the primary focus of all tax collection efforts and extend some discourse reviewing the challenges of the far taxpayers and addressing the concerns, they may have which increase the cost of compliance and inhibit economic development.

Section 1.5 - Guiding Principles

155. The policy fails to incorporate key constitutional guiding principles for the Kenyan tax system. Further, it does not make or provide for empirical research to be carried out prior to changes in tax laws or prior to imputing new taxes in our tax system.

156. ALN proposes that during the formulation of any new tax measure, various institutions such as the National Treasury and the Parliamentary Budget Office should be tasked with undertaking extensive research and be required to table data supporting the need for the tax change, the revenue expected to be yielded carefully from the change and the costs/administrative requirements needed to the tax.

Review of tax laws every five years

157. The stakeholder supported the proposal to have a comprehensive review of tax laws every five years to align with the policies and priorities of the Government. They further propose that;
   I. There be a transition period before the introduction of any new measures at least six to twelve months before any new tax measure is implemented;
   II. More clarity is required on specific areas that will be affected by the five-year review timeline such as tax bands and tax incentives to be reviewed; and
   III. A clear description of what constitutes a new tax measure and a clear process before a new tax measure is legislated into law.

Guidelines on public participation

158. The policy does not elaborate on structures to be in place for public participation throughout the entire stage of formulation of the tax proposal. Further, it does not specifically reference key institutions that participate in the law-making process. They propose entrenching a public participation framework that is critical to a properly functioning tax system.

159. Parliament should also be involved in monitoring the implementation of the policy.

3.2.17 BOWMANS LLP.

Bowmans LLP appeared before the Committee on 12th October 2023 and submitted as follows;

160. Under the Management of Tax Expenditure, the Policy has stated that the Government intends to reduce its tax expenditures by among others eliminating certain exemptions that are economically inefficient, inequitable and add to the complexity of the tax system. However, it is not all exemptions that are economically inefficient as the Policy supposes. For example, investment deduction allowances, which are at 150% when an investment is made outside Nairobi and Mombasa counties have encouraged numerous Investments in counties outside Nairobi and Mombasa. The committee should note that over a third of the country's gross domestic Product (GDP) is from Nairobi and Mombasa counties.

161. Due to the investment deductions allowances, investments in various sectors have been made thereby increasing development in Counties such as Kajiado, Kiambu County, Machakos county and Nakuru County among others whilst also distributing wealth to other regions of the country.

Justification.

The Government should consider not doing away with the incentives as the incentives by themselves, do not encourage investment. Other issues such as cost of credit, availability of cheap electricity, lack of competition from cheap imports and ease of doing business contribute to the making of a successful investment. The government should be more pragmatic and consider a multi-sectorial review of the business environment to identify and address systemic barriers that as a whole impede private sector growth in Kenya.

Predictability of the tax system

162. The NTP has indicated that Kenya's tax regime is extremely erratic and unpredictable. This has become rampant in the last few years where certain provisions by way for example, the provisions in the VAT Act relating to exported services were initially zero-rated (0%) for VAT purposes, then exempted from VAT, afterwards they were standard rated (at 16%) and are now zero rated (0%) for VAT purposes.

163. The impact of the unpredictability is that investors do not have confidence in making investment decisions since there is a likelihood that the provisions of the law that they relied on could be repealed or amended to the detriment of the investor. Therefore, we commend the Government for recognizing the problem arising from a lack of a stable tax system. Nonetheless, the Government should also consider the following:

    I. To ensure that investors are not caught off guard by abrupt tax changes, in case there is a real need to make a tax change, the Government should include grandfathering provisions in tax amendment provisions which ensure that those persons who made the investments with certain tax provisions are cushioned from the negative impact arising from the changes in the tax provision; and

    II. Tax changes (if any) should only be made in the most critical of cases for example, when the country needs to respond to a natural calamity, an event outside the control of Kenya (such as the Russia-Ukraine conflict), or a pandemic (such as COVID -19) and any other event that urgently requires government intervention to mitigate the impact to the Kenyan citizens.

Section 4.1 - Hard to tax sectors

164. The Policy has recognized that Kenya has a problem with hard-to-tax sectors which are sectors of the economy that by their nature are difficult to tax. A good example is the agricultural sector and the informal sector. The informal sector plays an important role in Kenya as it employs a majority of the persons of working age. However, the fact that these sectors do not contribute to the tax revenues is a big reason why the government is unable to realize its tax revenue targets. To address this, the stakeholder proposes the following:

    I. Possible use of withholding taxes which require businesses to withhold taxes at source when making payments too hard to tax Sectors. This should be in consultation with the relevant persons required to withhold;
    II. promote the use of digital/electronic payments which leaves a digital trail hence making it easier for the revenue authority to track the payment;
    III. Implementing information reporting requirements such as high-value cash transactions for items such sale of motor vehicles and real estate;

IV. encourage the sharing of data between government agencies for example the counties which license businesses with the KRA; and
V. Encourage the KRA to invest in data collection and data analysis to determine tax leakages in hard-to-tax sectors.

Equality of taxation

165. One of the key principles of tax is that the imposition of taxes should be fair and just and designed in such a manner that it distributes the tax burden fairly to all citizens. The government has been for the longest time unable to bring a sizeable portion of the adult population, which is working for gain in Kenya to the tax net which in itself goes against the principle of tax equity as the burden of tax in Kenya is borne by the minority.

166. Another issue that is of critical importance is the fact that the highest rate of tax for individuals in Kenya which is 35% is higher than the corporate rate of tax, which is 30%. This is despite the fact that individuals are not allowed to deduct expenses on their income, save for pension deductions subject to a limit of KES 20,000 per month.

Justification.

The government should ensure that any tax proposals in the future adhere to the principle of tax equity to ensure that the tax burden is distributed equitably and sustainably.

International double tax agreements

167. The lack of DTAs especially with other African countries (such as the East African Community) and jurisdictions that are well endowed with capital such as the United States of America, the European Nations such as Netherlands and Ireland, China and Japan among others is a barrier to investment that would provide the much-needed capital inflows to Kenya and also provide employment in the services sector to Kenyans.

168. The Government should prioritize entry into DTAs as these are some of the factors investors look into when making investment decisions. This will also cement Kenya's place as the leading economy in East Africa and also compete favorably with economies such as South Africa, Egypt and Nigeria in attracting investments.

Justification.

One of the key areas the Government could focus on is streamlining the process of entry into DTAs so that the process could be expedited while still ensuring that the necessary procedures are adhered to. For example, Kenyans were asked to comment on the proposed DTAs with Singapore and Barbados in 2020 and a proposed DTA with Ireland in 2021 and up to date these treaties have not entered into force highlighting the need for a more efficient process in the negotiation, ratification and entry into force of the DTAs.

Tax Dispute Resolution

169. As the Policy has noted, the tax dispute resolution process in Kenya is not efficient to both the government and the taxpayers since it can lead to prolonged legal disputes, which delays tax collections for the Government (where this is due), financial burden for the taxpayers arising from uncertainties which undermine the overall effectiveness of the tax system.

170. While tax laws can be highly complex and technical, there is a real need to ensure that tax disputes can be resolved efficiently without compromising the quality of judgments issued by Tribunals or the Courts.

Justification.

The stakeholder recommends that any form of ADR should not be conducted by KRA employees, but rather with persons who are independent of the dispute. This impartial approach is essential in ensuring transparency and fairness and also ensuring that the perception of neutrality is maintained in the ADR process. This will ensure that the process is beneficial to both the taxpayer and the KRA and is taken up by more taxpayers as a means of resolving tax-related disputes.

3.2.18 EAST AFRICA PRIVATE EQUITY & VENTURE CAPITAL ASSOCIATION (EAVCA)

East Africa Private Equity & Venture Capital Association (EAVCA) appeared before the Committee on 12th October 2023 and submitted as follows;

Section 4.6 – Corporate Income Tax

171. On Corporate Income Tax, the stakeholder proposed an amendment to the Policy to remove the cap on investment deductions.

Justification

The limitation of investment deductions to 100% of the invested amount may be injurious to Kenya's position as the preferred investment hub in East Africa (e.g., Rwanda allows for 150% tax deduction for qualifying expenditure related to an export-oriented investment project

172. EAVCA proposed to amend the Policy to provide for flexibility in the determination of preferential rates with respect to corporate income tax.

Justification

Current tax laws provide for preferential tax rates for SEZ/EPZ entities and are crucial to aiding Kenya in reducing its negative trade balance between imports and exports.

173. The stakeholder proposed the amendment of the Policy and the Income Tax Act to remove the taxation of repatriated profits.

Justification

The imposition of a 15% tax on repatriated profits would impact Kenya's attractiveness as an investment hub in East Africa (increased cost of operation and reduced profit margins)

Section 4.6 – Value Added Tax

174. In relation to VAT, EAVCA proposed an amendment to the NTP to allow for the imposition of preferential rates of VAT as opposed to a single rate.

Justification

The Policy does not provide for a preferential rate of VAT, and the effect is that all taxable services in Kenya are subject to VAT at a rate of 16% (save for zero-rated exports). The removal of preferential VAT rates would lead to an immediate increase in the cost of production for businesses operating in Kenya.

Section 4.7 – Excise Duty

175. Under the Excise Duty EAVCA proposed an amendment of the Policy to require inflation adjustments to be made after five years.

Justification

The Policy is silent on annual inflation adjustments, which has been a key shortcoming of the Excise Duty Act. While the provision on annual inflation adjustment was removed through Finance Act 2023, the tax policy should clearly state that any adjustment should be done after five years after careful consideration and involvement of stakeholders.

Section 4.12 – Predictability in taxes and tax bases

176. Regarding Predictability in taxes and tax bases, EAVCA proposed that the Policy should come out clear on this to allow investors to structure their business arrangements in light of the certainty of the laws in 5-year cycles (at a minimum). Reconsider the CGT on indirect transfer of shares or increase the threshold.

Justification

The Policy refers to a comprehensive review of tax laws every five years, however, it is not clear if tax adjustments will also be once every five years or if the Government will be allowed to make annual tax adjustments. One key concern is successive changes to Capital Gains Tax (CGT) introduced by the Finance Act, 2022 and Finance Act, 2023.

177. The stakeholder proposed the amendment of the NTP to include a mechanism to ensure stakeholder engagement and public participation in the review of tax laws.

Justification

The Policy does not specify any mechanisms that the National Treasury or the implementing agencies will use to ensure that stakeholder engagement is incorporated into every amendment process and that such engagement meets the Constitution's standards.

3.2.19 OKOA UCHUMI.

Okoa Uchumi appeared before the Committee on 12th October 2023 and submitted as follows;

Section 4.6 - Value Added Tax

178. Okoa Uchumi noted that VAT revenues were low and thus recommended that there be increased transparency in tax exemptions, timely and full VAT refunds and simplification of VAT tax reforms.

Section 4.1 - Hard to tax sectors

179. Concerning hard-to-tax sectors, the stakeholder proposed the wording in the draft policy in paragraph (ii) be amended to read

" (ii)Explore ways of enhancing taxation in the informal sector including the use of presumptive tax, taxing SACCOs (under which informal sector players operate), using constant/fixed annual charges/fees to all traders/vendors involved in the informal sector, among other measures;"

Section 4.2 - Management of Tax Expenditures

180. The stakeholder proposed the wording in the draft policy be amended in paragraph (ii) to read:

"(ii) Develop and regularly review guidelines for granting incentives taking into consideration the costs and benefits of the incentives, and ensure an inclusive process for granting tax incentives aligned with principles of public participation;"

Section 4.11 - International Taxation and Tax Treaties

181. They proposed the wording in the draft policy be amended to read: "*Develop rules to address base erosion and profit shifting risks ensuring that anti-abuse measures are provided in all treaties to avoid tax avoidance and are aligned to anti-abuse measures within domestic legislation,*

Section 1.5 - Guiding Principles

182. Okoa Uchumi proposed the inclusion of principles in line with human rights-based approaches to tax justice. These principles include:

I. Inclusion and empowerment: tax policy should ensure the participation and involvement of citizens in the articulating of their ideas to influence decision-making processes, enhancing their dignity, and improving their capacity which will increase domestic revenue mobilization.

II. 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.

3.2.20 KENYA ASSOCIATION OF MANUFACTURERS (KAM)

Kenya Association of Manufacturers (KAM) appeared before the Committee on 12th October 2023 and submitted as follows;

Section 1.4 – Objectives of the Policy

183. Under section 1.4, the objectives of the National Tax Policy, KAM proposed for addition of the following paragraph (xi) to the stated objectives:

"(xi) To provide a benchmark against which all tax legislation shall be enacted".

Justification

The benchmark should represent the standard taxation treatment that applies to similar taxpayers or types of activities. It should neither favor nor disadvantage similar taxpayers or activities.

Section 1.5 - Guiding Principles

184. Under the guiding principles, the stakeholder proposed for inclusion of the following as a guiding principle:

"The National Tax Policy shall incorporate elements of data protection as provided for in the Data Protection Act, 2019".

Section 4.5 – Personal Income Tax

185. Under the Income Tax, Kenya Association of Manufacturers proposed for amendment of Section 2 of the Income Tax Act to include a definition of taxable income as follows: *"taxable income shall be based on the net of income and expenses"*

Justification

This would enhance clarity and align with best practices such as Nigeria's Tax Policy.

186. The stakeholder also proposed that the personal tax bands should remain in force for three years (and not 5 years).

Justification

Pension and Provident Fund should be tax-exempt at the time of

i. retirement
ii. Justification
iii. Money has already lost value and retired person has more needs of money.

Section 4.5 – Corporate Income Tax

187. Concerning Corporate Income Tax, KAM proposed for introduction of a lower tax rate for MSMEs and New Startup.

188. Corporate social responsibility (CSR) expenses should be allowed as business expenses for the greater good.

Section 4.6 – Value Added Tax (VAT)

189. On VAT, KAM proposed an amendment to remove the exempt category and introduce a lower tax rate for all goods for taxpayers by e.g., 2% or 4%.

Justification

To have input tax allowed and pass on the benefit to consumers in terms of lower prices.

190. On transfer of business, KAM proposed that it should be zero rated and the VAT treatment of plants, machinery and raw material should be exempt.

Justification

To make institutions stronger and encourage mergers and acquisitions (M&A).

Section 4.7 – Excise Duty

191. Under the Excise duty, KAM proposed that no excise duty should be imposed on raw material, intermediate, and packaging materials used in manufacturing locally.

Justification

Excise duty should remain as a consumption and a sin tax.

Section 4.8 – Customs administration

192. On Customs Administration, KAM gave a proposal that the National Tax Policy should adopt policies that protect the local industries and investments from unfair foreign competition. Finished goods are exempted under the fifth schedule while raw materials/inputs to manufacture the same attract import duty

Justification

The case of Free Trade Area goods entry into EAC at preferential tariffs vis a vis EAC rules of origin locking out the same goods manufactured in EAC from EAC markets.

193. The stakeholder also proposed for maintenance of a unified Tax Ledger per PIN under the Tax Administration

Justification

So that tax set-off becomes automatic.

194. Only one uniform date should be introduced for tax payment, preferably date 10th and 20th of each month as projected by KAM.

Justification

Currently, there are more than 10 different dates for different taxation leading to administrative burden.

195. Kenya Association of Manufacturers submitted that the National Tax Policy should provide for a transition period of between 1–3 months before an enacted legislation takes effect and should provide that all costs related to administration/compliance with excise tax shall be borne by the government

Justification

This will allow the Revenue Administration and business to configure their systems to allow for seamless transition and enhance compliance.

New Proposal

196. The stakeholder proposed that the NTP be amended in Chapters 2 & 3 to provide for new additions in the chapter as follows:

(a) Miscellaneous Fees & Levies Act:-

I. All taxes and levies charged by any Government Agencies including Counties or Corporates must fall under the National Tax Policy.
II. Define the scope of the law to include all national fees and charges.
III. No other national fees and charges are to be proposed outside the Act.
IV. National Treasury to receive proposals from MDAs and submit them to Parliament for approval together with an impact assessment.
V. Cabinet Secretary the National Treasury plays a coordinating role with other MDAs

Justification

The National Tax Policy should ensure that all levies, fees, and charges are aligned to specific services.

197. KAM proposed the inclusion of a new section under Chapter 3 to address the matter of County Taxation

Justification

The National Tax Policy should address the following in relation to County taxes, fees, and levies: Unpredictability of the county taxes, fees levy, and charges; Cross border taxation of activities/mobility. For example, motor vehicles conveying products across counties are subjected to fees at the entry point in the form of CESS, and multiple fees on branded vehicles across counties.

3.2.21 ERNEST & MARTIN.

Ernest & Martin appeared before the committee on 12th October 2023 and submitted as follows;

Section 1.3 – Rationale of the Policy

198. Amend section 1.3 on the "*rationale of the policy*" *to include*

"taxation shall not impose an undue burden to the citizenry including the cost of living".

Justification

The policy does not address the negative impacts excessive taxation has on the citizenry of Kenya. In particular, the increase in cost of living has resulted in the deterioration of the standard of living of your average Kenyan. Going by Kenya's consumer price index as published by the KNBS in September 2023

The tax policy should consider cushioning the population from the negative effects of tax increases especially as relates to sensitive components in the pricing of essential goods and services.

Section 4.1 - Hard to Tax Sectors

199. Section 4.1(i) seeks to improve tax collected from the transfer of properties. To achieve this objective the government should speed up the titling of land in Kenya.

Justification

This will markedly improve the collection of capital gains taxes and stamp duties.

Section 4.3 - Increase in tax compliance levels.

200. Amend Section 4.3(iv) of the NTP to provide legal and regulatory framework and operational guidelines for taxpayers to forward suggestions and complaints in respect of tax administration procedures whenever there is a review of tax administration procedures to address gaps and emerging issues.

Justification

The proposal needs a legal and regulatory framework and operational guidelines for taxpayers to forward suggestions and complaints with respect to tax administration procedures.

Section 4.5 - Personal income tax

201. Section 4.5(iii) be amended to provide for Progressive tax bands and ensure that rates are reviewed regularly in line with the consumer price index.

Section 4.6 - Value Added Tax

202. Section 4.6(ii) of the NTP be amended to include other factors other than Cost of compliance as the reason for exempting goods or services. The Medium-Term Revenue Strategy (MTRS) uses international best practices, such as the destination principle or unprocessed items. This should also cover critical or essential goods and services.

203. The stakeholder proposed amendment of Section 4.6(iv) to aloe multiple rates of VAT as opposed to the use of a single rate of VAT.

Justification

Cost of living and other factors may necessitate a rate higher or lower than the standard rate.

204. Section 4.6 be amended to allow for group VAT registration. However, this shall be actualized through an amendment of the VAT Act to facilitate registration and compliance.

205. The stakeholder proposed an amendment of Section 4.6 to extend the use of the term "*exempt supplies*" under the VAT Act to include any supplies which are not subject to tax by or under the provisions of any Act for the time being in force, to the extent provided by that Act e.g., the Privileges and Immunities Act

Section 4.8 – Customs Administration

206. Ernest and Martin proposed that Section 4.8 be amended to provide that, any amendment to the East Africa Customs Management Act or customs administration in general should undergo public participation and Parliamentary approval, prior to the government making any proposals to the EAC and upon enactment, the regulations should undergo Parliamentary approval as per the Statutory Instruments Act.

Section 10 - Tax Dispute Resolution

207. Concerning Dispute resolution processes, Article 159(2) (c) of the Constitution of Kenya recognizes mediation as a form of dispute resolution to be applied by courts. The only limitation on mediation imposed by this article is in relation to traditional dispute resolution mechanisms. As such paragraphs 4(a) and (b) of The Tax Procedures (Settlement of Tax Disputes out Of Court or Tribunal) Regulations, 2020 [Legal Notice 123 of 2020] are in contravention of article 159(2) and section 55(1) of the tax procedures act.

PART IV

4.0 COMMITTEE OBSERVATIONS

208. The Committee, having considered the policy and the submissions from members of the public and stakeholders made the following observations.

I. THE STRUCTURE OF THE NATIONAL TAX POLICY

209. With respect to the general structure of the draft National Tax Policy, the Committee observes that:

(a) The National Tax Policy structure does not conform to the standard format and practice of presenting a national policy. Although the NTP focuses on the policy objective of guiding tax issues in the country it lacks vital policy facets like identification of policy concern, policy action, policy outcomes, and implementation framework.

(b) The National Tax Policy has not provided for a Risk management framework. This framework is important in guiding the implementers of the policy in identifying, forecasting, and mitigating risks associated with the implementation of the NTP.

(c) The National Treasury has developed the Medium Term Revenue Strategy (MTRS) that shall guide the revenue collection strategy in the country for the next three (3) years (FY 2024/25 – 2026/27). However, there are misalignments and discrepancies in the proposals in the MTRS in relation to the National Tax Policy although ordinarily, MTRS is a subset of the NTP. For instance, the MTRS proposes the adoption of the pension's taxation method to be Exempt –Exempt-Exempt (EEE) the NTP maintains the taxation method to be Exempt –Exempt-Tax (EET).

(d) The design of the Policy lacked definitions/glossary of critical terms and concepts and the rationale for governments imposing taxes which is a critical area that sets the stage for the policy pronouncements. To address this, the policy should include a glossary of basic and critical terms such as Tax, Fee, Levy, Charge, Income, Tax yield, Tariff, Tax Evasion, Tax avoidance, Tax Rate, Tax Band/Scale, Tax Buoyancy, Tax Service, Taxpayer, Tax Incentive, Tax Exemption and Tax Rebate.

II. THE RATIONALE AND OBJECTIVE OF THE NATIONAL TAX POLICY

210. Regarding the rationale and objective of policy as stated in the draft National Tax Policy and as provided in Sections 1.3 and 1.4 of the NTP, the Committee observes that:

(a) The objectives of the National Tax Policy are narrow and majorly geared towards revenue generation as opposed to the promotion of economic development, enhancing the country's competitive edge, promotion of economic diversification, value for money and businesses and establishment of tax incentives and exemptions that is aligned to Kenya development agenda among others broad outcomes. Therefore, there is a need to expand objectives in NTP to ensure a healthy ecosystem is the bedrock for sustainable economic growth.

(b) Matters of climate change, the development of mitigation mechanisms, trading in carbon and the need to adopt environmental strategies to mitigate this existential threat are issues of consideration at all decision-making levels in the country. However, the National Tax Policy is silent on this important matter.

III. INCOME TAX

211. Concerning Income Tax as provided in the NTP under Section 2.4.1 (situational analysis), Section 3.2 (challenges facing Kenya's taxation system), Section 4.5 and Section 4.6 on Policy guidelines, the Committee observes that:

(a) The Income Tax Act in Kenya was enacted in 1973 and has undergone piecemeal amendments and has not kept pace with the current economic realities. Therefore, there is a need for the National Tax Policy to pronounce itself on time horizon to guide a comprehensive review of such legislation. Income tax policy should be driven by the design of an efficient mechanism for raising revenues while causing minimum distortions in the markets, firms and households, from which the revenue is paid.

(b) Kenya's tax band structure is not progressive and not wide enough to cushion low-income earners. Therefore the National Tax Policy should ensure the progressivity of the tax band structure. The Committee noted that the marginal rate of 35% is 5% higher than the corporate income tax rate of 30%. This means that not only are individuals taxed at rates higher than corporations, but also have a higher tax base considering that individuals are taxed on their gross earnings, while corporations can claim deductions for the expenses incurred in the production of their income individuals are not allowed to claim deductions.

(c) Currently, the pension is taxed using the Exempt–Exempt–Tax (EET) method meaning Kenya does tax pension contributions nor does it tax pension fund income but taxes pension payment. The proposed Medium Term Revenue Strategy (MTRS) for 2024/25 -2026/27 the pension tax structure from Exempt-Exempt-Tax (EET) to Exempt-Exempt-Exempt (EEE) to make withdrawals exempt irrespective of the taxpayer's age. Therefore, there is a need to harmonize the National Tax Policy with this progressive tax structure.

(d) Section 22A of the Income Tax Act provides that the deduction in respect of contributions of an employee in a year shall be limited to the lesser of the sum of contributions made by the employee to registered funds in the year, 30% of the employee's pensionable income in the year, or KES 240,000 per annum (or part thereof in case of a part year of service).

Whilst inflation has continued to erode the value of money year-on-year, deductible contributions to retirement savings have remained the same for over 15 years, with the current cap of KES 240,000 per annum having come into effect from 1 January 2006. Therefore there is a need to review the CAP of KES 240,000 and allow for a review of the same every five (5) years to keep pace with inflation, the rising cost of living, the increasing tax burden, and other payroll-related levies that individuals, particularly those in formal employment, must bear.

(e) The Eighth Schedule of the Income Tax provides for a standard rate of calculating Capital Gain Tax (CGT) however due to inflationary changes in the country year-on-year basis it means the value of properties is eroded. Therefore, CGT should aim to tax only the actual gains arising on the property by adjusting the change in property value and eliminating the inflation effect on the value. Failure to adjust the inflationary changes creates inequity since a transferor is taxed on unearned income.

(f) In the past preferential CIT rates have created distortions and granted some firms preferential treatment. Therefore, the National Tax Policy should be aligned and be able to outline government strategies and ensure tax incentives that include preferential CIT are aligned with the overall economic development agenda.

(g) The Committee is aware that the government has introduced a Gaming Control Bill, 2023 a Bill to regulate the Gaming sector including tax laws in the Sector. The Bill indicates a shift in taxation policy to a single Gross Gaming Rate(GRR). Therefore, this shift to a single Gross Gaming Rate should be replicated in the National Tax Policy

IV. Value Added Tax (VAT)

212. In relation to Value Added Tax as enumerated in Section 1.2.3 (Introduction) Section 2.4.2 (Situational analysis), Section 3.2 (Challenges facing Kenya tax system) and Section 4.6 (Policy guideline) the Committee noted that:

(a) The National Tax Policy provides for a single rate VAT and this is informed by the need to reduce tax expenditure. If the single rate is upheld, it would mean that even for sensitive products, any opportunity to alter the rate as a way to cushion the economy against shocks occasioned by global trends and the adverse effects of price increases of these products would be blocked.

(b) The National Tax policy provides that VAT exemptions will only be considered on cost compliance, limiting the use of exemptions to incentivize investment and at times cushion Kenyans from economic shocks like high prices level of goods and investment promotion

V. EXCISE DUTY

213. Regarding the Excise Duty as captured in Section 1.2.4 (Introduction) Section 2.4.2 (Situational analysis), Section 3.2 (Challenges Facing Kenya tax system) and Section 4.7 (Policy guideline) the Committee observed that:

(a) The National Tax Policy provides that excise duty shall be charged on luxury goods, communication services and other goods to raise revenue to facilitate the government funds on budgeted priorities programs. There is a need to specify what 'other goods' entail so that it does not provide a blanket criterion for the inclusion of goods and services in the second schedule of the Excise Duty Act.

(b) The imposition of the excise duty in Kenya seems not to be based on any sightable study but has rather been incrementally depending on the expected revenue to be collected under the tax line. With time the imposition and the increase of the excise duty rate may not have yielded additional revenues as expected. Therefore, the NTP should provide for the need to determine an optimal rate of excise duty to ensure certainty and predictability before any excise duty is levied in the future. Further, the policy should provide criteria for including and excluding essential items listed in the Second Schedule of the Excise Duty Act and the period in which such items remain listed.

(c) Excise Duty on raw materials has tended to stifle competitiveness by making locally manufactured goods uncompetitive. Finished goods that come into the country are not subject to the same taxes imposed on the local ones. Consideration should be given to the need to grow local industries whose ripple effect could impact diverse sectors' value chains.

(d) Excise duty tax was created to target the negative externality or social cost of a product. As such, the tax was designed to target harmful product components or the best available proxy for that externality or cost. This implies that less harmful or less costly substitutes should be excluded from the tax base. Currently, excise duty taxes are applied on products that have no harmful component, e.g., financial services, water, airtime and data and this is seen as geared towards revenue generation and this may result in distortions across the value chain. The excise tax on such goods and services works as an additional Value Added Tax which becomes very punitive on final consumers.

(e) Excise duty imposed on the prevention of consumption of harmful products should be used for tackling the effects caused by these products on society

VI. CUSTOMS ADMINISTRATION

214. Regarding the Custom Administration as captured in Section 2.4.3 (Situational analysis), Section 3.2 (Challenges facing Kenya's tax system) and Section 4.8 (Policy guidelines), the Committee observed that:

(a) Policy guidelines as contained in Chapter Four (4) do not provide policy concerns, objectives, actions, outcomes and expected risks and thus there is a need to amend the policy to include these key aspects of the policy-making to enhance logical flow.

(b) Customs management in the East Africa Community where Kenya is a member state is governed by the East Africa Customs Management Act, 2004 (EACMA). Additionally, amendment or application for stay of provision within the EACMA Act is done through the Council of Ministers an organ of EAC as provided in East Africa Customs Management Protocol. The current practice means that whenever an amendment or application for a stay of execution is being canvased Parliamentary Approval is never sought and as a result, there are cases of misalignment of tax laws as enacted by the Parliament. Therefore the NTP under Section 4.8 be amended to provide that, any amendment to the East Africa Customs Management Act or customs administration in general should undergo public participation and Parliamentary approval, prior to the government making any proposals to the EAC and upon enactment, the regulations should also undergo Parliamentary approval as per the Statutory Instruments Act.

(c) The case of Free Trade Area goods entry into EAC at preferential tariffs vis a vis EAC rules of origin locking out the same goods manufactured in EAC from EAC markets. Therefore, Section 4.8 of the NTP should be relooked to ensure that Kenya adopts policies that protect the local industries and investments from unfair foreign competition.

VII. Hard to Tax Sector

215. With respect to Hard to tax sector as identified in Section 4.1 of the National Tax Policy, the Committee observes that:

(a) The NTP under the policy guidelines, identifies agricultural and informal sectors as challenging to tax. However, in the Medium-Term Revenue Strategy (MTRS), the digital sector is recognized as an additional hard-to-tax Sector. Therefore, it is imperative to expand the policy's scope by incorporating the digital sector, which includes digital assets and cryptocurrencies, as a third challenging sector to tax. This update is crucial for a more comprehensive approach to addressing the complexities and unique challenges posed by taxation within the evolving digital landscape.

(b) There is a need to develop alternative strategies to tax the informal sectors, for instance possible use of withholding taxes which require businesses to withhold taxes at source when making payments in hard to tax Sectors. Additionally, promote the use of digital/electronic payments which leaves a digital trail hence making it easier for the revenue authority to track the payment.

(c) The National Tax Policy identifies the agricultural sector as a hard-to-tax sector. There is already a tax regime for taxation of income from agricultural activities Therefore, the policy should be accurate on the target. The government should also conduct extensive research to establish how to cluster agriculture by scale/ nature in a bid to improve productivity for tax considerations as opposed to a blanket condemnation of the sector.

(d) The NTP proposes a requirement for farmers and other informal sector players to register with the subsector associations and cooperative societies. Requiring sector players to register with subsector associations and cooperative societies will not drive tax compliance without any other business rationale.

(e) The Policy should not interfere with the already established structures such as cooperative which has developed sectors such as agriculture. Instead, there is a need for more innovative ways to expand the tax base by including large informal businesses that remained largely untaxed.

VIII. Management of Tax Administration

216. With respect to the management of tax expenditures as identified in Paragraph (ii) of Section 3.1 (Challenges facing Kenya's Tax System) and Section 4.2(Policy guidelines) of the National Tax Policy, the Committee observes that:

(a) There have been significant delays in the processing of tax refunds which has led to backlogs and cashflow challenges to taxpayers. This has been attributed to delayed exchequer releases and approvals as well as uncoordinated granting of tax incentives which are never backed by any study to assess the impact on the economy and tax revenues forgone. Therefore there is a need for the NTP to provide an effective strategy to address the eyesore.

(b) Tax incentives in Kenya are aimed at promoting investments, enhancing the country's competitiveness and providing relief for low-income earners and vulnerable groups in the society. However, the NTP lacks an objective criterion to determine eligibility for Tax incentives in Kenya and as a result, incentive schemes may not aligned with the overall economic agenda and hence vulnerable to influence by political and private interests.

(c) During approval of Annual Estimates and Budget Policy Statement, the expected Tax expenditures in the Fiscal year are not explicitly provided in the budget books. Therefore the NTP should provide that tax expenditure analysis and estimates must be comprehensively captured in the Budget Policy Statement and Budget Estimates for improved budget transparency. Additionally, the policy should provide that, the National Treasury publicizes reports with comprehensive tax expenditure analysis and estimates.

(d) The NTP requires tax sector players who enjoy tax incentives to provide statistical data on the impact of the incentives on the growth of their businesses. However, the NTP does not provide any obligation to tax sector players that enjoy tax incentives to provide statistical data on the impact of the incentives to the impact on the national economy or the environmental or social impact.

IX. Miscellaneous Fees & Levies Act

217. Concerning fees and levies imposed by the Miscellaneous Fees & Levies Act and that constitute tax revenues, the Committee observed that

(a) The National Tax Policy is silent on such levies and charges, especially the ones processed through the Finance Act except on levies and charges levied on imported goods as enumerated in Section 2.4.4 (situational analysis). Therefore there is a need for the NTP to be amended to provide for policy guidelines on such levies and charges. Additionally, the NTP should provide for a need for a comprehensive economic impact assessment on levies before approval/ implementation is undertaken.

X. Predictability in tax rates and tax bases

218. Regarding predictability in tax rates and tax bases, the Committee observed that:

(a) Section 4.12 of the NTP that addresses predictability in tax rates and tax bases misses key aspects such as policy concerns, policy objectives, policy outcomes and policy risks and thus requires to be amended and allow for flexibility to deal with any emerging issues in case of unforeseen changes in the economy or a public outcry due to crafting of the law

(b) The current tax laws in Kenya were enacted long ago for instance the Income Tax Act was enacted in 1973. Due to this, many patches in these laws have resulted in misalignment and unpredictability of taxes.

(c) The review of the Tax laws by the government has not been supported by a comprehensive economic impact assessment and a legal audit report detailing the considered impact of the proposed changes in terms of tax revenue, development, investment, employment and economic growth among others. However, the NTP does not address this handicap in legislation.

(d) All taxes and levies that are geared toward the manufacturing and investment sector in the country must be allowed to run for a minimum of three years to allow investors to have a predictable tax and any amendments must be backed by a comprehensive study on the impact of the tax or levy on business growth and to the economy.

XI. International Taxation and Tax Treaties

219. In relation to International Taxation and Tax Treaties, the Committee observed that:-

(a) Currently, the role of Parliament in the ratification of treaties is limited to the point of expressing reservation. There is a need to provide a mechanism for the National Assembly's comments and views on Double Taxation Agreements (DTAs) before the execution of the treaties. Therefore the NTP should be amended to provide for prior approval of the DTAs before executions.

(b) There are no more than twenty (20) DTA's in force in Kenya. The bulk of the old crop of DTA's gave up a lot of taxing rights. For instance, all DTA's fashioned along the OECD model allocate taxing rights to the country of residence which cannot be Kenya. DTA's fashioned along the UN Model provide for shared rights and an elaborate methodology of elimination of double taxation while sharing the taxation rights.

(c) Kenya being a service and technology-receiving country requires strong and clear provisions on withholding tax. A lot of payments are made in the form of Management and Professional fees. The model tax treaty must as a matter of policy contain articles on Professional and management fees, and Other Income articles fashioned along the UN Model tax convention

(d) The lack of DTAs especially with other African countries (such as the East African Community) and jurisdictions that are well endowed with capital such as the United States of America, the European Nations such as Netherlands, Ireland, China and Japan among others is a barrier to investment that would provide the much-needed capital inflows to Kenya and also provide employment in the services sector to Kenyans. The NTP should prioritize entry into DTAs as these are some of the factors investors look into when making investment decisions. This will also cement Kenya's place as the leading economy in East Africa and also compete favorably with economies such as South Africa, Egypt and Nigeria in attracting investments.

(e) There is a need for re-negotiation of old DTAs to ensure that the instruments are kept up to pace with the current business realities in the relevant countries.

XII. Implementation Framework

220. In relation to the implementation framework as provided in Chapter Five (5) of the National Tax Policy the Committee observes that:-

(a) The National Tax Policy does not provide for an implementation matrix that shall guide the implementation of the policy. In the absence of the implementation framework, it would be difficult to track the interventions required, resources required and ensuing outcomes.

(b) There is a lack of clarity in the National Tax Policy on which specific entity will be responsible for the implementation and coordination framework for the policy. There is a need to have an independent entity to oversee the implementation of the policy. The entity should submit its report quarterly to the National Assembly on the implementation of the Policy.

XIII. Compliance

221. Concerning the Increase in tax Compliance level as provided in Section 4.3(Policy guidelines) the Committee observed that:-

(a) The National Tax Policy does not provide for a tax audit process framework. Therefore, there is a need to provide a tax audit process framework to ensure the certainty and predictability of the process.

(b) Currently, there are different compliance dates for different tax heads leading to administrative burden to the taxpayer. For instance, WHT is remitted to the Commissioner General within 5 working days after the deduction is made, whereas an employer is required to remit the housing levy within nine days after the end of the month in which the payments are due.

PART V

5.0 COMMITTEE RECOMMENDATION

222. The Committee, having considered the proposed National Tax Policy and the submissions from members of the public and stakeholders, **recommends-**

I. **THAT, the House APPROVES the proposed National Tax Policy subject to the revision of the proposed Policy as follows;**

NO.	AREA/SECTION	REVISIONS
1	General Structure of the draft National Tax Policy	1. **Align the Policy structure to standard government policy format.** In particular, provide for policy concerns, policy objectives, policy actions, and policy outcomes for each of the policy guidelines under Chapter Four (4). 2. **Integrate a Risk Management Framework within the policy.** This framework should outline procedures for identifying, assessing, mitigating, and managing risks associated with implementing the policy. 3. **Harmonize the draft National Tax Policy with the draft 2023 Medium-Term Revenue Strategy (MTRS) to** ensure coherence and consistency between the National Tax Policy and the Medium-Term Revenue Strategy (MTRS) and reconcile any disparities or conflicting proposals between the two documents. 4. **Incorporate a comprehensive glossary defining critical terms and concepts used in the National Tax Policy.** This glossary should cover essential terms such as tax, fee, levy, income, tax evasion, tax avoidance, tax rate, tax band/scale, tax buoyancy, tax service, taxpayer, tax incentive, tax exemption and tax rebate among others. 5. **Expand the objectives of the National Tax Policy to provide additional policy guidelines** that support economic development, enhance the country's competitive edge, promote economic diversification, guarantee value for money and businesses, and establish tax incentives and exemptions scheme that is aligned with Kenya's development agenda. 6. **Align the National Tax Policy to ensure that, taxation supports** the country's strategies in the mitigation of climate change.

NO.	AREA/SECTION	REVISIONS
2	Section 4.1 of the draft National Tax Policy (Hard to tax Sector)	1. Expand the Policy's scope by incorporating the digital sector as a third challenging sector in addition to the informal and agriculture sectors. 2. Ensures that the Policy does not interfere with the already established structures such as Cooperatives Societies which have developed sectors such as agriculture. Instead, the Policy should provide for more innovative ways to expand the tax base by including large informal businesses that remained largely untaxed. 3. Provide alternative strategies to tax the informal sectors, for instance possible use of withholding taxes which require businesses to withhold taxes at source when making payments in hard to tax Sectors. 4. Provide for the use of digital/electronic payments which leaves a digital trail as a way of expanding the tax base.
3	Section 4.2 of the draft National Tax Policy (Management of Tax Administration)	1. Provides for an efficient funding structure that ensures that settlement of approved tax refunds is done within six months. 2. Provide an objective criterion to determine eligibility for Tax incentives to align it to the overall economic agenda and to prevent political and private interests. 3. Provides that, Tax expenditures estimates are explicitly provided in the annual budget estimates presented before the National Assembly during the budgeting cycle to improve budget transparency and that the policy obligates the National Treasury to publicise reports on annual tax expenditures. 4. Sets out that, the tax sector players who enjoy tax incentives should submit to the National Treasury statistical data on the impact of the incentives on their business growth and growth of the national economy and the environment.

NO.	AREA/SECTION	REVISIONS
4	Section 4.3 of the draft National Tax Policy (Increased in Tax Compliance Level)	Provides for a tax audit process framework to ensure certainty and predictability of the process.
5	Section 4.5 and Section 4.6 of the draft National Tax Policy (Income Tax)	1. Pronounce itself on the time horizon to guide a comprehensive review of income tax. 2. Sets out a progressive tax band structure that ensures the marginal rate is not higher than the corporate income tax rate. 3. Provides that, Income taxes should all times set at an optimal level to guard against the effect Laffer curve and ensure that it does not erode the disposable income/ purchasing power of salaried employees 4. Ensures that pension is treated using the Exempt–Exempt–Exempt (EEE) method as proposed in the draft Medium Term Revenue Strategy (MTRS) 2023. 5. Provides for inflation adjustment in pension and allow for review of the same every five (5) years to keep pace with inflation, the rising cost of living, the increasing tax burden and other payroll-related levies that individuals, particularly those in formal employment, must bear. 6. Ensures that Capital Gains Tax (CGT) taxes only actual gains from the disposal of property by adjusting the change in property value and eliminating the inflation effect on the value. It is proposed that the policy adopts the indexation method of calculating Capital Gains Tax (CGT). 7. Sets out that, where a preferential Corporate Income Tax (CIT) is granted, the granting is guided by Kenya's overall economic development agenda and should not be lower than fifty percent of the general Corporate Income Tax (CIT) rate. 8. Provide for shift in taxation policy for the Gaming, Betting and Lotteries sector to a single Gross Gaming Rate (GRR).

NO.	AREA/SECTION	REVISIONS
		9. Ensures that the granting of income tax incentives or exemptions should only be targeted to manufacturing and investments and the same shall be sustained for not less than five (5) years to allow for growth of those sectors and certainty of business environment.
6	Section 4.6 of the draft National Tax Policy (Value Added Tax VAT)	1. Provide Multiple VAT rates to allow for an opportunity for an alternative rate as a way to cushion the economy against shocks occasioned by global trends and the adverse effects of price increases of these products. 2. Provides that in addition to costs compliance and administration costs as provided for in the draft National Tax Policy, the granting of VAT Exemptions be based on incentivizing investment and cushioning Kenyans from economic shocks.
7	Section 4.7 of the draft National Tax Policy (Excise Duty)	1. Ensures that Excise duty should only be charged on luxury goods, communication services, and other goods as per the policy provided that, the '*other goods*' category as captured in the draft Policy should not include essential goods, basic necessities goods, food items whether imported or locally made, medicaments, or agricultural-related products. 2. Pronounces itself that, at all times Excise Duty should be set at an optimal rate to ensure certainty and predictability before any excise duty is levied in the future. 3. Provide that, the following shall apply in regard to Excise Duty— (a) Excise duty rates imposed on products shall not exceed the optimal excise duty rate. (b) The optimal rate shall be based on studies conducted by the Kenya National Bureau of Statistics (c) The optimal excise duty rates undergo public participation and approval by the National Assembly. (d) The optimal tax rate shall be reviewed every three years.

NO.	AREA/SECTION	REVISIONS
		4. Provides an objective criterion for including and excluding essential items listed in the Second Schedule to the Excise Duty Act and the period in which such items remain listed. 5. Provide that, Excise duty imposed on the prevention of consumption of harmful products should as much as possible be used for tackling the effects caused by these products on society.
8	Section 4.9 of the draft National Tax Policy (Customs Administration)	Provides that, any amendment to the East Africa Customs Management Act or customs administration in general should undergo public participation and the National Assembly's approval, prior to the government making any proposals to the East Africa Community, and upon enactment, the regulations should also undergo National Assembly's approval as per the Statutory Instruments Act.
9	Section 4.11 of the draft National Tax Policy (International Taxation and Tax Treaties)	1. Provides for the National Assembly's prior approval of Double Taxation Agreements (DTAs) before their execution. 2. Provides for re-negotiation framework for old Double Taxation Agreements (DTAs) to ensure the instruments are kept up to pace with the current business realities in the relevant countries.
10	Chapter Five (5) of the draft National Tax Policy (Implementation framework)	1. Provides for inclusion of an implementation matrix that should guide the implementation of the policy. The implementation matrix should among other things capture timelines, responsibilities, actors, costs etc. 2. Provides for an independent entity to oversee the implementation of the policy. The entity should submit its report quarterly to the National Assembly on the implementation of the Policy. 3. Establish a dedicated Fiscal Policy Committee/Unit in the National Treasury whose membership is broad base including professional entities to oversee the implementation of the National Tax Policy, and in particular to— (a) Ensure effective coordination of all key players and stakeholders for the attainment of the policy objectives. (b) Enhance compliance with the policy.

NO.	AREA/SECTION	REVISIONS
		(c) Provide recommendations informed by research on changes to any tax law or policy. (d) Initiate the review of the policy.
	Section 2.4.4 of the draft National Tax Policy (Miscellaneous Fees & Levies Act)	1. Sets out, guidelines on imposition of all levies and charges levied on imported goods. 2. Ensures that levy/charge levied to support and protect the local manufacturing and investment sector remains unchanged for at least five (5) years to allow growth of those sectors and to provide certainty and predictability of the business environment. 3. Provides that, any imposition of a levy/charge be preceded by a comprehensively undertaken economic impact assessment before approval/ implementation.

II. THAT, the National Tax Policy and revision set herein above guides any future revisions of tax-related laws.

III. THAT, the Cabinet Secretary, the National Treasury publishes the National Tax Policy and revisions set herein above in appropriate medium including the Ministry of National Treasury and Economic Planning's website for public dissemination and also submit the same to the National Assembly within forty five (45) days.

Signed…………………………………… Date: 23rd November, 2023

HON. CPA KIMANI KURIA, MP
(CHAIRPERSON)
DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING

THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 23 NOV 2023 Day: Thurs
TABLED BY: Hon. (CPA) Kimani Kuria, MP Chairperson, Finance & National Planning
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