Law Society of Kenya

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"Via Email: cabinetsecretary@treasury.go.ke"

Our Ref: **T.B.A.**

Your Ref: T.B.A.

Date: 23rd March 2020

Dear Cabinet Secretary,

RE: Proposed Relief Measures to mitigate against the effects of the COVID-19 on Businesses and Investments in Kenya

The Law Society of Kenya, in furtherance of its statutory mandate to assist the government in the administration of justice and advance the rule of law, proposes the following interventions to assist the country during this global pandemic with serious economic repercussions.

1. INTRODUCTION

1.1. The World Health Organization (**WHO**) categorized the outbreak of the severe acute respiratory syndrome Coronavirus 2 (**COVID-19** or the **Crisis**) as a pandemic and the Kenyan Government has since announced bold measures to contain the spread of the virus in Kenya.

1.2. We remain cognizant of the directive by H.E. Uhuru Kenyatta on the need for the public and private sector to work together in combating the crisis and supporting the Kenyan economy during these difficult times. Consequently, we propose here various fiscal measures for consideration by the Government to provide relief to businesses, investments and the Kenyan economy.

2. INCOME TAX

2.1. Corporation Tax

Under the provisions of the Income Tax Act of Kenya, Cap 470, Laws of Kenya (the **ITA**), gains or profits that accrue or are derived from Kenya are chargeable to corporation tax, at a rate of thirty percent (30%). We propose the following:

2.1.1. Manufacturers of Essential Supplies

To enhance the fight against the spread of COVID-19, we propose that the Government incentivises manufacturers of relevant essential supplies such as sanitizers, toiletries, masks, gloves, vitamins and specialized medical equipment, by temporarily lowering the applicable corporation tax at least for the current year of income.

2.1.2. Small and Medium Enterprises (SMEs)

To provide financial relief to SMEs doing business in Kenya, we propose that the Government lowers the applicable corporation tax during the current year of income and as the government has signalled its intention to support this sector, consideration should be given to maintaining the lowered rate for the long-term. This will boost the cash flows of SMEs in the short-term and improve the ease of doing business in Kenya in the long-term.

2.1.3. Donations

Under the provisions of the Income Tax Act (Chapter 470, Laws of Kenya) (the **ITA**), only expenditure incurred on donations granted to a charitable institution with a tax exemption certificate or to any project approved by the Cabinet Secretary for National Treasury and Planning or donations to the Kenya Red Cross, county governments or any other institution responsible for the management of national disasters to alleviate the effects of a national disaster declared by the President, are allowed as a deductible expense on the donor company.

To promote grant of donations by corporate entities to mitigate the spread of the virus and alleviate the negative effects of the pandemic, we propose that any expenditure incurred by corporate entities for donations made directly to the public or indirectly through hospitals or institutions for disaster management towards the effort to combat the COVID-19 pandemic, be deductible in computing the taxable income of the relevant taxpayer in the year of income.

We point out that a similar tax relief was introduced in the Republic of China as one of the measures to ensure combined efforts from all sectors in the fight against COVID-19.

2.1.4. Business expenses

In a statement given by the President on 15 March 2020 regarding the measures to be taken to reduce the spread of COVID-19, the President encouraged businesses and companies to allow employees to work from home, with the exception of employees working in critical or essential services. This will require businesses and companies to incur additional expenses such as purchase of additional laptops to allow employees to work from home, internet expenses, transportation costs, airtime expenses, expenses relating to essential items such sanitizers, masks and gloves, and medical expenses incurred in relation to the employees.

Under section 15 of the ITA, only the expenditure wholly and exclusively incurred by a tax payer in the production of income is deducted when ascertaining the income of the tax payer for tax purposes. In order to ensure the business and companies take all reasonable steps to ensure the economy continues to function with minimal interruptions, we propose that the additional business expenses that will be incurred by businesses during the pandemic period be granted a 150% tax deduction.

2.1.5. Instalment taxes and balance of tax

Due to the additional business expenses that are being incurred and/or are expected to be incurred by businesses and companies to mitigate the impact COVID-19 in the work places, it is certain that there will be a negative cash-flow impact on the businesses. Despite this, companies whose financial year-end is 31st December will be expected to pay their balance of tax in April and others expected to pay their instalment taxes in accordance with the provisions of the ITA.

To unlock cash flow to the fight against COVID-19 and to mitigate the negative cash-flow impact which may cripple the businesses, we propose that the Government considers the deferral of instalment taxes and balance of tax due in April 2020 by one month and subsequent instalment taxes be deferred for a further one month period for the financial year 2020 to cushion businesses from the negative cash-flow impact.

2.2. Employment/Individual Income

2.2.1. Income Tax Bands

Under the provisions of the ITA, individual and employment income in Kenya is chargeable to income tax, in accordance with the income tax bands established under the Third Schedule of the ITA. We believe that individuals who fall within the lower bands will be hit hardest by the economic turmoil caused by the effects of the crisis.

To cushion these employees from the negative economic impact of the pandemic, we propose a temporary waiver on PAYE on low income employees earning KES 23,885 and below per month until COVID-19 is brought under control.

The United States is also considering a tax relief on payroll taxes to cushion employees against the negative impact of COVID-19 on the economy.

2.2.2. Personal Relief

Under the third schedule of the ITA, every individual taxpayer is entitled to a personal relief in the amount of KES 16,896 per annum (KES 1,408 per month). To ensure that the affected individual taxpayers are able to meet their daily expenses and other unplanned expenses, we propose that the personal tax relief to resident individuals be enhanced by 100% for taxpayers for the current year of income.

2.2.3. Mortgage Relief

We propose that the Government increases the mortgage relief from the current KES 300,000 per annum (i.e. KES 25,000 per month) to KES 500,000 to provide relief to borrowers whose liquidity is likely to be affected during the current year of income.

3. VALUE ADDED TAX (VAT)

3.1. VAT Refunds

Under the provisions of the Value Added Tax, No. 35 of 2013 (the **VAT Act**), registered taxpayers are entitled to a refund of any excess VAT credits if their supplies are zero-rated, for tax paid in error and tax on bad debts. In addition, the VAT Act provides for refunds that arise from credits resulting from tax withheld by appointed withholding VAT agents. We note that the Government has initiated a process to speed up the existing refund claims but a much more aggressive process is needed to provide registered taxpayers with the much needed liquidity to continue operations during this crisis.

We therefore propose that the Government increases the rate and the amount of the refund pay out for verified claims.

3.2. VAT Automated Assessment (VAA)

In 2018, the Kenya Revenue Authority (**KRA**) rolled out the VAA system to detect inconsistencies between purchase and sales invoices which have been declared in VAT returns, to communicate the inconsistencies to both the purchaser and the supplier and (on that basis) raise an auto assessment on the purchaser for any outstanding inconsistencies.

While laudable, we note that the system has created various challenges for taxpayers and particularly an unreasonable and almost impossible administrative burden on retailers (who at this time are critical to our economy). As the government has been encouraging, taxpayers to work from home to minimise the spread of COVID-19, they are unlikely to be in a position to clear the discrepancy notices that are being issued. We would recommend that the VAA system be stopped for the duration of the crisis.

3.3. Zero Rating of Essential Supplies/ Emergency Relief

Under the provisions of the VAT Act, taxable supplies made by registered persons in Kenya; the importation of taxable goods and the supply of imported taxable services are chargeable to VAT, at the rate of 16% unless specifically mentioned in the First or Second Schedule of the Act. To enhance the fight against the crisis, we propose that the government zero rates essential supplies such as sanitizers, toiletries, masks, gloves, vitamins and specialized medical equipment. This allows suppliers to provide essential supplies at affordable prices and claim any excess credits.

In addition, we propose that the Government zero rates taxable goods for emergency relief purposes for use in specific areas and within a specified period, supplied to or imported by the government or its approved agent, a non-governmental organization or a relief agency authorized by the CS in charge of Disaster Management, from the current exempt status.

We also propose that the importation of sanitizers, toiletries, masks, gloves and specialised medical apparel for infectious diseases for use in Kenya during the pandemic period be exempt from VAT under the First Schedule to the VAT Act.

Note that a similar tax relief was introduced in the Republic of China to promote mass production of the essential items to help fight COVID-19.

3.4. VAT on commercial buildings

Current VAT law in Kenya exempts the sale, renting, leasing, hiring, letting of land or residential premises. In order to give business relief during the duration of the crisis, we propose that the exemption be extended to rent or leasing of commercial buildings which are currently subject to VAT at the standard rate of 16%.

4. TAX PROCEDURES ACT

4.1. Submission of Returns

Under the Tax Procedures Act (the **TPA**), taxpayers are required to file Pay- As- You- Earn (**PAYE**), VAT and Withholding tax returns monthly and corporation tax returns annually. Considering the potential challenges by taxpayers to submit these returns within the current statutory time limits, we propose the extension of the time limits for a period of 90 days, to be reviewed if the crisis is not under control by that time.

4.2. Payment of Taxes

To accommodate the potential challenges by taxpayers to make payments within the statutory time limits, we further propose a 90 day extension period for the payment of the taxes. This is bearing in mind that April is the first quarter of the financial year for most taxpayers and the due date for the payment of the first instalment corporate tax and the balance of the corporate tax liability for the previous financial year.

4.3. Tax Assessments

While we laud the efforts of the KRA to recover unpaid taxes, we propose that new tax assessments be put on hold for the duration of the crisis to allow for the continuity of business operations, as assessed taxpayers may have challenges complying with the statutory time limits for the objection and appeal process.

As is the case with Rwanda, we would recommend that KRA halts all comprehensive tax audits and post clearance tax audits for the period when the Government has ordered a slowdown of operations to curb the spread of Covid-19.

4.4. Execution/Enforcement by KRA

We also propose that the KRA puts on hold any enforcement measures, including issuance of agency notices and freezing of bank accounts, to enable businesses to meet their operational expenses and have sufficient cash flows to ensure that they will be in a position to continue business operations.

5. EXCISE DUTY

Under the provisions of the Excise Duty Act, telephone and internet data services; fees charged for money transfer services by banks, money transfer agencies and other financial service providers; fees charged for money transfer services by cellular phone service providers; and other fees charged by financial institutions are chargeable to excise duty.

Bearing in mind the Government directive to limit the use of physical cash and work from home, we propose that the Government temporarily reduces or waives the applicable excise duty rates on the above mentioned services, in combating the spread of the COVID-19.

6. TOURISM AND CATERING LEVY

It is no doubt that one of the sectors that have been greatly affected by COVID-19 outbreak is the hospitality sector. With the suspension of travel for all persons coming into Kenya from any country that has reported COVID-19 cases and the ban of all conferences, meetings and public gatherings, it is imperative that hotels and restaurants will scale down their operations or close until CIVID-19 is brought under control. This will result in huge losses to the businesses and employees risk being declared redundant.

Under the Tourism Act, persons engaged in the provision of tourism services are required to charge a tourism levy at a rate of 2% of the gross sales. Further, hotels and restaurants are required to charge a catering levy at a rate of 2% of the gross sales. Section 106 of the Tourism

Act allows the CS for National Treasury to grant certain fiscal incentives to promote the development of sustainable tourism, including waivers and rebates to persons engaged in provision of tourism services, hotels and restaurants.

We propose that the Government take advantage of the provisions of section 106 of the Tourism Act and grant tax rebates and waivers to operators in the hospitality industry, to cushion them against the negative impact of the crisis.

7. STAMP DUTY

The Stamp Duty Act requires that registrable documents and other instruments must be lodged for stamping within a period of 30 days from the date of execution or in the case of a foreign document, from the date the document is brought into Kenya. Following the closure of the land offices and registries, registrable documents and other instruments that require stamping, may not be lodged for assessment and stamping within the required time lines.

Accordingly, we propose for the Government to waive stamp duty penalties for both late assessment and late payment of stamp duty, for instruments executed during the period of the crisis and instruments which were already executed, but have not been lodged for assessment and payment by 17 March 2020 and were within the required time lines.

8. Statutory filings at the Companies Registry

The Companies Act, 2015 provides for filing of notices and documents with the Companies Registry relating to certain changes in a company within a prescribed period. These changes include changes in the shareholders of a company, the share capital, board of directors, change of registered office, amendment of articles, winding up, et cetera. Where these changes are not notified and relevant documents lodged with the Companies Registry within the prescribed period, late filing penalties may be imposed by the Registrar of Companies.

We propose that a waiver of penalties be granted in respect of statutory filings that are/were due to be filed during the pandemic period until operations in the Companies Registry normalise.

9. Customs duty and related levies

9.1. Port clearance

In order to assist importers and manufacturers who import intermediate products, we recommend that the process of clearing goods at the port be sped up during the crisis to ensure that business can work more efficiently and lower cost.

9.2. **Duty and levies**

The importation of intermediate and finished goods that are classified as essential supplies such as sanitizers, toiletries, masks, gloves, vitamins and specialized medical equipment be imported duty free and without application of the Import Declaration Fee and Railway Development Levy.

10. Debt Relief and Moratoriums

Several concerns have been expressed by members of the public and our own members about their ability to service loans on account of acute business disruptions brought about by the current pandemic. This scenario extends to financial obligations owed to financial institutions and SACCOs.

We propose that the Central Bank of Kenya and the banking/microfinance industry meet and consider the following debt relief incentives and draw inspiration from the state of New York which is currently discussing the following measures:

a. Forbearing mortgage payments for 90 days from their due dates based on financial hardship.

b. Refraining from reporting late payments to credit rating agencies for 90 days.

c. Offering mortgagors an additional 90-day grace period to complete trial loan modifications, and ensuring that late payments during the COVID-19 pandemic does not affect their ability to obtain permanent loan modifications.

d. Waiving late payment fees and any online payment fees for a period of 90 days.

e. Postponing foreclosures and evictions.

f. The agreed relief options are communicated to all borrowers.

The above measures should extend to all SACCOS.

11. Payment of Dividends

On account of the postponement of the Annual General Meetings, public listed companies and SACCOS cannot pay out any declared dividends to the members. This is a very unique situation that has the following consequences:

a. Shareholders had a legitimate expectation to receive dividends to meet their financial obligations especially when they traditionally expect payments in the next few months.

b. There are shareholders who in anticipation of dividend payments had made certain commitments which are now frustrated.

c. Companies that had already declared dividends before the pandemic was declared are now faced with the uncertainty of future cashflows on account of the negative economic impact of the pandemic and may need to reconsider their accounts and makes necessary adjustments and provisions.

d. SACCOs and Public Listed Companies that may not be affected in any way and would be in a position to pay out dividends are constrained by operation of law not pay out dividends in the absence of an AGM.

There is an urgent need to consider the implications of the above scenarios and how best to sustain the livelihoods of the shareholders and also ensure that the interests of the companies are not affected adversely. This is an unprecedented situation that invites innovative intervention-either immediate or through legislative intervention as the current law does not contemplate payment of dividends and subsequent ratification at a future AGM. Should e-voting by shareholders be considered a viable option in future when such exigencies arise where they can ratify payment of dividends?

12. Pending Bills

We are happy to note that the government shall effect payment of pending bills within the next 30 days. We pray that all bills that are owed to law firms on account of services rendered to any government body whatsoever (be it counties, parastatals, constitutional commissions) are also included in the payments. This will mitigate law firms that are already facing serious financial crisis across the board. We already have a serious backlog of monies owed to lawyers who have rendered pro bono legal services or appointed as mediators to settle disputes under the auspices of the judiciary.

13. Enhancing and Supporting Electronic Commerce and Filing Processes

There is urgent need to ensure that the e-filing processes in the judiciary and the lands department are fast-tracked. The judiciary has already gazetted its **Practice Directions on Electronic Case Management** on 20th March 2020 which will come in force at a future indeterminate date. We pray that adequate resources are allocated to support the judiciary enforce the digitization process. This will greatly improve access to justice and enhance efficiency in the ease of doing business in Kenya with the expeditious determination of disputes.

As regards the digitization of the lands department, a task force was set up in 2018 leading to a comprehensive report- **"Report On Electronic Land Transactions, Registration, Conveyancing And Other Related Activities Under The Land Registration Act, 2012 The Land Act, 2012 And The Community Land Act, 2016"**- that was released in March 2020. This report needs to be implemented rather than setting up another task force to repeat its work that will end up using valuable public resources and take more than a year to implement.

We are happy to appear before the National Budget Team in person to explain our proposals further, at a time convenient to them.

Yours Faithfully,

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