



THE KENYA FAIR TAX MONITOR



TAX JUSTICE
NETWORK
AFRICA



OXFAM

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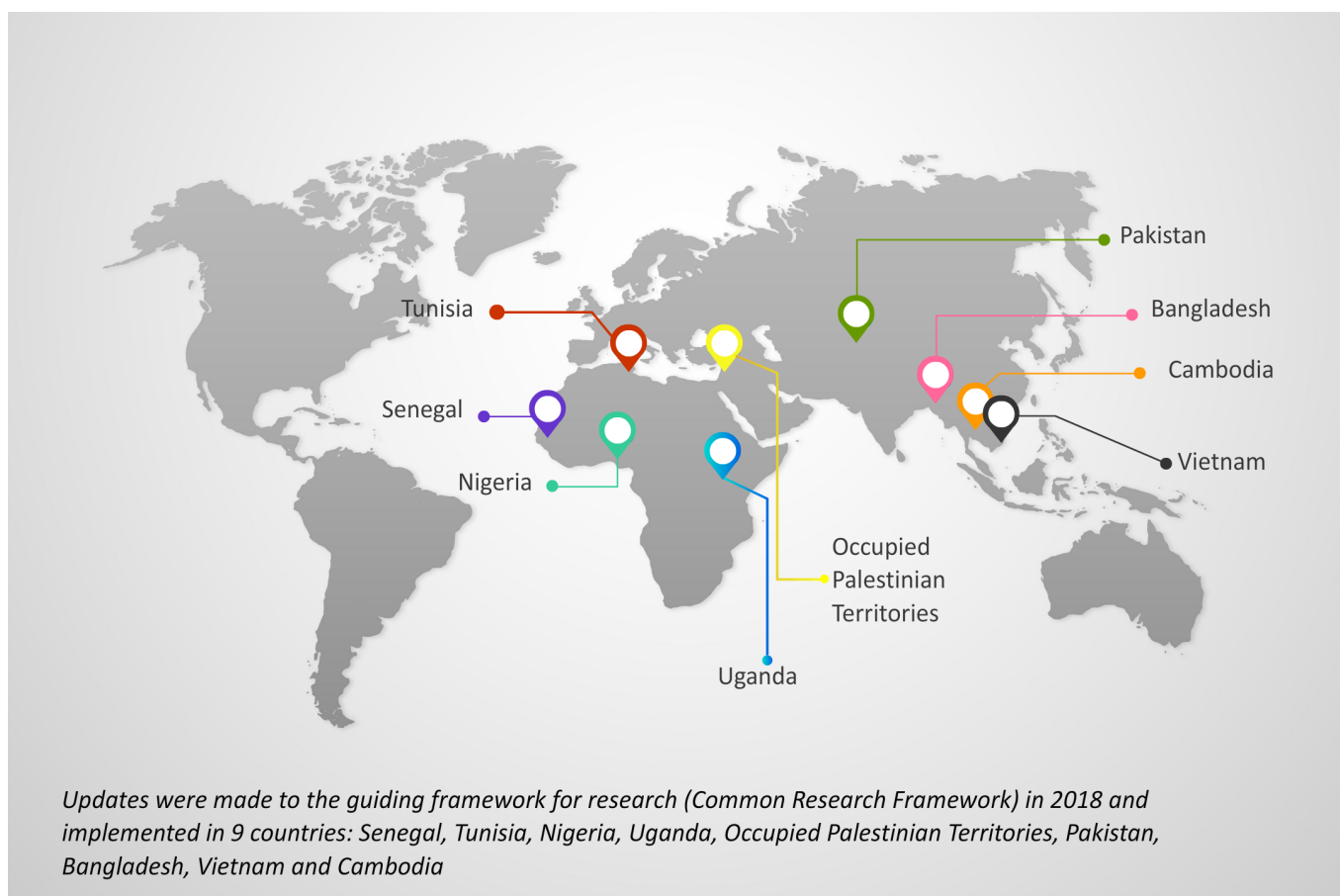
ASSESSING THE FAIRNESS OF KENYA'S TAX SYSTEM

The Fair Tax Monitor (FTM) project was started in December 2014. The FTM project was developed by Oxfam Novib and Tax Justice NetworkAfrica in collaboration with partners and Oxfam Country Offices.

The Fair Tax Monitor's overall goal is to strengthen the advocacy activities at the local and global levels. Through the development of local capacity on technical fiscal issues, the FTM provides an overview of national tax systems and identifies the main challenges they face. The tool provides reliable evidence for the advocacy and lobby work of national actors, which strengthens their position and increases their credibility as well as their influencing power. Furthermore, the FTM compares key elements of tax systems and thus complements the activities of Oxfam's global Even it Up! campaign and TJN-A's activities realized at the African level. The project's focus is on tax policies and practices, and by deliberate choice it pays only reserved attention to issues related to public expenditure.

The pilot phase in 2015/2016 was implemented in: Bangladesh, Pakistan, Uganda and Senegal. A first update was made to the guiding framework for research (Common Research Framework) in 2018 and implemented in 9 countries: Senegal, Tunisia, Nigeria, Uganda, Occupied Palestinian Territories, Pakistan, Bangladesh, Vietnam and Cambodia. The ambition of the new Common Research Framework methodology which has been implemented in this report, is to expand to Latin America and sharply increase the number of national reports produced in Africa.

The FTM Working Group has defined a fair tax system as follows: [1] progressive and serves as a mechanism to redistribute income in a gender responsive way; [2]



allows to raise sufficient revenue to perform government functions and provide high-quality essential public services; (3) refrains from and eliminates tax exemptions and incentives to the elite (individuals and corporate); and (4) tackles causes of illicit capital flight and tax evasion & avoidance by multinational companies and the wealthy.

The FTM uses a Common Research Framework (CRF) to gather qualitative and quantitative information about a country's tax system in a standardized manner. The collected data will be categorized and evaluated and entered into the FTM online tool. A research report such as this one, with more detailed information and analyses will be available for each focus country at www.maketaxfair.net.

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Allows to raise sufficient revenue to perform government functions and provide high-quality essential public services



Refrains from and eliminates tax exemptions and incentives to the elite (individuals and corporate)



Tackles causes of illicit capital flight and tax evasion & avoidance by multinational companies and the wealthy

Research Methodology

The various chapters were developed by different authors working on aspects of either tax justice or transparency and accountability in their respective organisations. The findings are derived primarily from desk research relying on the provisions of Kenya's laws affecting the fairness of its tax system and existing research on the same. The different chapters were then collated by TJNA and Oxfam in Kenya who thereafter edited and finalised the study.

Limitations of the Study

As the study does not undertake any primary research, any shortcomings in terms of data are a direct result of inadequacies in existing data, including lack of data on a particular subject, lack of disaggregated data and lack of access to data.

Structure of the Report

The report structure generally follows the criteria of the FTM Common Research Framework. It begins with a description of Kenya's tax system followed by an assessment of each of the criteria of the CRF followed by conclusions and recommendations.



EXECUTIVE SUMMARY

Kenya is in the midst of an economic crisis, with a debt stock that has reached 68.1% of its GDP as of June 2021, the steady growth of inflation and the weakening of the Kenya shilling, Kenya is struggling to finance its public services. As of June 2021, debt servicing had reached 50% of revenue. This has led to the crowding out of spending on critical social sectors such as health, agriculture and social protection that receive less than 10-15% of the national budget. For these reasons, this, compounded with the economic shocks of the COVID-19 pandemic have increased pressure on Kenya's ability to raise revenue.

In the past five years, the government has resorted to introducing taxes such as digital service tax, minimum tax and deepening the excise tax base. While previously viewed primarily as a sin tax, excise duty is being used as a means of increasing tax revenue. For instance, excise duty is now imposed on fees charged by digital lenders, mobile money transfers amongst others. Some of these measures are a result of the fiscal consolidation measures that have been imposed in Kenya through Kenya's arrangement under the IMF's Extended Credit Facility and Extended Fund Facility. Kenya has so far mostly resorted to inequitable means of raising tax revenue while still maintaining a plethora of unevaluated harmful tax incentives and exemptions and failing to effectively tax wealth.

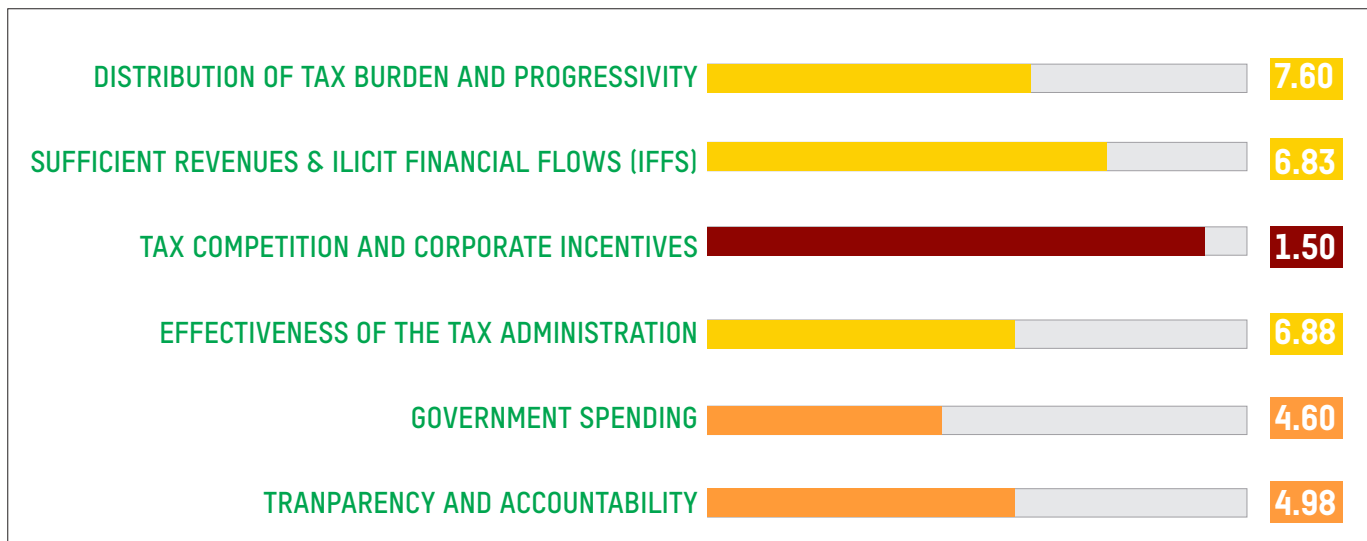
This study proposes recommendations on how Kenya's tax system can be improved to not only meet the financing gaps for its development but also do so in a fair and equitable manner that ensures that the tax burden is being shared equally. Reorienting existing tax reform programmes away from simply expanding revenue collection towards greater emphasis on how revenue is collected, and how this can contribute to broader state-building goals. This will involve improving equity in tax enforcement and administration, improving public awareness, transparency, taxpayer services, broadening and improving direct taxation.

Scoring Methodology of the Study

The present study relied mainly on literature review of relevant documents and analysis of secondary data guided by the Common Research Framework (CRF) methodology. Several research questions guided the CRF review and analysis of data from which this report was generated.



According to the FTM scoring methodology, the results show that Kenya’s tax system obtained the following scores on the report sections:

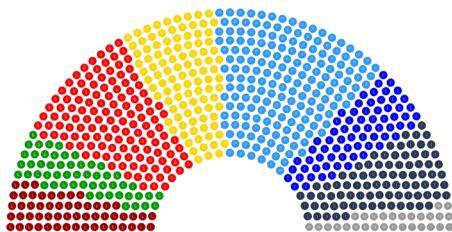


Note: The scores are defined within a scale of Zero to Ten: a score of zero represents an unfair component of a tax system, whereas, ten represents a fair component of a tax system¹.



Kenya’s Tax System

Kenya’s tax administration system is split between the national and county governments. The Constitution of Kenya, 2010, outlines through article 209 the powers to impose taxes or raise revenue for both the national Government and the county government.



In Kenya, tax governance is guided foremost by the Constitution of Kenya 2010 which provides in Article 210 that no tax can be imposed, varied, or waived without the process being carried out through national legislation.

The current laws governing Kenya’s tax system include:

- The Constitution of the Republic of Kenya 2010;
- The Public Finance Management (PFM) Act of 2012;
- The County Government Act of 2012;
- The Income Tax Act;
- The Value Added Tax Act of 2013;
- The East African Community (EAC) Customs Management Act of 2004;
- Excise Duty Act of 2015
- Miscellaneous Fees and Levies Act of 2016
- Tax Procedures Act of 2015
- Tax Appeals Tribunal Act of 2015
- Kenya Revenue Authority Act
- Stamp Duty Act

¹Fair Tax Monitor (2012). Key-Fair-Tax-issues-from-CRAFT-Country-Baseline-Studies.pdf. Key Fair Tax Issues. <https://www.maketaxfair.net/assets/Key-Fair-Tax-issues-from-CRAFT-Country-Baseline-Studies.pdf>



These laws spell out the duties and responsibilities of the institutions responsible for regulation, planification, assessment, collection, administration, enforcement and accounting for all tax and non-tax revenues.

In Kenya, few studies have been conducted to assess the public perception of the tax administration, however, the results indicate that citizens are largely critical of how taxes are calculated or assessed and there is general lack of knowledge on their structures. The regular audits conducted by tax administrations to detect and deter tax evasion or avoidance have created an increasingly negative trust relationship between authorities and taxpayers - especially Large Taxpayers.

Tax Burden and Progressivity

Kenya relies almost equally on both direct and indirect taxes. The Value Added Tax (VAT) system is regressive in nature due to being imposed on consumption irrespective of one's income. However, essential goods such as food items as well as personal protective equipment (PPE) are either exempted or zero rated in light of the COVID-19 pandemic, and this makes the VAT less regressive. The process of adding or removing goods and services from the exemption or zero-rated list is however highly politicised, creating uncertainty around the taxation of petroleum products as well as clean energy materials. Excise duties, traditionally used as "sin taxes" to influence consumption on alcohol, tobacco products and gambling and betting, have over time been expanded and deepened to include taxes on goods and

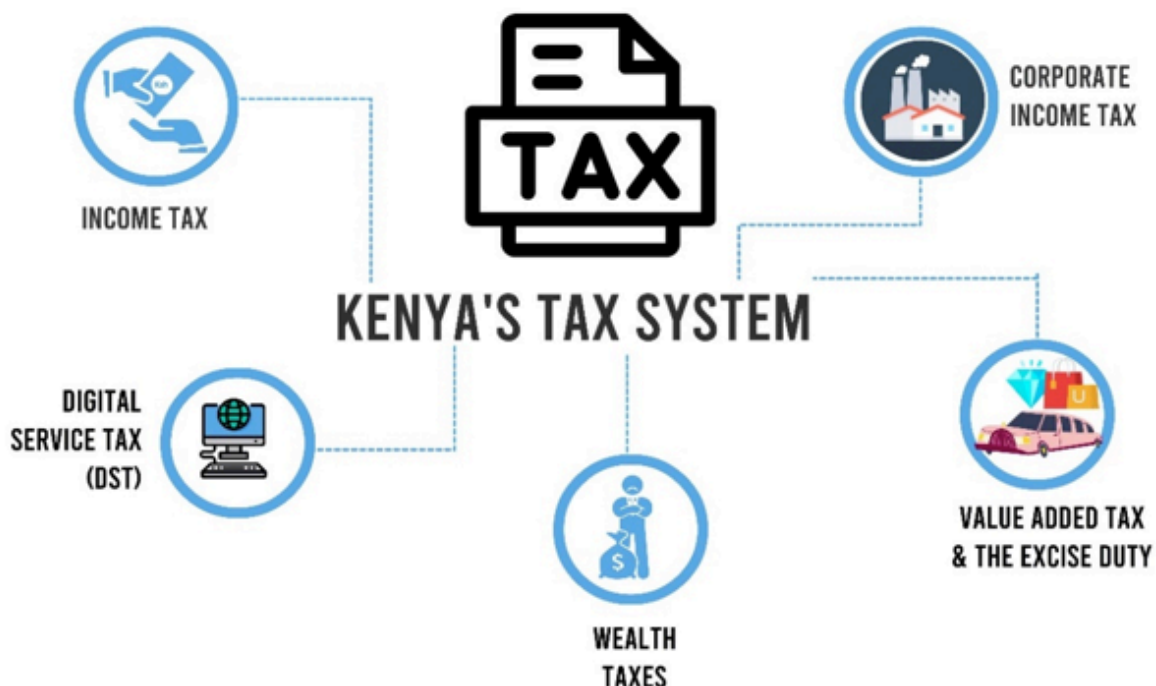
services such as mobile data and money and financial transactions, bottled water, imported sim cards etc².

The potential of wealth taxes in Kenya has not been fully exploited especially with regard to property taxes. The revenue performance of wealth taxes such as Capital Gains Tax (CGT) is not publicly available as income tax and consumptions taxes such as VAT. It would also deem well for Kenya to introduce new forms of taxation such as inheritance tax and gift taxes.

Sufficient Revenues and Illicit Financial Flows

The tax-to-GDP ratio for Kenya while higher than the Sub-Saharan average, has decreased annually over the last five years despite overall increases in nominal revenue. The number of active taxpayers has also increased but not translated to increased revenue relative to active taxpayers. The policy frameworks around the taxation of extractives have been developed but have not yet been operationalised.

The Ministry of Finance has established mechanisms of promoting tax transparency through memberships to global bodies promoting exchange of tax information and administrative assistance on tax matters. Additionally, the Kenyan Revenue Authority (KRA) has established a Transfer pricing unit to counter tax abuses by multinational corporations. However, Kenya still grapples with revenue losses from Illicit Financial Flows (IFFs), currently estimated at USD 565 million per annum.



THE 2020 DOCUMENTS LEAK, SO CALLED THE 'FINCEN FILES' INDICATED THAT USD 60 BILLION WORTH OF SUSPICIOUS TRANSACTIONS WERE MADE BY 53 KENYA-BASED COMPANIES THROUGH BILATERAL TAX TREATIES.

Kenya's tax treaty network includes bilateral deals with fifteen countries, four of which are tax havens (Seychelles, South Africa, Netherlands and Mauritius) and four others are classified as very restrictive (France, Qatar, Zambia and South Korea). This means that these DTAs limit the taxing rights of Kenya. The current legal framework provides for a participatory process of ratifying international treaties, which includes cabinet, parliamentary scrutiny and public consultation.

Tax Competition and Corporate Incentives

Kenya provides a wide range of incentives in the form of capital deductions, tax holidays, special rates in free zones, exemption from certain income taxes, amongst others. While Kenya, may have the some of the highest standard Corporate Income Tax (CIT) rates in the East African region, it offers some of the most permissive incentives.

Estimates by the KRA indicate that Kenya lost up to 5.15% of its GDP in 2017 and 2.96% in 2020 (Tax Expenditures Report, 2021) through generous tax incentives. Tax holidays and incentives specific to Export Processing Zones are considered the most harmful but are not included in the 2021 report. This puts to question the cost-effectiveness of tax incentives in such zones, Kenya continues to pursue the use of free zones to attract foreign investment, by establishing Special Economic Zones. The proliferation of these

incentives is worsened by a lack of coordinated regime in providing and administering the incentives within the free zones.

There is a growing lack of transparency in the administration of tax incentives in Kenya evidenced by her failure to publish tax expenditure information. This is despite the constitutional mandate to publish tax expenditures and the IMF recommendations on the country's fiscal transparency.. The COVID-19 pandemic has had a positive impact on the reduction of tax incentives, especially with regard to capital deductions. Since the onset of the pandemic, the government is continuously doing away with redundant incentives. Further, the Kenyan government seeks to domesticate the country by country (CbC) reporting framework in order to enhance tax transparency.

Effectiveness of Tax Policy and Administration

Kenya performs poorly on actual collection of tax compared with the potential levels that could be collected. According to a 2018 publication by KRA, the average compliance gap for all tax heads stood at 30%, which translated to 6.6 % of the national GDP.

Tax administration has undergone various reforms to boost revenue collections, including the automation of tax processes, increased investment in tax awareness campaigns and trade facilitation infrastructure. However,

administration still faces challenges such as inadequate staffing. There is a need to especially build the capacity of county governments to collect revenue. County governments are short on technical capacity, proper legal frameworks as well as human resources in order to efficiently administer taxes.

Government Spending

Kenya has been unable to meet its commitments with regard to pro-poor spending in healthcare and agriculture. Healthcare financing has not met the Abuja Declaration 15% target. It was only in 2020, due to its response to the COVID-19 pandemic that Kenya was able to meet and surpass the target. Fiscal decentralisation has led to public services such as healthcare being devolved at county level. This has been met with many challenges including delayed disbursements of funds from the national government leading to situations whereby patients have to buy their own supplies to access healthcare. Agriculture is severely under-financed despite being one of the major contributors to Kenya's GDP. It has consistently failed to meet the 10% Maputo commitment. This comes at a time when Kenya is facing climate change related severe drought and famine. Despite food security being one of the key action plans in Kenya's National Climate Change Action Plan, it continues to be the least financed with more resources concentrated on renewable energy. Education in Kenya is the most financed social



sector with the advent of Free Primary Education and capitation grants for secondary school tuition fees leading to increased enrolment. However, this has also led to the reduction of the quality of education due to congestion and the inadequacy of infrastructure. This sector requires increased development expenditure to meet these needs.

On the other hand, debt servicing takes up a large chunk of expenditure in Kenya. As of June 2021, according to the Public Debt Management Report, debt servicing as a percentage of revenue stood at 50%. Over the past 10 years, Kenya's external debt stock has changed significantly with the growth of commercial loans. These foreign- currency dominated loans present a high refinancing risk for Kenya. In 2021, as a result of the economic shocks caused by the pandemic, Kenya was declared to be at high risk of debt distress and entered into an Extended Credit Facility and Extended Fund Facility with the IMF. These programmes have introduced fiscal consolidation measures that are likely to affect social spending.

Transparency and Accountability

Kenya has laws that allow for access to information including tax information. Tax information such as types of taxes, rates etc. is readily available on the KRA website. However, information regarding tax deals that is often within the ambit of the National Treasury is much more difficult to access. Kenya also has laws that require the disclosure of tax expenditures (TEs). Recently, this is

being implemented with the release of the first publicly accessible tax expenditure report in 2021. There is much room for improvement in the reporting of TEs under CIT as tax holidays were not captured in the 2021 report.

While KRA is audited on an annual basis by the independent body of the Office of the Auditor General, debate and action on the recommendations of the OAG is still lagging.

General corruption within the government affects tax compliance in Kenya and therefore stronger action needs to be taken against corruption including encouraging whistleblowing through the passing of the Whistleblower Protection Bill and any other relevant laws.

Company disclosures in Kenya require submission of audited financial statements and beneficial ownership information. However, only publicly listed companies share their financial statements publicly. Beneficial ownership (BO) information requirements while highly commendable are only limited to companies and no other public vehicles such as partnerships and trusts. There is no public register of BO information.

Civil society engages with different arms of government on tax including the Ministry of Finance, KRA, the parliament and even the judiciary with certain degrees of success. However, it is necessary for a national level Public Participation Act to be enacted with specific focus on public finance engagement to provide more clarity to public participation processes.

RECOMMENDATIONS

1. Cost-benefit analyses should be carried out as we review the existing and planned tax incentives. Essentially, tax incentives should only be provided if the additional taxes revenues expected over the long term compensate for taxes foregone in the immediate or medium term, or if measurable positive externalities can be identified with equivalent effect.
2. The Government and Civil Society Organisations should increase the sensitisation of taxpayers of the need to pay taxes and demand better public services.
3. KRA should work with county governments and use memorandums of understanding to improve their shared ways of working and collection easier.
4. KRA should have better access to databases from other public authorities such as the central bank, the vehicle registration office and other so as to empower the tax assessments of large business and rich and/or high-income individuals.
5. The Government should increase the national budgetary allocation for social protection programmes.
6. Supporting civil society actors to engage in debates about tax issues, particularly through the formation and expansion of inclusive business associations, taxpayer associations, and partnerships between government and civil society organisations.
7. Increased national government spending in healthcare and agriculture is critical. Further, counties need to increase Own Source Revenue (OSR) in order to meet their spending needs in these areas and reduce over-reliance on the national government.
8. Increasing the scope of BO requirements to not only include companies but also trusts and partnerships will improve tax transparency and be instrumental towards addressing corruption in Kenya.

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ABBREVIATIONS AND ACRONYMS

AiA	Appropriations in Aid
ARUD	Agriculture Rural and Urban Development
ATAF	African Tax Administration Forum
BEPS	Base Erosion and Profit Shifting
CGT	Capital Gains Tax
CIT	Corporate Income Tax
CRF	Common Research Framework
DST	Digital Services Tax
DTA	Double Taxation/Tax Agreement
EAC	East African Community
EPZ	Export Processing Zone
FY	Financial Year
GDP	Gross Domestic Product
GOK	Government of Kenya
GRB	Gender Responsive Budgeting
iCMS	Integrated Customs Management System
IMF	International Monetary Fund
LPG	Liquefied Petroleum Gas
KRA	Kenya Revenue Authority
MDAs	Ministries Departments and Agencies
MNCs	Multinational Corporations
MNE	Multinational Entity
MSMEs	Micro Small and Medium Enterprises
MTEF	Medium Term Expenditure Framework
NHIF	National Health Insurance Fund
NSSF	National Social Security Fund
OAG	Office of the Auditor General
OECD	Organisation for Economic Cooperation and Development
PAYE	Pay As You Earn
PBO	Parliamentary Budget Office
PIT	Personal Income Tax
PWD	Persons Living with Disabilities
SEZ	Special Economic Zone
SME	Small and Medium Enterprise
SDGs	Sustainable Development Goals
TVET	Technical, Vocational Education and Training
USD	United States Dollars
VAT	Value Added Tax
WHO	World Health Organisation

GLOSSARY

Accelerated Depreciation. Method of depreciation under which taxpayers may allocate larger depreciation deductions to the first year or first few years of useful business assets, such as plant and machinery.

AD VALOREM Tax. A tax on goods or property expressed as a percentage of the sales price or assessed value.

Allowance (Tax). Deduction or exemptions generally made in computing income taxes, inheritance and gift taxes and some forms of sales taxes.

Appropriation in Aid (AiA)-means any revenue which a country government entity receives and is approved by parliament for application by that entity to finance its activities.

Audit. Examination and verification carried out by an outside agency (such as an accountancy firm or the tax authorities) of a taxpayer's books and accountants and/or the general accuracy of returns and declarations, either as a routine operation, or when tax evasion is suspected.

Balance sheet. Statement of the financial position of a business at a particular date. The statement will show the business's assets in one column and its liabilities and owner's equity in another column.

Base company. Company situated in a low-tax or non-tax country (i.e. tax haven), which is used to shelter income and reduce taxes in the taxpayer's home country. Base companies carry on certain activities on behalf of related companies in high-tax countries (e.g. management services) or are used to channel certain income, such as dividends, interest, royalties and fees.

Base erosion and profit shifting (BEPS): According to the OECD (2013), base erosion and profit shifting refers to tax planning strategies that exploit gaps and mismatches in tax rules to make profits 'disappear.' This is done to shift profits to locations where there is little or no activity but the tax rates are low. This results in little or no corporate tax being paid. The base erosion and profit shifting project coordinated by the OECD, originally requested by the G20, seeks to reform international tax standards that have become open to exploitation by multinational firms.

Beneficial Ownership: Refers to an individual or entity with ownership of a property or stock whose legal title is in another entity's names. A beneficial owner of an equity is the ultimate owner and beneficiary of generated income.

Book value. The value of an individual asset as recorded in the accounting records of a taxpayer, calculated as actual cost minus allowances for any depreciation.

Brackets (Tax). Term used in connection with graduated system of taxation to refer, for example, to the portions or slices of taxable income subject to particular rates of income tax.

Capital assets. All property held as investment by a taxpayer.

Capital expenditure. Expenditure on improvement rather than repair or maintenance. Capital expenditure is any type of expense that a company capitalizes, or shows on its balance sheet as an investment, rather than on its income statement as an expenditure.

Capital gain. A gain/profit on the sale of capital assets.

Carryover. A process by which the deductions or credits of one taxable year that cannot be used to reduce tax liability in that year are applied to reduce tax liability in subsequent years (carryforward) or previous years (carryback).

Cash basis (cash method). The accounting method which recognizes income and deductions when money is received or paid. This contrasts accrual accounting, which recognizes income at the time the revenue is earned and records expenses when liabilities are incurred regardless of when cash is received or paid.

Consumption tax. Tax levied on the ultimate consumption of goods and services. Sales tax and value-added tax are examples of consumption taxes.

Corporate income tax. Income tax on the income of companies.

Credit, foreign tax. A method of mitigating international double taxation. If income received from abroad is subject to tax in the recipient's country, any foreign tax on that income may be credited against the domestic tax on that income. The theory is that this means foreign and domestic earnings of an entity will as far as possible be similarly taxed, although usually the credit allowed is limited to the amount of domestic tax, with no carry over if tax is higher abroad.

Credit, tax. An amount of money that taxpayers are permitted to subtract from their payable taxes.

Custom duties. Taxes on goods imported into a country.

Deduction at Source (or withholding tax). Tax on income imposed at source, i.e. a third party, for example an employer, is charged with the task of deducting the tax from salaries of its employees and transferring that amount to the government.

Depreciation. An accounting technique in which the cost of an asset is allocated over the periods in which the asset is used.

Direct Taxes. Taxes imposed (levied) on income, wealth and property, such as Personal Income Tax, Corporate Income Tax, Property Tax and Capital Gains Tax. The tax burden is always on an individual or an entity and can't be shifted by the taxpayer to someone else.

Double taxation, international. International juridical



double taxation arises when comparable taxes are imposed in two or more states on the same taxpayer in respect of the same taxable income or capital, e.g. where income is taxable in the source country and in the country of residence of the recipient of such income.

Double Taxation Treaties (DTTs) or Double Taxation Agreements (DTAs). DTTs or DTAs are meant to regulate taxation in multiple jurisdictions to avoid double taxation and double non-taxation. In general, DTTs tend to among others: determine which country has taxation rights over a certain income; define which taxes are covered in the treaty; determine who is a resident and eligible for benefits on each state; and reduce the amounts of tax withheld from interest, dividends, and royalties paid by a resident of one country to residents of the other country (otherwise known as source and residence countries).

Duty (tax). The same as customs duties (sometimes called a tariff), a type of tax levied on imported products.

Earned income. Income or compensation derived from personal services in an employment, trade, business, profession or vocation. (cf. investment income).

Effective tax rate. The effective tax rate is the average rate at which an individual or corporation is taxed. The effective tax rate for individuals is the average rate at which their earned income is taxed, and the effective tax rate for a corporation is the average rate at which its pre-tax profits are taxed.

Environmental Tax. Tax imposed for environmental reasons, e.g. to provide an incentive to reduce certain emissions to an optimal level or taxes on environmentally harmful products.

Equity/Fairness. Making people with greater ability and the rich pay relatively more taxes (vertical equity) and taxpayers in similar circumstances to pay similar amounts of tax (horizontal equity).

Excise Tax. These are indirect taxes charged on the manufacture, sale or use of certain types of goods and products. They are commonly included in the price of the product (such as cigarettes, alcohol or gasoline) or activity (often gambling).

Excise tax is usually paid by producer of goods, but passed onto the consumer through the price, and usually is levied in addition to sales tax or VAT.

Exemption (tax). Tax laws frequently provide specific exemptions for persons, items or transactions, etc. which would otherwise be taxed. Exemptions may be given for social, economic or other reasons.

Export duty. Tax levied on goods or services when they leave an economic area. Often used on basic commodities when they enter the global market, such as rubber,

copper, palm oil, sisal, tea, cocoa and coffee.

Fair Tax Monitor. A tool which measures tax fairness and compares the levels and trends of tax injustice that exists across country tax systems and over time.

Fair tax system. A tax system that is considered fair has the following characteristics: (1) it is progressive and serves as a mechanism to redistribute income in a gender sensitive way, (2) it allows to raise sufficient revenue to perform government functions and provide essential services, (3) it refrains from and eliminates tax exemptions and incentives to the elite and (4) tackles causes of illicit capital flight and tax evasion by international companies and the wealthy.

Financial statement. Report which contains all of the financial information about a company. The report generally consists of a balance sheet, income statement and may include other information as well.

Fiscal policy. Part of economic policy which relates to taxation and public expenditure.

Flat tax. A tax applied at the same rate to all levels of income. It is often discussed as an alternative to the progressive tax.

Formalization. The transition of informal companies and businesses to the formal economy.

Fraud (tax). Tax fraud is a form of deliberate evasion of tax which is generally punishable under criminal law. The term includes situations in which deliberately false statements are submitted, fake documents are produced, etc.

Free Trade. A global system with zero duties/taxes on international trade (imports and exports). Can also refer to a lack of customs duties between two (or more) countries.

Gender responsive. A lense to be applied to tax systems to overcome historical gender biases in order for women to truly engage with and benefit from the economic system. Gender-responsive planned actions should integrate measures for promoting gender equality and women's empowerment, foster women's inclusion and provide equal opportunities for women and men to derive social and economic benefits, eliminating all implicit and explicit negative gender-biases.

Hidden tax. Indirect tax paid by the consumer without their knowledge. These are usually levied during the production process, meaning the firm incurs higher costs, and raise the price of the good for the consumer.

Illicit Financial Flows. The cross-border movement of funds that are illegally acquired, transferred or used. The sources of these cross-border transfers may be bribery, theft by government officials, the trafficking of drugs, arms and humans, smuggling, commercial tax evasion, trade mispricing or abusive transfer pricing.



Income (shifting) splitting. Denotes a number of practices aimed at ensuring that income, which would have been taxed at a higher rate in the hands of the person who derived it, is taxed in the hands of another person at a lower rate. Often happens within a family or household, as a number of countries establish combined income filing for spouses.

Income quantile. A grouping of the population by average household income. Income quintiles are divided into five groups (quintiles), with approximately 20% of the population in each group. The groups are ordered from lowest to highest income. The income range within each quintile may not be equal across quintiles. Income quintiles are often used as a proxy measure of socio-economic status.

Indirect cost. Costs that cannot be identified in relation to a particular activity or project but that, nevertheless, are related to the direct costs [e.g. overhead expenses, costs of supporting departments, and a proper share of research and development (R&D) costs].

Indirect Taxes. Taxes on consumption such as VAT/Sales Taxes/Goods and Services Tax, Customs duties, and Excise duties. Generally assumed to be more regressive than direct taxes.

Informal sector (economy). Economic activities, and the income derived thereof, that circumvent or avoid government regulation or taxation. Also called the cash economy, grey economy, shadow economy or underground economy. It comprises all those economic activities that circumvent the costs, and are excluded from the benefits and rights, incorporated in the laws and administrative rules covering property relationships, commercial licensing, labour contracts, torts, financial credit, and social systems. For the purpose of FTM research, we will focus on informal sector businesses instead of informal sector workers. We therefore recognize 3 types of informal businesses: (1) subsistence enterprises, (2) micro & small businesses and (3) small & medium businesses.

Large Taxpayer Unit (LTU). As part of a tax administration office, LTU monitors large taxpayers exclusively, through auditing, registration, tax accounting, collections, and taxpayer service provision covering more than one type of tax. The definition of 'large' differs by national context.

Letter-box company. A paper company, shell company or money box company, i.e. a company which has complied only with the bare essentials for organization and registration in a particular country, while no real economic activity takes place in such country. The actual commercial activities are carried out in another country.

Local tax. In countries where there is a central or federal government and separate levels of government at state, provincial, county or city levels, taxes levied at the lower levels of government are commonly referred to as "local" taxes.

Luxury taxes. Indirect ad valorem tax imposed on supplies of specific non-essential and normally expensive commodities that are arbitrarily considered (e.g. toiletries, cosmetics, jewelry, pearls and precious stones and metals, etc.).

Marginal rate of tax. A marginal tax rate is the amount of tax paid on an additional dollar of income. The marginal tax rate for an individual will increase as income rises. This method of taxation aims to fairly tax individuals based upon their earnings, with low-income earners being taxed at a lower rate than higher income earners.

Mutual Administrative Assistance in Tax Matters Convention. This is a convention to facilitate the entering into bilateral tax information exchange agreements between state parties. Some FTM countries will have ratified and/or signed this treaty.

Net income. Net income is gross income minus deductible income-related expenses. Many countries levy income tax on this basis.

Parent company. Company with a substantial participation in the share capital of another company, called the subsidiary.


Presumptive taxation. The term presumptive taxation covers a number of procedures under which the 'desired' base for taxation (direct or indirect) is not itself measured but is inferred from some simple indicators which are more easily measured than the base itself.

Progressivity. A progressive tax is one that places the biggest burden on those most able to pay. Most often applied in the form of income tax, a progressive tax is one where the tax rates rise as incomes increase, so that those who earn high incomes have a greater proportion of their incomes taken as tax.

Property tax. Type of tax imposed on property owned by individuals and businesses based on the assessed value of the property (buildings, land, etc.).

Public Spending. Expenditure by the government on public infrastructure/goods and social services such as education and health.

Public and private sectors. The public sector is that part of the economy that includes services provided by the government (public healthcare and education, government officials, military, police, etc.)



and government-owned companies. Businesses and organizations that are not part of the public sector are part of the private sector.

Quality of Government Spending. Measures the level of public expenditure directed to the poor (pro-poor spending).

Regressivity. A regressive tax, in contrast to a progressive tax, is one where everyone pays the same amount of tax regardless of their income or their ability to pay, or a tax of which the tax rates decreases as the taxable amount increases. This results in a greater tax burden for those with a low ability to pay tax (the poor) compared to those with a higher ability to pay (the rich). Indirect taxes are often thought to be regressive.

Refund (of tax). Tax repaid to a taxpayer because of overpayment.

Ring fencing. Theoretical enclosure established by tax legislation around certain profits, losses, transactions or groups of transactions in order to isolate them for tax purposes.

Royalties. Payments of any kind received as consideration for the use of, or the right to use intellectual property, such as a copyright, patent, trademark, design or model, plan, secret formula or process. Royalty payments are calculated on the basis of sales (volume) or profits. Accounting figures can easily be manipulated to show minimal profit that is subject to royalties. Sales-based royalties offer a greater guarantee that royalties are paid.

Social security system. Government programs intended to promote the general welfare of the population through targeted social assistance measures guaranteeing access to sufficient resources for food and shelter and to promote health and well-being for the population at large and potentially vulnerable segments such as children, the elderly, the sick and the unemployed.

Sales tax, goods and services tax, value added tax: Sales tax. Indirect tax imposed on sales of goods and services. The tax may be imposed as a percentage of gross receipts, i.e. ad valorem tax, or as an amount per unit of product. The tax is generally paid by the buyer but the seller is responsible for collecting and remitting the tax to the appropriate authorities. Most sales taxes are designed as consumption taxes, i.e. as taxes on consumer expenditure. They may be levied at either a single stage in the production or trade process (e.g. on manufacture, wholesale or retail sale) or at multiple stages, such as is the case with a value added tax or

turnover taxes.

Value Added Tax (VAT). Specific type of consumer tax levied at each stage of the production and distribution process. The suppliers of goods or services are liable to remit it to the tax authorities. In its purest form, VAT is a tax on all final consumption of goods and services. VAT is a percentage of the price each supplier charges to his customer.

Goods and services tax (GST). A form of VAT applied in some countries (e.g. Australia, Canada, and New Zealand).

Tariff. In general, the term "tariff" refers to a list (schedule) or system of levies (taxes, duties, charges) imposed by countries on foreign trade transactions (especially importations).

Tax Avoidance. The practice of seeking to minimize the tax one pays. Tax avoidance seeks to reduce the payment of tax by arranging affairs in a way that fits within the letter of the law, (though not necessarily within the spirit of the law). A common method is the realization of operations and transactions without economic purpose, done exclusively with the objective of reducing tax liability. As a result, while tax avoidance could be strictly legal, it is frequently in contradiction with the intent (spirit) of the law.

Tax Evasion. The illegal, fraudulent non-payment or under-payment of tax. Tax evasion frequently involves unreported income and falsified documents. It is generally punishable under criminal law.

Tax haven. Tax haven usually refers to a country which imposes a low or no tax, and is used by corporations to avoid tax which otherwise would be payable in a high-tax country. According to an OECD report, tax havens have the following key characteristics; No or only nominal taxes; Lack of effective exchange of information; Lack of transparency in the operation of the legislative, legal or administrative provisions⁴.

Tax holiday. Fiscal policy measure that offers a period of exemption from income tax for new industries (usually foreign investments) in order to develop or diversify domestic industries, create employment, etc.

Tax treaty (double taxation agreement). An agreement between two (or more) countries for the avoidance of double taxation. A tax treaty may be titled a Convention, Treaty or Agreement.

Trade taxes. These are taxes on imports and/or exports.

Thin Capitalisation: A state of a business entity's financing structure where debt is significantly higher compared to equity. With Uganda's Domestic Tax law

⁴OECD (1998), Harmful Tax Competition: An Emerging Global Issue, OECD Publishing, Paris, <https://doi.org/10.1787/9789264162945-en>



allowing interest deductions on debts acquired, an entity may choose to have high debt in the capital structure to increase expenditures; thereby, reducing the taxable income.

Trade Mis-invoicing: Trade mis-invoicing is defined by Global Financial Integrity (GFI) as a method for moving money illicitly across borders, which involves misreporting the value of a commercial transaction on an invoice submitted to customs. The GFI report (2014) identifies four basic categories of trade mis-invoicing: import under-invoicing, import over-invoicing, export under-invoicing and export over-invoicing.

Transaction taxes. Type of tax that uses a specific type of transaction as its object, e.g. sales tax, immovable property transfer tax, etc.

Transfer pricing. A transfer price is the price charged in transactions entered into by related companies which are part of the same economic group for goods, services or intangible property. Abusive transfer pricing occurs when prices are manipulated so that income and expenses are improperly allocated for the purpose of

reducing taxable income in specific countries.
Turnover tax. General term used to refer to the different forms of consumption and sales taxes.

Wealth taxes. It is a tax based on the market value of assets that are owned by individuals. These assets include, but are not limited to, cash, bank deposits, shares, fixed assets, private cars, assessed value of real property, pension plans, money funds, owner occupied housing and trusts. An ad valorem tax on real estate and an intangible tax on financial assets are both examples of a wealth tax. Not all countries have this type of a tax. Although many developed countries choose to tax wealth, the United States has generally favored taxing income and property taxes. In the FTM study, property, land, and capital gain tax represent wealth taxes.

Whistleblower. A person who reveals wrongdoing within an organization to the public or to those in positions of authority.

Windfall tax. A tax levied by governments against certain industries when economic conditions allow those

industries to experience above-average profits. Windfall taxes are primarily levied on the companies in the targeted industry that have benefited the most from the economic windfall, most often commodity-based businesses.

FY	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21
	87.65	97.76	101.07	101.06	102.29	101.99	103.84	108.76

Exchange Rate

The exchange rates between Kenyan Shillings (KES) and US dollars (US\$) used in this study are:

Source: Central Bank of Kenya

N.B. The convention from KES to USD was done using the average exchange rate during that financial year.

Sources for glossary:

C. Makunike. (2015). Towards Measuring Fairness of Tax Systems in Developing Countries. Tax Justice Network-Africa. http://www.academia.edu/13411337/Towards_Measuring_Fairness_of_Tax_Systems_in_Developing_Countries

Global Financial Integrity (2014). Hiding in Plain Sight: Trade Misinvoicing and the Impact of Revenue Loss in Ghana, Kenya, Mozambique, Tanzania, and Uganda: 2002-2011

http://iff.gfintegrity.org/hiding/Hiding_In_Plain_Sight_Report-Final.pdf

J. Rogers-Glabush. (2015). IBFD International Tax Glossary, 7th Edition.

<http://www.ibfd.org/IBFD-Products/IBFD-International-Tax-Glossary-7th-Edition>

Investopedia. (n.d.). Wealth. <http://www.investopedia.com/terms/w/wealth.asp>

1.0 BRIEF DESCRIPTION OF KENYA'S TAX SYSTEM



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1.1 Historical Background of Tax Reforms in Kenya

The Structural Adjustment Programmes (SAP) in the 1980s led to major tax reforms in a bid to increase tax revenue. The reforms that followed were focused on increasing efficiency in tax administration and collection rather than principles of equity and progressivity. This led to the introduction of the Tax Modernisation Programme (TMP) which was adopted in 1986 and formed the foundation of the current tax system.⁵This led to several key developments in the tax administration model, the introduction and structure of Value Added Tax and the structure of Personal Income Tax.

In accordance with the TMP, the Kenya Revenue Authority (KRA) was launched in 1995, adopting the semi-autonomous revenue agency model. It was believed that by establishing a separate entity to increasing the operational independence of the tax administrators, it would lead to increased efficiency.⁶To date, the Kenya Revenue Authority collects taxes at national level. At sub-national level, county governments have powers to collect the taxes that they impose (Own Source Revenue).⁷The change in Constitution in Kenya in 2010, led to the introduction of devolution of central government powers to sub-government. In Kenya, sub-national government is vested in county governments.

Other key developments included the introduction of Value Added Tax in 1990 to replace sales tax. VAT was introduced on the basis that it would provide a wider scope of collection of taxes than the sales tax as it covered services as well and goods that were not necessarily manufactured.⁸The administration of the VAT system was met with many challenges at its onset. For instance, there

were 17 different VAT rates in 1990 including: 0, 3, 5, 17, 18, 25, 30, 35, 45, 50, 75, 80, 100, 150 and 210. By 2012, these rates were reduced to the standard rate of 16%, 12% on strategic goods and services such as energy and petroleum, zero rated goods and services, and VAT exempt goods and services. Throughout the years various reforms were undertaken to rationalise VAT rates⁹.

In 2013, a new legal framework for VAT was introduced through the enactment of the VAT Act 2013. It led to the rationalisation of rates to only three, including the standard rate of 16%, zero-rating and exemption.¹⁰The aim of the Act was to reduce exemptions and zero-rated goods and services. Therefore, goods such as computers, software, and mobile devices, were removed from the zero-rated designation. However, of more concern was the removal of some food items such as baby food and processed milk and the removal of cooking gas from zero-rated and exempted designations¹¹.

Personal Income Tax (PIT) was introduced under the Income Tax Act 1974. In the earlier years,

especially in the years following the Structural Adjustment Programme, there were income bands for top earners at higher rates for instance between the years 1986 and 1989, the highest rate was 65%. In the years, 1990 to 1994, the highest rate was 40% while in the following years, the tax rates gradually decreased from 37.5% to 35% and finally to 30%.¹²The earlier years had a high number of income brackets amounting to eight in 1986, however, this has eventually been simplified to five income brackets. PIT fell on the burden of mainly waged employees. It was believed that by reducing the higher marginal rates, it would be increasing savings and investments rates amongst the higher income earners¹³.

The introduction of iTax in 2014 was one of the most impactful tax reforms in the last 10 years. This is a web-based application that allows persons to register electronically and file their taxes electronically. Bolstered by the 6th KRA Corporate Plan which focused on tax modernisation programmes, iTax was further made compulsory in 2016. This led to the rise of concerns on the impact of this

⁵Institute of Economic Affairs(2006), Taxation and Tax Modernization in Kenya: A Diagnosis of Performance and Options for Further Reform

⁶OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

⁷Constitution of Kenya 2010, Article 209(3) [a]

⁸Omondi, F.(2020), Effects of Value Added Tax Reforms on Household Welfare and Collection Efficiency and the Determinants of its Compliance Gap in Kenya <https://irlibrary.ku.ac.ke/bitstream/handle/123456789/21515/Effects%20of%20value%20added%20tax.....pdf?sequence=1>

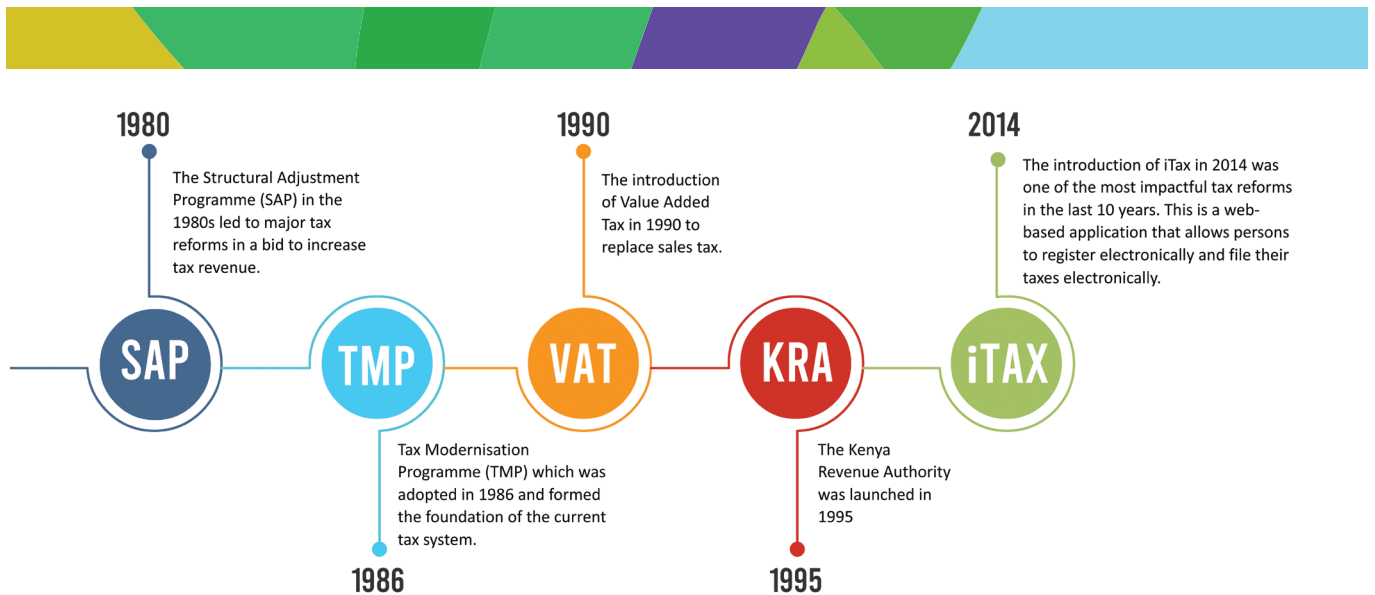
⁹ibid

¹⁰Matosek, M (2015), Who Foots the Tax Bill? Tax Burden Analysis in Kenya (Central European University)

¹¹ibid

¹²Oxfam,(2017) Taxing for a More Equal Kenya: A Five Point Action Plan to Tackle Inequality

¹³Institute of Economic Affairs(2006), Taxation and Tax Modernization in Kenya: A Diagnosis of Performance and Options for Further Reform



policy on rural areas, where internet penetration was low.¹⁴To date, the process of registering for and filing various taxes has been largely digitalised in Kenya.

In 2020, the Covid-19 pandemic affected Kenya's tax system through to the economic shocks it caused. Kenya responded to this by taking tax measures such as the reduction of the standard rate of VAT from 16% to 14%, reduction of Corporate Income Tax from 30% to 25% and reducing the Personal Income Tax rates while increasing the threshold of the lower income bands. These measures were largely progressive in nature as they were intended to cushion

low-income earners and micro and small businesses from the shocks caused by the pandemic.¹⁵Additionally, the pandemic had a devastating effect on the revenue raising capability of Kenya and therefore there was increased pressure to increase the tax base. This led to the reconsideration and adjustment of several tax incentives including capital and investment allowances as well as tax incentives provided in special zones and the implementation of new taxes such as Digital Services Tax¹⁶.

In April 2021, Kenya entered into a 38-month arrangement under the IMF's Extended Credit Facility

and Extended Fund Facility. This arrangement will lead to the adoption of fiscal consolidation measures including measures aimed at increasing efficiency in revenue collection. The first review of the programme has shown particular interest in the potential of corporate minimum tax for increased revenue as well as digital taxes.¹⁷Further, conditionalities such as decreased expenditure on inefficient state-owned enterprises can already be observed. Major restructuring is already taking place in public universities leading to merging of some offices as well as lay off of some employees of public universities and other state-owned enterprises¹⁸.

1.2 Overview of the Current Tax System

The Income Tax Act imposes personal income tax which is collected through self-assessment and Pay As You Earn (PAYE). With PAYE, employers deduct from their employees' income and remit it to KRA¹⁹.

Corporate Income Tax is levied on corporate bodies such as limited companies, trusts, and co-operatives on their annual income. Companies that are based outside Kenya but operate in Kenya or have a branch in Kenya pay Corporation Tax on income only accrued within Kenya at a rate of 37.5%²⁰.

Other taxes include withholding tax which is imposed on dividend payments, interest payments, professional fees, pension payments and insurance fees or commissions²¹. Advance tax is tax that is levied on commercial vehicles before they are licensed²².

¹⁴Nimmo E. (2019), 'The Colonial Aftermath in Digitalizing Tax' Financing for Development <http://uonjournals.uonbi.ac.ke/ojs/index.php/ffd/article/view/255>

¹⁵Parliamentary Budget Office (2020), The COVID-19 Global Pandemic: Impact to the Economy and Policy Options Special Bulletin

¹⁶

¹⁷IMF (2021), First Reviews of the Extended Arrangement under the Extended Fund Facility and an Arrangement under the Extended Credit Facility and Requests for Modifications of Performance Criteria and Structural Conditionality—Press Release; Staff Report; and Statement by the Executive Director for Kenya .

¹⁸Mutinda, T. (2021) 'UoN Abolishes Major Colleges, Faculties in Massive Restructuring Move' [The Star, 9th July 2021] <https://www.the-star.co.ke/news/2021-07-09-uon-abolishes-major-colleges-faculties-in-massive-restructuring-move/>

¹⁹Kenya Revenue Authority (2021) More about PAYE, <https://kra.go.ke/en/helping-tax-payers/faqs/more-about-paye>

²⁰Kenya Revenue Authority (2021) More about PAYE, <https://kra.go.ke/en/helping-tax-payers/faqs/more-about-paye>

²¹Kenya Revenue Authority (2021) More about withholding tax, <https://kra.go.ke/en/helping-tax-payers/faqs/more-about-withholding-tax>

²²Kenya Revenue Authority (2021) types of taxes, <https://www.kra.go.ke/en/individual/filing-paying/types-of-taxes/advance-tax>



Instalment tax is tax paid in advance in anticipation of the taxable income in a year. It is paid by individual taxpayers who have a tax liability, that is not fully covered under PAYE, of over KES 40,000 payable for any year²³.

Digital Service Tax (DST) was introduced through the Finance Act 2019 on the basis that the digital economy despite generating substantial income was going untaxed. ²⁴This tax was imposed on any income made through the provision of services through a digital marketplace. DST was to be imposed at the rate of 1.5% of the gross transaction value. There was no minimum threshold provided for the value of such transactions which led to concerns regarding its fairness and progressivity. In 2021, due to the increased agitation over DST, the Kenyan government through the Finance Act 2021, exempted all Kenyan residents from DST, so that DST would only be imposed on non-residents. This measure was established a few months before Kenya rejected the two-pillared proposal from the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) with pillar one seeking to introduce global measures on the digital economy.

The indirect taxes value added tax (VAT) and excise tax are imposed under the Value Added Tax Act 2013 and the Excise Duty Act 2015.

These two taxes are characterised as being largely regressive in nature. VAT is a consumption tax charged at each stage of the value chain in the production or distribution of goods or services, the threshold for registration is an annual turnover of KES 5,000,000.

²⁵Excise tax is charged on the sale or production of what are deemed 'non-essential' goods such as jewellery, confectionery amongst others. The tax is imposed based on the value of these goods or at specific rates. This tax is often passed on to consumers through increase in prices²⁶.

Possibly, the greatest potential of increasing the tax base and revenues is by taxing the wealthy more, this can be achieved by widening the tax base for wealth tax and introducing higher tax rates for high income earners.. Today, Kenya only imposes a narrow range of wealth taxes including Capital Gains Tax at a rate of 5% on gains made from the transfer of property and property taxes. ²⁷Efforts were made to increase the rate of CGT to 12.5% through the Finance Bill 2019, however, this was met with heavy lobbying efforts by the Kenyan corporate sector and the proposal was rejected. ²⁸Kenya needs to re-evaluate its property taxation regime with a view to ensuring the tax burden is shared fairly. Kenya should also consider the introduction of inheritance taxes and other wealth taxes to progressively increase tax revenues and improve the equity of the Kenyan tax system.

²³Kenya Revenue Authority (2021) types of taxes instalment, <https://www.kra.go.ke/en/individual/filing-paying/types-of-taxes/installment-tax>

²⁴Kenya Revenue Authority (2022), Introducing digital tax service <https://kra.go.ke/en/helping-tax-payers/faqs/digital-service-tax-dst>

²⁵Kenya Revenue Authority (2021) More about VAT, <https://kra.go.ke/en/helping-tax-payers/faqs/more-about-vat>

²⁶Kenya Revenue Authority (2021) ,companies partnerships types, <https://www.kra.go.ke/en/business/companies-partnerships/companies-partnerships-pin-taxes/company-partnerships-types-of-taxes>

²⁷OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁸Kassam A, (2019) Kenya Finance Act, 2019 <https://www.rsm.global/kenya/insights/tax-insights/kenya-finance-act-2019>

2.0 DISTRIBUTION OF THE TAX BURDEN AND PROGRESSIVITY



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2.1 Introduction:

In pursuit of an equal society, countries utilise various tools to ensure income re-distribution. One such tool is the use of the tax system to attain fiscal justice. A tax system whose tax burden is heavier on the rich and lighter on the poor of the society can be considered progressive. To ensure commitment to reducing inequality, the country must ensure that income is redistributed at the point of tax collection and that there are mechanisms to ensure that tax collected is invested to reduce inequality through the funding of public services. This section examines the progressivity of Kenya's tax system and distribution of the tax burden through lenses of the country's tax structure.

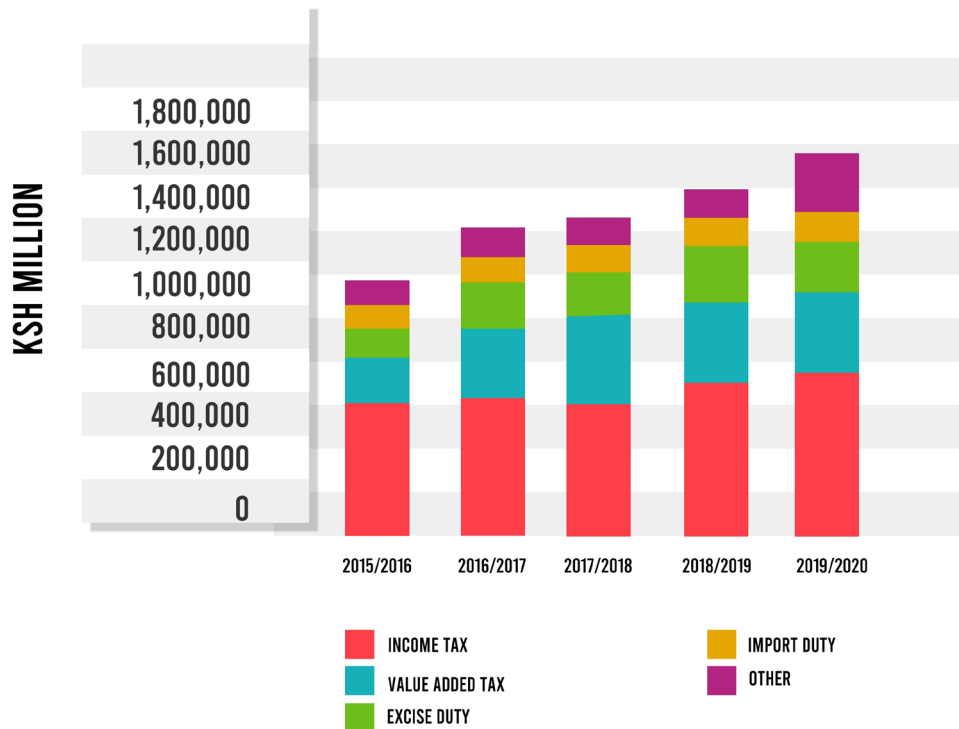
2.2 Allocation of Tax Burden

Table 1 presents the tax structure in Kenya as a percentage of GDP and GDP growth rate from 1963 to 2010. As Figure 1 presents Kenya's ordinary revenue performance.

TYPE OF TAX	1963 -1972	1973 -1982	1982 -1992	1992 -2002	2002 -2010
Tax revenue	12.1	18.3	20.4	23.6	20.7
Direct Tax	5.1	6.6	6.8	8.4	8.2
Indirect Tax	6.5	11.3	12.4	13.2	10.6
GDP growth rate (%)	6.6	5.2	4.2	2.3	4.3

Table 1: Tax structure in Kenya as a percentage of GDP and GDP growth rate from 1963 – 2010

ORDINARY REVENUE PERFORMANCE



Source: Karingi and Wanjala (2005), Amanja and Morrissey (2005), Economic Surveys²⁹

Figure 1: Composition of Ordinary Revenue

Source: PARLIAMENTARY SERVICE COMMISSION PARLIAMENTARY BUDGET OFFICE, Unpacking the Estimates of Revenue and Expenditure for 2020/2021 and the medium term³⁰

Since independence, there has been a general trend towards indirect taxation as opposed to direct taxation as shown in Table 1 where indirect taxes contribute about 42% of tax revenue and direct taxes contribute about 54% at independence whereas in the succeeding decades this proportion averaged at 36% for direct taxes compared to 58% for indirect taxes contribution to tax revenue.

In more recent years, specifically between FYs 2004/5 to 2019/20, CIT contributed on average 18.89% of total revenue; PIT contributed 24.28% (amounting 43.17% together) and VAT contributed 25.14% (KRA, 2020/2021), levelling up the contribution of both direct and indirect taxes to almost equal contribution to total revenue.

Presently, both direct and indirect taxes account for about 8% of GDP each.

Table 2 shows that from the FY 2012/2013 to the FY 2018/2019, income tax has ranged from 47% to 39% as a percentage of total revenue while VAT ranged from 26% to 23% as a percentage of the total revenue.

Upon further analysis, from the FY 2012/2013 to the FY 2018/2019, the contribution of indirect taxes (VAT, Excise Duty, Import Duty) ranged from 44% to 40% while the contribution of direct taxes (Income Tax) ranged from 47% to 40%. (Table 1). This leads to the conclusion that Kenya relies largely on income taxes, however, there is a close margin between the contribution of direct and indirect taxes to the total revenue collected. As indirect taxes are based on the value of goods, services, and assets, rather than people's ability to pay, they are considered to be more burdensome on poor people (even if some goods and services are VAT exempt).

The Kenyan government heavily relies on income tax and VAT as major contributors to tax revenue.

²⁹Owino, O. B. (2018). The trade-off between direct and indirect taxes in Kenya: An empirical analysis. Journal of Economics and Development Studies, 6(4), 187-201. http://jedsnet.com/journals/jeds/Vol_6_No_4_December_2018/16.pdf

³⁰Parliamentary Budget Office (2020), Unpacking the Estimates of Revenue and Expenditure for 2020/2021 and the medium term <http://www.parliament.go.ke/sites/default/files/202005/Estimates%20of%20Revenue%20and%20Expenditure%20for%20202021.pdf>

Table 2: Tax Revenue Performance 2012/13- 2018/19

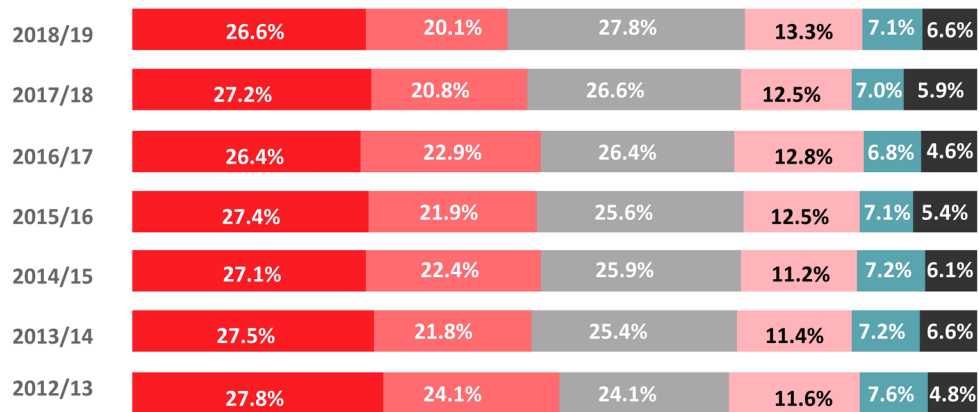
Year	Import Duty	Excise Duty	Income Tax	VAT	Total Tax Revenue	Non - Tax Revenue	Total Revenue
2012/13	7%	11%	45%	26%	90%	10%	100%
2013/14	7%	11%	46%	24%	88%	12%	100%
2014/15	7%	11%	47%	24%	89%	11%	100%
2015/16	6%	11%	46%	24%	88%	12%	100%
2016/17	6%	12%	45%	24%	87%	13%	100%
2017/18	6%	11%	42%	23%	82%	18%	100%
2018/19	6%	11%	40%	24%	82%	18%	100%

Source: CBK & National Treasury (2012- 2019)

Taxes on other goods and services	249,382.05	274,126.48	292,413.82	290,102.09	240,501.96
Taxes on financial and capital transactions	11,090.88	28,928.42	13,258.70	13,758.24	17,575.28
Excise taxes	165,474.08	167,753.13	196,608.90	198,031.61	244,807.09
Taxes on use of goods and permission to use the goods or perform service and activities	1,383.67	1580.25	2,222.19	1,809.97	2,466.60
Taxes on goods and services collected as AIA	71,333.42	75,864.67	80,324.03	76,502.27	75,653.00
Taxes on international trade transactions	131,829.98	138,285.56	152,374.87	151,274.15	162,704.39
Custom duties	89,943.34				
Other taxes on international transactions	41,886.64	44,600.17	45,499.94	53,251.91	55,942.32
TOTAL TAX REVENUES	1,345,296.32	1,410,086.94	1,544,262.05	1,532,236.00	1,669,831.89
Social security contributions	746.86	510.96	475.37	507.64	492.43
Property income	32,497.01	26,833.34	29,718.58	118,541.89	43,560.17
Sale of goods and services	15,470.12	16,094.97	24,767.80	19,284.54	19,760.48
Fines, penalties and forfeitures	1,930.44	2,078.74	2,601.59	2,266.90	1,811.80
Ministerial appropriation in Aid	42,728.72	60,754.12	20,210.49	202,282.31	28,127.15
Other receipts not elsewhere classified	901.00	5,916.61	91,931.14	103,070.07	129,062.95
TOTAL NON-TAX REVENUES	94,274.15	112,188.73	169,704.97	103,070.07	129,062.15
TOTAL ORDINARY REVENUES	1,439,570.48	1,522,275.68	1,713,967.02	1,796,189.36	1,892,646.88

Table 3: National Government Gross Receipts on the Recurrent Account, 2016/7 – 2020/21

Source: CBK National Treasury, and KNBS <https://www.knbs.or.ke/wp-content/uploads/2021/09/Economic-Survey-2021.pdf>



	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19
Pay As You Earn (PAYE)	27.8%	27.5%	27.1%	27.4%	26.4%	27.2%	26.6%
Other Income Tax	24.1%	21.8%	22.4%	21.9%	22.9%	20.8%	20.1%
VAT	24.1%	25.4%	25.9%	25.6%	26.4%	26.6%	27.8%
Excise Duty	11.6%	11.4%	11.2%	12.5%	12.8%	12.5%	13.3%
Import Duty	7.6%	7.2%	7.2%	7.1%	6.8%	7.0%	7.1%
Other	4.8%	6.6%	6.1%	5.4%	4.6%	5.9%	6.6%

Figure 2 and 3 confirm that the contribution of direct to indirect taxes to total revenue is almost equal in contribution and has been the case for the last eight years.

2.3 Personal Income Tax

Person Income Tax (PIT) is levied on both residents and non-residents' employment income (wages and salaries) and other personal income (e.g. business and property ownership). In Kenya, PIT is mainly collected using the Pay As You Earn (PAYE) method, where employers withhold taxes based on the amount of salary and allowances of salaried employees,

The PAYE mode of assessment applies to employees, regardless of the sector. The PIT system provides for a personal relief of KES 16,896 per annum or KES 1,408 per month. On top of this, the tax system provides for an insurance relief of 15% of the number of premiums paid for self, spouse, or child not exceeding KES 60,000 per annum. People with disabilities are also granted a tax exemption for the first KES 150,000 of their monthly income³¹.

In terms of performance, between the FYs 2009/2010 and 2019/2020, PIT as a percentage of GDP averaged 4.7% and as a percentage of total tax revenues averaged 25.68%.

F/Y	PIT BN KES	GDP	PIT/GDP*100	GROWTH PIT%	TOTAL TAX	PIT AS % OF TOTAL	PERFORMANCE
2009/10	124,503	2,458,405	5.06%	16.37%	534,403	23.30%	102.16%
2010/11	148,614	2,787,304	5.33%	19.37%	634,903	23.41%	98.53%
2011/12	180,861	3,990,412	4.53%	21.70%	707,360	25.57%	109.38%
2012/13	216,601	4,506,152	4.81%	19.76%	800,486	27.06%	95.47%
2013/14	259,173	5,051,600	5.13%	19.65%	963,823	26.89%	100.52%
2014/15	284,852	5,832,000	4.88%	9.91%	1,069,597	26.63%	97.51%
2015/16	321,237	6,710,000	4.79%	12.77%	1,210,912	26.53%	94.30%
2016/17	344,877	7,658,000	4.50%	7.36%	1,365,269	25.26%	97.10%
2017/18	371,294	8,679,000	4.28%	7.66%	1,435,338	25.87%	95.50%
2018/19	401,609	9,510,000	4.22%	8.16%	1,580,062	25.42%	97.06%
2019/20	427,077	10,355,000	4.12%	6.34%	1,606,865	26.58%	96.92%

Table 4: PIT collections, contribution to GDP, percentage contribution to GDP, percentage growth, percentage relative to total tax and performance between FY 2009/2010 to 2019/2020

Source: Author computations using KRA databases

As shown in Table 5 ³²the Kenyan personal income tax system is slightly progressive and has provisions to cushion taxpayers with lower disposable income and persons living with disabilities (PWDs) against adverse impacts of bearing a heavier tax burden. The PIT' progressivity can be improved further by reviewing tax rates applicable to the wealthy upwards since the gap between the rich and the poor is wide in Kenya, top 10% wealthy households own 42% of the national income, whereas the bottom 10% in the wealth hierarchy own just 1% of the national wealth³³.

In response to the COVID-19 pandemic, the Kenya government adjusted the tax bands in order to cushion individuals from the economic shocks caused by the pandemic. The table 5 shows the adjustments that were made to the income bands. Personal tax relief was also increased to an annual amount of KES 28,800 from KES 24,000. ³⁴These measures were intended to support low-income households by reducing the tax burden on them. However, targeted cash transfers may have been more effective in cushioning lower income earners in comparison to most fiscal measures that may have benefited the rich as well.

Monthly Taxable Income	Annual Taxable Income	New Tax Rates	Tax Rate s as a response to the COVID-19 pandemic
First 12,2 98	On the first KES 147, 580	10%	0%
12,299 – 23,885	From KES147, 580 to KES 286,623	15%	0%
23,886 – 35,742	From KES 286,623 to KES 425,666	20%	10%
35,473 – 47,059	From KES 425,666 to KES 564,709	25%	15%
Above 47,060	On all income over KES 564,709	30%	20% * [above KSh. 57,333 = 25%]

Table 5: Comparison between previous tax rates and new rates in response to the COVID-19 pandemic

Source: Kenya Revenue Authority, Income Tax³⁶

It was estimated that the tax reliefs provided would lead to tax losses amounting to approximately KES 19.84 billion due to providing tax relief to low-income earners while reducing the tax rates for top bands would lead to tax losses amounting to KES 7.08 billion. ³⁷Due to such revenue shortfalls, these measures were short-lived and in December 2020 the government reinstated taxes as they were before through the enactment of the Tax Amendment Law (2) Act 2020.

In Kenya, the following are exempted from personal income tax:

- That part of the income of the President of the Republic of Kenya derived from salary, duty allowance and entertainment allowance paid or payable to him from public funds in respect of or by virtue of his office as President of the Republic of Kenya³⁸.

- All allowances payable to the Speaker, Deputy Speaker, Vice-President, Ministers, Assistant Ministers, and all other Members of Parliament are exempt from income tax under section 5 of the National Assembly Remuneration Act³⁹

These exemptions from personal income tax of high-ranking government officials, who do not deserve, because of their higher pay, should be discontinued. This calls for advocacy measures to advocate for the reforms to that effect.

³¹Kenya Law (2010), Income Tax Act, Cap 470, Laws of Kenya <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20470>

³²Kenya Law (2010), Income Tax Act, Cap 470, section 5, 30 Laws of Kenya <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20470>

³³Napisa, M. (2019) Addressing Equity Through Taxation: A View From Kenya <https://views-voices.oxfam.org.uk/2016/02/addressing-equity-through-taxation-a-view-from-kenya/>

³⁴The tax law amendment bill (2020), The Tax Laws (Amendment) Act, 2020 <https://www.kpda.or.ke/documents/Policies/The%20Tax%20Laws%20Amendment%20Act%202020.pdf>

³⁵Kenya Revenue Authority (2020), Individual Income Tax , <https://kra.go.ke/helping-tax-payers/faqs/tax-laws-amendment-2020>

³⁷Parliamentary Budget Office(2020),, 'The COVID-19 Global Pandemic: Impact to the Economy and Policy Options' 1(2020) Special Bulletin

³⁸Kenya Revenue Authority (2021), the income tax Act (CAP 470), Section 3 of the First Schedule of the Income Tax Act, <https://kra.go.ke/images/publications/Income-Tax-Act-Cap-470-Revised-2021-3-1.pdf>

³⁹Kenya Revenue Authority (2021), the income tax Act (CAP 470), Section 13 of the First Schedule of the Income Tax Act, <https://kra.go.ke/images/publications/Income-Tax-Act-Cap-470-Revised-2021-3-1.pdf>

2.4 Corporation Income Tax (CIT)

CIT is an income tax levied on the annual income of corporate bodies such as Limited companies, Trusts, and Co-operatives. Foreign companies that operate or have a branch in Kenya pay CIT only on the income accrued within Kenya. The statutory corporate income tax rate stands at 30% for resident companies and 37.5% for non-resident companies and their branches. However, there are other preferential rates (as described in Annex 1), such as companies in Export Processing Zones (EPZs)

that are exempt from corporation income tax for the first 10 years of operation and subject to CIT at a rate of 25% after the initial exemption period. Companies listed on the securities exchange pay a CIT of 25% for the first five years.

Partnerships do not pay corporation tax. Their profit is distributed to the individual partners in the ratio of their ownership. The profit then forms part of each individual's income, from where it is taxed. Partnerships declare their profit through the Income Tax Partnership Return.

Table 7: CIT

F/Y	CIT(BN KES)	GDP (BN KES)	CIT/GDP*100	GROWTH CIT %	TOTAL TAX	CIT AS % OF TOTAL	CIT TAX RATE	CIT PRODUCTIVITY D/H	PERFORMANCE
2009/10	94,835	2,458,405	3.9%	9.15%	534,403	17.75%	30%	0.13	96.14%
2010/11	123,120	2,787,304	4.4%	29.83%	634,903	19.39%	30%	0.15	105.38%
2011/12	147,187	3,990,412	3.7%	19.55%	707,360	20.81%	30%	0.12	104.43%
2012/13	175,979	4,506,152	3.9%	19.56%	800,486	21.98%	30%	0.13	99.92%
2013/14	192,787	5,051,600	3.8%	9.55%	963,823	20.00%	30%	0.13	96.34%
2014/15	219,219	5,832,000	3.8%	13.71%	1,069,597	20.50%	30%	0.13	92.00%
2015/16	235,096	6,710,000	3.5%	7.24%	1,210,912	19.41%	30%	0.12	83.83%
2016/17	277,171	7,658,000	3.6%	17.90%	1,365,269	20.30%	30%	0.12	91.69%
2017/18	260,682	8,679,000	3.0%	-5.95%	1,435,338	18.16%	30%	0.10	82.89%

Source: KRA databases

In terms of performance, between FYs 2009/2010 – 2019/2020 CIT has contributed an annual average of 3.58% to GDP in this period, while its contribution to Total Tax Revenue stood at 19.47%.

The low performance is attributed to several issues. First, the low effective tax rate paid by companies, with Kenya's Marginal Effective Tax Rate (METR) calculated at 15.2%.

⁴⁰Secondly, it is attributed to inefficiencies in the collection of CIT as can be seen in Table 7 on the performance of CIT collections.

Also, non-transparent provision of tax incentives and the utilisation of Double Taxation Treaties by Multinational Corporations (MNCs) leads to a reduced total collection.

In 2020, in response to the COVID-19 pandemic, CIT was reduced from 30% to 25% in order to cushion businesses from the economic shocks caused by the pandemic. It was expected that this would lead to a revenue shortfall of KES 45.69 billion. ⁴¹However, the Kenya Revenue Authority Performance Report of the FY 2020/2021, indicates that there was in fact a growth of 3.7% which has been attributed to the increased remittance of 'Energy, Agriculture and Construction sectors'⁴².

⁴⁰Jack M. and Duanjie C.(2012), 'Capturing Economic Rents from Resources through Royalties and Taxes' (2012) 1(30) School of Public Policy

⁴¹Parliamentary Budget Office(2020), 'The COVID-19 Global Pandemic: Impact to the Economy and Policy Options' 1(2020) Special Bulletin

⁴²Kenya Revenue Authority(2021), 'Annual Revenue Performance FY 2020/2021' (Press Release, 4th July 2021) <https://www.kra.go.ke/en/media-center/press-release/1299-annual-revenue-performance-fy-2020-2021>

2.4.1 Transfer Pricing in Kenya

Transfer pricing (TP) in Kenya is based on the arm's length principle as encompassed in section 18 of the Income Tax Act, Cap 470. This means that the transactions of related companies often forming a multinational enterprise (MNE) should be priced at a rate which they would have been placed, had these parties not been related (ie. at market rates). This principle is also called the separate entity principle because each company is considered a separate entity within a group company or MNE, modelled after the OECD Transfer Pricing Guidelines⁴⁵.

Further, thin capitalisation rules which limit the amount of interest deductibility that can be carried out in financial transactions between related companies to reduce their tax liability is encompassed in section 16 of the Income Tax Act. In Kenya, this rule is based on a debt-to-equity ratio of 3:1 preventing related companies from structuring their financial transactions largely as debt to reduce their tax liability through interest deductions.

There has been some success in the application of the separate entity principle in Kenya for instance, the famous case of Unilever Kenya leading to the establishment of a TP unit and the enactment of Transfer Pricing Rules. ⁴⁴Kenya has also managed from just one TP case to recover more than US\$23 million and it was reported that Kenya had managed to recover KES 15 billion from tax audits⁴⁵. Despite this, there has

been wide criticism of the separate entity principle especially by developing countries mainly because of its high administrative costs and the fact that it is because of the exploitation of these rules that has caused widespread tax abuse⁴⁶.

Kenya attempts to keep modelling its TP framework in a manner that reduces tax abuse. For instance, Kenya joined the Inclusive Framework for Base Erosion and Profit Shifting (BEPS), a platform which seeks to review the international tax rules including on TP. More importantly, Kenya recently enacted progressive changes to its TP laws through the Finance Act 2021. These include the change of thin capitalisation rules from the debt-to-equity approach to limiting interest deductions once interest payments reach 30% of earnings before interest, taxes, depreciation, and amortisation. This is an approach adopted by several European countries as well as Canada and the United States of America. It aims to curb the loopholes presented by the debt-to-equity ratio approach⁴⁷.

Kenya is also increasing the powers of the revenue authority in determining when entities can be found to be related, which is an important aspect of the TP process. This means that there will be a wider scope of entities that may be subject to TP auditing, and this further increases the tax base. While the measures are commendable, there is need for protection of small businesses in Kenya that may undertake genuine transactions in a bid to capture multinational enterprises⁴⁸.

2.5 Value Added Tax (VAT)

Value Added Tax is an indirect tax charged by businesses at each stage of the production and distribution chain up to the retail stage of goods and services, including imports. It is borne by final consumers of goods and services. The VAT standard-rate in Kenya is 16%, the lowest in East Africa with the rest of the region charging VAT at an average of 18%.

To encourage agricultural activity

and protect low-income households, various goods are exempted ⁴⁹from VAT including agricultural materials such as various seeds such as maize seed, live farm animals, unprocessed milk, fresh bird eggs still in their shells, vegetable, fruits amongst other agricultural and food items. Before the Finance Act of 2018, VAT on petroleum products was 16% however, the Act reduced this to 8%. ⁵⁰This was after widespread protests and court actions against the increase to 16%.⁵¹Materials and machinery used specifically and designed for the use of

persons living with disabilities (PWDs) are tax exempted. However, this is largely underutilised by PWDs due to the general lack of awareness that these tax exemptions exist⁵².

Tax exemptions on materials used for building solar energy equipment, biogas, clean cook stoves amongst others are used to encourage the use of clean energy in Kenya.⁵³Essential food items such as ordinary bread,

⁴⁵Attia W.(2017), 'How Kenya has Implemented and Adjusted to the Changes in International Transfer Pricing Regulations: 1920-2016' (October 2017) 69 ICTD Working Paper

⁴⁴OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf> lbid

⁴⁵OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

⁴⁶TJNA (2020), Health Financing & Taxation for Sustainable Healthcare (TJNA, August 2020)

⁴⁷Muendo, E. and Wanyama, L.(2021), 'The Finance Bill Should Protect Small Businesses in New Tax Proposals' (Citizen Digital, 10 June 2021) <https://citizentv.co.ke/blogs/opinion-the-finance-bill-should-protect-small-businesses-in-new-tax-proposals-11853373/?amp>

⁴⁸OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

⁴⁹That means if you sell these goods and services you won't charge your customers any VAT, and if you buy them there will be no VAT to reclaim. If you make some exempt sales, you can't reclaim VAT on any costs you incur while making those sales.

⁵⁰Finance Act 2018



maize flour, cassava flour, wheat flour and processed milk that reaches specified standards are zero-rated.⁵⁴ These food items are staple foods consumed by Kenyans. Zero-rating and exempting the items above, especially food items led to a decreased tax burden for poorer households as shown in the Figure 4⁵⁵.

EFFECTIVE VAT RATE ON FOOD CONSUMPTION PER QUINTILE

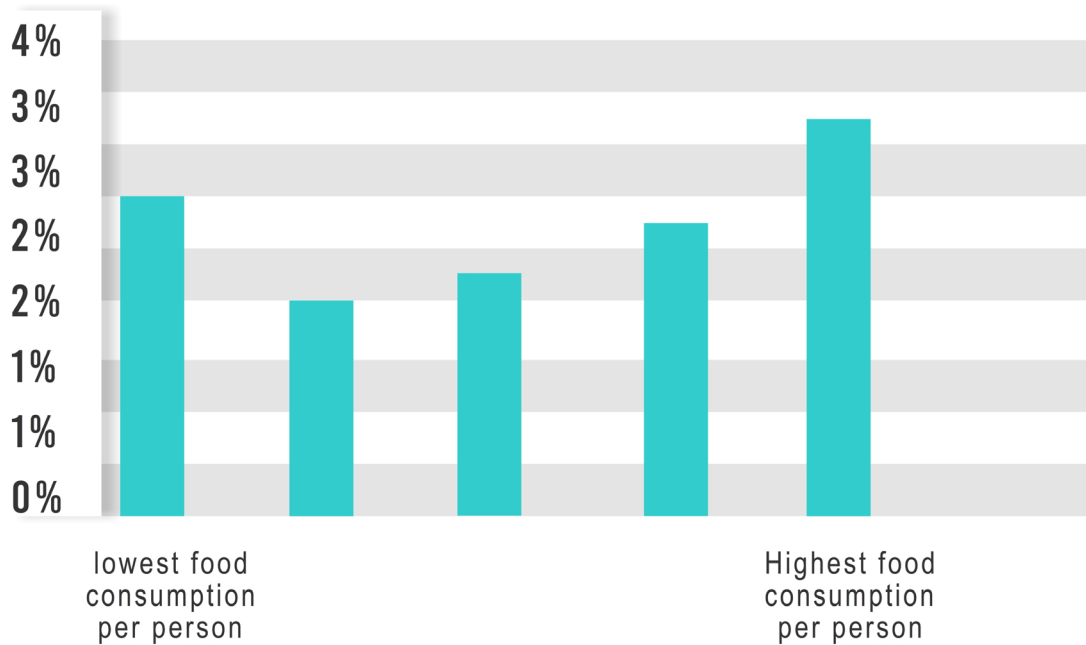


Figure 4: Effective VAT rate on food consumption per quintile
 Source: Oxfam in Kenya, *Impact of Debt Servicing on Social Spending and Wellbeing of Low-income Households in Kenya (2021)*.

The existence of differentiated VAT rates provides some progressivity to the system, since the exempted goods and services are consumed mainly by poorer households. In addition, the annual turnover threshold for VAT registration is set at KES 5 million (US\$49,024), which means that a broader range of small businesses are excluded from registering for VAT.

The status of zero-rated and exempted goods is often a contentious issue in Kenya. For instance, several proposals to make ordinary bread exempted have been met with much resistance, since manufacturers are not able to recover their input tax, therefore, they pass this cost to the final consumer making these items more costly. Additionally, the process of deciding the VAT status of items such as maize seeds, agricultural pesticides, Liquefied Petroleum Gas (LPG) amongst

others has been inconsistent and unpredictable.⁵⁶ The process is largely influenced by political considerations rather than the socio-economic impact it will have on Kenyans, especially, the poor. Thus creating an unpredictable environment for business while increasing the cost of living for low-income earners. Following mounting pressure from the IMF to increase revenue generation and collection, Kenya overhauled its VAT regime in 2013. This was aimed at expanding the tax base by removing VAT exemptions and shifting previously zero-rated items to VAT exempt. Following the overhaul of the VAT Act in 2013, sanitary pads were moved from the list of zero-rated items to VAT exempted items. Other essential goods and services which had previously been zero-rated such as basic food stuff, agricultural inputs and medical supplies became VAT exempt. Removal of the essential goods

⁵¹Mumbere D.(2018) 'Kenya Says Unpopular Fuel Tax Is Necessary, Proposes 8% Cut' (Africanews, 14th September 2018) <https://www.africanews.com/2018/09/14/kenya-says-unpopular-fuel-tax-is-necessary-proposes-8-percent-cut/>

⁵²Omulu,C(2017) 'People with disability unaware of their tax saving position: KRA' (Business Daily, 1st December 2017) <https://www.businessdailyafrica.com/bd/news/people-with-disability-unaware-of-their-tax-saving-position-kra-2179876>

⁵³National Council for Law Reporting(2013),Value Added Tax Act 2015 First Schedule https://www.kra.go.ke/images/publications/ValueAddedTax_ActNo35of2013.pdf

⁵⁴Kenya Revenue Authority(2022),Zero-rated items are within the VAT system but are currently set at a 0% rate <https://www.kra.go.ke/individual/filing-paying/types-of-taxes/value-added-tax>

⁵⁵Oxfam (2018), Taxing for a More Equal Kenya: A Five Point Action Plan to Tackle Inequality <https://policy-practice.oxfam.org/resources/taxing-for-a-more-equal-kenya-a-five-point-action-plan-to-tackle-inequality-620389/>

⁵⁶Nyamori,B.(2018)[Finance] VAT and Agriculture in Kenya: Recent law changes <https://www.agroberichtenbuitenland.nl/landeninformatie/kenia/achtergrond/latest-developments/vat-and-agriculture-in-kenya-recent-law-changes>

and services from zero-rating to exempt reduces the intended effect of lowering costs since manufacturers of exempt supplies pass the cost of input VAT to the final consumer. The price of sanitary pads, for instance, is still relatively high in Kenya and thus unaffordable to many poor women. This underscores the need for increased government action such as zero-rating of VAT on basic goods instead of granting them VAT exemptions⁵⁷.

In the wake of the Covid-19 pandemic, the government introduced several VAT measures. For the period between April 2020 to December 2020, the standard rate was reduced from 16% to 14%⁵⁸. The supply of various medicaments including vaccines was made tax exempt. Further, personal protective equipment (PPE) was also

exempted to reduce the costs of essential goods needed in the healthcare sector. However, many items such as LPG items, materials used in the manufacture of solar equipment, biogas, amongst others were removed from exempt status to standard status. A study carried out in 2018 found that 54% of urban households used LPG for cooking while 18% of rural households used LPG for cooking.⁵⁹ Considering the increased use of LPG, this proposal was met with much resistance as it abruptly increased the cost of clean cooking for Kenyans at a time when tax measures were supposed to cushion Kenyans from the adverse effects of the pandemic. The standard rate of 14% was reversed back to 16% in December 2020.

KRA									
F/Y			(VAT / GDP)*100	Standard Rate	VAT Productivity(E/F)	VAT Growth		VAT as % of total	Performance
2010/11			6.16%	16%	38.50%	21.72%		27.04%	99.60%
2011/12			4.38%	16%	27.38%	1.81%		24.71%	85.1%
2012/13			4.07%	16%	25.41%	4.82%		22.89%	79.0%
2013/14			4.62%	16%	28.90%	27.47%		24.23%	105.3%
2014/15			4.54%	16%	28.39%	13.41%		24.76%	98.1%
2015/16			4.33%	16%	27.09%	9.81%		24.02%	93.7%
2016/17			4.40%	16%	27.47%	15.72%		24.65%	99.4%
2017/18			3.94%	16%	24.66%	1.72%		23.85%	94.2%
2018/19				4.15%	16%	25.97%	15.41%		96.1%
2019/20				3.69%	16%	23.06%	-3.31%		95.5%

Table 8: VAT performance between the FY 2010/2011 to 2019/2020
Source: KRA databases

In terms of performance in nominal amounts, VAT contribution to total tax revenue stood at an average of 24.67% between 2009/2010 and its contribution to GDP averaged 4.55% within the same time period.

VAT productivity stood at an average of 0.27 for the period under study,⁶⁰ implying that KRA is only able to collect 27% of the potential VAT base. Improved level of transparency and accountability on expenditure of tax revenue in Kenya can motivate taxpayers to be more compliant in paying taxes. Further, simplification of the process of tax administration, compliance process, and reforms to introduce more basic necessities to zero rate category, could also reduce cases of tax evasion and avoidance, hence improve the performance of VAT collection.

⁵⁷Oxfam(2020), Analysis of Tax Incentives and Exemptions in the Finance Acts From 2009 – 2019, [December, 2020]

⁵⁸Kenya Law (2020), Tax Law (Amendment) Act 2020 <http://www.parliament.go.ke/sites/default/files/2020-12/Tax%20Laws%20%28Amendment%29%28No.2%29%20Bill%2C%202020.pdf>

⁵⁹Ministry of Energy (2019), Clean Cooking Association of Kenya and the Ministry of Energy , Kenya Cooking Sector Study: Assessment of the Supply and Demand of Cooking Solutions at the Household level (August 2019) <https://eedadvisory.com/wp-content/uploads/2020/09/MoE-2019-Kenya-Cooking-Sector-Study-Abridged.pdf>

⁶⁰Kenya Revenue Authority(2022), KRA data bases



2.6 Excise Duty

Excise duty has traditionally been a tax on goods and services for the purpose of repricing or curbing their consumption, otherwise known as a “sin tax”. Traditional goods and services on which excise is imposed include alcohol, tobacco products, gambling or betting and other products considered luxuries or unnecessary.

Under the Excise Duty Act, however, essential goods and services have also been taxed including fuel, imported cellular phones, imported ready to use SIM cards, mobile phone services, bottled water and juices among others. This has the negative effect of increasing the cost of living particularly for the poor. Increasing taxes on mobile services including mobile money, for example, has the direct effect of increasing the costs of those who are already financially excluded or unbanked. Whereas, increasing excise tax on highly luxurious goods amounts improved progressiveness of the tax, hence more equitable income redistribution.

2.7 Wealth Taxes

Wealth taxes are taxes on the holding, transfer, or increase in the value of wealth. Wealth taxes relate to the whole range of assets that make up wealth: cash and bank balances; real property such as houses; personal property such as jewellery, pictures, and boats; stocks and shares; pensions and other financial assets; and business assets.

Wealth tax is imposed on the richer section of society with the intention of promoting a redistribution of resources and bringing better parity amongst taxpayers. A wealth tax can effectively reduce wealth concentration at the very top for the simple reason that, if the wealthy have to pay a percentage of that wealth in taxes each year, it becomes harder for them to amass even more wealth.

Wealth and property taxes under Kenya’s tax system include the following:

i) Property Taxes

The Property tax is annual and levied by the local government, depending on the location and value of the property. It is usually about 1% of the property value. Land tax is a local tax with rates varying depending on the location of the land. The highest rate is 8%, which applies to Nairobi. Land tax applies to land regardless of, whether or not, income is earned from it. Land includes: vacant land, including vacant rural land; and land where a house, residential unit or flat has been built. The land tax is levied based on:

- The market value of land;
- Value of land increase as it is serviced with good roads;
- Water, sewage system;
- Streetlights and other security systems;
- Once serviced the land is considered usable as zoned for settlements, industrial or agriculture.

County Governments can charge a property rate based on an assessed commercial rate for the lands. Since leasehold applies as a right of usage and not ownership, and further based on special conditions, the county can impose property rates on top of leasehold rates. If property rates are not paid, the National Land Commission can ask to terminate leases for failure to utilise land.



Stamp duty on property transfers is charged according to the value of the transaction or the nominal rates on certain financial instruments and transactions. Stamp duty is levied at a flat rate of 4% on properties located in municipalities, and at a flat rate of 2% on properties located outside municipalities while a stamp duty of 1% is payable on the transfer of shares and registration of share capital. However, no stamp duty is charged on the transfer of shares in companies listed on the Nairobi Securities Exchange.

Stamp duty on property leases is levied on property leases at varying rates, depending on the lease duration. Stamp duty is levied at a flat rate of 1% on period leases up to three years, and at a flat rate of 2% on period leases exceeding 3 years.

The performance of property and CGT do not appear separately in the KRA revenue performance reports from other income taxes. It is difficult to determine their share (and the share of wealth taxes) therefore in comparison to total revenue. There is therefore need for disaggregated data on revenue for the two taxes for enhanced transparency and accountability on tax revenue collection.

ii) Capital Gains Tax (CGT)

is a tax levied on a gain accrued on or after 1st January, 2015 on the transfers of property including land and marketable securities situated in Kenya, whether or not the property was acquired before 1st January, 2015. The rate was 5% of the net gain (ie Sales Proceeds minus the Acquisition and Incidental costs) until the Finance Act, 2022 which raised it to 15%. It is declared and paid by the transferor of the property. The following transactions are exempt from CGT:⁶¹

- Income that is taxed elsewhere, as in the case of property dealers;
- Issuance by a company of its shares and debentures;
- Disposal of property for the purpose of administering the estate of a deceased person;
- Transfer of property between spouses as part of a divorce.

CGT had been suspended in 1985 to encourage investment in the real estate sector as well as spur growth in the securities exchange. It was later announced to be reintroduced through Kenya Gazette Supplement No. 141 on 19th September 2014 to be effective on 1st January 2015, but it was not implemented due to intense lobbying by the Kenya Association of Investment Bankers (KASIB) who challenged the constitutionality of the law for allegedly lacking public participation. When the High Court ruled in favour of the law, KASIB together with the Kenya Association of Manufacturers, the Institute of Certified Public Accountants of Kenya (ICPAK) and the Kenya Bankers Association (KBA) issued a lobby document advocating for the removal of the CGT from trading in listed securities in order to attract investors. KASIB also issued a press statement threatening to suspend trading at the Nairobi Securities Exchange (NSE) until the issue was resolved. In the first quarter of the introduction of CGT, trade volume at the NSE dropped by over 70%.

The Government attempted to compromise with KASIB by introducing a lower rate of 0.3% withholding tax on gains from listed securities as proposed in the 2015 Finance Bill but gave in entirely and exempted gains from listed securities from CGT. On October 1st, 2016, CGT collection was digitised together with stamp duty payments. Full implementation begun on the 30th of January, 2017, when KRA required that CGT be paid before property is transferred simultaneously with the payment of Stamp Duty, whilst previously, CGT was payable before the 20th of the month in which the transfer was done. This was challenged in court by the Law Society of Kenya and it was decided in March 2017 that CGT should not have to pay for the transfer of property until registering the transfer instrument.⁶²In 2019, the Treasury attempted to increase the rate of CGT from 5% to 12.5% in the Finance Bill, 2019 but this was rejected parliamentarians However, in the Finance Bill in 2022, the rate was increased to 15% and passed in law. . .

The previous situation and outcome of the political dispute over CGT sadly illustrates the power of the economic political elite of Kenya to determine tax policies in their favour at the expense of the population at large and the fairness of the Kenyan fiscal system.

⁶¹KPMG[2016], 'Accounting for Capital Gains Tax in Kenya: Accounting Perspectives' <https://assets.kpmg/content/dam/kpmg/pdf/2016/05/tnf-kenya-cap-gains-feb24-2016.pdf>

⁶²Kenya Law[2017], Petition 39 of 2017, <http://kenyalaw.org/caselaw/cases/view/132569/>

Relative to other EAC countries, Kenya previously charged the lowest rate of CGT (except for Burundi which has no CGT) with Uganda, Tanzania and Rwanda charging between 10 – 30%. There remains a lot of potential to generate a lot more tax revenue from CGT and to promote progressive taxation in this way. This can be done by imposing CGT on indirect transfers of property. In the financial year 2017/18, KRA reported to have collected Sh16.6 billion from CGT. Keeping CGT low and narrowly applied, ⁶³however, demonstrated the policy capture by the political elite.

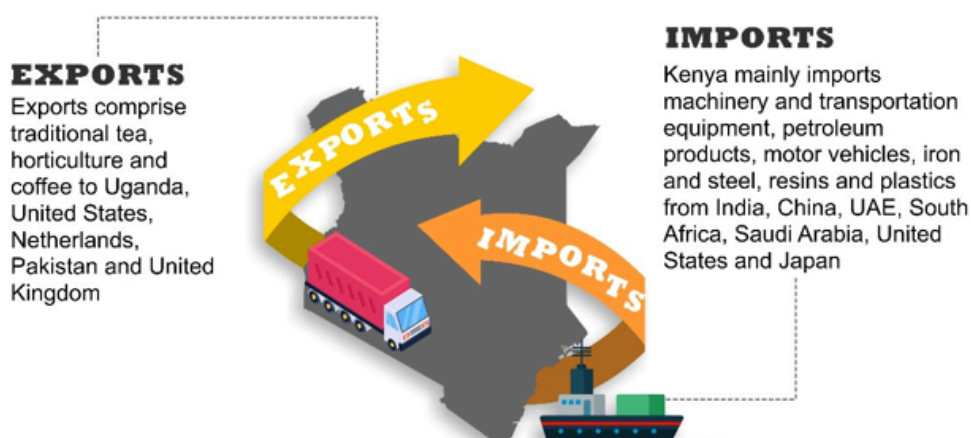
iii) Luxury goods

Kenya was ranked the second-largest luxury market in Africa after South Africa in the Africa Wealth Report in April, 2022. Luxury goods consumed in Kenya include cars, premium alcohol, jewellery, footwear, expensive dinnerware and exclusive cruise ship trips among others.

Luxury cars, defined as private passenger motor vehicles whose engine capacity exceeds 2,500cc for diesel and 3,000cc for petrol-powered vehicles received an increase excise duty from 20% to 30% in 2018. In 2020, KRA proposed new base rates for charging duties on motor vehicle imports. The value of a model is calculated based on the Current Retail Selling Price (CRSP) for that specific model, adjusted for depreciation at a rate of 10%. Insurance and freight charges are added to the adjusted CRSP to arrive at the customs value. The vehicle then attracts an import duty of 25%, excise duty (ranging from 25-35%) and VAT of 16%, payable cumulatively and in that order. A higher CRSP quote, therefore, has the effect of inflating taxes and the ultimate yard prices of second-hand cars⁶⁴.

The recently passed Finance Act 2022 provides for an increase in excise duty on wines, spirits with an alcoholic percentage of more than 6% and beer products whose alcohol content exceeds 6%. A study on excise taxation in Kenya showed that alcoholic products, beer (lagers and stouts) have lower price elasticity of demand of -0.366 compared with traditional beer with a price elasticity of demand -0.755. The price elasticity of demand for beer is -0.80 for the youth and -0.38 for the non-youth. The same study claims that commodities with highly inelastic price elasticities of demand are less responsive to price changes and therefore that if the policy objective is to increase excise tax revenues, then commodities with lower price elasticities of demand should bear a larger tax burden⁶⁵.

Excise duty on jewellery including imported jewellery has increased from 10% to 15% under the Finance Act, 2022. There have been more recent attempts, therefore, at increasing taxes on wealth and on luxury goods. Tax justice activists go further to propose a wealth tax on the super-rich and high-income earners. A wealth tax of just 2% on those with a net worth of \$5 million (Sh568 million), 3% on \$50 million (KES 5.7 billion) and above, and 5% on \$1 billion (KES 113.5 billion) would net the exchequer \$900 million (KES 102.2 billion) ⁶⁶which is almost equivalent to the total allocation to the Health Ministry in the FY 2020/2021 (which was KES 121.09 billion).



⁶³As presently, it does not include selling of land with a value of less than Sh3 million; transfer of securities listed on the Nairobi Securities Exchange; exchange of property due to incorporation, recapitalisation, separation, dissolution, or acquisition.

⁶⁴Kenya Law (2018), petition 190 of 2018 and Article 47 of the Constitution <http://kenyalaw.org/caselaw/cases/view/183255/>

⁶⁵Ochieng, J., & Agwaya, R. (2020). Discussion Paper No. 241 of 2020 on Excise Taxation in Kenya: A Situation Analysis. <https://kippra.or.ke/wp-content/uploads/2021/02/DP241.pdf>

⁶⁶Oxfam International, (January, 2022), "Inequality Kills: The unparalleled action needed to combat unprecedented inequality in the wake of COVID-19". Available at: <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/621341/bp-inequality-kills-170122-en.pdf>

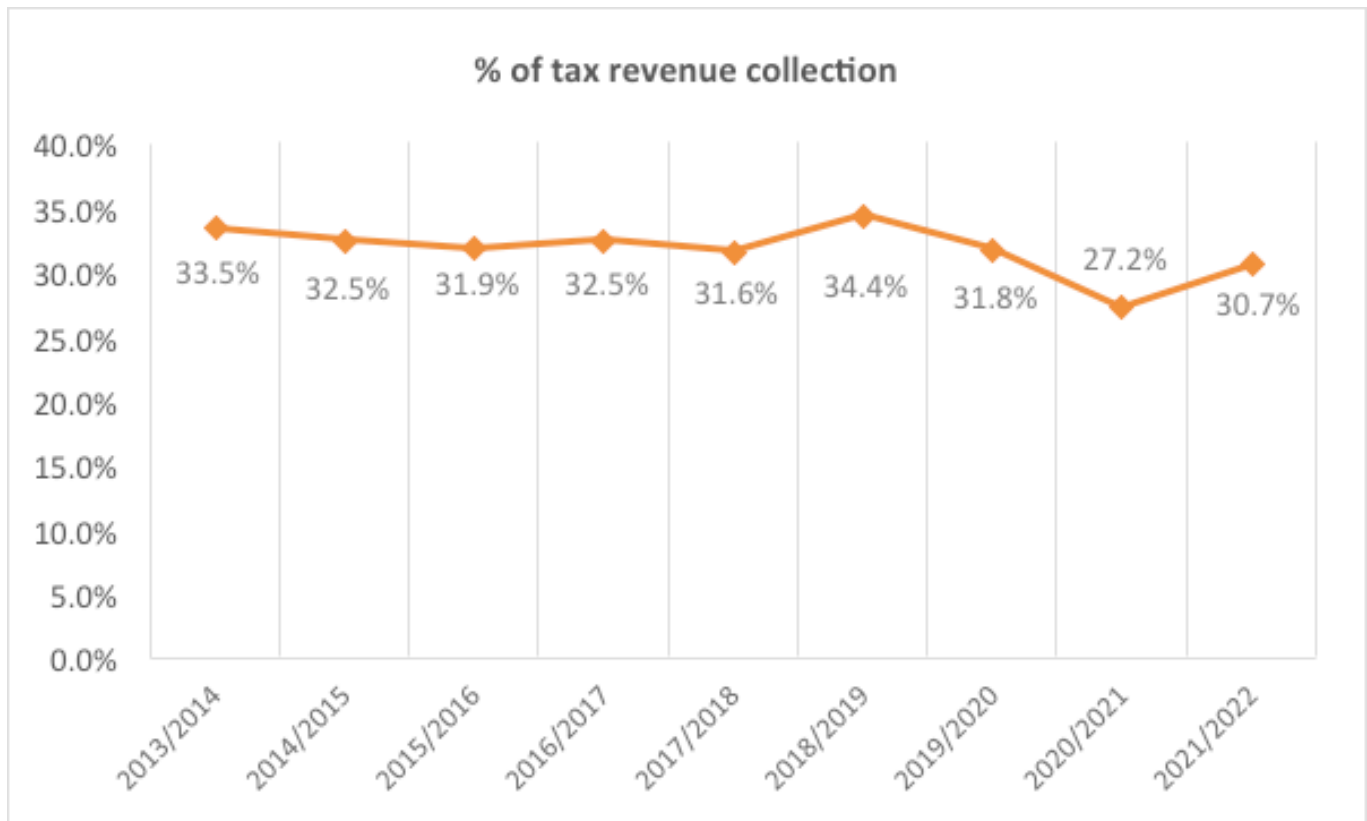


Figure 5: Trends in international trade taxes performance for FYs 2013/14 -2021/22
 Source: KRA Databases and Authors computations

2.8 International Trade Taxes

Trade taxes refer to tariffs collected on imports and exports, measures directly administered at the national border. Trade taxes have been on a steady decline since the 90s and more sharply since 2000. ⁶⁷Studies on the effect of trade taxes on trade deficit show that excise duty had a significant positive effect on trade deficit in Kenya in the long run and that import duty had a significant negative effect on trade deficit in Kenya in the long run meaning that; the government of Kenya should adopt a fiscal policy geared towards reducing excise duty to encourage exports as the locally manufactured products will be less expensive improving international competitiveness and hence decrease in trade deficit; and that the government through its fiscal policy should increase import duty to discourage importers and thus decrease imports which will decrease the trade deficit⁶⁸.

Kenya mainly imports secondary products including machinery and transportation equipment, petroleum products, motor vehicles, iron and steel, resins and plastics from India, China, UAE, South Africa, Saudi Arabia, United States and Japan⁶⁹. These imports mainly affect the costs of construction and transportation whereas it exports primary products that comprise of traditional tea, horticulture and coffee to Uganda, United States, Netherlands, Pakistan and United Kingdom⁷⁰. These exports are largely sold raw, exposing its farmers to price shocks in international commodity markets and losing out on revenue that could have been generated from value addition were these goods to be processed in Kenya before exporting.

Economists reckon that a persistently higher trade deficit slows down the creation of new jobs for Kenya's growing skilled youth as most revenue is spent on buying goods from foreign factories, raising production and job openings in source markets.

⁶⁷Macro trends (2020), Kenya Trade Balance 1960 2022, <https://www.macrotrends.net/countries/KEN/kenya/trade-balance-deficit>

⁶⁸Kiganda, E.S Ouma D.(2018) Effect of Trade Taxes on Trade Deficit In Kenya https://www.researchgate.net/publication/327982179_EFFECT_OF_TRADE_TAXES_ON_TRADE_DEFICIT_IN_KENYA

⁶⁹Trading economics (2022) Kenya Imports, <https://tradingeconomics.com/kenya/imports#:~:text=Kenya%20imports%20mostly%20machinery%20and,Arabia%2C%20United%20States%20and%20Japan.>

⁷⁰World bank(2019), Kenya trade balance, exports and imports by country and region 2019 <https://wits.worldbank.org/CountryProfile/en/Country/KEN/Year/2019/tradeFlow/EXPIMP>

2.9 Presumptive and Turnover Taxes

Presumptive Tax is charged at 15% of the single business permit or trade license issued/renewed by Country Government. It is paid once a year at the point of acquiring or renewing a single business permit or trade license. The Turnover Tax or Minimum Tax was introduced by the Finance Act, 2020 which amended the Income Tax Act to introduce a minimum 1% of tax of gross turnover to be paid monthly. In September 2021, however, the Minimum Tax was judged to be unconstitutional and therefore declared null and void⁷¹.

Presumptive Tax/Turnover Tax in Kenya applies to:

- Any person whose turnover from business is between KES 1M – 50 M in a year.
- All persons who are issued, or liable to be issued, with a business permit or trade license by a county government in a year.

The following businesses were exempt from payment of Presumptive Tax /Turnover Tax under the Kenyan Income Tax Laws:

- Rental business
- Management and Professional services
- The income of incorporated companies

The presumptive tax paid at county level at a rate of 15%, based on the value of the trading license, is regressive, since the rate is capped at 15% irrespective of the size of business.

2.10 Digital Services Taxes (DST)

Digital Service Tax ("DST") was introduced in Kenya through the Finance Act, 2019 and enacted through the Finance Act, 2020 with an effective date of 1st January 2021. It was introduced to both the Income Tax Act ("ITA") and the Value Added Tax Act ("VAT Act"). Both Acts prescribe that DST shall be payable by a person whose income is earned in Kenya from the provision of services through a digital marketplace. Further, both the ITA and VAT Acts define a digital marketplace as "a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means".

The introduction of DST in Kenya is in line with developments across Africa to expand the tax base through DST and the potential for revenue for DST in Kenya has been one of the reasons, Kenya has abstained from signing on to the Inclusive Framework.

DST is taxed at a flat rate of 1.5% of the gross transaction value therefore regressive.

The Digital service providers conducting their businesses in digital market place in Kenya are required to file a DST return and pay the tax due by the 20th day of the month that follows after the digital service is offered⁷². It is payable on a monthly basis and those who qualify include Resident and Non – Resident digital service providers, digital market place providers, or their appointed tax representatives⁷³.

2.11 Public Perception of the Tax System

In Kenya, few studies have been conducted to assess the public perception of the tax administration, however, the results indicate that citizens are largely critical of how taxes are calculated or assessed and there is general lack of knowledge on their structures.

The regular audits conducted by tax administrations to detect and deter tax evasion or avoidance have created an increasingly negative trust relationship between authorities and taxpayers – especially Large Taxpayers. In an effort to mitigate this negative perception, KRA has been conducting studies that are meant to assess the level of satisfaction of taxpayers with the tax administration. These are further complemented by studies by civil society organisations. For instance, a study by Oxfam Kenya ⁷⁴indicates there has been a shift by KRA from coercive to building a trust relationship with taxpayers.

2.13 Gender and Taxation

A gender analysis of tax policy in Kenya is hampered by a lack of gender disaggregated data on taxpayers. This deficiency is worsened by the large proportion of women working in the informal sector outside the tax net. ⁷⁵Income tax rates are imposed based on income

⁷¹Kenya Law (2021), CONSTITUTIONAL PETITION NOS. E005 OF 2021 WITH PETITION NO. 1 OF 2021 <http://kenyalaw.org/caselaw/cases/view/218609/>

⁷²Kenya Revenue Authority(2020) Introducing digital service tax <https://kra.go.ke/images/publications/Brochure-Digital-Service-Tax-Website.pdf>

⁷³OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

⁷⁴Oxfam (2018) An evaluation of taxpayer relations with tax authorities in Kenya [https://oi-files-cng-prod.s3.amazonaws.com/kenya.oxfam.org/s3fs-public/file_attachments/Taxpayer%20Final%20\[4\].pdf](https://oi-files-cng-prod.s3.amazonaws.com/kenya.oxfam.org/s3fs-public/file_attachments/Taxpayer%20Final%20[4].pdf)

only, irrespective of gender. PIT returns do not inquire the gender of the person filing the return. For CIT, the name of the business, rather than the identity of the owner, is registered in KRA's database. While directors and trustees are also registered, their gender is not reported, making it more complex to ascertain the gender statistics.

THE KENYAN TAX SYSTEM PROVIDES FOR JOINT FILING RULES FOR COUPLES.⁷⁶ THE REGULATIONS FURTHER DEFINE QUALIFYING INTEREST TO INCLUDE INTEREST EARNED ON AN ACCOUNT HELD JOINTLY BY A HUSBAND AND WIFE.

Therefore, the tax structure appears to treat men and women equally, but it has an unequal impact. For instance: Kenya has a lean VAT exemption and zero-rated regime, coupled with a non-preferential excise duty regime, these being indirect taxes that place a heavier burden on women since women spend a higher proportion of their income on consumer goods for their families. Women tend to spend more of the income under their control on goods that contribute to the social reproduction of labour, including healthcare, education, food, childcare and the elderly. Changes in the price of these goods (due to tax policies) can lead to a reduction in consumption, or substitution of better-quality goods by inferior ones. Taxes on utilities (such as water and electricity) fall disproportionately on female majority households, because women spend more on household consumption including on utilities to save time from household tasks (e.g., collecting water)⁷⁷.

2.14 Recommendations

There is a need for the development of a national tax policy in Kenya that is based not only on efficiency but rather based on its progressivity, fairness and socio-economic and gendered impact.

- 1.** The Kenyan government needs to reform the tax system so as to decrease the reliance on regressive indirect taxes such as VAT and presumption taxes, and increase progressive direct taxes especially on large corporation and wealthy households.
- 2.** The PIT rates and thresholds need to be more progressive, e.g. by adding additional tax bands for very high incomes. It is both unfair and inefficient that a person earning 33,000 KES per month pay the tax PIT rate


as a person earning 900,000 KES per month.

- 3.** There is need to review and introduce wealth taxes in Kenya including new ones such as CGT on indirect transfers of assets and inheritance tax. The property taxation framework at county level must be reviewed and harmonised with a view to increasing efficiency. Property taxation revenue performance should also be included in annual revenue performance reports.
- 4.** There is a need for the Kenyan government to consider reintroducing the COVID-19 fiscal measures of reduced rates on Value Added Tax (VAT) and Turnover Tax. This is because low-income earners and small businesses are still experiencing the negative impact of the pandemic, reduced rates will help cushion them.

⁷⁵Federation of Kenya Employers, [2021], The Informal Economy in Kenya, Accessed at: wcms_820312.pdf (ilo.org)

⁷⁶Kenya Revenue Authority(2021),the income tax act(CAP 470),Section 3 of the First Schedule of the Income Tax Act, <https://kra.go.ke/images/publications/Income-Tax-Act-Cap-470-Revised-2021-3-1.pdf>

⁷⁷Sarkar, A. [2020], "Every practices of poor urban women to access water: Lived realities from a Nairobi slum", Accessed at: <https://www.tandfonline.com/doi/abs/10.1080/00020184.2020.1781594>



5. The Kenyan government need to find ways of reducing the gap between the statutory CIT rate of 30% and 37.5% and Kenya's Marginal Effective Tax Rate (METR) calculated at only 15.2%. For instance, there is a need to collect and publish tax expenditures caused due to the foregone revenue from tax incentive structures in the CIT regime. Additionally, there is need to review the cost effectiveness of these CIT incentives regimes.

6. The Kenyan government need to review and correct accordingly the technical challenges of its Transfer Pricing framework to increase efficiency. There is a need for increased data on the revenue collected through Transfer Pricing audits. Lastly, as Kenya increasingly widens the tax base through the introduction of increased TP measures, caution must be taken to capture MNEs rather than SMEs conducting genuine transactions.

7. Kenya needs to reduce the tax unpredictability of VAT rates through determining VAT exemptions or reduced rates through analyses of the socio-economic impact rather than through political considerations. Kenya must also reverse the increased VAT rates on the clean energy sector such as solar equipment as well as LPG. Failure to do so will have a negative impact on climate change.

8. There is need to review and introduce wealth taxes in Kenya including new ones such as CGT and inheritance tax. The property taxation framework at county level must be reviewed and harmonised with a view to increasing efficiency. Property taxation revenue performance should also be included in annual revenue performance reports.

9. Kenya should think creatively to find alternative ways to raise revenue from very rich household, e.g. by increasing the excise duty on selected product and introduce new taxes on luxury products.

10. There is a need for the development of national tax policy in Kenya that is based not only on efficiency rather based on its progressivity, fairness and socio-economic and gendered impact.

11. 11. As Kenya seeks to increase the tax base through the introduction of Digital Services Tax despite international pressure to do away with it in line the G20/OCED global tax deal, Kenya needs to frame its DST framework in line with the ATAF Suggested Approach to Drafting Digital Services Tax Legislation to ensure progressivity in the imposition of DST.

12. There is need to collect disaggregated data on taxpayers including their gender in order to promote more gender sensitive tax policies but also in terms of revenue derived from wealth taxes (including property taxes and CGT) in order to assess whether they are sufficient in terms of promoting equity.



3.0 SUFFICIENT REVENUES AND ILLICIT FINANCIAL FLOWS (IFFS)



3.1 Revenue Sufficiency

Kenya’s Vision 2030 Plan, the country’s long-term development blueprint, aims to make Kenya a middle-income country by the year 2030. This is being implemented through successive five-year medium-term plans. Kenya is currently in its Third Medium Term Plan (MTP) running from 2018 to 2022. Kenya’s Domestic Revenue Mobilisation (DRM) Strategy is key in achieving the objectives of the Vision 2030 Plan. More specifically, the Second and Third Medium Term Plan focuses on the Big Four Initiatives of increasing the contribution of the manufacturing sector to the overall GDP to 15%, providing universal healthcare, affordable housing by providing 500,000 housing units, and improving nutrition by 2022⁷⁸.

The Second Medium Term Plan set revenue targets of between 20.2% to 25% of GDP between the financial years of 2013/2014 and 2016/2017. However, revenue collection consistently fell below these targets which can partly be attributed to setting of unrealistic revenue performance targets. On a positive note, total revenue collection consistently increased despite failure to reach the revenue targets. ⁷⁹The Third Medium Term Plan 2018-2022 sets projections of revenue percentage of GDP from 19% in FY2017/2018 to 19.4% in FY2021/2022. ⁸⁰Table 9 shows the Kenya’s total revenue as a percentage of GDP.

	FY 2013/2014		FY 2014/2015		FY 2015/2016		FY 2016/2017		FY 2017/2018	FY 2018/2019	FY 2019/2020	FY 2020/2021	FY 2021/2022
Total revenue as a percentage of GDP	Target	Actual	Target	Actual	Target	Actual	Target	Actual	Projection	Projection	Projection	Projection	Projection
	24.9	19.2	25.0	19.0	20.2	18.4	20.7	18.3	19.0	18.9	19.0	19.2	19.4

Table 9: Total revenue⁸¹ as a percentage of GDP
 Authored from the Third Medium Term Plan

The steady increase in the size of Kenya’s budget in the past five years has placed greater pressure on the need for increased revenue mobilisation. The Controller of Budget Reports indicate an increase in revenue collection from the FY 2014/15 to the FY 2019/20 by examining the receipts made into the Consolidated Fund. The Controller of Budget is an independent office established under the Kenya Constitution to exercise oversight over budgets. The Consolidated Fund is a fund where all the money received or raised by the national government is paid. ⁸²Other than tax and non-tax revenue, funds collected from external loans and grants, domestic borrowing and other sources of domestic financing such as interest earned from loans and rental income are paid into this Fund⁸³.

Despite expectations that there would be revenue shortfalls in the FY 2020/2021 due to the COVID-19 pandemic economic shocks, there has in fact been an improvement with Kenya’s revenue performance, with the revenue authority

⁷⁸Government of Kenya(2018), Third Medium Term Plan 2018 – 2022 Transforming Lives: Advancing Socio-economic Development through the “Big Four” <https://www.planning.go.ke/wp-content/uploads/2020/11/Medium-Term-Plan-III-2018-2022.pdf>

⁷⁹World Bank Group Kenya(2019),Public Expenditure Analysis 2019 Creating Fiscal Space to Deliver the Big 4 while Undertaking a needed Fiscal Consolidation

⁸⁰Government of Kenya(2018), Third Medium Term Plan 2018 – 2022 Transforming Lives: Advancing Socio-economic Development through the “Big Four” <https://www.planning.go.ke/wp-content/uploads/2020/11/Medium-Term-Plan-III-2018-2022.pdf>

⁸¹Kenya Revenue Authority (2018),Total revenue refers to both tax revenue and non- tax revenue.

⁸²Constitution of Kenya(2010), Article 260 (1)

meeting the set targets. The Kenya Revenue Authority has indicated that there was a 3.7% revenue growth. This has been attributed to the increased remittance of the 'Energy, Agriculture and Construction sectors'.⁸⁴ More information on the specific tax heads is anticipated upon the release of the full revenue performance report.

Government expenditure has tripled from the 2009/10 fiscal year to the 2018/19 fiscal year (Central Bank of Kenya). This can be attributed to several factors including devolution and the increase in the public wage bill; debt servicing which accounts for 25.1% of total

recurrent expenditure and 21.2% of total government revenues for the 2019/20 fiscal year; and mismanagement of public funds which compromises the ability of the National Treasury to make adequate budget appropriations and to execute its development projects.

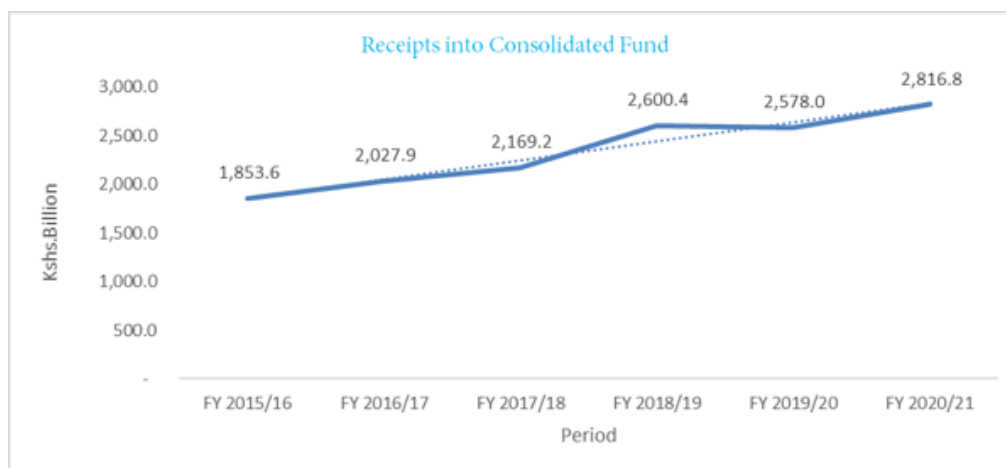


Figure 6: Receipts into the consolidated fund from FY 2015/16 to FY 2020/21
Controller of Budget Annual Report FY 2020/21

3.2 Revenue from Extractives

Kenya has a broad variety of untapped mineral resources, including soda ash, fluorspar, titanium, niobium and rare earth elements, gold, coal, iron ore, limestone, manganese, diatomite, gemstones, gypsum and natural carbon dioxide. Extractives, however, currently contribute only about 1% to Kenya's GDP, or less than 2% of total export revenues (AfDB/KNBS)⁸⁵ though it is estimated, that the sector may grow to contribute 10% of GDP. The total value of minerals produced in 2021 increased by 33% from KES 22.7 billion in 2020 to KES 30.2 billion. There was an increase in production for most minerals including titanium ore, and soda ash⁸⁶.

The policy and legal framework around extractives in Kenya provide for equity in distribution of resources, public participation throughout the process, openness, and accountability.⁸⁷ Article 69 (1) of the Kenya Constitution, 2010, requires the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and to ensure that the accruing benefits are shared equitably, ensuring the resources are utilised for the benefit of the people of Kenya. Article 201 also states that the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations.

⁸⁵ Controller of Budget (2019), Annual National Government Budget Implementation Review Report for FY 2020/21 (2021); Annual National Government Budget Implementation Review Report for FY 2019/20 (2020); Annual National Government Budget Implementation Review Report for FY 2018/19 (2019); Annual National Government Budget Implementation Review Report for FY 2017/18 (2018); Annual National Government Budget Implementation Review Report For FY 2016/17 (2017); Annual National Government Budget Implementation Review Report For FY 2015/16 (2016); Annual National Government Budget Implementation Review Report For FY 2014/15 (2015)

⁸⁶ Kenya Revenue Authority (2021), 'Annual Revenue Performance FY 2020/2021' (Press Release, 4th July 2021) <https://www.kra.go.ke/en/media-center/press-release/1299-annual-revenue-performance-fy-2020-2021> accessed 10th October 2021

⁸⁵ Afdb (2021), information centre for extractive sector, <https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/information-centre-for-the-extractives-sector>

⁸⁶ Kenya National Bureau of Statistics (2022), Kenya Economic Survey 2022. <https://www.knbs.or.ke/wp-content/uploads/2022/05/2022-Economic-Survey1.pdf>

⁸⁷ Constitution of Kenya, (2010), Articles 62(3) and 66(2) which provide that ownership, on behalf of its citizens, of the natural resources within the country resides with the National Government and that Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies respectively.

The Mining Act, 2016 governs the extraction of all minerals except petroleum and hydrocarbon gases.

The Petroleum Act, 2019 provides for the: contracting, exploration, development and production of petroleum. The Petroleum Act consolidated the laws relating to petroleum operations where previously, the upstream petroleum industry was regulated by the repealed Petroleum (Exploration and Production) Act, while midstream and downstream operations were regulated by the now repealed Energy Act (2006). The Energy Act, 2019 also consolidated the laws relating to energy; it distinguishes the functions of the national and county governments in relation to energy, provides for the exploitation of renewable energy sources, regulates midstream and downstream petroleum and coal activity and

provides for the supply and use of electricity and other forms of electricity.

Petroleum revenues are generated through legal and contractual arrangements including taxes and royalties, production sharing contracts (PSCs) or through state participation or state equity in the exploration project. The current CIT for mining companies is 30% for domestic firms and 37.5% for foreign firms. Fees are provided for in the Third Schedule of the Mining Act.

The Cabinet Secretary for Petroleum and Mining sets rates for royalties for various minerals in the Regulations. Examples of rates include ad valorem royalty on all diamonds from Kenya at 15% of the gross value (as assessed by an approved valuer appointed under the Diamond Industry Protection Regulations).⁸⁸Royalty in respect of carbon dioxide sold is seven cents per kilogram⁸⁹.

Capital gains tax on farm outs, applies to the assignment of mining interests at prevailing corporate tax rates.

The Ninth schedule to the Income Tax Act has ring-fencing rules per

contract area (or per petroleum agreement). The expenditure incurred on one contract is only deductible against income derived by the contractor from the same contract area. A loss incurred in a contract area can only be carried forward and deducted against income of that contract area, thus the calculation of taxable liability is done separately for each contract area and this protects government revenue.

PSCs in Kenya⁹⁰ provide for “windfall tax” or tax applied to the company share of profit oil that is generated from oil prices that exceed the “threshold price” at the point of export.

Petroleum revenues can generate substantial economic wealth especially at the local level due to the division of revenues formula which is 75% to national government: 20% to local government: and 5% to resident communities.

How petroleum revenues should be treated is an issue of contention – whether as part of general revenues and paid into the Consolidated Fund or whether they should be separated and paid into specialized Petroleum Funds.

3.3 Illicit Financial Flows (IFFs)

According to the 2021 State of Tax Justice Report by the Tax Justice Network, Kenya loses up to 555.8 million USD per year due to global tax abuse.⁹¹Corporate tax abuse leads to the greatest losses in revenue with Kenya losing 495.9 million USD annually, followed by 62.9 million USD lost through offshore wealth annually.⁹²This means that Kenya loses 0.08% of its GDP to global tax abuse on an annual basis⁹³.

In 2022, Kenya was ranked 41 out of 141 jurisdictions in the financial secrecy index by Tax Justice Network.⁹⁴This ranking was partly due to the efforts of the Kenya government to set up an international financial centre (IFC) in Nairobi. The Nairobi International Financial Centre will provide amongst other concessions, tax incentives to non-resident investors in order to encourage investment to be channeled through Kenya.⁹⁵Concerns with regard to transparency and taxation have been raised especially with regard to the fact that another international financial centre is being set up in Kigali, Rwanda.⁹⁶It is expected that due to the competitive nature of IFCs, two IFCs in the region are likely to have a negative effect on harmful

⁸⁸Kenya Law (2010), Regulation 39[1]

⁸⁹Kenya Law(1961), Section 3, Mining (Royalty on Carbon Dioxide) Regulations, 1961

⁹⁰Kenya Law(2019), Under the Model PSC of the Petroleum Act, 2019

⁹¹Tax Justice Network(2021), The State of Tax Justice 2021 (TJN, 2021)

⁹²OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

⁹³OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

⁹⁴Tax Justice Network(2021) , Financial Secrecy Index 2022 (TJN, 2022)

⁹⁵Nairobi International Financial Centre Authority, ‘Nairobi international Financial Centre Summary’ https://nifc.ke/NIFC_Summary.pdf accessed 10th February 2022

⁹⁶Tax Justice Network Africa(2019), A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven? (TJNA, 2019)



tax competition in the region. Despite the lack of clarity on the nature of the tax incentives to be provided, Kenya has gone ahead to sign a Memorandum of Understanding with one of the highest ranked IFCs, the City of London⁹⁷.

Further, Kenya has continued to increase its tax treaty network for instance in the year 2021, the country has considered signing DTAs with Ireland, Portugal, Singapore and Turkey. Some of these DTAs have provisions that may potentially be harmful to Kenya's tax base.⁹⁸This is further heightened by the fact that Kenya is considering entering into DTAs with known secrecy jurisdictions such as Ireland. Analogous to these developments, Kenya has been named in several corporate abuse exposés. Leaked financial records submitted to the US Department of Treasury covering \$2 trillion of suspicious transactions globally revealed how 53 Kenyan companies and individuals used Double Taxation Agreements to move \$60 billion in suspicious transactions.⁹⁹Further the Pandora Papers, showed how public officers and their families, in Kenya, the Head of State's, family were involved in the holding of several assets in offshore jurisdictions. The aftermath of the Pandora Papers showed that very little legal enforcement exists for public officers and their family members holding offshore wealth as Kenyan legislation only requires public officers to disclose wealth held within the country¹⁰⁰.

Kenya has taken several steps to combat IFFs, key among them being joining the global regimes against IFFs such as the Global Forum on Transparency and Exchange of Information for Tax Purposes, the Inclusive Framework on Base Erosion and Profit Shifting Project (BEPS), and signing the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Further, Kenya has made several commendable changes in its domestic laws to further combat corporate tax abuse. For instance, through the Finance Act 2021 Kenya adopted a new definition of permanent establishment (PE) capturing a wider scope of what it constitutes in line with the UN Model Convention on Tax Treaties¹⁰¹.

Further, the country has improved its thin capitalisation rules with regard to transfer pricing by moving away from the previous method of the debt to equity ratio of 3 is to 1. With the advancement, excess interest deductions shall be curbed if they are in excess of 30% of earnings before

interest, taxes, depreciation, and amortisation.¹⁰²The definition of control has also been amended. Control shall no longer be defined through shareholding and voting rights only, the Finance Act 2021 broadened this to include economic tests as well.¹⁰³For instance, a person who purchases 90% of the sales of an entity, exclusive rights on intellectual property amongst others will be deemed to constitute control as per the new provisions of the Finance Act 2021¹⁰⁴.

Further, the Finance Act 2021, has introduced aspects which seek to domesticate country by country (CbCR) reporting in Kenya which will be effective in the FY 2022. Ultimate parent entities which are based in Kenya shall now be required to submit returns to the KRA on the group company activities¹⁰⁵.

The key reporting requirements comprise the Country-by-Country report, master file and local file¹⁰⁶. Finance Act, 2022 stipulates that either the ultimate parent company (UPE) or the constituent entity appointed by the group, the surrogate parent entity (SPE), of a MNE operating a reportable business that is part of the MNE group in Kenya should file the CbCR report consisting of the identity and jurisdiction of each constituent entity, financial information, the number of employees and other information required by the Revenue Authority¹⁰⁷. Effective CbC reporting would boost transparency of MNEs tax matters and improve tax information sharing by tax authorities in various countries¹⁰⁸.

Meanwhile, the main institutions mandated to fight IFFs in Kenya – the Central Bank of Kenya (CBK), the KRA and the National Treasury – face numerous challenges limiting their effectiveness. Such challenges include; weak inter-agency cooperation between the financial sector regulators, law enforcement agencies and the financial institutions; weak laws and internal controls governing financial institutions; and limited engagement with international bodies tackling IFFs¹⁰⁹.

Effective containment of IFFs in Kenya requires collaboration between the different arms of government, members of parliament, the private sector, and the international community. The focus of these concerted efforts should be to strengthen preventive measures, surveillance systems, IFF detection and recovery procedures.

⁹⁷FSD Africa[2021], 'UK announces £132m of New Investments in Kenya and Backs Nairobi as an International Financial Centre' [FSD Africa, 27 July 2021] <https://www.fsdafrica.org/news/prudential-signals-intent-to-join-the-worlds-newest-international-financial-centre-in-nairobi/> accessed 28th October 2021

⁹⁸Tax Justice Network Africa (2019), 'The Good, the Bad and the Ugly: An Examination of the Kenyan Double Taxation Agreements with Portugal and Turkey' (TJNA, forthcoming)

⁹⁹Mukami, P. S Africa Uncensored, [2020], 'Kenya Transactions in FinCEN Files Raise Suspicions Around Coffee and Ivory Trade' (Piga Firimi, October 2020)

¹⁰⁰Kenya Law (2010), The Public Officer Ethics Act Chapter 183, Laws of Kenya

¹⁰¹Kenya Law (2010), Finance Act 2021, section 2

¹⁰²OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹⁰³Ibid

¹⁰⁴Ibid

¹⁰⁵Ibid

¹⁰⁶https://www.ey.com/en_gl/tax-alerts/kenya-introduces-country-by-country-reporting-requirements

¹⁰⁷OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹⁰⁸Deloitte (2016), Country by Country Reporting, <https://www2.deloitte.com/mm/en/pages/tax/articles/country-by-country-reporting-faqs.html>

3.4 Tax Revenues

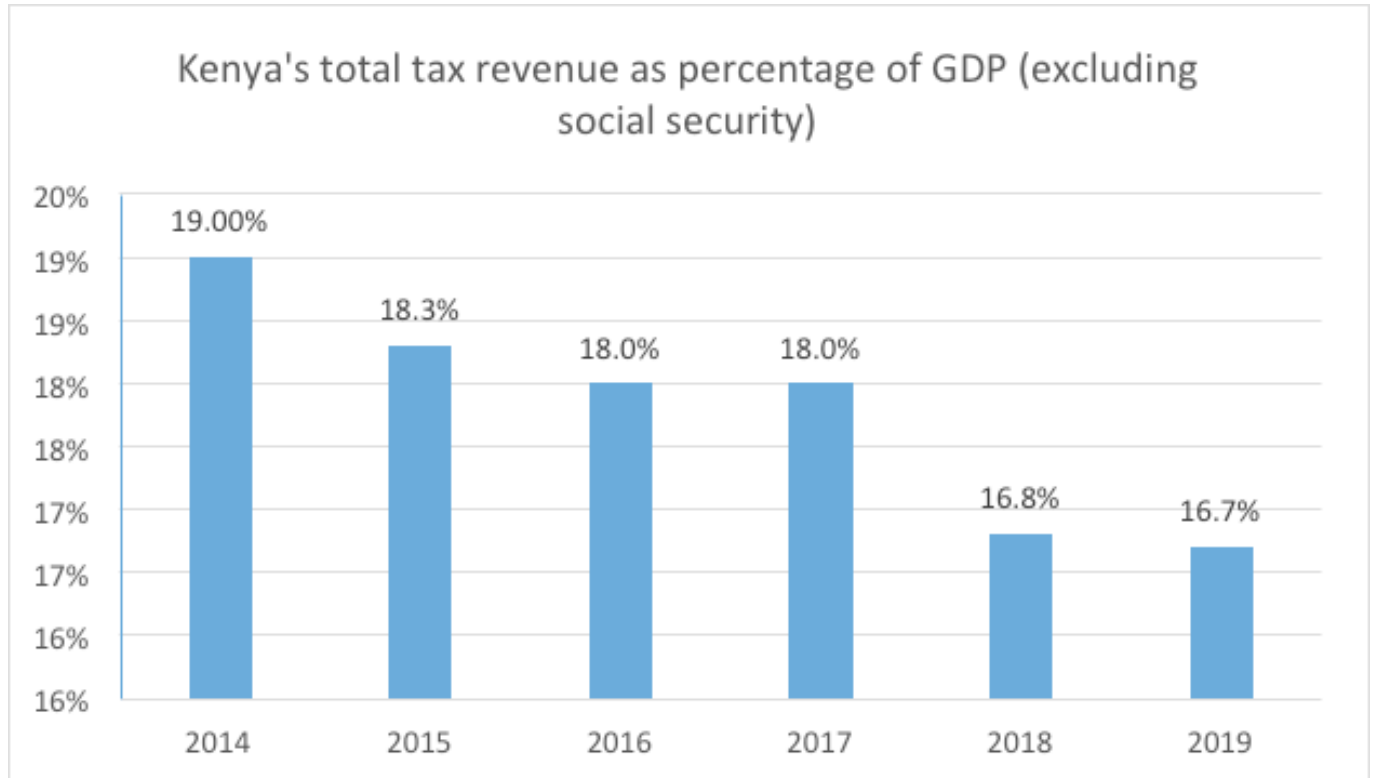


Figure 8:
Source: OECD Revenue Statistics in Africa 2021

As illustrated in Figure 5, between the years 2014 to 2019, Kenya's tax to GDP ratio fell from 19.0 % of GDP to 16.7% of GDP.¹¹⁰A World Bank study and the Annual Kenya Revenue Authority Performance Report attribute this to changes in the economic structure that led to the rise in income in the agricultural sector as well as a rise in tax expenditures resulting from overly generous tax incentives¹¹¹.

This is backed by the 2021 Tax Expenditure Report which shows that in 2017 and 2018, tax expenditures amounted to 5.15% and 4.6% of the GDP.¹¹²In 2019 Kenya's tax to GDP ratio was 17.3% as per the OECD Revenue Statistics.¹¹³In comparison, the average for the 30 African countries was 16.6% in the year 2019¹¹⁵.¹¹⁵Kenya performed below its middle-income peers like South Africa that had a tax to GDP ratio of 26.2%¹¹⁶.

¹¹⁰Parliamentary Service Commission(20210,Budget Policy Statement,https://www.treasury.go.ke/wp-content/uploads/2021/11/Draft-2022-Budget-Policy-Statement_F.pdf

¹¹¹OECD/AUC/ATAF(2021), Revenue Statistics in Africa 2021 (OECD Publishing, 2021), https://read.oecd-ilibrary.org/taxation/revenue-statistics-in-africa-2021_c511aa1e-en-fr#page1. It should be noted that the figures provided in this sentence exclude social security contributions.

¹¹²World Bank Group(2019), Kenya Public Expenditure Analysis 2019 Creating Fiscal Space to Deliver the Big 4 while Undertaking a needed Fiscal Consolidation (June 2019); Kenya Revenue Authority, Annual Revenue Performance Report FY 2018/2019 <https://kra.go.ke/images/publications/Revenue-Performance-Report-2018-19.pdf>

¹¹³National Treasury and Planning, (2021) Tax Expenditure Report (Government of Kenya, September 2021)

¹¹⁴OECD/AUC/ATAF(2021), Revenue Statistics in Africa 2021 (OECD Publishing, 2021), https://read.oecd-ilibrary.org/taxation/revenue-statistics-in-africa-2021_c511aa1e-en-fr#page1. It should be noted that the figures provided in this sentence include social security contributions.

¹¹⁵OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹¹⁶ibid

¹¹⁷ibid

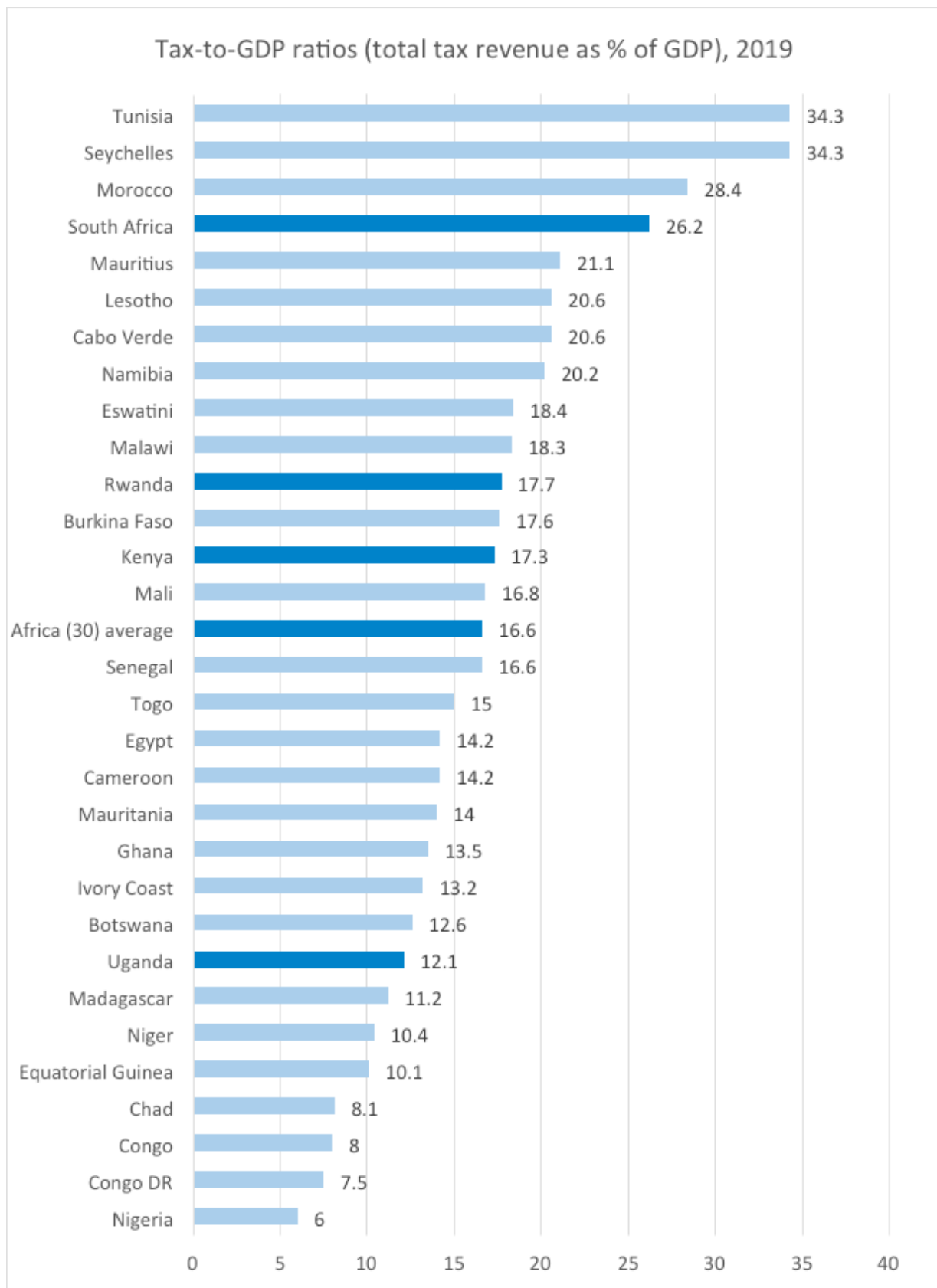


Figure 9:
Source: OECD Revenue Statistics in Africa 2021

3.5 Non-tax revenues

Non-tax revenue has been fluctuating over the past years. Table 9 shows that as per the OECD African Revenue Statistics, non-tax revenue peaked at 2.1% in 2017 between the years 2014 to 2019.¹¹⁷ Sales of goods and services represented the largest share of non-tax revenues in 2017, amounting to 0.6% of GDP and 29.7% of non-tax revenues.

Table 11: Non-tax revenue as a percentage of GDP from 2008 to 2018

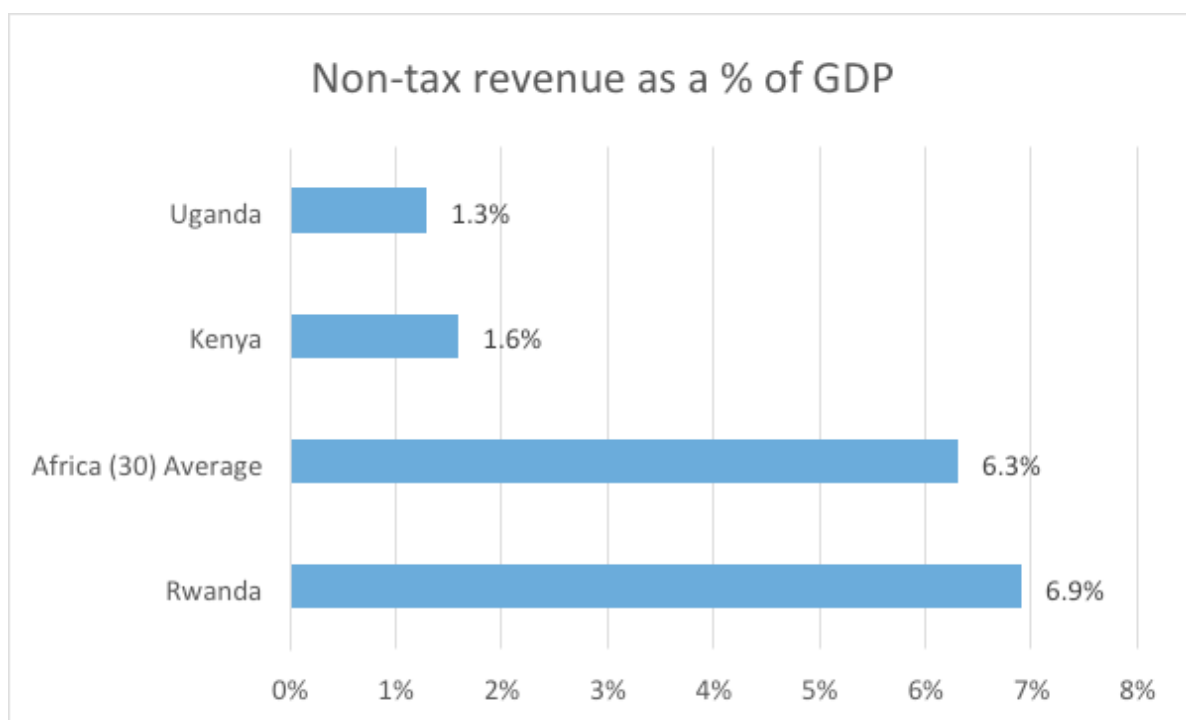
YEAR	2008	2010	2013	2014	2015	2016	2017	2018	2019
Non-tax revenue as a percentage of GDP	3.2	1.1	1.4	1.5	1.9	1.8	2.1	2.3	1.6

Authored with statistics from OECD 2020 Report. These figures include sub national governments non -tax revenue from the year 2014-2018.

Kenya's non-tax performance compared to the other African countries covered under the OECD Revenue Statistics was low. In 2019, Kenya had a non-tax revenue to GDP ratio of 1.6% in comparison with the average of 6.3%¹¹⁸

¹¹⁷OECD/AUC/ATAF(2021), Revenue Statistics in Africa 2021 [OECD Publishing, 2021], https://read.oecd-ilibrary.org/taxation/revenue-statistics-in-africa-2021_c511aa1e-en-fr#page1. It should be noted that the figures provided in this sentence include social security contributions.

¹¹⁸OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>



Figure/ Graph 10:
Source: OECD Revenue Statistics in Africa 2021

Fragmentation in Reporting on Non- Tax Revenue

The OECD Revenue Statistics Report considers sale of goods and services, fines, penalties and forfeits, grants, property income excluding rents and royalties, miscellaneous and unidentified revenue as non-tax revenue. However, it does not consider various levies, government agency revenue and land rates as non-tax revenue although they are considered to be non-tax revenue under the Public Finance Management laws. In Kenya, non- tax revenue is categorised in various ways by different government agencies. The Kenya Revenue Authority collect various levies and government agency revenue which they classify as 'agency fees'.¹¹⁹These include the railway development levy, road maintenance levy, petroleum development fund levy, aviation and airport revenue, land rates and cash in transit¹²⁰. Disaggregated data on the performance of each of these tax heads is required.

There is further categorisation of what would be considered non-tax revenue. In Kenya, Appropriations in Aid (AiA) are revenue collected by government agencies through imposition of service charges and fees and donor loans and grants.¹²¹These funds are treated differently from ordinary revenue as they do not pass to the National Treasury for further allocation and distribution. They are collected directly by the government agencies.¹²²Performance of AiA can be found in reports by the National Treasury. The Controller of Budget reports flagged the issue of poor reporting of revenues generated from AIAs by government agencies.¹²³These reports would be valuable information to consider in the preparation of forecasts in the future. If calculations on non-tax revenue (excluding grants) were to be done based on property income, sales of goods and services, fines, penalties and forfeits, miscellaneous, and unidentified revenue, it would amount to KES 146.137816 billion and 8.04% of GDP for the year 2019 which is a much higher percentage than the figure estimated by the OECD's conception of NTR.

Moreover, under the Constitution of Kenya 2010, revenue collection is decentralised. County governments have the power to impose taxes and other fees and charges. This own source revenue (OSR) is a critical source of funding that the World Bank identified as having potential to reduce counties' overreliance on equitable sharing of resources between the national government and county governments.¹²⁴Own Source Revenue according to a baseline survey done by the World Bank in 2015 consists of property taxes/rents, business permits/licenses, parking fees, cess, advertisement fees, building permits, liquor fees amongst others. The Controller of Budgets Office in their assessment of OSR, consider ordinary revenue i.e. revenue derived from imposing taxes and permits as well as Appropriation in Aid (AiA) which further fragments reporting on non- tax revenue.

¹¹⁹Kenya Revenue Authority(2020), Seventh Corporate Plan: Revenue Mobilization through Transformation 2018/19 - 2020/21 <https://www.kra.go.ke/images/documents/7th-Corporate-Plan-FA-Online-version-min.pdf>

¹²⁰ibid

¹²¹Kinuthia, J. & Lakin, J (2014) 'Sharing Revenue: How Much of Kenya's Budget is Already Committed and cannot be shared?' Budget Brief No.25 International Budget Partnership

¹²²OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹²³Auditor- General(2013), Report of the Auditor - General on the Appropriation Accounts, Other Public Accounts and the Accounts of the Funds of the Republic of Kenya for the Year 2012/2013 (Government of Kenya, 2013)

¹²⁴Adam Smith International(2019), Final Report: Own-Source Revenue Potential and Tax Gap Study of Kenya's County Governments (Adam Smith International, 2019)

3.6.1 Own Source Revenue

According to the Controller of Budget reports, despite the potential of OSR, county governments have been failing to meet their revenue targets.

	FY 2015/2016		FY 2016/2017		FY 2017/2018		FY 2018/2019		FY 2019/2020		FY 2020/2021	
	Target	Actual	Target	Actual	Target	Actual	Target	Actual	Target	Actual	Target	Actual
KES in Billions	50.54	35.02	57.66	32.52	49.22	32.49	53.86	40.30	54.9	35.7	54	34

Table 12: Non-tax revenue performance from FY 2015/16 to 2018/19
 Authored from Controller of Budget County Reports (2016-2019)

The under-performance of own source revenue has been attributed to the lack of proper and updated legal frameworks of county governments on revenue collection, the need to improve county governments' capacity in revenue collection, and the need to improve on reporting on collection of non-tax revenue¹²⁵.

¹²⁴OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹²⁵OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>



3.7 TAXPAYERS



OXFAM

Kenya has a taxpayer registration system that requires that taxpayers both corporate and natural persons to acquire a Personal Identification Number (PIN). This process was automated with the introduction of the iTax system which allowed taxpayers to register online through a web-based system and file their returns. Kenya still faces the challenge of obliging taxpayers to register for tax. At the end of the FY 2014/15, data showed that 2.7 million SME businesses were not registered for tax purposes.¹²⁶ Additionally, there were around 960,000 small scale commercial farmers who were not in the tax bracket and only 15,000 out of an estimated 100,000 landlords who were filing returns on tax income.¹²⁷ Eventually, KRA did succeed in recruiting 11,129 informal taxpayer by the FY 2017/18.¹²⁸ In the FY 2018/2019, as per the KRA Annual Performance Revenue Report, 4.4 million users of iTax filed their tax returns.¹²⁹ This is a significant increase from the previous financial years but when compared to a population of 19.6 million registered voters, there is still room for improvement.¹³⁰ This means that despite 19.6 million people being eligible to register for iTax, only 4.4 million registered.

The other challenge faced is the great numbers of inactive taxpayers. This means that despite being registered, these taxpayers do not file any returns including nil returns. As per the KRA 6th Corporate Plan, there were 1.6 million active taxpayers in the FY 2014/2015.¹³¹ This was in comparison to the 8.1 million who were present in the Personal Identification Number database. This means that there were 6.5 million taxpayers who were inactive.

Through targeted measures to increase the tax

base such as leveraging on the government ICT systems to gain access to data on inactive taxpayers, targeted taxpayer education including encouraging taxpayers to file nil returns and leveraging on the mobile money reliance of the informal sector, the number of active users has been increasing.¹³² It increased to 2.3 million in the FY 2015/2016.¹³³ This increased to 3.47 million in the FY 2016/2017, 3.94 million in the FY 2017/2018,¹³⁴ 5.1 million in FY 2018/2019, 5.77 million in FY 2019/2020 and 6.1 million in FY 2020/2021.¹³⁵ This is presented in Table 12.

	FY 2015/2016	FY 2016/2017	FY 2017/2018	FY 2018/2019	FY 2019/2020	FY 2020/2021
Active taxpayer	2,300,000	3,470,000	3,940,000	5,100,000	5,770,000	6,100,000

Table 12:

¹²⁶Kenya Revenue Authority,(2020), Sixth Corporate Plan: Trust and Facilitation 2015/16 - 2017/18 <https://www.kra.go.ke/images/publications/6th-Annual-Tax-Summit-Report.pdf>

¹²⁷ibid

¹²⁸Kenya Revenue Authority,(2021), Seventh Corporate Plan: Revenue Mobilization through Transformation 2018/19 - 2020/21 <https://www.kra.go.ke/images/documents/7th-Corporate-Plan-FA-Online-version-min.pdf>

¹²⁹Kenya Revenue Authority,(2020) Annual Revenue Performance Report FY 2019/2020 <https://www.kra.go.ke/images/publications/KRA%20Annual%20revenue%20performance%20%20report.pdf>

¹³⁰Attia, W.and Mwaniki,M.(2020), 'A Covid-Era Discussion: Mobility of the Informal Sector, Fiscal Legitimacy and the Fiscal Contract in Kenya' December 2020 Public Affairs Research Institute <https://pari.org.za/covid-mobility-informal-sector-fiscal-legitimacy-kenya/>

¹³¹Kenya Revenue Authority(2020), Sixth Corporate Plan: Trust and Facilitation 2015/16 - 2017/18 <https://www.kra.go.ke/images/publications/6th-Annual-Tax-Summit-Report.pdf>

¹³²OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹³³ibid

¹³⁴ibid

¹³⁵Kenya Revenue Authority(2020), Eighth Corporate Plan: 2021/2022 - 2023/2024 <https://kra.go.ke/images/publications/KRA-8TH-CORPORATE-PLAN-.pdf>



As for corporate bodies, by the end of the Financial Year 2017/2018, 78,000 corporate bodies were tax compliant however KRA noted there were 480,000 registered companies that were not active taxpayers.¹³⁶The 7th KRA Corporate Plan aims to increase the number of active taxpayers to 7 million, targeting 511,000 informal sector players, 1.56 million single business permit holders, 25,000 professionals, 40,000 online traders and a further 66,000 landlords.

In the FY 2018/2019, 36,818 landlords were recruited and 1,519 professionals were recruited.¹³⁷As of the FY 2019/2020, 90,862 companies were recruited as taxpayers while 1.58 individual taxpayers were recruited¹³⁸.

Formalisation of informal sector enterprises in Kenya has a pyramidal shape with majority (73.3%) of informal enterprises yet to start their formalization journey, a few (19.1%) are a step away from informality, another minimal proportion (5.4%) are midway the journey¹³⁹. A mere 1.4% of informal enterprises are ready to formalise while less than one per cent are fully formalised.

The costs of formalisation (which include high costs of compliance with tax regulations, existence of too many procedures and delays, high cost of compliance with social security regulations and labour laws, lack of information and informal costs incurred through corruption) appear to outweigh the gains from formalisation. These gains include reduced cost of inspection, better access to credit, access to strategic business location, expansion of clientele base and eligibility for business development services and other support programs.

A major factor that drives informality in Kenya is lack of opportunities to do business with the government and failure to export goods and services.

¹³⁶OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹³⁷Kenya Revenue Authority(2020), Annual Revenue Performance Report FY 2019/2020 <https://www.kra.go.ke/images/publications/KRA%20Annual%20revenue%20performance%20%20report.pdf>

¹³⁸ibid

¹³⁹International Labour Organization (2012), public employment, https://www.ilo.org/wcmsp5/groups/public/---ed_emp/--emp_ent/documents/publication/wcms_820312.pdf

3.8 RECOMMENDATIONS



OXFAM

- 1.** Kenya has failed to meet its revenue targets set under its national development plans. This has been attributed to the setting of unrealistic targets. The National Treasury needs to review its methods of revenue projection and improve collection of accurate and disaggregated data on various sources of revenue, particularly non - tax revenue.
- 2.** Kenya's steps to tackle corporate tax abuse through transfer pricing are highly commendable. However, Kenya's expansion of its tax treaty network is highly concerning. A DTA policy should be developed through a public multiple consultation with the Kenya Revenue Authority, the Ministry of Finance and the private sector as well as civil society.
- 3.** Kenya should discontinue setting up an International Financial Centre, and if that is not possible, than at least ensure strong transparency and substance requirements are put in place and publicised by the Nairobi International Financial Centre.
- 4.** There is a need to put in place more stringent measures with regard to the holding of offshore wealth by public officers through the amendment of the Public Officers Ethics Act and any other provisions of the law. Such as introducing restraining measure on international transactions denominated in domestic currencies to reduce the effect of the offshore currency market on exchange rates and domestic monetary policy
- 5.** While Kenya has a tax to GDP ratio that is above the average of most African countries, Kenya has been lagging behind its neighbours such as Rwanda as well as its middle-income peers. The National Treasury, the Kenya Revenue Authority and all other relevant agencies involved in the administration of tax incentives need to improve this by curbing harmful tax incentives that reduce the tax base and progressively tax the informal economy.
- 6.** Reporting on non-tax revenue in all its categorisations by various government agencies such as the Kenya Revenue Authority, the County governments, the Controller of Budget and any other relevant government agencies to streamline and harmonise the manner in which they report non-tax revenue in order to properly monitor the performance of non- tax revenue. Further, there is a need for data on non - tax revenue to be disaggregated to its specific heads such as government levies, property income amongst others.
- 7.** Sub-national revenue potential should be considered and improved by streamlining the legal frameworks of county governments on revenue collection, improving county governments capacity in revenue collection, and improving reporting on collection of non-tax revenue at sub-national level.
- 8.** There is also a need to increase inter agency cooperation in the fight against IFFs amongst the various institutions acting independently. This should bring together Revenue authorities, customs, financial crime units and other relevant agencies at both national and international level for a concerted effort in the fight against IFFs.

4.0 TAX COMPETITION AND CORPORATE TAX INCENTIVES



OXFAM

4.1 Governance

In Kenya, tax governance is guided foremost by the Constitution of Kenya 2010 which provides in Article 210 that no tax can be imposed, varied, or waived without the process being carried out through national legislation. For a waiver of tax to be constitutionally sound, it must be accompanied by reason, disclosed to the public and reported to the office of the Auditor General, an office established by the constitution to audit and report on the use of public funds by the government¹⁴⁰.



This strong constitutional basis which should ensure any tax waiver is both transparent and justified it challenged by the large number and variety of tax incentives and the large number of government agencies involved. This increases the complexity of the tax system and thus increases the risk of both legalized tax revenue loss due to unnecessary incentives, the risk of corruption and the risk of tax avoidance and evasion.

Tax incentives as defined by the KRA are provisions in the

law that grant to any person or activity favourable conditions that deviate from the normal provisions of the tax legislation. These incentives take various forms usually involving one or more of the following: Reduction in tax rates, tax exemptions, allowable deductions to reduce tax liability and tax holidays. Incentives and exemptions are granted through the amendment of existing tax statutes through the Finance Acts and on occasion, through Tax Laws (Amendment) Acts. Tax statutes include Income Tax Act, the Value Added Tax Act, 2013,

The Excise Duty Act, 2015, The Miscellaneous Fees and Levies Act, 2016, The Stamp Duty Act, and The East African Community Customs Management Act, 2004.

Like many countries in Africa, Kenya has a comprehensive range of tax incentives incorporated in statutory form, most especially the Income Tax Act and the VAT Act 2013. They range from tax holidays, favourable depreciation rates, special deductions, tax rebates, preferential rates for VAT or remissions from the same, import duty exemption and an additional range of sector-specific benefits.

¹⁴⁰Constitution of Kenya (2010), Article 210



These incentives are provided to induce domestic investment, attract Foreign Direct Investment and promote exports.

Tax incentives are implemented by the Kenya Revenue Authority, but it is not the only government agency concerned with tax incentives. The Kenya Investment Authority, the Export Processing Zones Authority and the Special Economic Zones Authority working closely with the Ministry of Finance as well as the Ministry of Trade and Industry develop tax incentive policy.¹⁴¹ These bodies are empowered by statute to determine the investment criteria requirements that will allow entities to benefit from tax incentives. Further, they are the administrators of these entities registered under their respective regimes, providing licensing and monitoring the economic activities of the entities benefitting from the tax incentives. The plethora of government agencies involved in the design of tax incentives and the criteria for entities which can benefit from tax incentives may reduce the effectiveness of tax incentives.

¹⁴²Too many agencies increase the complexity of assessing firms and may cause an overlap of functions. For instance, while special economic zones were meant to phase out export processing zones in Kenya, they continue to exist side by side meaning that entities can place themselves in a position to take undue advantage of the tax incentives available especially in a state where there is little inter-agency coordination between the relevant bodies¹⁴³.

There are exemptions on various taxes including excise duty, import declaration fees and railway development fees among others, whose policy objective is to promote local manufacturing and industry and in so doing promote employment and reduce poverty and inequality. These include:

- Locally manufactured passenger motor vehicles which is defined as a motor vehicle for the transportation of passengers which is manufactured in Kenya and whose total value comprises at least 30% of parts designed and manufactured in Kenya by an original equipment manufacturer operating in Kenya¹⁴⁴.
- Inputs and raw materials imported by manufacturers of pharmaceutical products,
- Goods imported for use in the construction and maintenance of human vaccine manufacturing plants
- Goods, inputs and raw materials imported by a company which is: Engaged in business under a special operating framework arrangement with the Government Incorporated for purposes of undertaking the manufacture of human vaccines; and whose capital investment is at least KES10b

In Kenya, tax governance is guided foremost by the Constitution of Kenya 2010 which provides in Article 210 that no tax can be imposed, varied, or waived without the process being carried out through national legislation. For a waiver of tax to be constitutionally sound, it must be accompanied by reason, disclosed to the public and reported to the office of the Auditor General, an office established by the constitution to audit and report on the use of public funds by the government.¹⁴⁵

There is no clear policy on minimum economic substance requirements before an entity can enjoy the tax incentives provided under various regimes. Kenya requires that in order to benefit from investment incentives provided under the investment promotion regime, an investor must show intention to invest at least 100,000 USD.¹⁴⁶ Further, in order to benefit from the economic activities within the Special Economic Zone or Export Processing Zones, the investor must show that they are contributing positively

to an economic priority sector outlined by the Ministry of Trade and Industry or the respective authorities.¹⁴⁷ But none of the relevant laws providing these incentives require proof of critical economic substance adherence such as undertaking core economic activities, a certain local employment threshold and a physical presence in Kenya.

Kenya's General anti-tax avoidance rule (GAAR) is found in Section 23 of the Income Tax Act. This rule empowers the Commissioner to collect taxes avoided if he is of the opinion that a certain transaction has been initiated with the very intention of reducing the taxpayer's tax liability. By invoking this rule, the Commissioner is empowered to reverse the effects of a dubious transaction by making appropriate adjustments and collecting the taxes in question. Besides this general provision, the Income Tax Act has several specific tax anti-avoidance provisions (SAARs).

¹⁴¹Wawire H. W. (2020), 'Constraints to Enhanced Revenue Mobilization and Spending Quality in Kenya' (January 2020) CGD Policy Paper 163

¹⁴²IMF (2015), 'Options for Low Income Countries' Effective And Efficient Use Of Tax Incentives For Investment: A Report To The G-20 Development Working Group By The IMF, OECD, UN And World Bank (IMF, 2015)

¹⁴³Laryea, E., Ndonga, D., & Nyamori, B. (2020). Kenya's Experience with Special Economic Zones: Legal and Policy Imperatives. *African Journal of International and Comparative Law*, 28(2), 171-194.

¹⁴⁴Kenya Law (2010), Second Schedule of the Excise Duty Act

¹⁴⁵Constitution of Kenya (2010), Article 210

¹⁴⁶KenInvest (2020), Investor Services: <https://eregulations.invest.go.ke/menu/61?l=en>

¹⁴⁷Kenya Law (2016), Special Economic Zones Regulations 2016 Legal Notice Number No. 147 of 2016; https://www.industrialization.go.ke/images/downloads/SEZA/Kenya_SEZ_Regulations_Legal_Notice_No_147_of_2016.pdf

4. Analysis of Tax Incentives in Kenya

Both fiscal and non-fiscal incentives are available in Kenya. The KRA implements the issuance of the fiscal (tax) incentives in collaboration with other regulators and facilitators such as the Capital Markets Authority, Export Processing Zones Authority among others as provided under the Income Tax Act law. Tax incentives are mainly in the form of capital deductions. These deductions are made at the point of computing the gains or profits of a person or company for any year of income.

A. Special Economic Zones (SEZ)

Capital expenditure on buildings and machinery for use in a Special Economic Zone shall be entitled to Investment deduction equal to one hundred percent of the capital expenditure. Corporate taxation at a rate of:

- 10% for the first 10 years
- 15% for the next 10 years
- Withholding tax rates on payments made to non-residents (royalties, interest, management fees) 5%; Dividends paid to residents and non-residents by the SEZ are exempt from Tax.
- SEZ enterprises are not required to register for VAT. The supply of goods or taxable services to a SEZ is subject to VAT at 0% (zero-rated)¹⁴⁸.

B. Export Processing Zones Incentives

- A 10-year CIT holiday is available to certain designated enterprises that undertake activities consisting of the manufacture of goods for exports only (under the Export Processing Zones) and a 25% tax rate for a further 10 years
- 10-year withholding tax holiday on dividends and other remittances to non-resident parties (except for EPZ commercial license enterprises)
- 100% investment deduction on new investment in EPZ buildings and machinery¹⁴⁹.

C. Incentives for Newly Listed Companies

- Companies listed on the Nairobi Securities Exchange are entitled to reduced rates of income tax for a period depending on the percentage of share capital listed. For newly listed companies, there are preferential corporate tax rates that depend on the percentage of listed shares as:
 - 20% rate if 40% of issued share capital is listed (for a five-year period).
 - 25% rate if 30% of issued share capital is listed (for a five-year period).
 - 27% rate if 20% of issued share capital is listed (for a three-year period)¹⁵⁰. Resident companies are taxable in Kenya on income accrued or derived from Kenya. Resident companies with business activities outside Kenya are also taxed on income derived from business activities outside of Kenya. Non-resident companies are subject to Kenya's CIT only on the trading profits attributable to a Kenyan permanent establishment (PE). The rate of CIT for resident companies, including subsidiary companies of foreign parent companies, is 30%. The CIT rate for branches of foreign companies and PEs is 37.5%¹⁵¹.

D. Capital allowances

- These are tax incentives offered for capital expenditures at different rates. They include wear and tear allowances on machinery and equipment in different classes; industrial building deduction; investment deduction on building and/or machinery; and farm-works deductions; public expenditures of a capital nature (construction of a public school, hospital, road or any similar infrastructure will be an allowable deduction; Telecommunication sector and Computer software allowances¹⁵².

¹⁴⁸Kenya Law(2022),Income Tax Act Chapter 470 of the Laws of Kenya, 1974; Special Economic Zones Act 2015, revised by the Finance Act, 2022

¹⁴⁹Kenya Law(1990),Income Tax Act Chapter 470 of the Laws of Kenya, 1974 ; Export Processing Zone Act Revised 2012 [1990]

¹⁵⁰Kenya Law(1974),Income Tax Act Chapter 470 of the Laws of Kenya, 1974

¹⁵¹OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹⁵²OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

4.3 The Status of Export Processing Zones and Special Economic Zones in Kenya

Special Economic Zones were introduced to take over from the EPZ regime but with a wider purpose than improving exports¹⁵³. They were meant to phase out EPZs but the current situation shows that both entities exist side by side. Three Special Economic Zones were to be established within Mombasa County (Dongo Kundu SEZ)¹⁵⁴ which was to be an industrial hub focused on processing of agricultural products and enhance trade within the East African trade and set to earn Ksh. 400.4 billion for Kenya. ¹⁵⁵This area was to generate one million jobs by the completion of its implementation. ¹⁵⁶Another gazetted zone is Tatu City which is a 5000 hectares mixed development project gazetted as a special economic zone. Unfortunately, despite the establishment of tax incentives under Special Economic Zones, there have been no comprehensive reports in their performance. Further, the existence of certain SEZs have been marred with tax evasion and money laundering allegations¹⁵⁷.

On the other hand, as of 2018, there were 72 gazetted Export Processing Zones in Kenya, employing 57,099 Kenyans, with exports amounting to KES 72,390 and investment amounting to 105,066. The EPZ performance reports indicate a consistent upward growth in investments with a 10.3% growth noted between the years 2017 and 2018¹⁵⁸. However, none of these performance reports evaluate the impact of the incentives granted. They fail to evaluate what is known as a 'credible counterfactual' which is what would be the trajectory of growth in the absence of Export Processing Zones. ¹⁵⁹Further, the question of what factors exactly are

enabling the growth in the volume of exports, whether it is the tax incentives or the existence of the African Growth and Opportunity Act or other factors still arises.

The efficacy of the tax incentives provided under EPZs has been in question in the past years. In fact, the Parliamentary Budget Office noted that in 2018, the government lost KES 537 billion in tax expenditures and this was around 35.7% of the ordinary revenue collected in the financial year 2017/2018.

The Parliamentary Budget Office noted that this necessitated a change in tax policy on the removal of tax incentives which they described as providing no 'concrete benefits.' ¹⁶⁰Further, while export volumes may have increased, other areas of efficacy such as employment growth have underperformed. In fact, EPZs have been challenged for human rights violations and poor labour practices. Women who have been reported to make up a large part of the EPZ workforce have been especially affected by the lack of a living wage, hazardous working conditions, and sexual harassment within EPZs¹⁶¹.

4.4 Comparative CIT Rates in Eastern Africa

Kenya in comparison with its neighboring states within the East African Community has the highest CIT rates for non-residents. For the most part, East African states have harmonised their CIT rates except for Burundi. However, Kenya does offer the some of the lowest rates for entities that qualify for special economic zones as well as the highest investment deductions as shown in the next section.

	Burundi	Kenya	Rwanda	Tanzania	Uganda
Corporate Tax					
Standard Rates (Resident)	30%	30%	30%	30%	30%
Standard Rates (Resident)	35%	37.5	30%	30%	30%

Table 13: Comparative standard CIT rates among East African Community partner states
 Authored from EAC Tax Matrices website * Rates are as they were in the year 2013

¹⁵³Laryea, E., Ndonga, D., & Nyamori, B. (2020). Kenya's Experience with Special Economic Zones: Legal and Policy Imperatives. African Journal of International and Comparative Law, 28(2), 171-194.

¹⁵⁴<https://openjicareport.jica.go.jp/pdf/12245486.pdf>

¹⁵⁵Ministry of Industrialisation Trade and Enterprise Development, 'Kenya Unveils Grand Industrialisation Roadmap' <https://www.industrialization.go.ke/index.php/media-center/blog/286-kenya-unveils-grand-industrialisation-roadmap>

¹⁵⁶Mwenesi, R. (2018) 'Progress on The Establishment of Special Economic Zones in Kenya' (2018) Kenya institute of Planners https://kip.or.ke/wp-content/uploads/2018/10/1_ICPBF_MolTC_Special-Economic-Zones_Robinah-Mwenesi.pdf

¹⁵⁷Kenya Revenue Authority (2018), Tatu City Shackled by KRA Tax Probe (Genghis Capital, October 6 2018) <https://www.genghis-capital.com/newsfeed/tatu-city-shackled-by-kra-tax-probe/>

¹⁵⁸EPZA (2018), Annual Performance Report; <https://epzakenya.com/wp-content/uploads/2020/09/EPZ-Annual-Performance-Report-year-2018.pdf>

¹⁵⁹Jones, S., & Thomsen, L. (2008). An assessment of the impact of Export Processing Zones and an identification of appropriate measures to support their development.

¹⁶⁰Parliamentary Budget Office, (2018) Eye on the 'Big Four': Budget Watch for 2018/19 and the Medium Term (PBO, 2018)

4.4.1 Regional Perspectives on Tax Incentives

Tax incentives often provide prime conditions for harmful regional tax competition. This can be seen in the case of the partner states of the East African Community where as shown in Table 12, the standard corporate income tax rates are fairly harmonised but there is great disparity and clear competition in the taxes provided in special zones and export processing zones, capital deductions and investment allowances¹⁶².

Kenya has the highest investment allowances within the region and broad capital deductions with only Rwanda providing lower tax incentives than Kenya. It is apparent that these tax incentives are creating distortions within the East African Community defeating the purpose of fair competition within the Common Market and causing serious revenue losses to each of these states. Therefore, the end result is that all states are losers in what has been described as the 'race to the bottom'.¹⁶³This calls for the review of tax incentives especially the preferential treatment provided in special zones as well as the capital deductions and investment allowances provided and with a view to preventing harmful tax competition within the region¹⁶⁴.

4.5 Double Tax Agreement

Kenya is signatory to 15 DTAs. Negotiated double tax agreements between Kenya and other states usually have concessionary tax rates on various categories of payments. Kenya's increasing tax treaty network also puts the country at a risk of losing income tax through aggressive tax planning. Four of the treaties are classified as very restrictive, these are France, Qatar, Zambia and South Korea.¹⁶⁵This implies that, treaties with such partners make the Kenyan tax system vulnerable to aggressive tax planning and limit the country's ability to protect taxing rights. Additionally, the treaties signed with Seychelles, South Africa, Netherlands and Mauritius which are ranked as the most aggressive and extensive tax haven jurisdictions that are used by multinational enterprises to avoid paying tax, further expose Kenya in terms of playing a role in the erosion of revenues¹⁶⁶.

This coupled with recent revelations which alleged how betting giant SportPesa avoided payment of taxes through the transfer of USD 53 million¹⁶⁷to the United Kingdom under the guise of the local subsidiary paying the UK subsidiary for "IT and services" used in its Kenyan operations makes the tax system prone to tax abuses¹⁶⁸.

4.6 Transparency

An IMF Report on Fiscal Transparency found that between 2014 to 2019, Kenya has not been publicly publishing any comprehensive tax expenditures. This is in violation of the constitutional requirements and Public Finance Management Act that any waiver of taxes must be followed by a publicly accessible report on the same¹⁶⁹. This is also contrary to best practice which requires that there must be pre ante and post ante reports on tax expenditures¹⁷⁰.

	Burundi	Kenya	Rwanda	Tanzania	Uganda
Corporate Tax in Special Zones	Free Trade Zone- 0% on the first 10 years 15% from the 11th year 10% if entity employs 100 Burundians	Export Processing Zone- Nil for the first 10 years 25% for the next ten years Special Economic Zones- 10% for the first 10 years 15% for the next 10 years	Companies registered in Free Trade Zones pay a CIT rate of 0%	Not Applicable	Not Applicable

¹⁶⁰Parliamentary Budget Office,(2018) Eye on the 'Big Four ':Budget Watch for 2018/19 and the Medium Term (PBO, 2018)

¹⁶¹KHRC and (SOMO),(2008), Assessing the Impact of Kenya's Trade and Investment Policies and Agreements on Human Rights (FIDH, 2008) https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT_CESCR_NGO_KEN_41_9389_E.pdf

¹⁶²Petersen, H. G. (2010). Tax systems and tax harmonisation in the East African Community (EAC): Report for the EAC/GTZ program'Support to the EAC integration process' (No. 60). Finanzwissenschaftliche Diskussionsbeiträge.

¹⁶³OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹⁶⁴Tax competition in the EACL <https://www.nomos-elibrary.de/10.5771/2363-6262-2020-4-601.pdf>



Capital Deductions	<p>Tax Depreciation Buildings at Cost- 5% Heavy machinery, boats, ships, airplanes- Intangible assets-10% Intangible assets including goodwill- 10%</p> <p>Computers and accessories, information and communication systems, software products and data equipment (under a pooling system and on declining balance)- 50%</p> <p>All other business assets- 25%</p>	<p>Industrial Building Allowance: (straight line) Hostels and education buildings – 50% Qualifying rental and commercial buildings- 25% Other qualifying buildings – 10%</p> <p>Plant and machinery (reducing balance) Class 1 37.5% Class 2 30% Class 3 25% Class 4 12.5% Telecommunication equipment (straight line) 20%</p> <p>Computer software (straight line) 20% Capital expenditure under an Equal proportions over the Concession ailing arrangement period of the concession Mining specified minerals Year one 40% Year two to seven 10%</p>	<p>Buildings, plant and equipment (each asset on its own on a straight line basis) 5% Intangible assets including goodwill (each asset on its own on a straight line)-10% Computers and accessories, information and communication systems, software products and data equipment (under a pooling system on straight line basis)-50%</p> <p>All other business assets (under a pooling system on straight line basis) 25%</p>	<p>Buildings (straight line) Used in Agriculture or livestock/ fish farming-20% Other-5%</p> <p>Plant & machinery (reducing balance) Class 1-37.5% Class 2-25% Class 3-12.5%</p> <p>Intangible assets (straight line) Over useful life</p> <p>Agriculture - improvements/ research and development 100%</p> <p>Mining exploration and development 100%</p>	<p>Industrial Buildings Initial allowance- 20% and annual write down allowance of 5%</p> <p>Plant Machinery (Initial allowance of 50% in specific areas and in all other areas- 75%)</p> <p>Annual allowance on the reducing balance is as follows: Year 1- 20% Year 2-30% Year 3-35% Year 4-40% Commercial Buildings get an allowance of 5% on a straight line basis</p>
Investment allowances	Not available in Burundi	<p>Qualifying investment exceeding Kshs 200 million (outside Nairobi, or the Municipalities of Mombasa or Kisumu)- 150% Other qualifying investments- 100%</p>	<p>If registered business is located in Kigali- 40%</p> <p>If business is located outside Kigali and is a business falling within the priority sectors- 50%</p>	Not available	Not available

*Table 14: Comparative rates in special zones, capital deductions and investment allowances in East Africa
 Authored from EAC Tax Matrices website and PWC (2013) * The rates presented above are as they were in the year 2013*

¹⁶⁵Tax Justice Network Africa(2018), Trick or Treat(y)? Kenya’s Tax Treaties Giveaways to Tax Havens (TJNA, 2018)


¹⁶⁶OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹⁶⁷<https://www.financeuncovered.org/stories/how-african-betting-giant-sportpesa-slashed-tax-bills-by-shifting-profits-from-kenya-to-the-uk>

¹⁶⁸Lionel,F.S Wafula,P.(2018), ‘How African Betting Giant Sportpesa Slashed Tax Bills By ‘Shifting’ Profits From Kenya To The UK’ (Africa Uncensored, September 8, 2020)

¹⁶⁹Allen,R., Tang,V., Imran ,A., Maate,R. & Seeds,P.[2020],,Kenya Fiscal Transparency Evaluation Update (IMF, 2020) <https://www.imf.org/en/Publications/CR/Issues/2020/01/13/Kenya-Fiscal-Transparency-Evaluation-Update-48941>

¹⁷⁰OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>



While the legal framework of providing tax incentives has been clearly laid out in various statutes, the process of acquiring licenses to benefit from these incentives especially in special zones has been marred with political interference from political aspirants in the licensing process.¹⁷¹ Additionally, under section 13 of the Income Tax Act the Cabinet Secretary for Finance has been given wide powers to exempt income from taxation with very little public participation requirements other than tabling such exemptions before Parliament¹⁷².

Further, despite the clear constitutional requirement that Double Taxation Agreements must be passed through public participation processes before being signed, the Kenyan government has failed to abide by due procedure. The Kenyan constitution provides for the following steps of treaty ratification. First, the treaty must be approved by cabinet, then submitted to the parliament for approval. During the parliamentary process, the relevant parliamentary committee is to

ensure public participation is undertaken. Civil society in Kenya took action against the government for failure to abide by this process through a public interest litigation case in the Constitutional Courts challenging the validity of the Kenya – Mauritius Double Taxation Agreement for failing to abide by the principle of public participation amongst other grounds.

¹⁷³The Tax Justice Network Africa in Kenya has gone back to court seeking further remedies on 10 Double Taxation Agreements including Iran; Kuwait; Seychelles; South Africa; Qatar; Korea; the United Arab Emirates (UAE); India; the Netherlands and Mauritius.¹⁷⁴This strategic litigation has led to substantive change in law through the Finance Act 2021 such as the official consideration of DTAs as treaties rather than subsidiary legislation that can easily be enacted by the Cabinet Secretary for Finance (Minister of Finance). This means that there is now expected to be a higher level of transparency and standards of public participation whenever the government wishes to sign a DTA.

4.7 Effectiveness of tax Incentives

The introduction of tax incentives in Kenya was broadly aimed at promoting investment, Foreign Direct Investment and employment creation. Moreover, the 2019 World Economic Forum Global Competitiveness Report ranked Kenya number 95 out of 141 investment destinations.¹⁷⁵The principal challenges that undermined Kenya's ranking were organised crime and corruption, infrastructure especially access to and quality of electricity and water, macro-economic management with debt levels a prominent determinant, health and skills of the workforce, high tariffs, financial markets, undermined by a non-performing loans portfolio and business dynamism.¹⁷⁶In all these, Kenya ranked among the poorest 30% worldwide.¹⁷⁷Sadly, the Kenyan government is giving away tax revenue on the false premise that it if needed to attract investors. The best the Kenyan government can do to create "incentives" and a good climate for businesses is to make a good society in general by improving infrastructure, labour markets, worker skills, security, reducing corruption and reducing fiscal mismanagement.

During the 6th Annual Tax Summit in 2020, the Cabinet Secretary of Finance remarked that in the year 2018, tax expenditures amounted to 6% of the GDP at KES 535.9 billion. VAT accounted for the greatest share of tax expenditures at 69.2% followed by corporate income tax at 15.7%.¹⁷⁹Further, a World Bank study showed that corporate tax exemptions which were concentrated in specific sectors of the economy such as Finance, Health, Manufacturing and ICT cost Kenya 1.8% of its GDP in income while VAT incentives cost

3.1 % of GDP in lost revenue in the financial year 2014/2015.¹⁸⁰An IMF report estimated revenue foregone due to tax expenditures at KES 478 Billion (4.27Bn) in 2017, approximately 5.3% of the country's GDP in that period.¹⁸¹It went further to quote the lack of a formal methodology for estimating tax expenditures as one of the key challenges hampering fiscal transparency. Another report by members of the Financial Transparency Coalition¹⁸²specifically identifies tax incentives granted to operators in Special Economic Zones

(SEZs) as harmful citing abuse of the process of determining beneficiaries and the poor performance of SEZs. Tax incentives seem critical only in a limited number of areas, e.g. exports. An IFC study found that 49-51% of exporters indicating they would not have invested in the absence of these incentives¹⁸³. Secondly, tax incentives, despite their lower priority ranking, are reliable. Tax incentives in Kenya are incorporated in various statutes and thus the investor has a degree of certainty they will benefit from them. Evidence shows that generally tax

¹⁷¹Wawire, N. (2020). Constraints to enhanced revenue mobilization and spending quality in Kenya. Policy Paper.

¹⁷²Kenya Law [1974], Income Tax Act, [Chapter 470 of the Laws of Kenya] 1974

¹⁷³Tax Justice Network- Africa v Cabinet Secretary for National Treasury & 2 others [2019] eKLR <http://kenyalaw.org/caselaw/cases/view/169664>

¹⁷⁴TJNA(2020), 'Civil Society Takes Government Back to Court over Kenyan Double Taxation Agreements' (Press Release, 24th September 2020) <https://taxjusticeafrica.net/wp-content/uploads/2020/09/CS0-go-back-to-court-over-Kenyan-DTAs.pdf>

¹⁷⁵World Economic Forum(2019), The Global Competitiveness Report 2019 (WEF, 2019) http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf

¹⁷⁶OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf> *ibid*

¹⁷⁷*ibid*



incentives are not among the priority drivers of investment decisions. According to the International Financial Corporation (IFC) investor motivation survey, tax incentives ranked number 11 in order of priority in terms of factors determining whether to invest in Kenya.¹⁸⁴The first five were access to finance, access to land, labour costs, affordable skilled labour and proximity to the port. Further, 60% of investors indicated they would have invested with or without the available tax incentives hence indicating that the use of tax incentives may be redundant.¹⁸⁵Evidence also shows that tax incentives are not very effective as the main policy instrument to attract investment¹⁸⁶.

The government must invest in improving other complimentary factors that facilitate investment such as infrastructure, labour markets, worker's skills, security, reducing corruption and fiscal management make commitments in these areas less easy to guarantee.

The Nairobi International Financial Centre (NIFC) Act, was enacted in July 2017 to facilitate the establishment of the Nairobi International Financial Centre, the Nairobi International Financial Centre Authority, and for connected purposes.¹⁸⁷The Draft Regulations were published in July, 2021 for public consultation. Civil society submissions on the NIFC included concerns around the potential for roundtripping, transfer pricing, a watering down of beneficial ownership requirements, and the lack of sufficient checks and balances¹⁸⁸.

4.8 Impact of COVID-19

Since the onset of the COVID-19 pandemic in Kenya, there has been a major shift in policy towards tax incentives. In a bid to increase resources available for the pandemic response, several incentives have been done away with for instance the Tax Amendment Act 2020 did away with several tax holidays such as special rates for newly listed companies as well as special rates for companies operating recycling plants. To maintain the cushion for the low-income earners and for Micro, Small and Medium Enterprises (MSMEs), the Authorities did not reverse the personal relief on income tax and the lower turnover tax (1%) for small businesses introduced in April 2020.

Many households and businesses continue to benefit from the temporary debt relief agreements reached with their banks, and borrowers accounting for a total of 54.2% of loans had entered such rescheduling agreements by the end of 2020. Overall, the authorities' decision to pause fiscal adjustment this year will allow accommodating health, social, and development spending to support the recovery, complemented by accommodative monetary policy.¹⁸⁹Parastatals have had various tax exemptions removed including exemptions from paying income tax on dividends. Significantly, the capital deductions regime was largely changed with major reductions being made as shown in the table below¹⁹⁰.

¹⁷⁸National Treasury(2021), Tax expenditure revenues, https://www.treasury.go.ke/wp-content/uploads/2022/02/15.11.2021_Tax-Expenditure-Report.pdf

¹⁷⁹OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹⁸⁰World Bank(2017), 'Poised to Bounce Back? Reviving Private Sector Credit Growth and Boosting Revenue Mobilization to Support Fiscal Consolidation' (December 2017) 16 Kenya Economic Update

¹⁸¹Allen,R., Tang,V., Imran ,A., Maate,R. & Seeds,P.(2020),,,Kenya Fiscal Transparency Evaluation Update (IMF, 2020) <https://www.imf.org/en/Publications/CR/Issues/2020/01/13/Kenya-Fiscal-Transparency-Evaluation-Update-48941>Kenya Fiscal Transparency Evaluation Update (IMF, 2020) <https://www.imf.org/en/Publications/CR/Issues/2020/01/13/Kenya-Fiscal-Transparency-Evaluation-Update-48941>

¹⁸²Financial Transparency Coalition(2020), Use and abuse of Tax Breaks :How Tax Incentives Become Harmful (FTC, January 2020) <https://www.christianaid.org.uk/sites/default/files/202001/Use%20and%20Abuse%20of%20Tax%20Breaks.pdf>

¹⁸³OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹⁸⁴World Bank(2016), Investment Motivation Survey Summary Report (IMF, May 2016)

¹⁸⁵OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹⁸⁶Alexander,K.& Stefan,P.(2009), Empirical Evidence on the Effects of Tax Incentives <https://www.imf.org/external/pubs/ft/wp/2009/wp09136.pdf>

¹⁸⁷Kenya Law (2019), Nairobi International Financial centre <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2025%20of%202017>

¹⁸⁸OECD (2019), A Beneficial Ownership Implementation Toolkit <https://www.oecd.org/tax/transparency/beneficial-ownership-toolkit.pdf>

¹⁸⁹IMF (2021), IMF and Kenyan Authorities Reach Staff-Level Agreement on a Three-Year, US\$2.4 Billion Financing Package <https://www.imf.org/en/News/Articles/2021/02/15/pr2140-imf-and-kenyan-authorities-reach-staff-level-agreement>

¹⁹⁰Deloitte(2020), 'Tax Laws Amendment Act 2020' (April 2020) Kenya Tax Alert



Building/Machinery and Others	Repealed rate	New rate
Hotel buildings	100% or 150% in the first year of use	50% in the first year of use; and 25% p.a. on reducing balance thereafter
Buildings used for manufacture	100% or 150% in the first year of use	50% in the first year of use; and 25% p.a. on reducing balance thereafter
Educational building including students hostels	50% p.a. on straight-line	10% per annum on a reducing balance basis
Commercial buildings	25% p.a. on straight-line	10% p.a. on reducing balance
Machinery used for manufacture	100% or 150% in the first year of use	10% p.a. on reducing balance
Aircrafts	30% p.a. on reducing balance	50% in the first year of use; and 25% p.a. on reducing balance thereafter
Ships	Ships of more than 125tonnes -100% in the first year of use Ships of less than 125tonnes -12.5% p.a. on reducing balance;	50% in the first year of use; and 25% p.a. on reducing balance thereafter
Heavy earth-moving equipment	•37.5% p.a. on reducing balance	•25% p.a. on reducing balance
Other motor vehicles	•25% p.a. on reducing balance (Qualifying cost of non-commercial vehicle restricted to KES 2m)	25% p.a. on reducing balance
Computer and peripheral computer hardware, software, calculators, copiers and duplicating machines	30% p.a. on reducing balance and 25% for software	25% p.a. on reducing balance

*Table 15: Changes made to tax incentives due to the COVID-19 pandemic
Sourced from Deloitte 2020*

4.9 RECOMMENDATIONS

- 1.** The Kenyan tax incentives regime comes at a high cost and with highly debatable benefits. Thus the government should review and publish the cost-benefit rationale for all its tax incentives and only maintain those who are clearly justified and approved through a national legislative process. Essentially, tax incentives should only be provided if the additional taxes expected over the medium term compensate for taxes foregone in the immediate term, or if measurable externalities can be identified with equivalent effect.
- 2.** It is unacceptable that the Kenyan government has failed to publish any comprehensive tax expenditures 2014 to 2019. All relevant government agencies such as the Ministry of Finance and the Kenya Revenue Authority should publish publicly accessible tax expenditure reports on a regular basis in compliance with the Kenya Constitution and Public Finance Management Act.
- 3.** The Kenyan government should open negotiations within the East African Union to negotiate a harmonization of tax incentives across the Union which stops tax competition and race-to-the-bottom on tax incentives.
- 4.** Transparency practices, such as public country-by-country reporting (CBCR) and transparency around tax incentives, should be a requirement for multinational corporations and large companies so that they can be held publicly accountable. It is important to emphasise transparency in the process of awarding the incentives, clarity and simplicity of legal texts and procedures to obtain these incentives, and the expiry of such incentives over time in order to ensure their effectiveness.
- 5.** The KRA and other relevant agencies need to integrate tax transparency into their corporate plan and allocate adequate resources towards this and other transparency measures.
- 6.** Increased coordination between administrators of special zones, export processing zones, the Kenya Investment Authority and the Kenya Revenue Authority in the design of investment criteria and economic substance requirements as well as in the administration of registered entities will help to prevent unworthy entities from benefitting from tax incentives as well as reduce the risk of tax evasion through abusive use of tax incentives.
- 7.** Similarly, the policy framework should focus on tackling factors that undermine the Kenyan investment climate directly rather than trying to compensate for them through tax reliefs. The revenues mobilised through reduced incentives can be used on e.g. the infrastructure, human resource and security shortcomings that undermine the country's competitiveness.



5.0 EFFECTIVENESS OF TAX ADMINISTRATION



OXFAM

5.1 Organisation

The effectiveness of tax administration in Kenya is determined by several factors affecting optimal operations of KRA, including its, enabling policy and legislations, governance and structure, financial and human resources, revenue performance and tax leakages. The taxpayers' perception and attitudes of the tax administration also affect the effectiveness of the tax administration¹⁹¹.

The Kenya Revenue Authority was established by the Kenya Revenue Act (Chapter 469 of the Laws of Kenya). The Act charges the Kenya Revenue Authority with the responsibility of collecting revenue on behalf of the Government of Kenya in perpetuity.¹⁹²An independent Board of Directors is the governing body. The board is responsible for the review and approval of policies and monitoring of the functions of KRA. The board is comprised of 7 directors and the chairperson. The board is thus comprised of five male and three female members consisting of both public and private sector experts¹⁹³.

Kenya adopted the semi-autonomous revenue agency in its design of the KRA.¹⁹⁴This means that to a great extent it operates independently of the Ministry of Finance. This is observed in areas such as personnel management, corporate governance and financing of its activities. For instance, KRA is legally empowered to keep up to 2% of the revenue it collects (with approval from the Cabinet Secretary of Finance).¹⁹⁵Further, KRA is allowed to keep 3% of the difference between the revenue estimates and the actual revenue collections in the event that it

exceeds performance beyond the estimates.¹⁹⁶As observed by a World Bank study this not only gives KRA financing freedom especially in an inefficient budgetary allocation system, but it also incentivises the revenue authority to enhance its performance.¹⁹⁷Further, the Kenya Revenue Authority is a State Corporation, but it has been exempted from some of the requirements of the State Corporations Act and public service obligations in order to function more effectively. For instance, KRA employees can be paid above civil service terms¹⁹⁸.

The day to day management of the Authority is the responsibility of the Commissioner General, assisted by Revenue and Support Commissioners and other departmental heads.¹⁹⁹The secretariat is headed by the Commissioner General who is assisted by nine other commissioners. These commissioners head the following departments: the Domestic Taxes Department, Customs and Border Control, Strategy Innovation and Risk Management, Intelligence and Strategic Operations, Investigations and Enforcement, Regional Coordination and Corporate Support Services and two support

departments (Legal Services and Board Coordination and the Kenya School of Revenue Administration (KESRA)).²⁰⁰The high level leadership team of the KRA including the Commissioner General is comprised of eight male and two female commissioners.²⁰¹The operations of the Kenya Revenue Authority are governed primarily by legislation including the Finance Act, VAT Act, Income Tax Act, Excise Duty Act, the Business Law Act and all other written laws prescribed under the Kenya Revenue Authority Act. Tax administration is predominantly under the Domestic Taxes Department as well as the Customs and Border Control department.

²⁰²The former collects VAT, income taxes and excise taxes operating under the relevant laws while the latter collects custom revenue. The department has staff stationed across the country including private tax and custom agents. Within the Domestic Taxes Department, there is established a Large Taxpayers Office (LTO). This was established in 1995 to provide services to taxpayers who meet the threshold of an annual turnover of KES 750 million.²⁰³A Transfer Pricing Unit consisting of 15 officers is established within the LTO.²⁰⁴This unit carries out Transfer Pricing

¹⁹¹Gerger, G. Ç., Gerçek, A., Taşkın, Ç., Bakar, F., & Güzel, S. (2014). Determining the factors that affect taxpayers' perspective on tax administration: Research in Turkey. *International Journal of Economics and Finance Studies*, 6(1), 1309-8055.

¹⁹²Kenya Law [1995], KRA Act 1995: file:///C:/Users/Rogders%20Kidiya/Downloads/No.%202%20of%201995.pdf

¹⁹³Kenya Revenue Authority (2018), Seventh Corporate Plan Revenue Mobilization Through Transformation 2018/2019- 2020/2021 [Government of Kenya, 2018]

¹⁹⁴Kenya Revenue Authority [2018], Seventh Corporate Plan Revenue Mobilization Through Transformation 2018/2019- 2020/2021 [Government of Kenya, 2018]

¹⁹⁵Kenya Law [1995], Kenya Revenue Act [Chapter 469 of the Laws of Kenya] 1995

¹⁹⁶OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

¹⁹⁷Taliercio R. (2004), 'Designing Performance: The Semi-Autonomous Revenue Authority Model in Africa And Latin America' (October 2004) 3423 World Bank Policy Research Working Paper

¹⁹⁸Moyi, E., & Ronge, E. (2006). Taxation and tax modernisation in Kenya: A diagnosis of performance and options for further reform.

¹⁹⁹Kenya Revenue Authority (2022), 'Our Governance' <https://www.kra.go.ke/en/about-kra/leadership>

audits on taxpayers to ensure compliance with the transfer pricing laws in the Income Tax Act and Transfer Pricing Guidelines.

The Constitution of Kenya 2010 established a two-tier system of government comprising the national and 47 county governments. This is reflected in the tax system. According to the Constitution, the national government retains the powers to impose taxes (both direct and indirect). The county governments' powers to impose tax is confined to

property taxes, entertainment taxes and other taxes that are feasible within their jurisdiction.²⁰⁵KRA has no jurisdiction on county-imposed taxes. County governments have authority to administer and collect the taxes that they impose.

²⁰⁶However, there are initiatives in place for more collaboration between county governments and KRA. These include the signing of Memoranda of Understanding between the two entities so that KRA can collect some county fees on an agency business as well as streamlining the process

of property taxation across all counties.²⁰⁷Further, there have been several initiatives especially in the collection of presumptive tax between the two entities including connecting and automating the information systems on the business licensing so as to track down tax evaders. In its 7th Corporate Plan, KRA plans to pursue an arrangement with the Nairobi County to collect fees from Single Business Permits on an agency basis²⁰⁸.

5.2 Resources for Tax Administration

5.2.1 Financial Resources

The Kenya Revenue Authority gets financial resources from various sources including through agency income which is the amount KRA is allowed to retain from the revenue estimates projected for a particular financial year. The amount is to be determined by the Cabinet Secretary for Finance but it should not exceed 2% of the total estimates.²⁰⁹Further, if KRA exceeds in the collection of revenue beyond the revenue estimates, KRA is entitled to 3% of the difference of the excess. As shown in the table below, agency income is one of the most significant sources of income of the KRA. This is closely followed by commission income which is derived from the commission paid to KRA for collecting fees on an agency basis on behalf of other government agencies²¹⁰.

KES '000	FY 2015-2016	FY 2016-2017	FY 2017-2018
Agency Income	15,358,009	15,458,009	17,651,754
Commissions Income	1,999,599	1,785,534	1,847,003
Interest Income	834,982	564, 529	348,804
Deferred income from amortisation	136,611	196,663	324,635
Other income	314,901	564,529	558,682
Total (KSH)	17,844,102	18,589,882	20,730,878
Total (USD)			

Table 16: KRA income from the FYs 2015/16- 2017/18

Source: OAG Reports FY 2015/16 - 2017/18

²⁰⁰OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁰¹Ibid

²⁰²Kenya Revenue Authority 9(2020), Departmental Committee on Finance and National Planning, Report on the Inspection Visits to the Kenya Revenue Authority Offices to Ascertain the Impact of Revenue Enhancement Activities on Revenue Collection (Government of Kenya, 2020)

²⁰³PricewaterhouseCoopers,[2018] 'Transfer Pricing and Developing Countries - Kenya' https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/trpr_dev_count_app_d.pdf (Commissioned by the European Commission)

²⁰⁴European Union (2018)Transfer Pricing Associates Global, 'Transfer Pricing Country Summary Kenya' (May 2018) <https://www.tpa-global.com/wp-content/uploads/2020/05/180613-kenya-transfer-pricing-country-summary-report-2018.pdf>; <https://www.pwc.com/gx/en/international-transfer-pricing/assets/kenya.pdf>

²⁰⁵Constitution of Kenya (2010), Article 209 (3)

²⁰⁶OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁰⁷Kenya Revenue Authority (2018), Seventh Corporate Plan Revenue Mobilization Through Transformation 2018/2019- 2020/2021 (Government of Kenya, 2018)

²⁰⁸OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁰⁹Kenya Law (1995),Kenya Revenue Act (Chapter 469of the Laws of Kenya) 1995

²¹⁰Auditor General(2016;2017;2018;2019), Report of the Auditor General on the Financial Statements of Revenue Accountability Statement of Kenya Revenue Authority of the Year ended June 2016 (Government of Kenya, 2017); Report of the Auditor General on the Financial Statements of Revenue Accountability Statement of Kenya Revenue Authority of the Year ended June 2017(Government of Kenya, 2018); Report of the Auditor General on the Financial Statements of Revenue Accountability Statement of Kenya Revenue Authority of the Year ended June 2018 (Government of Kenya, 2019)

KRA also receives capital grants and development funding specifically for tax modernisation efforts and revenue enhancement initiatives.²¹¹In the FY 2015-2016, KRA received a development budget of KES 1,254,930,000 for projects such as the iTax rollout and coordinated border

control.²¹²In the FY 2016-2017 the National Treasury provided capital grants and development funding amounting to KES 18, 249,137, 000. In the FY 2017-2018, the National Treasury provided capital grants amounting to KES 17,309,410,000.²¹³This was a period during which the 6th KRA Corporate Plan and KRA Vision 2018 were majoring

on the implementation of tax modernisation hence development funding was particularly high during this period. It should be noted however that the revenue enhancement initiatives and tax modernisation initiatives are funded separately from other capital expenditure by the National Treasury²¹⁴.

5.2.2 Human Resources

Competent and adequate human resources are at the heart of an effective tax administration, and the situation is very critical in Kenya. The OECD recommended number of staff for the KRA is 14,555²¹⁵. As of 2018, there were only 6,906 staff²¹⁶. Of note however, is the distribution of the limited staff. 30.9% of KRA staff are currently allocated to taxpayer/costumer on support functions. 8% more than the numbers proposed by the OECD. At only 1.4%, dispute resolution has the lowest staffing ratios and is meagre compared to the minimum baseline of 4% recommended by the OECD.

As per the figures provided by KRA, only support services were adequately staffed. The rest were severely understaffed with dispute resolution and taxpayer services having the widest margin to the required threshold followed by the debt enforcement. The Parliamentary Committee on Finance and National Planning noted in their Report on an Inspection Visit to the KRA that understaffing especially in regional locations was significantly contributing to revenue underperformance

as well as frustrating the success of the revenue enhancement initiatives launched.²¹⁷The Report noted that there were especially only 4500 permanent staff at One Stop Border Posts (OSBPs) at Namanga, Busia and Malaba which were key East African trade passages.²¹⁸The Committee believed that with the introduction of 24-hour services at OSBPs, this would greatly improve revenue performance, however, this would be strained by strained human resources.

Function	OECD %	Ratios %	KRA Current Ratios %	KRA Proposed Ratios %
Registration Services	14		59.3	67
Processing	17	63		
Audit	32			
Debt Enforcement	10		8.4	9.7
Dispute	4		1.4	1.4
Support	23		30.9	21.9

*Table 17: KRA tax administration staff distribution
Sourced from KRA 7th Corporate Plan*

²¹¹Auditor General(2016,2017,2018,2019), Report of the Auditor General on the Financial Statements of Revenue Accountability Statement of Kenya Revenue Authority of the Year ended June 2016 (Government of Kenya, 2017);

²¹²Auditor General, Report of the Auditor General on the Financial Statements of Revenue Accountability Statement of Kenya Revenue Authority of the Year ended June 2017 (Government of Kenya, 2018)

²¹³Auditor General(2019), Report of the Auditor General on the Financial Statements of Revenue Accountability Statement of Kenya Revenue Authority of the Year ended June 2018 (Government of Kenya, 2019)

²¹⁴ibid

²¹⁵Kenya Revenue Authority (2018),KRA, Seventh Corporate Plan Revenue Mobilization Through Transformation 2018/2019- 2020/2021 (Government of Kenya, 2018)

²¹⁶OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²¹⁷Government of Kenya (2020),Departmental Committee on Finance and National Planning, Report on the Inspection Visits to the Kenya Revenue Authority Offices to Ascertain the Impact of Revenue Enhancement Activities on Revenue Collection (Government of Kenya, 2020)

²¹⁸OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

5.2.3 Tax Modernisation

Kenya has initiated a myriad of tax modernisation and digitalisation initiatives. While it is important to equip tax inspectors with the best tools to do their job, one may question whether the resources spent on some of the many IT-systems could have been better used if there had been invested in educating existing and hiring more staff to the KRA. Among the many IT systems introduced in Kenya are iTax, the Integrated Customs Management System (iCMS), the Tax Invoice Management System (TIMS), iSupport and iCare and the Regional Electronic Cargo Tracking System (RECTS) amongst others²¹⁹.

The implementation of the iTax system was met with several concerns such as the mandatory use of the electronic system in 2016 with the threat that if taxpayers failed to comply, their PINs would be deactivated. This was a major concern especially in non-urban areas where ICT systems and even electricity might not be readily available²²².

5.3 Revenue Shortfalls

KRA has consistently failed to meet revenue targets set out in Kenya's budgetary documents from the FY 2016/2017 to FY 2018/2019.²²³ This is especially so in the collection of income tax, VAT, excise tax and customs (exchequer revenue). However, as shown in the Table 17, KRA seemed to meet and supersede agency revenue collection targets in the financial years 2017/2018 and 2018/2019 which consists of revenue collected by the KRA on behalf of other government agencies.

The worrying trend of KRA consistently failing to meet its targets has been attributed to the prevailing tax policy as well as the setting of unrealistic targets by the government.²²⁴ Apart from the identification of these external reasons, KRA underwent the Tax Administration Diagnostic Tool Assessment (TADAT) process in 2016. Having identified that the compliance gap for key tax heads as shown in the table below, KRA estimated that approximately 30% of the taxes due in Kenya are not collected which roughly translates into 6.6 % of GDP,²²⁵ KRA has since taken measures to promote voluntary compliance based on customer management solutions as well as data driven compliance initiatives.²²⁶ Other areas of improvement identified included the need for a more accessible dispute resolution process, improving the

KES	FY 2016/2017			FY 2017/2018			FY 2018/2019		
	Target	Actual	Performance rate	Target	Actual	Performance rate	Target	Actual	Performance Rate
Exchequer Revenue	1.337 trillion	1.273 trillion	95.2%	1.553 trillion	1.469 trillion	95.1%	1.47 trillion	1.36 trillion	92.2%
Agency Revenue	94.27 billion	92.2 billion	97.8%	87.96 billion	95.09 billion	106%	89.7 billion	103.1 billion	114.9%
Total Revenue	1.431 trillion	1.365 trillion	95.4%	1.541 trillion	1.435 trillion	93.1%	1.643 trillion	1.571 trillion	95.1%

Table 18: Comparison of revenue performance targets with actual revenue performance between FY 2016/17 -2018/19
 Authored from Auditor General KRA Revenue Accountability Statements

²¹⁹Kenya revenue Authority(2018),KRA, Seventh Corporate Plan Revenue Mobilization Through Transformation 2018/2019- 2020/2021 (Government of Kenya, 2018); Auditor General, Report of the Auditor General on the Financial Statements of Revenue Accountability Statement of Kenya Revenue Authority of the Year ended June 2017 (Government of Kenya, 2018)

²²²Naima, E(2019), 'The Colonial Aftermath in Digitalizing Tax' (2019) 1Journal on Financing for Development http://erepository.uonbi.ac.ke/bitstream/handle/11295/109651/Elmi_The%20colonial%20aftermath%20in%20digitalizing%20tax.pdf?sequence=1&isAllowed=y

²²³Auditor General,(2019), Report of the Auditor General on the Financial Statements of Revenue Accountability Statement of Kenya Revenue Authority of the Year ended June 2016 (Government of Kenya, 2017); Report of the Auditor General on the Financial Statements of Revenue Accountability Statement of Kenya Revenue Authority of the Year ended June 2017(Government of Kenya, 2018); Report of the Auditor General on the Financial Statements of Revenue Accountability Statement of Kenya Revenue Authority of the Year ended June 2018 (Government of Kenya, 2019)

²²⁴World Bank Group(2019),Kenya Public Expenditure Analysis 2019 Creating Fiscal Space to Deliver the Big 4 while Undertaking a needed Fiscal Consolidation June 2019

²²⁵Kenya revenue Authority(2018),KRA, Seventh Corporate Plan Revenue Mobilization Through Transformation 2018/2019- 2020/2021 (Government of Kenya, 2018)

²²⁶USAID(2018), TADAT Impact Survey: Leadership in Public Finance Management II (USAID, 2018)

integrity and accuracy of the taxpayer registry, increasing its accountability and transparency and enhancing the revenue management process of KRA amongst others²²⁷. Other internal challenges affecting tax administration include challenges in the application of IT in tax administration. A World Bank study showed that these challenges are mirrored at sub-national level.²²⁸ Many county governments were using manual revenue collection with its inherent risks of abuse and rent seeking. Adoption by counties of ICT systems was below par.²²⁹ County governments also lack principal legal frameworks to support revenue collection and management and instead use outdated policies inherited from the previous regime of

Local Authorities.²³⁰ In addition to this, county government revenue administrators lack basic skills for the function, a key factor behind poor enforcement strategy. Property tax revenue that could help counties raise urgently needed revenue in a progressive way are lost due to the failure to update property valuation rolls in some cases for over 30 years.²³¹ Vertical inter-government coordination between the national and county governments is needed to make revamp revenue collection in this area as well as cooperation with the Lands Registry.²³² Five Kenyan counties are currently undergoing the Tax Administration Diagnostic Tool Assessment (TADAT) process to identify further areas of performance weaknesses²³³.

Type of Tax	Compliance Gap (in %)		
	2015/2016	2016/17	2017/18
Corporation Income Tax	17.6	Na	
Personal Income Tax	Na		34.3
Import Duty	Na	Na	35.6
Excise Duty	Na	Na	15.2
Value Added Tax	Na	Na	45

Table 19: Tax compliance gap in %

Source: KRA Seventh Corporate Plan 2018/19-2020/2021

5.4 Public Perception of the Tax Administration

KRA conducts regular customer satisfaction surveys, and its latest report published refers to the FY 2019/2020, based on the findings, the customer satisfaction in 2019/2020 stood at 68.4% which was 3.5% drop from the 2017/18 which stood at 71.9%²³⁴ against a target of 80%.²³⁵ The Report has, however, registered an improvement compared to 2014, where the index was 65%. The gain was realised from a shift in satisfaction²³⁶ on adherence to core values, customer perception on staff, support given by staff to taxpayers, and complaint handling.²³⁷ However, there was a decline in customers' satisfaction with regards to the level of integrity and fairness exhibited by the staff. The survey does not necessarily measure the degree of fairness of the tax system but rather how clients perceive service delivered²³⁸.

However, a 2021 survey showed that while Kenyans generally believe that the government has a right to tax them, there is a rising concern about the lack of fairness of the taxation system with 66% of them being of this sentiment especially due to the economic pressures that were experienced as a result of the COVID-19 pandemic.²³⁹ Another Afrobarometer study showed that only 43% of Kenyans trust the KRA²⁴⁰.

5.5 Conventions

Kenya is party to the OECD Convention on Mutual Administrative Assistance in Tax Matters. Kenya is also a member of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) Action Plan. As mentioned in Chapter 3, Kenya will implement Country by Country reporting effective July 2022²⁴¹.

²²⁷OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²²⁸Adam Smith International, Final Report(2019): Own-Source Revenue Potential and Tax Gap Study of Kenya's County Governments (Adam Smith International, 2019)

²²⁹OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf> *ibid*

²³⁰*ibid*

²³¹*ibid*

²³²Kenya revenue Authority(2018),KRA, Seventh Corporate Plan Revenue Mobilization Through Transformation 2018/2019- 2020/2021 (Government of Kenya, 2018)

²³³UNCDF (2021), Launch Of Phase 2 Tadat Training And Assessment In Five Kenyan Counties <https://www.uncdf.org/article/6537/launch-of-the-2nd-phase-of-tadat-assessments-in-kenya>

Kenya also signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) subjecting 14 of its Double Taxation Agreements to the coverage of the MLI²⁴².

5.6 Oversight

The KRA is under oversight by several bodies, key among them is the Office of the Auditor General who not only prepares Revenue Accountability Statement Reports regarding the KRA but also audits KRA as a State Corporation on an annual basis within six months of the end of every financial year²⁴³. Additionally, the Parliament and specifically the Parliamentary Committee of Finance and National Planning as well as other committees such as the Public Accounts Committee have powers to investigate and interrogate KRA on its implementation of its mandate.

²⁴⁴The Ethics and Anti-Corruption Commission is also empowered to undertake investigations on KRA officials as public servants on suspicion of violation of integrity standards and abuse of public office.²⁴⁵KRA also has an internal audit department with the intention of also carrying out corruption style audits which been implemented through the establishment of the relevant policies²⁴⁶.

RECOMMENDATIONS

1. It is disastrous to the welfare of Kenyans that KRA has less than half of the recommended number of staff. The Kenyan government needs to substantially increase resources for KRA and tax collection. The KRA needs to drastically increase staff recruitment and retainment.
2. The KRA should train both County and National officials on appropriate methods of tax collection. KRA should strengthen their capacity to follow up cases of non-payment through fair and reasonable enforcement.
3. The Government and Civil Society Organisations should increase the sensitisation of taxpayers of the need to pay taxes and demand better public services.
4. KRA should work with county governments and use memoranda of understanding to improve their shared ways of working and make taxpayer registration and collection easier. Taxpayer databases should be used to share information.

²³⁴Kenya Revenue Authority (2020), Customer satisfaction survey <https://www.kra.go.ke/images/publications/Customer-Satisfaction-Survey-TADAT.pdf>

²³⁵Kenya Revenue Authority (2019), Annual Revenue Performance Report FY 2019/2020 <https://www.kra.go.ke/images/publications/KRA%20Annual%20revenue%20performance%20%20report.pdf>; KRA, Seventh Corporate Plan Revenue Mobilization Through Transformation 2018/2019- 2020/2021 (Government of Kenya, 2018)

²³⁶OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²³⁷Ibid

²³⁸Ibid

²³⁹Amadou Bolya, Maty Konteb, and Abebe Shimeles 'Corruption Perception and Attitude towards Taxation in Africa' (2021) 30 AERC Supplement 1 Journal of African Economies

²⁴⁰Thomas Isbell, 'Footing the Bill? Less Legitimacy, More Avoidance Mark African Views on Taxation' (Afrobarometer, February 2022)

²⁴¹OECD (2019), OECD/G20 Base Erosion and Profit Shifting Project: Country-by-Country Reporting – Compilation of Peer Review Reports (Phase 2): Inclusive Framework on BEPS: Action 13 (OECD Publishing, Paris 2019)

²⁴²OECD (2019), Status of List of Reservations and Notifications at the Time of Signature <https://www.oecd.org/tax/treaties/beps-mli-position-kenya.pdf>

²⁴³Constitution of Kenya (2010), Article 229; Public Audit Act 2015; Public Finance Management Act s. 80

²⁴⁴Parliamentary Service Commission (2020), Guide to Effective Oversight and Scrutiny of Budgets, Economic Policies and Related Documents: A Source Book for Legislators and Fiscal Analysts (Parliament of Kenya)

²⁴⁵Kenya Law (2011), Ethics and Anti-Corruption Commission Act 2011

²⁴⁶Kenya Revenue Authority (2018), Seventh Corporate Plan Revenue Mobilization Through Transformation 2018/2019- 2020/2021 (Government of Kenya, 2018)

CHAPTER 6: BUDGETARY ALLOCATION TO THE SOCIAL S



6.1 Health

6.1.1 Budget Allocation

Kenya has several spending targets for various public services. Kenya has under the Abuja Declaration committed to spend 15% of its total budget on health. Further, the World Health Organisation recommends that states spend 5 to 6% of their GDP in health and \$86 per GDP Capita to achieve Universal Healthcare in line with the Sustainable Development Goals. ²⁴⁷Kenya has consistently failed to meet the Abuja Declaration threshold in its budgetary allocations to the health sector. It was only in the FY 2019/20 that Kenya managed to allocate 29.6% of its total national budget to health which was largely due to the COVID-19 response.

²⁴⁸However, it should be noted that since the advent of the Constitution of Kenya 2010, Kenya has taken steps to devolve its health function to the sub- national level. In Kenya’s case, this means that public health services were devolved to county level. This has been mired with many challenges including, county governments’ overreliance on funds from the national government which is one of the main reasons why health was

devolved - to increase the access and quality of health services to people at the grassroot level. For instance, there have been prolonged delays of disbursement of funds from the national government to the county government. This has resulted in the shortage of medical supplies and the delay in payments of health care workers²⁴⁹.

Financial Year	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21
% of the national budget allocated to health	2.6%	2.6%	2.7%	3.1%	2.8%	3%	29.6%	3.6%

Figure 9: Percentage of the national budget allocated to health
Source: Authored from the Controller of Budget Reports

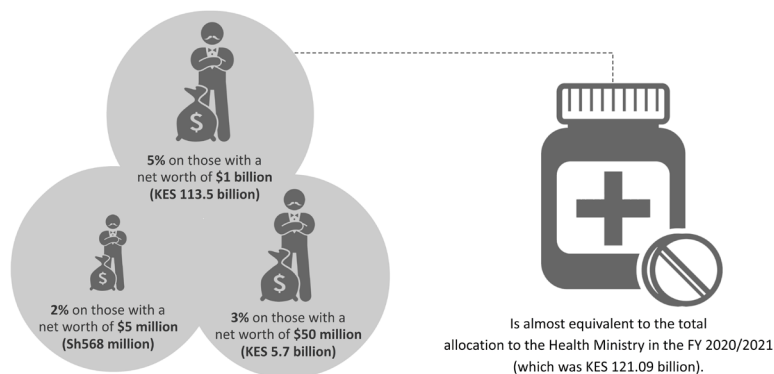


Table 18: Percentage of the national budget allocated to health

²⁴⁷World Health Organisation(2017), 'Domestic Resource Mobilization for Sustainable Financing for Health in Africa' [2017] Universal Health Coverage Forum, Tokyo https://www.afro.who.int/sites/default/files/2017-12/WHO_Report_AFR0_20_small.pdf

²⁴⁸COB report 2018

²⁴⁹Kimathi,L(2017), 'Challenges of the Devolved Health Sector in Kenya: Teething Problems or Systemic Contradictions?' (2017) 42 (1) Africa Development

6.1.2 Universal Healthcare Access

As part of universal health care (UHC), the Government through the National Health Insurance Fund (NHIF) has been implementing Social Health Insurance, as part of the programme initiated under the Health Insurance Subsidy Project (HISP Project) in April 2017 with support from the World Bank Group.²⁵⁰ The main objective of the project is to increase prepaid health insurance coverage, especially for the poor populations of the country.²⁵¹ The cover was offered to beneficiaries by the NHIF through its premier Super-Cover initiative, and beneficiaries were offered a full subsidy by the State for their premiums²⁵².

The number of beneficiaries was eventually reduced. NHIF is supposed to provide cover for consultation, laboratory, investigations, daycare procedures, drugs and dispensation, health education, wellness and counselling, physiotherapy services, immunisation, vaccines as part of outpatient services.²⁵³ As for inpatient services, NHIF is supposed to provide cover for maternal care – Antenatal and Prenatal care and deliveries, family planning, renal dialysis, overseas treatment for specialised surgeries not available locally, rehabilitation for drugs and substance abuse, all surgical procedures including transplants, emergency road evacuation services, radiology imaging services and cancer treatment. Unfortunately, there have been several issues with the implementation of NHIF for instance due to the delay of NHIF payments which have caused hospitals to impose user fees.²⁵⁴ This is further heightened by the inadequacy of NHIF payments to match the actual costs of the medical services that are to be provided.

Gross monthly income (in KES)	Premiums (in KES)
5999	150
6000 - 7999	300
8000 - 11999	400
12000 - 14999	500
15000 - 19999	600
20000 - 24999	750
25000 - 29999	850
30000 - 34999	900
35000 - 39999	950
40000 - 44999	1000
45000 - 59999	1100
50000 - 59999	1200
60000 - 69999	1300
70000 - 79999	1400
80000 - 89999	1500
90000 - 99999	1600
10000 and over	1700
self employed	500

Table 19: NHIF Contributions

Source: The NHIF (Standard and Special Contributions) Regulations 2015

NHIF contributions are compulsory for persons who are employed formally. Therefore, this means that the majority of its users are formal workers. In 2017, informal workers formed only 24% of the total number of persons who registered for NHIF yet as of 2018, around 80% of the Kenyans were informally employed while less than 20% were formally employed.²⁵⁵ This means that it is mostly people with a steady income or the better-off population that are benefitting from the NHIF registration despite the fact that the HISP was meant to target poor populations²⁵⁶.


²⁵⁰World Health Organisation(2017), 'Domestic Resource Mobilization for Sustainable Financing for Health in Africa' [2017] Universal Health Coverage Forum, Tokyo https://www.afro.who.int/sites/default/files/2017-12/WHO_Report_AFR0_20_small.pdf

²⁵¹OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁵² Ibid

²⁵³National Health Insurance Fund(2022), <http://www.nhif.or.ke/healthinsurance/> accessed 22nd March 2022

²⁵⁴Latif,L.(2021) 'Can you reap what you don't sow? Health Finance in Kenya's Progress Towards Universal Health Coverage' (2020) 1(2) Financing for Development ; Nation Team, 'Families Suffer as NHIF Delays Compensation' (Nation, 11 April 2021) <https://nation.africa/kenya/business/families-suffer-as-nhif-delays-compensation-3357876> accessed 22 March 2022



It has been suggested that some of the ways to improve the effectiveness of NHIF is by first making its registration compulsory for all persons under 18 having found that the contributions being made are inadequate.²⁵⁷NHIF contributes less than 1% to the health budget. Making NHIF compulsory would therefore increase member contributions to the Fund. Further, proposals were made to make it compulsory for employers to also contribute to the fund as well as making the government liable to contribute funds on behalf of vulnerable persons. These proposals were passed in law in 2021. It is anticipated that this will provide solutions to some of the issues of equity that NHIF has presented as long as the Kenyan government use up-to-date criteria and data to identify vulnerable persons who are to benefit from this scheme. New proposals have further been made in 2022 such as the requirement that workers earning more than KES 100,000 per month, pay 1.7% of their gross salaries as contributions to NHIF instead of the rigid KES 1700.²⁵⁸Further, new income brackets have been added for persons who earn more than KES 200,000.

6.1.3 Gender Responsive Healthcare Services

The 'Linda Mama' programme is a free maternal health policy that was introduced in 2013 to reduce the financial barriers for women and girls in accessing health services. At the time, it was known as the Free Maternity Services (FMS) policy. It was meant to remove user fees for antenatal, delivery and prenatal health services.²⁵⁹This had the effect of increasing the number of poor women who sought delivery services at healthcare facilities and teenage mothers who could not afford maternity services.²⁶⁰There was a level increase of 19.6% and 28.9% in normal deliveries and caesarean sections respectively in government health facilities due to the FMS policy. This reduced the number of unskilled deliveries and the risk of birth related complications as well as the spread of HIV/AIDS.²⁶¹Several challenges were however noted with the implementation of the Linda Mama programme, including reduced quality of services and the reduced registration for the National Health Insurance Fund (NHIF) by women benefitting from this programme. The biggest challenge however was the inadequacy of the funds used to reimburse the health facilities for the services that had been provided and the delayed payments by the Ministry of Health (MOH) to such facilities.²⁶²

In an effort to deal with the challenges posed by the FMS policy, the Linda Mama programme was transferred to the NHIF and wider coverage of benefits such as antenatal and prenatal care was provided. Services were offered not only at public health facilities but also private health facilities. This led to an increase in deliveries in public and private faith-based health facilities respectively. This has been attributed to the higher reimbursements for caesarean sections than normal

deliveries, leading to the concern that such facilities recommend more caesarean sections for the reimbursements rather than medical reasons. Further, the problem of delayed payments from the MOH and the NHIF still exist and many patients have complained about still making out-of-pocket payments due to the lack of supplies at their local facilities.

This is especially concerning in light of the COVID-19 pandemic where there was a continuous

delay in the disbursement of funds for the Linda Mama Programme from November 2020 to April 2021. Patients were forced to buy medical equipment in order to deliver their infants amongst making other out-of-pocket payments. More funds are required for skilled healthcare specialists and supplies, and better coordination is required between the two state agencies i.e. the MOH and NHIF for the successful implementation of this programme²⁶³.

6.1.4 The Impact of Covid-19

The first case of COVID-19 in Kenya was announced on the 13th March 2020. Since then, the Ministry of Health (MOH) and county governments have increased resources towards increasing diagnostic capacity in order to carry out COVID-19 testing, establishing mandatory screening of cargo vessels crew at all points of entry, establishing isolation/ quarantine facilities across health facilities in the country, procuring and distributing personal protective equipment (PPE) for health care workers and hiring an increased number of health care workers²⁶⁴.

²⁵⁵Barasa, E. Khama, R., Njeri, M., & Chuma, J. (2018) 'Kenya National Hospital Insurance Fund Reforms: Implications and Lessons for Universal Health Coverage' (2018) Health Systems & Reform; Federation of Kenyan Employers, 'The Informal Economy in Kenya' [FKE, March 2021]

²⁵⁶OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁵⁷Kenya Law (2021), The National Hospital Insurance Fund (Amendment) Bill, 2021 s 15A

²⁵⁸Mutua, J. (2021), 'Top Earners to Pay More for NHIF Monthly Charges' [Business Daily, 17 February 2022] <https://www.businessdailyafrica.com/bd/corporate/health/top-earners-to-pay-more-for-nhif-monthly-charges-3719476#:~:text=The%20NHIF%20on%20Wednesday%20published,Sh1%2C700%20to%20the%20NHIF> accessed 20th March 2022

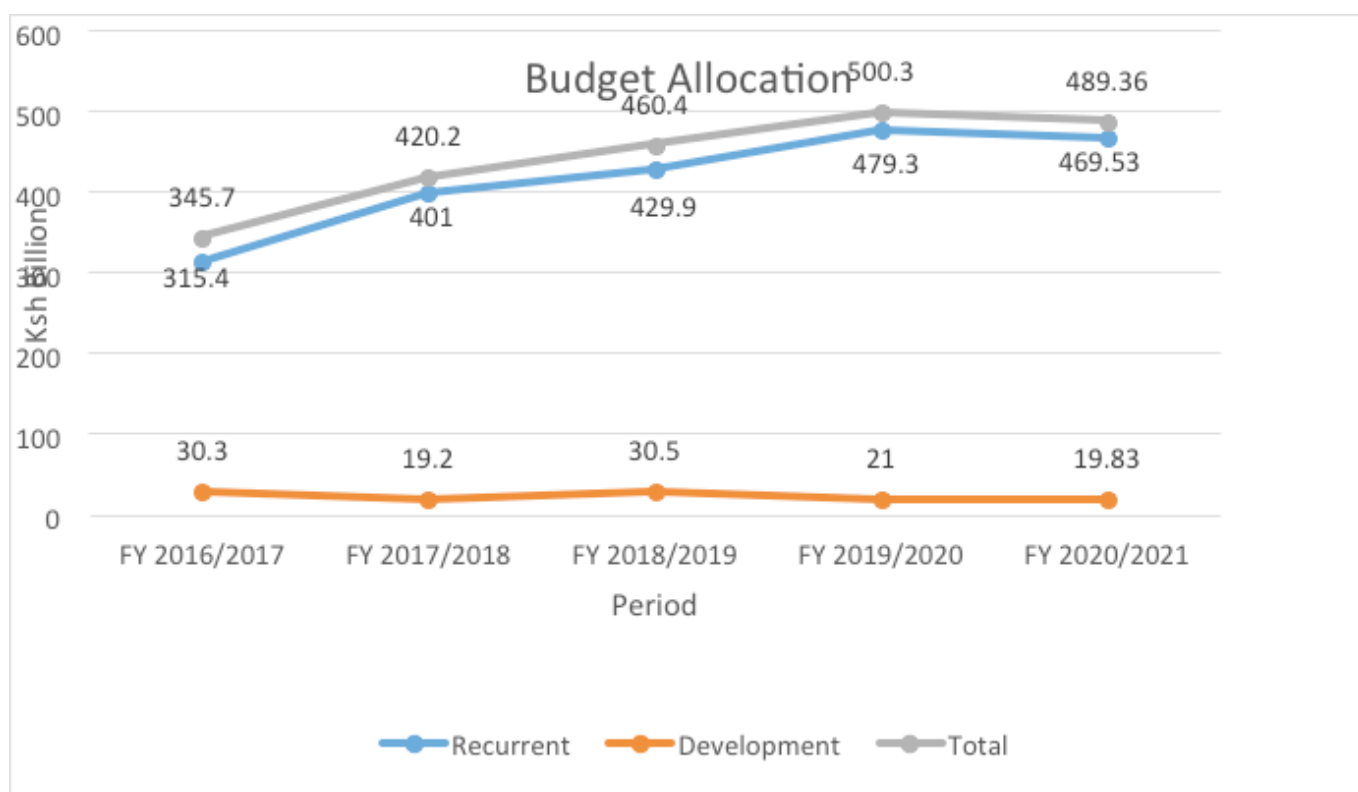


This has led to an increased allocation towards the health sector. During the FY 2019/2020, the sector was allocated a total of KES.119.2 billion – an increase of 40% from KES 85.1 billion in FY 2018/19 with a budget execution level of 91%. With the advent of COVID-19, there was an increase in gender-based violence. However, due to the limited human resources, programmes that cater to such areas have been severely underperformed²⁶⁵.

6.2 Education

6.2.1 Budget Allocation

Figure/ Graph 10:



Source: Controller of Budget Annual Report (FY2020/21)

²⁵⁹Orangi,O, Kairu,A, Malla,J, Ondera,J, Mbuthia,B, Ravishankar,N,S Barasa,E(2021) 'Impact of Free Maternity Policies in Kenya: An Interrupted Time-Series Analysis' (2021) BMJ Global Health

²⁶⁰Abuya,T., Mardieh,D., Matanda,D., Obare,F. & Bellows,B (2021) 'Impacts of Removing User Fees for Maternal Health Services on Universal Health Coverage in Kenya' (2021) 91 Impact Evaluation Report

²⁶¹OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁶²ibid

²⁶³Gitonga,A. (2022), 'Linda Mama on Verge of Collapse over Lack of Funds' (The Standard, 13 April 2021) <https://www.standardmedia.co.ke/rift-valley/article/2001409589/linda-mama-on-verge-of-collapse-over-lack-of-funds> accessed 20th January 2022

²⁶⁴Ministry of Health,(2020), Health Sector Report Medium Term Expenditure Framework (MTEF) for the Period 2021/22-2023/24 (Government of Kenya, October 2020)

²⁶⁵OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>



For the past five years, budget allocations towards the education sector have been on the rise peaking in the FY 2019/2020.²⁶⁶The Teachers Service Commission is the biggest beneficiary of recurrent expenditure benefiting from KES 255.8 billion in the financial year of 2019/20 out of a total of KES 413.0 billion total recurrent expenditure.²⁶⁷This means that teachers' remuneration accounts for more than the total recurrent expenditure at 61.9%.²⁶⁸The rest of the recurrent expenditure is divided between early education, primary and secondary education which are housed in the department for early and basic education, followed by university education. Very little is spared for vocational training as well as for post training. The inverse is however true for development expenditure with vocational training taking the lion's share.

²⁶⁹At the World Education Forum in 2000 in Dakar, African governments committed to allocating at least 9% of their budgets to education by 2010. The World Education Forum in 2015 in line with the Sustainable Development Goals on 'Achieving Inclusive and Quality Education for All' committed to increasing financing for education with adherence to the international/regional benchmarks of 4-6% of GDP or 15-20% of the total expenditure. Kenya has made efforts to abide by this commitment – with the highest budgetary allocation amounting to 18% and the lowest amounting to 13.8 % in the past eight years.

*Figure/ Graph 11: Net Enrollment Rates and Gross Enrollment Rates between 2008 and 2018
Source: KIPPRA 2020*

Financial Years	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	
% of budget allocation to education	18%	14.4%		14.2%	13.8%	15.6%	15%	14.3%

*Table 19: Percentage of total budgetary allocations to education
Authored from the Controller of Budget Reports*

²⁶⁶ibid

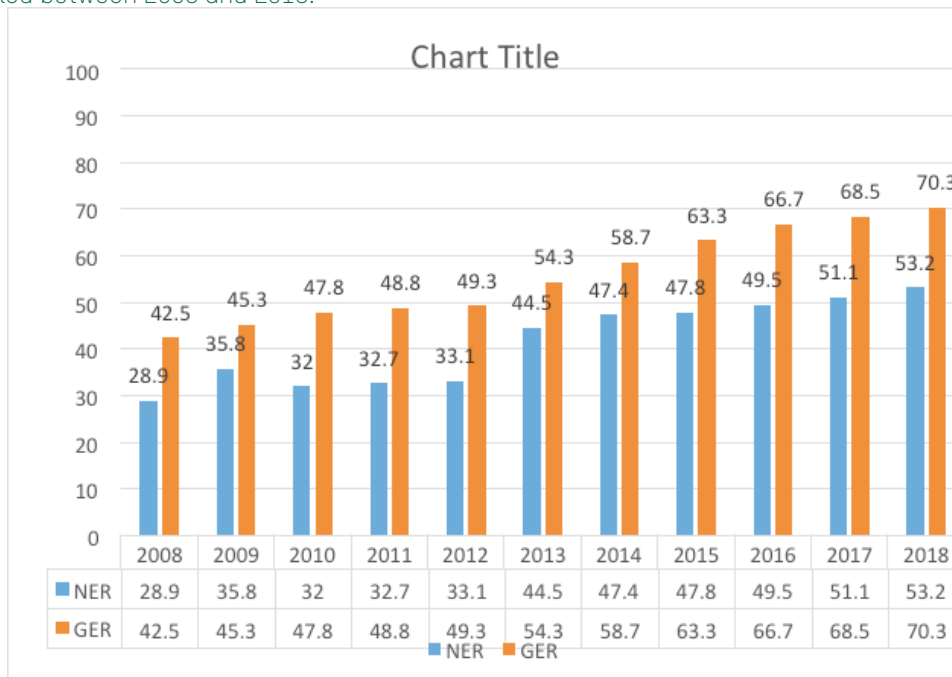
²⁶⁷ibid

²⁶⁸ibid

²⁶⁹Africa Child Policy Forum (2013). Child Well-Being Report Towards Greater Accountability to Africa's Children, [ACPF Addis Ababa,2013]

6.2.2 Free Primary and Secondary Education

The government introduced free primary education in 2003 whose aim was to ensure every child irrespective of social class can access quality education and also to ensure 100% transition of students from primary to secondary schools. A larger number of children from poor households benefit from spending on public education, in contrast with children of higher-income households, more of whom are enrolled in private primary education.²⁷⁰In 2008, in order to increase universal education for all, the government began providing free tuition for secondary schools. This was a commendable step by the Kenyan government. Since the advent of free secondary education, net and gross enrolment rates have almost doubled between 2008 and 2018.



Figure/ Graph 11: Net Enrollment Rates and Gross Enrollment Rates for Secondary Education between 2008 and 2018
Source: KIPPRA 2020

However, a closer look at the enrolment rates shows that there is still room for improvement. The net enrolment rate indicates the number of school-going children who are enrolling in school. This means that almost half of school going children were not being enrolled in secondary school as of 2018²⁷¹.

The challenges and criticisms of free secondary education have been discussed in various studies. The government subsidy of KES 10,265 for tuition fees only was simply inadequate. This was especially so for boarding schools compared to day-secondary schools. In boarding schools, KES 10,265 only accounted for 19.34% of the total fees needed to maintain a child's education in a boarding secondary school between 2010 to 2013.

²⁷²This adversely affected especially girls from enrolling and sustaining their admission in secondary boarding schools. In Trans Mara sub-county, it was reported that the dropout rates of girls in these boarding schools was nearly half the enrolment rate²⁷³.

This was improved between the FY 2016/17 to 2017/18 in which tuition support increased from the previous KES 12,870 to KES 22,244. ²⁷⁴KES 22, 244 remains to be the capitation grant for public secondary schools.²⁷⁵For parents or guardians with children in boarding schools, this means that they still have to cater for boarding fees, uniforms, teaching materials, examinations, medical insurance amongst other expenses.

²⁷⁰World Bank (2018), Kenya Economic Update Report World Bank: In Search of Fiscal Space: Government Spending and Taxation: Who Benefits? (Edition No. 18, October 2018, World Bank)

²⁷¹Samantha, L. & Wario, M (2020), 'Achieving 100 per cent Transition from Primary to Secondary School: Status, Challenges and Opportunities for Sustainability' (The Kenya Institute for Public Research and Analysis, 28 August 2020) <https://kippra.or.ke/achieving-100-per-cent-transition-from-primary-to-secondary-school-status-challenges-and-opportunities-for-sustainability/> accessed 2nd January 2022

²⁷²Kiage, J., Simatwa, E. & Ayodo, T (2014) 'Effect of School Fees and Levies on Enrolment of Girls in Boarding Public Secondary Schools in Transmara Sub County, Kenya: An Analytical Study' (June 2014) 5(5) pp. 152-165 International Research Journals

²⁷³OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁷⁴Luseno, S. & Wario, M., (2020) 'Achieving 100 per cent Transition from Primary to Secondary School: Status, Challenges and Opportunities for Sustainability' (KIPPRA, 28 August 2020) <https://kippra.or.ke/achieving-100-per-cent-transition-from-primary-to-secondary-school-status-challenges-and-opportunities-for-sustainability/>



	VOTE HEAD	G.O.K	PARENT	TOTAL
1	Teaching, Learning Materials & Exams	4,144.00	0	4,144.00
2	Boarding Equipment & Stores	0.00	20,830.00	20,830.00
3	Maintenance & Improvement	5,000.00	2,000.00	7,000.00
4	Other Vote Heads (Local travel and transport, Administration, Electricity, Personnel emolument.)	9,400.00	11,670.00	21,070.00
5	Activity Fees	1,500.00	500.00	2,000.00
6	Medical & Insurance	2,000.00	0.00	2,000.00
7	SMASSE	200.00	0.00	200.00
8	Total School Fees	22,244.00	35,000.00	57,244.00

Table 20: 2022/2023 Boarding schools Category B Fees Structure
Source: Education News Portal 2022

Schools classified as Category B are other boarding schools including extra county schools that are located in other areas other than the town of Nairobi, Mombasa, Nakuru, Kisumu, Nyeri, Thika and Eldoret²⁷⁶.

In 2019/20, the recurrent expenditure allocation for free day secondary education stood at KES 63.9 billion, while capital expenditure is KES 4.6 billion.²⁷⁷ There is need for increased budgetary allocations towards secondary education with regard to the hiring of more human resources, particularly teachers as well as increased learning equipment. This will help to improve the persistent issue of the poor quality of education in Kenya due to the strain of resources caused by increased free education²⁷⁸.

6.2.3 Gender Responsive Education Services

The Education and Training Sector Gender Policy 2007 sought to promote gender equality issues concerning access, equity and equality in the education sector and to enhance empowerment for effective participation and contribution in national development by all.²⁷⁹ One important intervention has been the distribution of sanitary pads for girls so as to prevent them from missing out on education due to the lack of facilitation of the necessary safe and sanitary material during menstruation. Kenya already began efforts towards this in 2004, when sanitary pads were exempted from VAT. Following the adoption of this policy and in line with the United Nations Sustainable Goal of ensuring inclusive and equitable education for all, the Kenyan government further removed import duty on sanitary pads.²⁸⁰ A Sanitary Towels Programme was launched in 2011 in which the government began distributing pads to girls in public schools in marginalised and slum areas. It is estimated that between 2011 and 2017, KES 1.9 billion was invested into this.²⁸¹ In 2017, through an Amendment to the Basic Education Act, the government was mandated to provide free sanitary pads to all school-going girls.²⁸² The State Department was allocated with a budget of KES 470 million to carry out this mandate in the financial year 2017/2018²⁸³.

Unfortunately, the implementation of the new policy has been mired by major issues. According to the remarks made by the Minister of Education in February 2020, the allocation of funds was still inadequate to provide for 1.4 million girls and that at most, they could only succeed in providing for sanitary pads for four months²⁸⁴.

²⁷⁶Ministry of Education [2022], New Reduced School Fees Structure and Guidelines for all Secondary Schools in Kenya; Education Ministry Releases Guidelines <https://educationnewshub.co.ke/2022-2023-new-reduced-school-fees-structure-and-guidelines-for-all-secondary-schools-in-kenya-education-ministry-releases-guidelines/> accessed 20th February 2022

²⁷⁷OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁷⁸Samantha, L. & Wario, M (2020), 'Achieving 100 per cent Transition from Primary to Secondary School: Status, Challenges and Opportunities for Sustainability' (The Kenya Institute for Public Research and Analysis, 28 August 2020) <https://kippra.or.ke/achieving-100-per-cent-transition-from-primary-to-secondary-school-status-challenges-and-opportunities-for-sustainability/> accessed 2nd January 2022

²⁷⁹Kwasi, S. (2022), Kenya's Education Focus Should be on Quality, Not Quantity (Institute for Security Studies, 18 July 2017) <https://reliefweb.int/report/kenya/kenya-s-education-focus-should-be-quality-not-quantity> accessed 3rd March 2022

²⁸⁰Ministry of Education (2007), Education and Training Sector Gender Policy 2015 (Government of Kenya, 2007)

²⁸¹Bryn, W. (2020), Taxes and Duties for Sanitary Products in Africa (Work and Opportunities for Women, May 2020)

²⁸²Ministry of Services and Public Gender (2018), 'Sanitary Towels Programme' (State Department of Gender, 2018) <http://gender.go.ke/sanitary-towels-program/>

²⁸³Kenya Law (2016), Basic Education Act 2016, section 39

²⁸⁴Ministry of Services and Public Gender (2022), 'Sanitary Towels Programme' (State Department of Gender, 2018) <http://gender.go.ke/sanitary-towels-program/> accessed 22nd February 2022

²⁸⁵Selina, T. (2022), 'Free Sanitary Pads not Reaching Marginalised Girls - Rights Group' (The Star, 2 March 2022) <https://www.the-star.co.ke/news/2022-03-02-free-sanitary-pads-not-reaching-marginalised-girls-rights-group/> accessed 13th March 2022

The Education and Training Sector Gender Policy 2007 was later reviewed which led to the adoption of the Education and Training Sector and Gender Policy 2015.²⁸⁵ These two policies collectively provided for other girl child focused interventions including the re-entry for girls who drop out of school as a result of pregnancy, affirmative action in the allocation of bursaries and mentorship programmes to encourage girls take up science, technology, engineering and mathematics (STEM) subjects in universities.

6.2.4 Impact of COVID-19 on Education

The Covid-19 pandemic led to the suspension of learning at all institutions following a directive by the office of the President of Kenya. This led to an increase in inequality as learners who could not afford to access virtual classes were severely affected due to the digital divide especially in rural areas. For girls, the closure of schools led to a great increase in the number of early pregnancies which was caused in many cases through sexual and gender-based violence (SGBV). Further, due to the loss of capital caused by the suspension, there was termination of employment and reduction of salaries especially within the first half of 2020²⁸⁶.

6.3 Agriculture

6.3.1 Budget Allocation

Financial Year	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
% of budgetary allocation to the ARUD sector	4%	3.7%	3.1%	2.1	1.8	2	2.2

Table 21: Percentage of budgetary allocation to the Agriculture and Urban Development (ARUD) sector
 Authored from the Controller of Budget reports

At the African Union Summit in Maputo in 2003, African governments under the Maputo Declaration pledged to allocate 10% of their total national budgets to agriculture and food security. Kenya consistently performs below that 10% despite the commitment made.

The Agriculture, Rural and Urban Development (ARUD) sector continues to be one of the least funded in comparison with other social spending sectors yet this sector has contributed to around 24% of Kenya's GDP over the last 10 years and further contributed towards 28 % of the GDP indirectly.²⁸⁷ Comparatively, public spending as a percentage of the total Kenya GDP from 2006 to 2020 has been at 2% of GDP. Government expenditure in agriculture as a percentage of the total expenditure in 2020 was only 3%.²⁸⁸ This under investment in the ARUD sector disproportionately affects women who are a substantial portion of the workforce, specifically small-scale farming.²⁸⁹ Food security continues to be a major challenge despite being a pillar of Kenya's development agenda, the 'Big Four'. One in three Kenyans experience food insecurity which amounts to 14.5 million Kenyans.²⁹⁰ This is especially so in arid and semi-arid areas of Kenya that experience several bouts of drought.²⁹¹ This has been heightened by prolonged drought related to climate change in 2022 and the removal of the maize flour subsidy²⁹².

In line with the Paris Agreement 2015, Kenya has in place a National Climate Change Action Plan (NCCAP 2018-2022) whose key priority sector includes increasing food security through climate smart agriculture. However, despite this, financing for food security ranks lowest with more funds going towards climate change mitigation measures such as renewable energy transition²⁹³.

²⁸⁵Ministry of Education, Science and Technology, (2015), Education and Training Sector Gender Policy (Government of Kenya, 2015)

²⁸⁶Government of Kenya (2020), Education Sector Report Medium Term Expenditure Framework 2021/22 - 2023/24 (GOK, 2020)

²⁸⁷Government of Kenya, (2021), Kenya Economic Report 2021: Kenya in COVID-19 Era: Fast-Tracking Recovery and Delivery of the "Big Four" Agenda (GOK, 2021)

²⁸⁸Institute of Economic Affairs, (2020) Public Spending in Agriculture in Kenya: Is it Beneficial to Small Scale Women Farmers? (IEA,)

²⁸⁹Government of Kenya, (2021), Kenya Economic Report 2021: Kenya in COVID-19 Era: Fast-Tracking Recovery and Delivery of the "Big Four" Agenda (GOK, 2021)

²⁹⁰African Portal (2014) Public Spending in Agriculture in Kenya: Is it Beneficial to Small Scale Women Farmers? <https://allafrica.com/stories/202003160613.html>

²⁹¹OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁹²Famine Early Warning System, (August 2022) Kenya Food Security Outlook Update: Impacts of Protracted Drought and High Inflation Rates Drive Widespread Emergency (IPC Phase 4) (FEWS, August 2022) <https://reliefweb.int/report/kenya/kenya-food-security-outlook-update-august-2022#:~:text=%EF%82%97%20Across%20Kenya%2C%20acute%20food,%2C%20transport%2C%20and%20fuel%20prices.> Accessed 27th October 2022

6.3.2 Gender Responsive Agricultural Sector

Over the past five years, the ministry has come up with programmes aimed at supporting women and the youth in urban agriculture technology through empowerment, and increasing access to water for small scale irrigation, domestic use and livestock (DRSLP).²⁹⁴ Despite the efforts made, this last project failed to achieve its objective fully due to delayed implementation. With regards to subsidies, the ministry established a fertiliser subsidy and e-fertiliser distribution system to ensure that farmers accessed subsidised fertilisers for farming. For pro-poor budgeting, the ministry has a programme to provide poor farmers access to affordable agricultural inputs.²⁹⁵ However, inadequate funding affected the effective achievement of this programme. The ministry has put in place a programme to support smallholder dairy operators to commercialise dairy activities. Further, there is a programme to cushion vulnerable pastoral communities against drought through livestock insurance that has achieved its objectives over the last five years.

Also, the ministry has implemented a project on Enhancing Gender Responsive Extension Services over the past 10 years that has achieved its objectives by 90%.²⁹⁶ The project is meant to mainstream gender aspects in all the programmes. In support of small-scale farmers, the ministry has had a Smallholder Horticulture Empowerment Project for Local and Upscaling that has 100% achievement.

Even though the government has tried to cater for the needs of poor and small-scale farmers according to a report on "Agriculture Productivity in Kenya: Barriers and Opportunities", Agricultural research, development and agriculture extension tend to favour the wealthiest.²⁹⁷ Cess has also been identified as a constraint across the sector.

6.3.3 Impact of COVID – 19 on Agriculture

In December 2019, the East African region, Kenya included, experienced a severe case of locusts' invasion. This persisted until mid-year 2020 and led to reduced crop yield.²⁹⁸ Simultaneously, the onset of the COVID-19 pandemic also served as a major blow to the ARUD sector, due to the lockdown measures that were effected from March 2020. This particularly affected smallholder farmers whose household income was affected due to delayed access to farm inputs such as seeds, reduced crop yield and difficulty in accessing markets due to restricted movement.²⁹⁹ The two issues mentioned above led to an increase in food prices and increased food insecurity.

²⁹⁴Government of Kenya, (2018) Agriculture Rural and Urban Development (ARUD) Sector Report: Medium Term Expenditure Framework 2020/21-2022/23 (Government of Kenya, November 2018)

²⁹⁵ OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

²⁹⁶bid

²⁹⁷Birch, I (2018), 'Agricultural productivity in Kenya: Barriers and Opportunities' (December 2018) Knowledge, Evidence and Development (K4D) https://assets.publishing.service.gov.uk/media/5c70028ee5274a0ecbe9a1c2/483_Agricultural_Productivity_in_Kenya_Barriers_and_Opportunities.pdf

²⁹⁸FAO (2020), Greater Horn of Africa and Yemen – Desert locust crisis appeal, January 2020–June 2021: Revised appeal for sustaining control efforts and protecting livelihoods (six-month extension). Rome

²⁹⁹Odhiambo, K., Lewis, J., Tefera, N., Thomas, A., Meroni, M., Dimou, M., Rembold, F. (2021), Impacts of COVID-19 and Desert Locusts on Smallholder Farmers Food Systems and Value Chains in Kenya, (Publications of the Office of the European Union, Luxembourg, 2021)

6.4 Fiscal Deficits and Sovereign Debt

The fiscal deficit in the past five years has been growing. This growth has led to increased external funding and borrowing as shown below.

In June 2021, 50% of government revenue (KES 780.6 Billion) was used to service debt, which is a 99% increase from June 2015.³⁰⁴ Noteworthy, is the particular growth of commercial debt during this period which increases the risk of refinancing due to foreign exchange risks and higher interest rates. In 2020, Kenya was declared to be in high risk of debt distress by the IMF.³⁰⁵ This increase in Kenya's debt stock is adversely affecting Kenya's spending on social sectors.

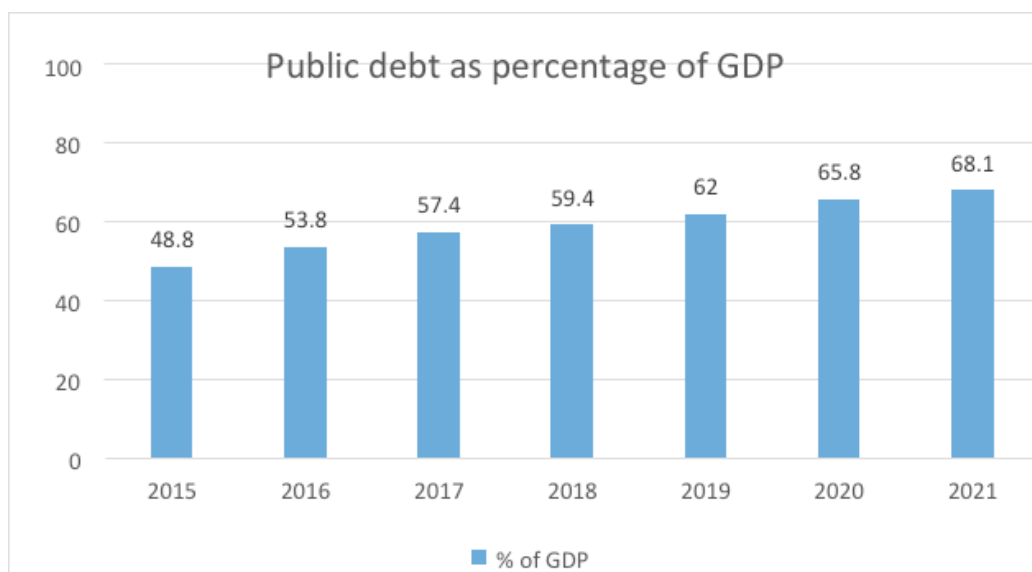


Table 22: Fiscal deficit as a percentage of GDP

Source: World Bank²⁹³ and Statista²⁹⁴

Kenya has sought international debt relief for its sovereign debt, utilising the G20 Debt Service Suspension Initiative and applying for a waiver of \$368.7 million³⁰⁶ and further seeking debt relief with China, a bilateral lender holding 21% of Kenya's debt. While measures to seek debt relief are commended, the risk of austerity measures adversely affecting social spending as it has in the past is highly anticipated. Further in April 2021, Kenya entered the Extended Credit Facility and the Extended Fund Facility programme with IMF with the aim of following the economic shock of the COVID-19 pandemic. Fiscal consolidation measures have since been introduced including the removal of fuel subsidies that has been implemented in 2022³⁰⁷.

This growth in public debt has been attributed to large scale expenditure on infrastructure development, the refinancing risk of foreign currency loans especially with the increase of commercial loans and little accountability, for instance the raising of the debt ceiling without any justification., amongst others³⁰⁸.

³⁰⁴National Treasury, (2021) Public Debt Management Report (Government of Kenya, 2021)

³⁰⁵OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>

³⁰⁶Herbling, D. (2021), 'China in Talks with Kenya for Debt Relief After Paris Club Deal' (Bloomberg, 18 January 2021) <https://www.bloomberg.com/news/articles/2021-01-18/china-in-talks-with-kenya-for-debt-relief-after-paris-club-deal>

³⁰⁷Okoa Uchumi Debt Campaign, 'Kenya Debt Crisis: Unpacking Fiscal Consolidation' (Okoa Uchumi, 2021)

³⁰⁸ibid

6.5 RECOMMENDATIONS

1. The Kenyan government should prioritise its social sector spending in order to meet its international commitments of e.g. xxx % of GDP spending on education and xxx % on health, agriculture.....

2. Besides increasing revenue through progressive taxes, the Ministry of Finance needs to enable increased social spending by reducing spending on non-priority sectors which reduces resources available for social spending and reduce its debt stock.

3. All the individual Ministries and State Departments need to improve collection of gender disaggregated data in order to effectively plan for programme-based projects that address gender inequalities. Addressing gender inequalities in Kenya needs to go beyond gender sensitisation programmes and instead implement a programme-based approach in addressing gender equalities during the budget making process.

4. Further, there is a need to restructure external debt in Kenya by reducing the prevalence of commercial debt and resorting to concessional loans instead. Parliament should require proper justification before raising the debt ceiling.

5. Due to the health and economic crisis caused by the COVID-19 pandemic, Kenya should consider the option of the issuance of Special Drawing Rights by the IMF as an immediate response of increasing the fiscal space for critical social spending in the wake of the global pandemic.

6. County governments with the support of the National Treasury must explore their Own Source Revenue Potential, e.g. property taxes, in order to increase resources available for health services at county level. Further, there is a need to improve the procurement systems and the timeliness of disbursements from the national government to the county government to prevent the shortage of medical supplies or the delay in payment of healthcare workers.

7. The Ministry of Finance jointly with the Ministry of Education need to carry out a proper assessment/analysis of the vulnerable population that would qualify to benefit from the government subsidies to be made on their behalf in contributing towards NHIF. This will help the Kenyan government accurately define the amount of resources that would be required for universal healthcare.

8. Proposals to increase NHIF contributions for higher income individuals should be considered by Parliament

10. The Ministry of Finance and Education should increase budgetary allocations towards sanitary pads for girls to increase the scope of the programme. This should be especially targeted for schools that are situated in arid and semi-arid areas.

11. The National Treasury should increase budgetary allocations to the agricultural sector to meet the regional requirement of 10% of its total budget. As one of the critical sectors in Kenya and the main pillars of development, the performance requirements of the ARUD sector are greater than the actual budget allocations that the sector was receiving. There is a need to increase financing for climate smart agriculture as a climate change adaptation measure in line with the Paris Agreement on Climate Change in adopting and mitigating issues of climate change during the budget making process.

13. The National Treasury needs to increase debt transparency. Further, there is a need to restructure external debt in Kenya by reducing the prevalence of commercial debt and resorting to concessional loans instead. Due to the health and economic crisis caused by the COVID-19 pandemic, Kenya should consider the option of the issuance of Special Drawing Rights by the IMF as an immediate response of increasing the fiscal space for critical social spending in the wake of the global pandemic.

7.0 Transparency and Accountability in the Taxation Systems

7.1 Information availability on the Tax system in Kenya

Tax and public spending can help to strengthen the government-citizen contract and improve public accountability and support citizen efforts to hold their government to account. The Kenyan Constitution creates a framework for openness, accountability, and public participation in all areas of public finance, including taxation.³¹⁰ Citizens must be informed and able to engage in policy-making to ensure that policies best reflect their interests, and to prevent the capture of policy-making spaces by the elite. Article 35 of the Constitution establishes the right to access to information enabling Kenyans not only to seek information from public entities and private entities whose information may affect their rights but also requiring the state to proactively publicise information that is of interest to the public. The procedural aspects of implementing the right to information are codified in the Access to Information Act, 2015³¹¹.

The implementation of the right to access to information has been met with some challenges. Key among them is the existence of various limitations in other legislative acts which are used to justify rejecting information requests. The case of *Timothy Njoya v Attorney General & another [2014]* eKLR illustrates this, whereby the petitioner was challenging section 125 of the Income Tax Act for conflicting with the right to access to information. The petitioner had been seeking to know from the Kenya Revenue Authority whether Members of Parliament had paid their taxes and required proof thereof but the Income Tax Act provided that tax officers are to maintain the confidentiality of tax information. The petitioner was denied this information and the court upheld the actions of KRA in doing so. This Court's decision was later reversed by the Court of Appeal in the case: *Timothy Njoya v Attorney General & another [2017]* eKLR³¹².

KRA has the primary responsibility of tax collection and administration in the country. Information on the number and level of tax rates, criteria for tax exemptions is readily available online.³¹³ Information regarding tax deals with national and multinational companies is managed by the National Treasury.

The Companies Act, 2015 makes it mandatory for companies registered in Kenya to prepare annual financial statements. These statements must adhere to prescribed accounting and financial standards. In Kenya, these are set by the Institute of Certified Public Accountants Kenya (ICPAK).³¹⁵ Additionally, the Act requires a company to keep accurate books of accounts at the company's registered office for a minimum of seven years. Both listed and unlisted companies are required to have external audits, with external auditors providing reports on the financial statements and directors reports. These reports are to be published annually. However, small companies are exempt from the requirement of external audits. The financial statements of listed companies are publicly accessible and can be found on the Nairobi Securities Exchange website.³¹⁷ The Act, however, does not require companies to set up internal control systems such as internal audit functions.

The Companies Act, 2015 outlines penalties and sanctions for directors that fail to prepare annual financial statements as per the requirements. Institutions in charge of enforcement do not necessarily publish reports that show enforcement actions and decisions taken in individual cases, including accounting matters³¹⁸.

The August 2017 amendment to the Companies Act, 2015, brought in provisions on beneficial ownership (BO). The amendments include a definition of a beneficial owner and requirements to provide information on beneficial owners in addition to that of directors and members.³¹⁹ The Companies (Beneficial Ownership Information) Regulations, 2020 gives effect to the provisions of the Act providing clear provisions on the obligations of the company in getting BO information. The information on beneficial owners should be included in the company register—kept at the company's registered address and lodged at the Registrar of Companies. This process has been digitized making it possible for companies to share BO information through the Business Registration Services portal through the BO e-register. Until 2020, bearer shares were allowed to exist in Kenya, however with the enactment of the Business Amendment Laws 2020, a new requirement to convert bearer shares to registered shares has been introduced.³²⁰ Bearer shares greatly increased the risk of financial opacity due to the fact that the owners of bearer shares were able to own shares simply through physical possession of the share certificate. This made it difficult for government authorities to trace the owners of these shares.

³¹⁰Constitution of Kenya, (2010), Article 10 and 201

³¹¹Kenya Law (2016), Access to Information Act No. 31 of 2016

³¹²Kenya Law (2017), *Timothy Njoya v Attorney General & another [2014]* eKLR; *Timothy Njoya v Attorney General & another [2017]* eKLR


³¹³Kenya Revenue Authority (2015), <https://kra.go.ke/en/individual/filing-paying/types-of-taxes/individual-income-tax>

³¹⁴Edwin Mutai, 'MPs Approve Tax-Free Deal for Japanese Firms, Expats' (Business Daily, 20 May 2021) <https://www.businessdailyafrica.com/bd/economy/mps-approve-tax-free-japanese-firms-expats-3406798> accessed 13th April 2022

³¹⁵Kenya Law (2015), The Companies Act, 2015 s. 620-622

³¹⁷NSE (2021), Financial reports and results; <https://www.nse.co.ke/investor-relations/financial-reports-and-results/category/46-nse-annual-reports.html>

³¹⁸ICPAK (2020), The accountants audit guidelines; <https://www.icpak.com/resource/the-draft-accountants-audite-guidelines-2020/>



While the steps to introduce beneficial ownership requirements are highly commendable, public sharing of BO information is highly constrained as the regulations explicitly provide that beneficial ownership information is not to be publicly shared. It can only be shared through the consent of the beneficial owner, a court order or when it is required by various law enforcement agencies. Publicly disclosing BO information is punishable to a fine or imprisonment.³²¹This was as a result of concerns with regard to data protection. However, in 2022, amendments to the Regulations were sought which have eased constraints with regard to public disclosure.³²²Firstly, the BO information may be published if it affects the country. This is however being left to the discretion of the government. Perhaps following a shocking media exposé on the use of COVID- 19 funds in the procurement process of Personal Protective Equipment (PPE) which was dubbed 'COVID-19 Millionaires', access to beneficial information ownership was extended to the Public Procurement Regulatory Authority (PPRA).³²³The 'COVID- 19 Millionaires' scandal and a subsequent audit by the Office of the Auditor General exposed how public officials within the Kenya Medical Supplies Authority (KEMSA) and other politically exposed persons by indirectly registering supply companies were awarded significant tenders for the supply of PPE amounting to Ksh 1,258,860,000. ³²⁴Despite investigations, no concrete legal action has taken place partly due to differences between the Office of the Director of Public Prosecutions(ODPP) and the Ethics and Anti- Corruption Commission(EACC). The requirement to provide beneficial ownership information is also limited to companies. Other legal vehicles such as limited liability partnerships as well as trusts are not required to provide BO information.

7.2 Auditing the KRA

The Kenya Revenue Authority is subject to audit on an annual basis by the Office of the Auditor General (OAG), whose independence is guaranteed by the Constitution and the Public Audit Act, 2015. The Auditor General makes the results of the audits publicly accessible through its website.

³²⁶Though the audits are accessible to the public through the official website of the OAG, a baseline survey undertaken by Transparency International Kenya in 5 counties, showed that 86% of citizens in these counties do not participate in the audit process.³²⁷Since auditing is a key part of public accountability, this indicates that there is very little public participation in holding the county governments accountable. The reasons for this included the technical nature of the report which made it difficult to comprehend the reports.

The audited reports are required to be submitted to the National Assembly within 11 months of the end of the financial year and debated upon by Parliament.³²⁸Appropriate action should be taken within three months after receiving an audit report from the OAG. Audit reports on the KRA have flagged several issues such as revenue shortfalls and the need to pay tax refunds³²⁹.

Though audit reports are often submitted to the parliament, there is often inaction by the relevant parliamentary committees despite the identification of financial malpractices such as spending that is unlawful. ³³⁰In other instances, despite parliamentary recommendations being made, these are not executed in a timely manner for instance, by the time parliamentary debates and recommendations are made, the responsible stakeholders are out of office³³¹.

³¹⁹Kenya Law,(2015), The Companies Act, 2015 s. 93A

³²⁰The Business Laws (Amendment) Act 2020

³²¹The Companies Act (Beneficial Ownership Information) Regulations 2020

³²²Companies (Beneficial Ownership Information) (Amendment) Regulations 2022

³²³Transparency International Kenya, 'Tracking Covid-19: A Report on Transparency and Accountability in Government's Response to the Covid-19 Pandemic' (TI- Kenya, 2020)

³²⁴Ibid

³²⁶Auditor General report <http://www.oagkenya.go.ke/Publications>

³²⁷Transparency International – Kenya , 'Strengthening Public Audit Accountability In Kenya : A Baseline Survey Report' (TI – Kenya, 2017)

³²⁸Public Audit Act, 2015 s.30

³²⁹Ibid

³³⁰Transparency International – Kenya , 'Strengthening Public Audit Accountability In Kenya : A Baseline Survey Report' (TI – Kenya, 2017)

³³¹Ibid

7.3 Open Budget Index

The Public Finance Management (PFM) Act, 2012, requires the budget to be publicised to promote transparency, effective management, and accountability about public finances in the national government. The Act also requires the National Treasury to report every four months to the National Assembly on the implementation of the annual national budget on areas not reported on by the Controller of Budget.³³⁴ The Budget Proposal Statement provides tax information such as the revenue performance of the previous financial year, highlighting the performance of various tax heads such as income tax, Value Added Tax (VAT) amongst others. Additionally, it outlines tax policy reforms and their expected impact on revenue collection. It outlines the revenue projections of the next financial year, highlighting the contribution of each tax head. The same goes for non-tax revenues which are often depicted as ministerial Appropriations in Aid.

The budget, which covers the total projected revenue and expenditure for a whole financial year, is provided as a summary of the total expenditure and net lending as ministerial and development expenditures to the respective ministries and state departments. Other allocations are made as to the equitable share from the national government with the deficit topped up by conditional allocations, grants, and loans. Though the budget proposal provides a breakdown of the financial allocations for various sectors, the allocations are made from the cumulative budget and not specified under tax or non-tax revenues.


In the 2021 Open Budget Index report, Kenya scored 50 out of 100 in transparency which is the same scoring as the last assessment in 2019. This was because most budget documents were found to be publicly available. However, there were delays in the public release of documents such as the Audit Report and the Mid-Year Review. Additionally, the comprehensiveness of certain budget documents was compromised due to lack of information such as macroeconomic information³³⁵.

CITIZENS' ENGAGEMENT



file:///C:/Users/Everlyn%20Muendo/Downloads/Ministry-of-Devolution-Planning-and-Council-of-Governors-%E2%80%93-County-Public-Participation-Guidelines-2016.pdf

Paolo de Renzio and Jason Lakin, A Taxing Journey: How Civic Actors Influence Tax Policy Lessons from Seven Case Studies on Civil Society Engagement (International Budget Partnership, 2020)



Kenya conforms to the IMF Fiscal Transparency Code that provides standards of transparency on public finances. The IMF in examining conformity with the Code examines four main areas including Fiscal Reporting, Fiscal Forecasting and Budgeting, Fiscal Risk Analysis and Management and Resource Revenue Management. The 2016 Fiscal Transparency Evaluation report on Kenya indicated that there was no coverage of tax expenditures within fiscal reports which was in violation of the public finance management laws that required transparency on tax exemptions.³³⁶The 2020 Fiscal Transparency Evaluation report showed that Kenya had made no progress in increasing transparency on tax expenditures³³⁷. However, towards the end of 2021, Kenya released its first tax expenditure report that covers a period of 2017 to 2020. While this is highly commendable, there is need to ensure that tax expenditure reports are released on an annual basis. There is a further need to make sure that the tax benchmark system used to determine tax expenditures is designed in such a way that enhances accountability. For instance, within the Corporate Income Tax benchmark system, tax holidays provided in preferential tax regimes such as special economic zones and export processing zones were included in the benchmark. This means that tax expenditures incurred through such economic zones which benefit from a host of tax concessions such as tax holidays amongst others were not captured within the report.

7.4 Citizens' engagement

The legal framework in Kenya provides for public participation measures in the budgetary process. For instance, section 25 of the Public Finance Management (PFM) Act, 2012, requires the National Treasury to seek and take into account the views of stakeholders and the public in preparing the Budget Policy Statement (BPS) before submission to Cabinet for approval and subsequent submission to Parliament. In particular, section 25 of the PFM Act requires the National Treasury to seek opinions and views from the Commission on Revenue Allocation, County Governments, Controller of Budget, the Parliamentary Service Commission, the Judicial Service Commission, the Public, and any other interested persons or groups. Further, the Public Finance Management Act mandates county governments in section 207 to establish structures and mechanisms for citizen participation in fiscal decision making³³⁸.

There are different strategies for civic actors for engaging with the government to influence tax reforms. This can be through engagement with the executive i.e. the National Treasury, legislative engagement both at national and county levels and lastly through the judiciary.

In Kenya, civic actors have been most successful in influencing tax reform through judiciary engagement. For instance, the Tax Justice Network Africa succeeded in having the Kenya-Mauritius Double

Taxation Agreement nullified which they argued would have a negative impact on the revenue raising ability of the government.

³³⁹Judiciary engagement has also been useful at county level. For instance, Jamofastar Welfare Association stopped the introduction of regressive taxes in Kiambu County that aimed to tax certain burial rites through instituting a public interest litigation case at the High Court. This case led to further steps to increase public participation in public finance at county level such as the drafting of the Kiambu County Public Participation Bill.

³³⁵International Budget Partnership,(2019) Open Budget Survey Kenya (International Budget Partnership, 2019)

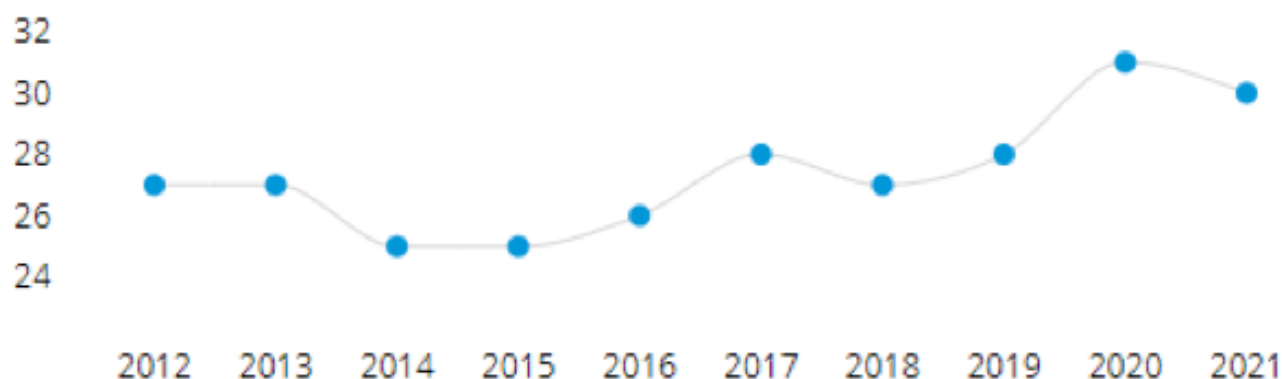
³³⁶IMF(2016), Kenya Fiscal Transparency Evaluation (IMF, 2016)

³³⁷IMF(2020), Kenya Fiscal Transparency Evaluation (IMF, 2020)

³³⁸Government of Kenya, (2016), County Public Participation Guidelines

³³⁹Renzio,P. & Lakin,J.(2020), A Taxing Journey: How Civic Actors Influence Tax Policy Lessons from Seven Case Studies on Civil Society Engagement (International Budget Partnership, 2020)

Score changes 2012 - 2021



Figure/ Graph 12: Score changes for Kenya in the CPI between 2012 - 2021

Source: <https://www.transparency.org/en/cpi/2021/index/ken>

7.5 Impact Assessment

The Kenyan government does not carry out a socio-economic impact assessment of tax policies. The impact of new tax measures is not assessed from the perspective of how it will affect inequalities or its effect on vulnerable members of the society. ³⁴⁰Instead, the government favours the use of social protection programmes and cash transfers to address inequalities and vulnerable members of the society. ³⁴¹Gender responsive budgeting in Kenya has been limited to specific budget allocations to social programmes addressing gender inequalities but has not properly addressed gender responsive taxation due to the lack of gender disaggregated data.

7.6 Corruption

Compliance by taxpayers is significantly shaped by whether or not the taxpayers believe that other taxpayers are remitting, how effectively they think that the revenue is being used, and whether or not they believe that tax administration is honest and fair.

According to the Transparency International Corruption Perception Index Report (CPI), Kenya scored 20 points out of 100 on the 2021 CPI. The CPI scores and ranks countries or territories based on how corrupt a country's public sector is perceived to be by experts and business executives. A country or territory's score indicates the perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean).

³⁴⁰National Treasury and Planning (2020), Strategic Plan 2018/19 - 2022/23 Sustained Socio-Economic Transformation for Job Creation and Shared Prosperity (May 2020)

³⁴¹OECD (2011) Supporting the Development of More Effective Tax Systems, A REPORT TO THE G-20 DEVELOPMENT WORKING GROUP BY THE IMF, OECD, UN AND WORLD BANK. <https://www.oecd.org/ctp/48993634.pdf>



Within tax services however, the Bribery Index report of 2019 showed that tax services were amongst the least prone government agency that was prone to bribes with a score of 12.4, with 100 being the worst score.³⁴² Many of the Kenyans who were surveyed in 2019 did not see the usefulness of paying a bribe to tax services.

However, a 2022 Afrobarometer survey showed that 39% of Kenyans believe there is corruption amongst tax officials. This could potentially affect tax compliance³⁴³.

Kenyans concern with corruption in the general government could also reduce their trust in tax services. Several Afrobarometer surveys between 2011 and 2014 indicated that 90.14% of Kenyans believed that the President and his officials are involved in corruption while 28.22 % and 25.78% of Kenyans have refused or would refuse to pay taxes and disagree that citizens should pay taxes respectively³⁴⁴.

KRA has conducted several cases including background checks, vetting and lifestyle audits. Their success has been attributed to an intelligence and strategic operations department with the mandate of prevention, detection, and investigation of corruption and unethical conduct in the authority. They are guided by the KRA anti-corruption policy and a code of conduct that all employees sign and are regularly trained on.

The internal audit department is also responsible for the investigation of fraud and fraud-related cases at the Authority and is relatively independent. Reports of their investigations are, however, not made public unless they reach court stage. It has been argued that to further discourage corruption, in addition to court action, convicted persons in addition to court orders should be deregistered from their professional bodies and barred from practicing again. Additionally, the Authority has a whistleblower policy that provides for the protection of whistleblowers contacting the authority despite the fact that there is generally no whistleblower protection law as the Bill has not been passed into law yet.

³⁴²Transparency – Kenya , Kenya Bribery Index 2019 (TI- Kenya, 2020)

³⁴³Thomas Isbell, 'Footing the Bill? Less Legitimacy, More Avoidance Mark African Views on Taxation' (Afrobarometer, February 2022)

³⁴⁴Amadou Bolya, Maty Konteb, and Abebe Shimeles 'Corruption Perception and Attitude towards Taxation in Africa' (2021) 30 AERC Supplement 1 Journal of African Economies

RECOMMENDATIONS

- 1.** The Kenyan government must carry out a socio-economic impact assessment on existing and new tax policies from an income and gender perspective.
- 2.** The National Assembly needs to release tax expenditure reports on an annual basis. It should be included in the budget process.
- 3.** The National Treasury needs to improve reporting tax expenditures under Corporate Income Tax (CIT) for instance by including tax holidays provided in special zones within the report.
- 4.** The Parliament needs to further extend disclosure of beneficial ownership requirements not only to companies but to other legal vehicles such as partnerships and trusts in Kenya and amend the law to allow for public access to beneficial ownership information. For this to happen, it is necessary to clarify when BO information is considered to 'affect the public'.
- 5.** Increased cooperation between several government agencies including the Business Registration Service, the Ethics and Anti- Corruption Commission, the Office of the Director of Public Prosecutions and other financial regulators must be enhanced in order to ensure that BO information is utilized effectively in curbing and addressing financial crimes and harmful tax practices.
- 6.** Timely access to audit reports must be provided by the Office of the Auditor General as specified in the public finance management laws. Additionally, the Government and the respective ministries need to meet their obligations and respond to the Auditor General's remarks as well as to recommendations made by the National Assembly on previous audit reports must be adopted.
- 7.** Parliaments need to enact Public Participation legislation both at national and county level that is in line with the Constitution of Kenya 2010 and is especially applicable to public finance management. The National Treasury, the Controller of Budget and other government institutions involved in budget formulation and implementation should public engagement outside of Nairobi.
- 8.** Civil society needs to carry out a legal analysis to identify the legal loopholes that limit the implementation of the Access to Information Act especially in gaining access to tax information. and work in tandem with the Kenyan Parliament to close these loopholes. Additionally, the civil society and the Parliament need to develop and pass the Access to Information Regulations in order to enable the full implementation of the Access to Information Act.
- 9.** The National Treasury should make public all tax deals with national and multinational companies.
- 10.** Generally, the Kenyan government needs to further include, involve and support civil society actors to engage in policy formation and decision making processes around tax issues, particularly through the formation and expansion of inclusive business associations, taxpayer associations, and partnerships between government and civil society organisations.



OKOA!
UCHUMI!

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