ANALYSIS OF TAX INCENTIVES AND EXEMPTIONS IN THE FINANCE ACTS FROM 2009 – 2019

Local innovation

Development promises

Investment promises

Resources for development

Tax incentives

Resource losses due to corruption

Unequal development

Job promises
ANALYSIS OF TAX INCENTIVES AND EXEMPTIONS IN THE FINANCE ACTS FROM 2009 – 2019
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Abbreviations</th>
<th>vii</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Taxation and Inequality</strong></td>
<td>1</td>
</tr>
<tr>
<td>1.1 Background</td>
<td>1</td>
</tr>
<tr>
<td>1.2 Tax Incentives and Exemptions</td>
<td>2</td>
</tr>
<tr>
<td>1.3 Elites and Elite Capture</td>
<td>3</td>
</tr>
<tr>
<td><strong>2. How tax laws are made</strong></td>
<td>5</td>
</tr>
<tr>
<td>2.1 Theoretical Framework</td>
<td>5</td>
</tr>
<tr>
<td>2.2 Institutional Framework for Granting Tax Incentives in Kenya</td>
<td>5</td>
</tr>
<tr>
<td><strong>3. Findings from analysis of Finance Acts 2009 to 2019</strong></td>
<td>7</td>
</tr>
<tr>
<td>3.1 Tax incentives to the rich versus incentives to vulnerable groups</td>
<td>7</td>
</tr>
<tr>
<td>3.1.1 Case Study: Tax Incentives Targeting Vulnerable Groups</td>
<td>8</td>
</tr>
<tr>
<td>3.2 Tax incentives to the Real Estate Sector</td>
<td>9</td>
</tr>
<tr>
<td>3.2.1 Case Study: Tax incentives to the Real Estate Sector 2009 to 2019</td>
<td>10</td>
</tr>
<tr>
<td>3.2.2 Case Study: Disproportionate benefits to wealthy real estate owners</td>
<td>10</td>
</tr>
<tr>
<td>3.3 Tax Incentives to the Manufacturing Sector</td>
<td>11</td>
</tr>
<tr>
<td>3.3.1 Case study: Tax incentive to select millers</td>
<td>12</td>
</tr>
<tr>
<td>3.4 Gender Sensitive Tax Incentives</td>
<td>12</td>
</tr>
<tr>
<td>3.5 Tax incentives in the extractive sector</td>
<td>13</td>
</tr>
<tr>
<td><strong>4. Critical Actors who influenced granting of Tax Incentives Kenya between 2009 to 2019</strong></td>
<td>15</td>
</tr>
<tr>
<td>4.1 Political Elites influence on Tax Laws</td>
<td>15</td>
</tr>
<tr>
<td>4.1.1 Case study: Political Elites Influence on Taxation of Capital Gains in Real Estate</td>
<td>16</td>
</tr>
<tr>
<td>4.1.2 Case Study: Influence of the Executive on Tax Laws</td>
<td>16</td>
</tr>
<tr>
<td>4.1.2.1 Northlands Project</td>
<td>17</td>
</tr>
<tr>
<td>4.1.2.2 Merger between CBA and NIC</td>
<td>17</td>
</tr>
</tbody>
</table>
ANALYSIS OF TAX INCENTIVES AND EXEMPTIONS IN THE FINANCE ACTS FROM 2009 – 2019

4.1.2.3 Affordable Housing Scheme

4.2 Organised Interest Groups

4.2.1 Case Study: Interest Group lobbying: Kenya Property Developers Association (KPDA)

4.2.2 Case Study: Interest Group lobbying: Association of Investment Bankers (KASIB)

4.3 Corporate Lobbying

4.3.1 Case Study: Corporate Lobbying in the Betting Industry

4.4 Tax Advocacy by Civil Society in Kenya

4.5 Engagement of women in Influencing Tax Policies

5. Key Obstacles that prevent active and influential tax advocacy

5.1 Lack of Expertise and Technical nature of Tax Rules

5.2 Inadequate Public Participation Processes and Structures

5.3 Fragmentation in Advocacy and Lack of Systematic Approach

5.4 Lack of Information on Formal Institutions that Formulate Tax Policy

5.5 Lack of Adequate Resources

6. Impact of the Incentives and Exemptions

Opportunity cost in health care

7. Recommendations and Conclusion

7.1 Recommendations

7.1.1 Public Education and Engagement on Tax Matters

7.1.2 Legitimacy Appeals and Framing of Tax Advocacy on Themes of Equity and Fairness

7.1.3 Streamlining of the Public Participation Structures

7.1.4 Provision of Forums for Engagement with Government and Policymakers

7.1.5 Transparency and Rationalisation of Tax Incentives and Exemptions

7.1.6 Consistent Research on Tax Justice Issues

7.1.7 Supporting and Collaborating with Women in advocacy

7.2 Conclusion
### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CSO</td>
<td>Civil Society Organisation</td>
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<tr>
<td>ICPAK</td>
<td>Institute for Certified Public Accountants of Kenya</td>
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<tr>
<td>KAM</td>
<td>Kenya Association of Manufacturers</td>
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<tr>
<td>KASIB</td>
<td>Kenya Association of Stockbrokers and Investment Banks</td>
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<td>KBA</td>
<td>Kenya Bankers Association</td>
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<tr>
<td>KES</td>
<td>Kenya shillings</td>
</tr>
<tr>
<td>KEPSA</td>
<td>Kenya Private Sector Alliance</td>
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<td>KPDA</td>
<td>Kenya Property Developers Association</td>
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<tr>
<td>KRA</td>
<td>Kenya Revenue Authority</td>
</tr>
<tr>
<td>VAT</td>
<td>Value Added Tax</td>
</tr>
</tbody>
</table>
1.1 Background

Kenya’s GDP has been growing at more than 5% for most of the past decade. This growth has however not been translating into reduced poverty with an estimated 17 million Kenyans still living below the international poverty line of USD $1.90 a day. In addition to this, the inequality gap in Kenya remains monumental with 0.1% of the population owning more wealth than the rest of the 99.9%. In order to accelerate the poverty reduction, there is need to focus on policies that ensure inclusive economic growth.

A properly functioning tax system is essential because it not only provides the means by which governments can fund the services expected of them but is also an important tool for wealth redistribution and therefore poverty and inequality reduction. Tax policy determines not only how much taxes a country can raise, but also who bears the burden of tax. One of the key tenets of tax policy as enshrined in Article 201 of the Constitution of Kenya, 2010 is that the burden of tax should be fairly shared. This can be achieved through progressive taxation, which requires that the rich bear a proportionately higher tax burden than the poor.

Progressive taxation in developing countries such as Kenya has however been difficult to implement due to the concentration of income on the very top percentiles. The wealthy taxpayers possess power and influence that allows them to block efforts to impose tax on their incomes.

Further, wealthy individuals use their economic resources and political connections to push for tax incentives that benefit them. In pushing for tax incentives, the wealthy argue that tax incentives are necessary to create an attractive business environment. This is despite lack of evidence on the

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effectiveness of tax incentives to attract investments in isolation. Further, social benefits from the investments are rarely commensurate to the tax revenues lost.\textsuperscript{7}

Despite the low correlation between tax incentives and increased investments, as well as the negative impact of granting tax incentives on public revenue, Kenya like many developing countries continues to grant tax incentives. \textsuperscript{8}This is mostly due to capture of the tax policy and legislation process by rich and powerful stakeholders coupled with politician’s willingness to extend favours to special interest groups. \textsuperscript{9}The impact of elite capture on formulation of tax laws is a shift of the tax burden from the rich to the poor which exacerbate poverty and inequality.

This paper seeks to analyse the patterns and trends of tax incentives and exemptions in Kenya granted in the period 2009 to 2019. This is aimed at identifying the main beneficiaries of the tax incentives and key stakeholders who influence formulation of tax laws for the of benefit select individuals or groups. The paper will also identify instances of structural disenfranchisement of the incentives on the Kenyan population with a bias on the poor, women and youth.

\subsection{1.2 Tax Incentives and Exemptions}

Tax incentives are special provisions that allow for exemption from tax, reduced rates of taxes, tax deductions on expenditure, tax credits, or deferral of tax liability. \textsuperscript{10}Tax exemptions take many forms and include tax holidays, zero rating or exemption from VAT and exemption from customs rates.\textsuperscript{11}

Like many developing countries, Kenya provides a wide range of incentives which are targeted towards promoting private investment. Tax exemptions and incentives are granted with the stated objective of promoting investment to spur economic growth and development and result to increased social benefits such as creating employment and reducing poverty. Mainstream opinion however is that tax incentives do not play a major factor in decisions as to whether to invest or not. \textsuperscript{12}Tax incentives on their own therefore have limited effect in attracting investments.

In Kenya, the government has been losing over KES 100 billion every year on tax incentives and exemptions. \textsuperscript{13}These amounts represent critical resources for achieving the government’s objectives of development and alleviation of poverty. Moreover, these incentives have tended to be directed at wealthy persons and have therefore resulted in the disenfranchisement of the poor and other

\begin{thebibliography}{9}
\item Sebastian (2013), \textit{Op cit.}
\item Tax Justice Network-Africa & Action Aid International, 2012. \textit{op. cit.}
\end{thebibliography}
vulnerable groups. Generous tax incentives in favour of the wealthy continue to persist in developing countries such as Kenya mostly due to capture of the tax policy and legislation process by rich and powerful stakeholders known as the elite.\textsuperscript{14}

### 1.3 Elites and Elite Capture

The elite refers to people, whether individuals, or small groups who exercise power and influence over decision making using formal or informal channels.\textsuperscript{15} They are individuals who can exert disproportionate influence over a collective action process. Elites include wealthy entrepreneurs, corporate executives, high government officials and public officers.

Elite capture is a situation where elites manipulate the decision-making arena and agenda and obtain most of the benefits.\textsuperscript{16} Elite capture in the tax process is said to occur where elites use their power and influence to manipulate decision making to appropriate benefits for themselves through tax incentives.

There are certain factors that help to explain elite capture. These include the "disparate access to economic resources, asymmetrical social positions, varying levels of knowledge of political protocols and different education levels."\textsuperscript{17} The power of the elite is perpetuated by ownership of land, family networks, employment status, wealth, political and religious affiliation, personal history, and personality.\textsuperscript{18} Elite power can be viewed from two different perspectives namely, instrumental power, and structural power.

Instrumental power is the deliberate and conscious political efforts by elites individually or collectively or through their associations and institutions and may be through strategies such as lobbying, direct participation in governance and policy making, campaign financing and media advocacy and campaigns.\textsuperscript{19} Elites’ access to resources (access to media, cohesion, and expertise) and their relationship with policy makers [including through institutionalised consultations, appointment or election to offices] are key sources of instrumental power.\textsuperscript{20} Mills argues that the elite are able to exercise instrumental power since they are part of the top social stratum that often sees one another socially and at business, and so, in making decisions, take one another into account.\textsuperscript{21}

\textsuperscript{14}Ibid

\textsuperscript{15}Marx Everest-Phillips, \textit{When Do Elites Pay Taxes? Tax Morale and State-Building in Developing Countries}, 2009. Available at: \url{http://www2.ids.ac.uk/gdr/cfs/TaxNews/WIDER%20when%20do%20elites%20pay%20taxes%20May09.doc}


\textsuperscript{18}Ibid.


\textsuperscript{20}Ibid.

Structural power on the other hand finds relevance in capitalism as capitalism requires private investment thus making governments in capitalist democracies dependent on creating the conditions under which holders of capital will be willing to invest. It involves the implicit threat of divestment or withdrawal of capital that operates to shape policy makers concerns and perspectives in agenda setting and policy formulation and may inadvertently lead to policy makers adopting pro-elite policy outcomes. The implicit threat of divestment poses concern for policymakers as it threatens to jeopardize the goals of the government and policy makers for economic development which may in turn lead to punishment by the electorate at the polls.

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23 Ibid.
2. HOW TAX LAWS ARE MADE

2.1 Theoretical Framework

Formulation of tax laws is an output of a public policy process which entails participation of several actors with different, and in some cases, conflicting interests. Several theories have been proposed by scholars in a bid to understand how policies affecting the public are made, as well as the key factors that determine why some policies are adopted while others are not. This paper considers two theories that are relevant in understanding why the tax law process may result in granting of tax incentives that benefit the rich at the expense of the larger public.

The Elite theory\(^{24}\) posits that societies are divided into those who have power [the elites] and those who do not. According to this theory, the elites are firmly in power, have shared values and are actively involved in shaping public policies with the aim of protecting their interests. On the other hands, the ‘masses’ are apathetic, uninformed, or not well organized to influence policies that affect them. Public policies such as tax laws therefore reflect the preferences and desires of the elites. This theory has been applied mostly in developing countries.

The group competition theory\(^{25}\) on the other hand considers public policies as a product of continuous struggle among organized interest groups. This theory posits that power in society is widely distributed and not concentrated in a few elites. Groups organize themselves based on their shared interest and the most organized groups with greater resources such as financial resources, information, recognition, access to policy makers etc. successfully lobby for public policies in their favor. The struggle for power often results to a win-lose situation.

This paper will seek to show how the two theories find relevance in explaining the patterns and trends of tax incentives granted in Kenya.

2.2 Institutional Framework for Granting Tax Incentives in Kenya

Chapter twelve of the Constitution of Kenya, 2010 lays out various principles to guide public finance in Kenya and requires that the public finance system promote an equitable society where the burden of taxation is shared fairly. Public expenditure should promote the equitable development of the country including by making special provision for marginalised groups and areas. The Constitution also requires openness and accountability, including public participation in financial matters.\(^{26}\) The Constitution further requires that no tax be imposed, waived or varied except as provided for by legislation\(^{27}\) thus


\(^{25}\)Ibid.

\(^{26}\)Article 201 (a) of the Kenyan Constitution.

\(^{27}\)Article 210 (1) of the Kenyan Constitution.
ensuring that holders of political office do not issue tax waivers and incentives at their discretion. Any tax incentive or exemption granted flows from amendment to existing tax statutes through the Finance Acts and on occasion, through Tax Laws (Amendment) Acts.

Parliament has enacted Laws and Regulations that set out the manner in which public participation is to be achieved in the budget making process and the enactment of the Finance Acts. The participatory structures and processes set out for public participation include open forums, written submissions, online platforms, and media. Under the Laws and Regulations, the public should be notified through notice in the Kenya Gazette of the dates, venue, and manner of public participation. To ensure transparency in the tax making process, Parliament is required to publish and publicise the documents received during the public participation process within 7 days of presentation. The courts have further set out principles of what constitutes adequate public participation to state that the public participation framework should allow for innovation and malleability to ensure that it is effective and should accord with the subsidiarity principle that those who are likely to be most affected should have a bigger say and should have their views being more deliberately sought.

From a formal institution perspective, Kenya seems to have a robust framework for safeguarding against abuse of tax laws that benefit a few at the expense of others such as granting of biased tax incentives. In practice however, the output of the tax law process indicates several instances where tax incentives have been granted in favour of the rich as will be discussed later in the report.

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30Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR.
The section below contains findings from review of tax incentives granted in Kenya between 2009 and 2019. The review analysed patterns and trends in the incentives in order to identify the main beneficiaries from the incentives as well as victims.

From the review, the emerging patterns observed include:

- Tax incentives targeting the rich were mostly direct taxes while incentives targeting the poor and vulnerable groups were mostly indirect taxes. Only in few instances were direct taxes provided to vulnerable groups in which case the tax benefits were capped.
- The real estate sector was the main beneficiary of tax incentives, followed by manufacturing sector. Generous incentives in real estate particularly benefited the rich as generous incentives were given to high value investments.
- There were no tax incentives specifically targeted at women, with the exception of VAT exemption on sanitary pads.
- Tax incentives to the extractive sector were mainly in respect to indirect taxes.
- Most tax incentives especially VAT exemptions and capital deductions granted required obtaining approval from the respective Cabinet Secretaries despite qualifying conditions being stated in law.

The trends and patterns are discussed in detail below.\(^{31}\)

### 3.1 Tax incentives to the rich versus incentives to vulnerable groups

Tax incentives favouring the rich were mostly direct taxes and these included reduced corporate tax rates\(^{32}\) tax holidays in special economic zones, tax holidays in export processing zones, low capital gains tax at 5%, and investment deductions of 100% and in specified cases, 150%. The amount of investment required to benefit from the above incentives places them out of the reach of the poor and as such seem to be ear-marked for the elite in society. These tax incentives are provided as percentages of actual amounts and not capped.

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\(^{31}\)The requirement to obtain Cabinet Secretaries approval introduces discretion in the granting of tax incentives. Since Cabinet Secretaries are political appointees of the executive, the need for this approval risks politicization of tax incentives. Further, since the approval is at the discretion of the Cabinet Secretary, it is difficult to maintain transparency and accountability in the process. The added step also creates additional administrative work for taxpayers who may not have the technical skills to make the application. In contrast, the elite have at their disposal financial resources to hire advisors who make the applications on their behalf. They also have close networks in government who may facilitate the approval process. The condition to obtain CS approval for tax incentives whose conditions are already specified in law is discriminatory.

\(^{32}\)Reduced CIT rates apply to some sectors such as special economic zones, developers in real estate who meet specified conditions, motor vehicle assembly, listed companies and plastic recycling companies.
Conversely, direct tax incentives targeting vulnerable groups such as low-income earners, the youth, and the disabled had maximum limits specified. For instance, tax free meal benefit, personal relief and income tax exemption for people with disability are all capped. In some cases, conditions were attached that result in the incentive being discriminatory. An instance is the requirement to pay an upfront KES 10,000 to benefit for tax exemption under the Ajira program.

While most incentives to the rich are in respect to direct taxes, in most cases, incentives targeting the vulnerable relate to indirect taxes. These take the form of VAT exemptions and reduced customs duties on basic food stuffs, agricultural inputs and medical services.33

The discrepancy in the incentives afforded to the elite and the poor has an implication on impact of the incentive on the intended recipients. Incentives on direct taxes have a greater impact since they result in a direct increase in disposable income of those who enjoy them. Increased disposable income allows the holders of the income to increase their wealth through reinvestment. Tax incentives in respect of indirect taxes in the form of exemptions and zero-rating are often broad-based and enjoyed by both the poor and the elite. The incentives may also not reach intended beneficiaries especially if provided to intermediaries such as manufacturers. This is because in free market economy the decision to reduce prices due to tax savings is at the discretion of the suppliers.

3.1.1 Case Study: Tax Incentives Targeting Vulnerable Groups

The Finance Act 2008 introduced an incentive targeted at low-income earners. The incentive provided that employers could provide food to their low-income earners without the same being treated as a tax benefit to the employees. However, in 2014, this incentive was expanded to include all employees provided the meals did not cost more than Kshs 4,000 per month per employee.

In 2016, in a bid to cushion the low-income earners, the Finance Act, 2016 exempted from tax, bonuses, and overtime and retirement benefits made to employees whose income is taxed at the lowest tax bracket, of 10%.

In the same year and subsequently in 2017, the individual tax bands and personal relief were revised. Following the revision, the lowest tax band was increased from KES. 121,968 in 2016 to KES. 147,580 per annum in 2019 while personal relief was increased from KES 13,944 in 2016 to KES 16,896 in 2019.34

The revision of the tax bands and personal relief in two consecutive years while a welcome move, may be argued to be inadequate to cater for the impact of inflation in all the years when no inflation adjustment had been made.

In 2010, the law was amended to allow persons living with disability receive an exemption from tax of KES. 150,000 per month, on all their incomes. For a person to qualify, they must be registered with the National Council for People with Disabilities and obtain a tax exemption certificate from the KRA. The tax incentive targeting people with disability is substantial given the average levels of income in Kenya, where 74% of salaried Kenyans earn less than KES 50,000.35 Unfortunately, most people living

33Most of these essential goods and services were previously zero-rated until 2013 when they were moved to exempt list.

34Third Schedule to the Income Tax Act, Cap 470

with disability are unaware of the existence of this exemption and therefore do not take advantage of it.\textsuperscript{36} There have been complaints from persons with disabilities on the process of obtaining the exemption. The complaints include that the process is often long and in some cases the revenue officers handling the exemption verification process are often unfamiliar and lack knowledge disabilities beyond the physical ones. Thus, disabilities resulting from illnesses such as neurological ones are often overlooked and denied exemptions despite the same being treated as disabilities under the Persons with Disabilities Act. Further, it is at the discretion of the revenue officers on whether or not to grant the exemption and there is no appeal process for the same. Since the exemption must be renewed every 5 years, the process is often tedious and can be expensive for those who have to travel from far flung areas to the vetting centres.\textsuperscript{37}

To address the rampant youth unemployment in Kenya, government in 2019 introduced the Ajira Programme. The Ajira programme was aimed at enabling over 1 million youth annually to be engaged as digital freelancers.\textsuperscript{38} Under the programme, income of individuals who registered under the Ajira Platform would be exempted from tax on the income earned from the Ajira platform, on condition that they pay a registration fee of KES, 10,000 per annum, in lieu of taxes.\textsuperscript{39} The requirement to pay an upfront annual amount of KES 10,000 to individuals seeking work opportunities is punitive and akin to taxing a person before they earn. The amount is also exceedingly high for the poor who live on less than 1.9 USD a day.\textsuperscript{40} As such, the exemption benefits those who can afford to pay the advance registration fee and renders it ineffective in benefiting poor youth.

### 3.2 Tax incentives to the Real Estate Sector

Real estate provides the main source of wealth for High Net Individuals in Kenya, at 26%.\textsuperscript{41} The real estate sector is well organized under the Kenya Property Developers Association (KPDA) which was established in Nairobi in 2006.\textsuperscript{42} The KPDA reports, among its key achievements, that it successfully lobbied for favourable tax incentives jointly with Kenya Private Sector Alliance (KEPSA) over the years.

The real estate sector is the most incentivised sector in Kenya. A significant number of tax incentives were given in 2009. The number of incentives reduced between 2010 and 2014. From 2015 however, the sector has consistently received tax incentives each year. The most generous incentives were introduced in 2009, 2015 and 2019. The influence of elites in real estate and lobbying through KPDA and KEPSA may explain the generous tax incentives to the sector.

\textsuperscript{37}Interview with persons with disabilities.
\textsuperscript{39}First Schedule to The Income Tax Act, Cap 470
\textsuperscript{40}World Bank (2015) op.cit.
The real estate sector is dominated by middle income persons and the rich. However, conditions attached to several tax incentives in the sector particularly favour the rich investors, as the most generous incentives apply to high value investments.

### 3.2.1 Case Study: Tax incentives to the Real Estate Sector 2009 to 2019

In 2009, in a bid to encourage development outside of the main cities, the government introduced a 150% investment deduction for any person investing more than KES 200 million for the construction of a building outside Nairobi, Mombasa or Kisumu. A proposal in the 2015 Finance bill to limit investment deduction to 100% on the basis that 150% was excessive and likely to erode the tax base was unsuccessful.

Prior to 2009, owners of commercial and residential property were not entitled to claim a capital allowance on their expenditure. This changed with the introduction of capital allowance on commercial and residential property with effect from 2010. However, not every property owner qualified for the allowance. For commercial property, capital allowance would only apply where social amenities were provided and for residential property, capital allowance would only apply if the property is located in a planned development area. In both instances, approval from the Cabinet Secretary is required.

In an unprecedented move, the Finance Act 2015 introduced a tax amnesty specific to landlords which included waiver of principal taxes, penalties and interest relating to the period 2013 to 2015. While it is not unusual for countries to give tax amnesties to encourage tax defaulters to voluntarily pay outstanding taxes, amnesties are usually given on penalties and interest. It is rare for the amnesty to extend to principal taxes. Further granting of a generous tax amnesty to a specific category of taxpayers who comprise the wealthy class through a national law was unusual.

The 2019 Finance Act introduced generous tax incentives to developers in real estate who participate in the affordable housing scheme. These include, reduced corporation tax rate, exemption from import duties, VAT, railway development levy, and import declaration fees on purchase of construction supplies, exemption from stamp duty and thin capitalisation restrictions. The value of the tax incentives to the affordable housing scheme was estimated at KES 50 billion by the Kenya Property Development Association (KPDA) in 2019.43

### 3.2.2 Case Study: Disproportionate benefits to wealthy real estate owners

One of the most generous tax incentives is the 150% investment deduction on buildings outside of Nairobi Mombasa and Kisumu. To enjoy the incentive, one requires a minimum capital investment of KES 200 million which only the rich can afford. Developers of residential property benefit from reduced corporate income tax rate but only if the number of units is at least 400. Further, to benefit from capital deduction on residential property, the property must be located in a planned development area and planned development areas are located in middle and upmarket areas. This means that landlords of residential property in low-income areas are not entitled to the tax incentive.

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On the other hand, tax incentives targeting low- and medium-income landlords as well as purchasers of residential property are inadequate at best, and at worst, punitive. The Finance Act, 2015 introduced a simplified tax regime for landlords of residential property earning more than KES 144,000 but less than KES 10 million per annum.\textsuperscript{44} Such landlords are required to pay a simplified tax at 10\% on gross turnover.\textsuperscript{45} 10\% tax rate on gross revenue is barely an incentive and is in fact punitive. This is because most landlords develop their property through debt the cost of financing in Kenya is high.\textsuperscript{46}

Purchasers of residential property receive a tax relief of 15\% on gross emoluments to a limit of KES 108,000 per annum for purchases made under the affordable housing scheme.\textsuperscript{47} Homeowners who obtain mortgages receive a maximum deduction on interest paid of KES 300,000 per annum.\textsuperscript{48} It is notable that tax relief and deductions targeting low and medium-income earners are capped and at relatively low amounts per annum, yet tax incentives targeting the rich are not capped. Further, while home ownership is encouraged, it is unfortunate that taxpayers who cannot afford to buy homes do not receive a specific tax relief or deduction to cater for the cost of housing.

### 3.3 Tax Incentives to the Manufacturing Sector

The manufacturing sector has also been a beneficiary of various tax incentives, including investment deductions on capital expenditure, VAT exemptions, and exemptions from custom duties on importation of machinery used for manufacturing.

An extremely generous investment deduction was introduced in the manufacturing sector through the Finance Act, 2009 targeting high value investors. The investors received 150\% investment deduction on installation of machinery or construction of building used for manufacturing, provided the investment was more than KES 200 million and located outside Nairobi, Mombasa or Kisumu. All other manufacturers are entitled to 100\% investment deduction on their capital expenditure. The Cabinet Secretary for Treasury proposed to limit the 150\% investment deduction to 100\% through the Finance Bill, 2015 but this was unsuccessful.

The Finance Act, 2017 introduced a tax rebate for manufacturers by allowing them to deduct 130\% of their cost of electricity in order to cushion them from high electricity costs. While the manufacturing sector is critical to the Kenyan economy and is a focus area for the Jubilee governments big 4 agenda, granting tax incentives of more than 100\% especially to huge investments is excessive and places a burden on the taxpayers.

In the period 2009 to 2019, most tax incentives offered to the manufacturing sector were VAT exemptions and exemption from custom duties targeting specific players. Manufacturers of agricultural products were consistent beneficiaries of VAT exemptions which mostly applied to their inputs or raw materials.\textsuperscript{49}

\textsuperscript{44}Turnover adjusted to 15 million in 2020.

\textsuperscript{45}Finance Act, 2015 Kenya. Landlords can opt out of the simplified regime and pay tax at the standard rate of 30\% on profits.


\textsuperscript{47}Finance Act, 2018

\textsuperscript{48}Section 15(3) of the Income Tax Act

\textsuperscript{49}Finance Act, 2015 and Finance Act, 2017
Though manufacturing plays a key role in development, the incentives targeted at the manufacturing sector seem to favour those with the ability to invest vast amounts while ignoring the small manufacturers. The high value requirements set out for manufacturers to enjoy the benefits effectively edge out start-up manufacturing entities and in so doing limit the benefits to the elite.

3.3.1 Case study: Tax incentive to select millers

Tax incentives to millers were substantial in 2011 and were argued to be aimed at curbing food shortages in the country.\(^\text{50}\) The tax incentives included remission of import duty on wheat grains at 0% instead of 10% for a period of one year, remission of import duty on maize grain at 0% instead of 50% for a period of 6 months, reduced custom duty rate on importation rice at the rate of 30% instead of 75% for a period of one year. The tax incentives would however only apply to gazetted millers.

While curbing food shortages is a valid reason to lower import duties on basic foodstuff, 2011 was a highly political year in anticipation of the general election in March 2013. The timing of the exemptions cast doubt on the real purpose of tax incentives especially since they applied to only gazetted millers whose selection was discretionary. Empirical evidence has shown that politicians use tax incentives as a bargaining tool with the economic elites, especially around election years in order to obtain financing for their campaigns. \(^\text{51}\) Duty remission on otherwise sensitive products which ordinarily attract high duties such as sugar have historically been used for election financing in Kenya.\(^\text{52}\)

3.4 Gender Sensitive Tax Incentives

Other than the VAT exemption on sanitary pads introduced in the VAT Act, 2013, tax incentives granted during the period 2009 to 2019 were gender neutral in their wording in that they did not target any specific gender. Neutral tax incentives potentially contain implicit bias since they fail to take into account the existing social arrangements that may disadvantage one gender and favour another.

Women for instance earn lower wages compared to men even for similar job grades, are overrepresented in the informal sector, and have historically been discriminated against in economic matters such as ownership of property.\(^\text{53}\) For instance, only 35% of women in Kenya own immovable property\(^\text{54}\), and women account for only 1% of all land titles in Kenya.\(^\text{55}\) Underrepresentation of women in the real estate sector implies that most women are unable to participate and benefit from the generous tax incentives offered to real estate owners.


In Kenya, just like in many other countries, women disproportionately bear the burden of unpaid care as a result of their gendered roles in society. This affects their capacity to participate in paid employment, pay taxes and benefit from social security provisions and public services afforded through the tax system. Further women tend to spend more on buying necessities such as food, clothes, school items and medicines than men.

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 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 high in Kenya 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 exemption.

High participation of women in the informal sector and unpaid care means that women have lower incomes than men. Low incomes reduce women’s access to capital from financial institutions. As a result, women cannot benefit from the generous tax incentives that require minimum capital investment of high value amounts.

### 3.5 Tax incentives in the extractive sector

The extractive sector has the potential to generate tax revenues for social and economic development goals. Empirical research from Africa shows that the extractive’s sector’s contribution to increase in revenues has however not been commensurate to Africa’s resource rich nature. This has been attributed in part to the grant of generous but harmful tax incentives which are initially stated to be geared towards encouraging the development of the extractives sector. The conclusion of double

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57Ibid

58Ibid


63Ibid
taxation treaties also poses the risk of loss of taxing rights in respect of income and capital raised by extractive activities taking place within a country’s jurisdiction.\textsuperscript{64}

Up until 2014, there was not much sector specific tax incentives with respect to the extractives sector. The only notable one was an exemption on import duty on the importation of machinery used in exploration in 2009.

Through the Finance Act, 2014 the government overhauled the taxation regime for the extractive sector and provided a new comprehensive taxation regime for the extractives sector. The new regime provided various incentives to the extractives sector. One of the key incentives was the right to carry forward their losses indefinitely. Whereas it is arguable that this was a reflection of the huge capital outlay as well as the time it takes to get to commercial production it is significant that companies in other sectors are only allowed to carry forward losses for up to 10 years. The other notable incentives granted include the right to depreciate machinery first used to undertake operations under a prospecting right at one hundred percent, allowable deductions for extraction and development expenditure at the rate of 20\% until the expenditure has been fully deducted and allowances for deduction of rehabilitation and decommissioning expenditure.

On indirect taxation, Paragraph 29 of the VAT Act, 2013 exempts taxable supplies (goods and services), excluding motor vehicles, imported or purchased for direct and exclusive use in oil exploration, by a company granted specified licenses, upon recommendation by the Cabinet Secretary responsible for the Ministry concerned.

\textsuperscript{64}United Nations Handbook on Extractives \textit{op.cit}

Formulation of tax laws is not just a technical process. The tax process entails intense lobbying and bargaining among different actors. The push for tax reforms was once considered to be an exclusive domain for the IMF, National Treasury, politicians, and tax experts. Recent studies have observed that the actors in tax policy debates have widened and now include entrepreneurs and civil society organisations. Interest groups, which comprise of individuals and corporates with shared interests, have increasingly become involved in tax policy matters, especially with respect to tax incentives. The tax incentives granted in the period 2009 to 2019 were mostly a result of intense lobbying by powerful corporates, associations, political elites and in most cases, concerted effort among all the three.

4.1 Political Elites Influence on Tax Laws

Political elites refer to individuals occupying institutions of political power such as the executive, judicial officers and the legislature. According to a study by New World Wealth, the wealthiest families in Kenya are politicians who control over 50% of the wealth in Kenya. The link between politics and wealth dates back to the decolonisation period where indigenous leaders who inherited state power used their power to accumulate wealth, mostly land. Indigenous leaders continued in the colonial administration policy of consolidating political power to enable economic exploitation of resources for their benefit. This was achieved by influencing legislation. The link between wealth and politics in Kenya and the history of power being used to dominate by influencing legislation may explain the outcome of tax policies which favour the rich.

For several decades, state officers were exempted from paying taxes on their salaries and allowances and efforts to subject their incomes to tax were shot down by MPs on several occasions. Taxation of state officers was finally effected through a change in the 2010 Constitution which prohibited any state officer from being exempted from taxes. In response to imposition of taxes, MPs increased their salaries to cushion themselves against the tax.

The reluctance by MPs to pay taxes points to the wider issue of political elite’s reluctance to share in the burden of taxation. It also explains why MPs continue to approve tax incentives favouring the rich in

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68National Assembly Remuneration Act No 9 of 1975

that they directly benefit from the tax incentives. The MPs can also use the incentives to bargain with the rich for political favours such as campaign financing.

4.1.1 Case study: Political Elites Influence on Taxation of Capital Gains in Real Estate

An example of how political elites use legislation for personal economic interests was displayed by the strong opposition by MPs against reintroduction of capital gains tax on sale of property and shares which had been suspended in 1985.

In justifying their opposition to the tax, MPs cited several reasons such as that the tax would stifle investments, that the tax would increase cost of rent thus harming the poor etc. John Mbadi who argued for the reintroduction of CGT in 2013 observed that the main reason the MPs were reluctant to pass the proposal was not that it would negatively impact the economy but that it would directly impact them. He stated that:

'It is unfortunate that my amendments have been declined by the Committee; allow me to just say two words. I have realized that it is very difficult, painfully so, to tax the rich in this country. It is not true that if you introduce capital gains tax, it will affect adversely the capital market in this country....

In this country, the moment you try to tax the rich, they will come up with all manner of arguments, like it is going to discourage investment or you are scaring away investors. Who are these investors? It is us. It is you and I. These Hon. Members are protecting themselves; let them not pretend that they are protecting investments.”

Due to pressure from the public, MPs finally approved reintroduction of capital gains tax in 2014 at a reduced rate of 5% from an earlier rate of 10% prior to the suspension in 1985. A proposal in the 2019 Finance Bill to increase the capital gains tax rate from 5% to 12.5% in 2019 was not approved by MPs.

4.1.2 Case Study: Influence of the Executive on Tax Laws

The Kenyatta family is another example of how pervasive political influence on tax laws for personal gain is. The Kenyatta family has deep political ties in Kenya, with 2 members of the family having occupied/occupying the president’s office and senior government positions over time. Other members of the family have held or currently hold senior executive or legislative positions. The Kenyatta family business dynasty has expanded significantly since Uhuru Kenyatta became the president in 2013 and some of their businesses have benefitted from tax incentives introduced during Uhuru’s presidency.

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4.1.2.1 Northlands Project

The family owns the Northlands project, a massive real estate development on 11,000 acres which comprises of residential houses, commercial buildings, and industrial park, recreational park, a special economic zone, education facilities among others. The project which is estimated at KES 500 billion would benefit from investment deduction at 150% (Finance Act 2009), lower corporation tax for construction of more than 400 residential houses (Finance Act, 2016) and exemption from VAT on supplies to be used in the construction of the industrial and recreation parks (Finance Act, 2015). Further, should the planned special economic zone be approved, the project would benefit from a 10-year tax holiday and reduced corporate income tax rate after 10 years as well as several other tax exemptions that apply to Special Economic Zones. The project was commissioned in 2018 but reports on it emerged in 2015, which coincides with the year when several tax incentives which would benefit the project were introduced. The coincidence raises questions on whether the tax incentives introduced were in anticipation of the Northlands project.

4.1.2.2 Merger between CBA and NIC

The Kenyatta family benefited from a discretionary exemption from payment of stamp duty from the National treasury in 2018, following a merger between Commercial Bank of Africa (CBA) which the Kenyatta family has a stake, and NIC Bank. The stamp duty payable was estimated at more than KES 300 million. This exemption displayed a blatant abuse of public office for private interest and received public outcry. Attempts by a civil activist to reverse the tax exemption through the court on grounds that the merger was not in public interest was unsuccessful.

4.1.2.3 Affordable Housing Scheme

More recently, the Kenyatta family is said to be a beneficiary of the generous tax incentives introduced in 2019 for developers of low-cost housing under the affordable housing scheme. The Kenyatta family is said to own four construction companies, C Max, Koto Housing, clay products, and Timsales that are involved in the affordable housing scheme. Involvement of the Kenyatta family companies in the affordable housing which targets the poor received sharp criticism.

The seeming influence of the president on taxation laws to favour private interests particularly granting tax incentives for private benefit casts doubt on the effectiveness of the existing institutions to provide...
oversight and prevent abuse of public office, in particular, the role of parliament in providing oversight over tax legislation in order to protect public interest. This is however not surprising given that even the law makers have displayed reluctance to share in the tax burden. It also suggests possible collusion between the executive and legislature to further private interest of political elites or exertion of undue influence by the executive.

4.2 Organised Interest Groups

Pressure from interest groups is a main driver for policy change. Interest groups exert pressure on policy makers to change policies to their preferences. As proposed by the group theory of public policy, the extent to which interest groups successfully influence policy makers depends on how well they are organized and the resources they command.

Kenyan private sector is well organized under professional and trade associations. Further, the associations along with individual corporate organisations collaborate under an umbrella body, the Kenya Private Sector Alliance (KEPSA). KEPSA currently has more than 500,000 members drawn from every sector in the economy. Due to its unique position as a representative of the entire private sector, the association commands vast resources and expertise that enable it to influence policies in the country.

KEPSA has extensive audience with policy makers. The Government has created forums to facilitate engagement between KEPSA and legislators in the Senate and National assembly through the Speaker’s roundtable. Other forums availed to KEPSA to engage policy makers include audience with the Council of Governors and with the president through the President’s Roundtable. Through these forums, KEPSA is able to push for policies on behalf of its members. Some trade associations have been particularly successful in pushing for favourable tax incentives on their own and through the umbrella body KEPSA, such as the KPDA.

4.2.1 Case Study: Interest Group lobbying: Kenya Property Developers Association (KPDA)

KPDA is a consortium of different players in the real estate sector comprising of property owners, developers, financial institutions, financial advisors, architects, major law firms, property managers and industry suppliers. The composition of the association gives it financial and technical leverage as well as access to policy makers since most politicians own real estate. KPDA has collaborated with KEPSA in lobbying for tax incentives which further increases its power to influence policies. In its 2019 annual report, the KPDA reported that through collaboration with KEPSA, it successfully lobbied for tax incentives under the affordable housing scheme, whose value is estimated at 50 billion. Notably, KPDA was founded in 2006 and several tax incentives in real estate were introduced in 2009. The sector has continued to receive generous tax incentives annually which potentially indicates the effectiveness of associations in influencing policies.

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79KEPSA Website, https://kepsa.or.ke/public-private-dialogue/ accessed on 15 January 2021

4.2.2 Case Study: Interest Group lobbying: Association of Investment Bankers (KASIB)

Another instance of institutionalized lobbying is demonstrated by series of efforts mounted by the Association of Investment Bankers (KASIB) protesting the reintroduction of capital gains tax on shares in 2014. KASIB challenged the constitutionality of the law re-introducing the tax arguing that the tax was uncertain in its application to listed securities and that Parliament did not follow the required process of public participation in passing it. The case was however dismissed with the court stating that the law had been validly passed. Undeterred, KASIB resorted to the threat of disinvestment and aggressive lobbying. KASIB mobilized other business associations for collective lobbying including the Institute for Certified Public Accountants of Kenya (ICPAK), Kenya Bankers Association (KBA), and KAM to issue a lobby document campaigning for the removal of the tax. KASIB also threatened to suspend trading at the NSE until the issue was resolved. KASIB’s actions were intended strong arm the government into acceding to its position on capital gains tax. Eventually, faced with the risk of losing investors and the aggressive lobbying, the government attempted to reach a compromise with KASIB through the introduction of a lower withholding tax rate of 0.3% on gains from listed securities. When this was not successful, the government gave in to the demands and through an amendment in the Finance Act and exempted gains from listed securities from tax.

The series of events demonstrates the difficulty of taxing the capital markets which have historically been concentrated in the hands of the economic and political elite. During the colonial time, trading at the NSE was a preserve of European colonial elites. Africans and Asians were not allowed to trade until after independence when a few Africans joined the elite club of investors at NSE when it was still operating as an exclusive members club.

Notably, while associations representing women, the youth, SMEs are members of KEPSA, tax incentives favouring them are disproportionately lower than tax incentives favouring the rich. This may be attributed to among others, the level of organisation of such associations and economic resources at their disposal. Benefits from KEPSA membership vary depending on the type of subscription. For instance, only platinum corporate subscribers participate in high level round table meetings with local and international policy makers.

4.3 Corporate Lobbying

Powerful corporations with vast financial resources have contributed to shaping tax policies that impact them. This has been done individually and in concerted efforts with other organisations. Taxation of

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82Ibid
87Platinum subscribers contribute KES 1,000, 000 per annum.
betting and gambling operators in Kenya offers an example of how aggressive lobbying by powerful corporates can influence tax policy. At its infancy stage, betting industry was dominated by SportsPesa which was a partnership of wealthy, politically influential Kenyans with Bulgarian investors. Owing to its dominant position, the company actively engaged the Kenyan government protesting against various taxes imposed to the sector.

4.3.1 Case Study: Corporate Lobbying in the Betting Industry

In 2012, following an online craze for gambling, the government sought to tax the betting and gambling industry by introducing a 20% withholding tax on winnings from betting and gaming. In the budget speech, the Cabinet Secretary for National Treasury indicated that the objective was “to make the winners to equally contribute towards the exchequer”. However, for some unclear reason, this tax was removed even before it came into effect through a second Finance Act, 2012 which was published in January 2013.

In 2013, the government again sought to re-introduce the tax through the Finance Act, 2013 as a final withholding tax on winnings at 20% with effect from 1st January 2014. The Association of Gaming Operators alongside 41 other industry players, responded by filing suit challenging the imposition of tax arguing that there was no public participation, and that the implementation of the tax was impractical. The case was however dismissed with the court finding that there was public participation and that in fact the Association of Gaming Operators had presented memoranda in opposition to the bill.

Undeterred, betting and gaming operators continued to lobby against the withholding tax arguing that there would be difficulties in implementation. In the budget speech for 2015 the Cabinet Secretary, perhaps in response to the complaints and challenges referred to the need to simplify taxes in the betting and gambling industry proposed to introduce a tax on public lotteries at 5 percent of the lottery turnover, and a tax on bookmakers at 7.5 percent of the gross betting revenues. Eventually, in 2016 the withholding tax on winnings was reduced to 7.5% from the initial 20% on the gross winnings payable to players with effect from 1st January 2016.

By 2017 public outcry on the impact of gambling on the young and vulnerable members of the society intensified. In response and in what was seen to be a serious policy stance against gambling, the Finance Bill, 2017 proposed to impose a uniform tax rate of 50% on all categories of betting. As expected, the proposal to impose tax at 50% received widespread and varied responses from various stakeholders.

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91There was confusion as to the effect of the change. There was divergence of opinion with some arguing that the effect was that for residents the withholding tax on betting and gaming was retained at 20% but that a new tax at 7.5% on winnings from bookmakers had been introduced and that for non-residents the 20% withholding tax on betting and gaming had been replaced with a 7.5% withholding tax on winnings from bookmakers.
Betting firms such as Sportpesa used their investment power by threatening to withdraw their local sport sponsorships\(^92\) knowing that doing so would affect the clubs that they sponsored. True to this, local sport bodies such as the Football Kenya Federation (FKF) made petitions for reconsideration of the tax proposal.\(^93\) It would seem that there had been aggressive lobbying with political actors and other key stakeholders because when the bill was presented the Parliamentary Committee on Finance, the Ministry of Interior and Coordination of National Government and the Kenya Revenue Authority advised against the increase of the impugned taxes.\(^94\) As a result the proposal was shot down by Parliament. However, when the Finance Bill, 2017 was presented to the President for assent, the President declined to assent to the Finance Bill maintaining that the 50% tax proposal was designed to “discourage Kenyans, and especially the youth, in directing their focus on betting, lottery and gaming activities instead of productive economic engagement, a vice that is likely to degenerate into a social disaster.”\(^95\) The President, in the memorandum sending the bill back to Parliament recommended a lower rate of 35%. This is what was eventually passed by Parliament.

As expected, the betting industry operators responded by actualizing their threats to withdraw sponsorship to local sport companies.\(^96\) In addition, the betting and gaming operators united under the umbrella of the Association of Gaming Operators to use their political networks and the threats of disinvestment to co-opt Ministry of Sport officials in their lobbying.\(^97\) Betting and gaming operators filed court cases challenging the new taxes arguing that the taxes were unfair and unconstitutional for various reasons including an alleged lack of public participation.\(^98\) The court however dismissed the cases finding that there was adequate public participation including the receipt of submissions from various stakeholders and that the petitioners were in the list of the members of KEPSA who had submitted a memorandum.\(^99\)

However, in spite of this victory for the government, the lobbying efforts seem to have borne fruit because in 2018 in a complete reversal of the stance taken in 2017, the government reduced the 35% uniform tax on betting, gaming and lotteries to 15% and in its place re-introduced the 20% withholding tax on winnings paid to players.\(^100\) The reason for this reduction was said to be “to enhance equity and

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\(^96\)Capital FM, Betting firm SportPesa have made good their threat to cancel all local sports sponsorship following the implementation of the 35 percent taxation by the government. Available at: [https://www.capitalfm.co.ke/sports/2018/01/02/sportpesa-cancels-local-sports-sponsorship/](https://www.capitalfm.co.ke/sports/2018/01/02/sportpesa-cancels-local-sports-sponsorship/) Accessed 12th January 2021.


\(^98\)Pevans East Africa Limited & another v Chairman Betting Control and Licensing Board & 7 others [2017] eKLR

\(^99\)ibid

\(^100\)KPMG, *New tax proposal may be the last nail in the gambling industry’s coffin*. Available at: [https://assets.kpmg/content/dam/kpmg/ke/pdf/tax/New%20tax%20proposals%20may%20be%20the%20last.pdf](https://assets.kpmg/content/dam/kpmg/ke/pdf/tax/New%20tax%20proposals%20may%20be%20the%20last.pdf) Accessed on 12th January, 2021.
fairness” which was an about turn from the previous policy stance of discouraging gambling and its harmful effects. This move was heavily criticised and was seen to have been influenced by lobbying from Sportpesa and other gambling operators.\textsuperscript{101} The previous stance of imposing the 35\% tax was viewed as having been intended for political mileage in an election year\textsuperscript{102}. Interestingly, despite the reduced rate, the betting industry still raised outcry over the re-introduction of the 20\% tax on winnings.

In 2019 the government again reverted to its stance to deal with the proliferation of betting and its negative social effects by proposing to introduce excise duty on betting activities at the rate of 10\% on the amount staked. As had become practice the betting and gaming operators intensified their lobbying through industry associations such as KEPSA\textsuperscript{103} who argued that the new tax measures were unfair and reiterated arguments made that these tax measures would only breed underground gambling, force players to bet using offshore companies which do not pay local taxes or would lead to disinvestment by betting companies\textsuperscript{104} all of which would end up denying crucial revenue to the government. When the lobbying efforts were unsuccessful and excise duty was passed at the rate of 20\%, the two leading betting companies, Sportpesa and Betin, actualised their threats of disinvestment and proceeded to exit the local market citing an unfair taxation and operating environment.\textsuperscript{105}

This worked because in 2020, Parliament removed the 20\% excise duty on amount wagered. The manner in which this amendment was passed was strange. This proposal had not been in the Finance Bill, 2020. The Clause to remove the excise duty was alleged to have been introduced at the Committee stage by the Departmental Committee on Finance and National Planning “after an obscure stakeholder group — identified only by a non-existent website shade.co.ke made the proposals on May 15, 2020”.\textsuperscript{106} The Cabinet Secretary for the National Treasury issued a statement stating that the tax was removed due to lobbying and indicating that the National Treasury would reintroduce the tax after the 6 months statutory waiting period. If indeed the National Treasury had been blindsided, the President had the power to refuse to assent to the Finance Bill like he did in 2017. Curiously, the President did not exercise that power.

4.4 Tax Advocacy by Civil Society in Kenya

The role of civil society in tax debates entails analysis of tax policies, advocacy for or against tax proposals and creating awareness in the general public on their rights and obligations with respect to

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{102}ibid
  \item \textsuperscript{104}Macharia Kamau, the Standard, Experts warn new excise tax may breed underground online gambling. Available at: https://www.standardmedia.co.ke/business/business-news/article/2001331021/experts-warn-new-excise-tax-may-breed-underground-online-betting. Accessed 12th January, 2021
\end{itemize}
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The role of civil society in Kenya gained momentum after enactment of the 2010 Constitution due to its requirement for public participation in formulation of annual tax bills, at both national and county levels.

Kenya has several international organisations engaged in tax issues such as Oxfam, Save the Children and Tax Justice Network Africa. In addition, Kenyan taxpayers and civil societies collaborate under the Kenyan National Taxpayer Association to among other things, conduct research, build technical capacities for Civil Society Organisations (CSOs) and promote tax justice through advocacy and influencing policy.108

The success by CSOs in influencing tax policies has been limited by the political system in the country, especially rampant clientelism. Members of parliament engage CSOs to gain support for their tax proposals but largely disregard tax proposal submitted by CSOs.109

Despite challenges faced by CSOs in influencing tax legislation in Kenya, the Tax Justice Network Africa successfully challenged the Kenyan Government over a tax treaty concluded between Kenya and Mauritius. The TJNA argued that due process was not followed as the treaty was concluded without public participation and would result to massive tax leakages due to unfavourable treaty terms. On this basis, the High court declared the tax treaty null and void.110 This ruling was a significant achievement in tax advocacy and it highlighted the critical role that civil society can play in shaping tax policies.

4.5 Engagement of women in Influencing Tax Policies

Gender equality is a critical component of sustainable economic growth and poverty reduction.111 Policymakers should therefore aim to ensure that policy interventions in taxation do not negatively impact on gender equality.112 In Kenya, significant progress has been made in championing for gender equality in public expenditure through projects such as the Women Development Enterprise Fund. However, little attention has been given towards gender analysis and fairness in revenue raising. As a result, gender bias subsists in tax policy whether explicitly or implicitly. Explicit bias occurs where the law treats men and women differently; whereas implicit bias relates to how the tax system affects the wellbeing of either gender.113

The Constitution of Kenya has made significant strides towards entrenching gender equality into the societal fabric. One way in which this has happened is through the provision for election of women representatives as members of the National Assembly. This makes it easier for women to get into...
the realm of policymaking and should arguably lead to a trickling down of advocacy for more gender responsive tax policies. However, other than the campaign against the removal of exemption of VAT on essential supplies including sanitary products, there has been little advocacy by women policymakers, who arguably have been able to join the class of political elites, for more gender sensitive tax policies.

Women parliamentarians have come together to form the Kenya Women Parliamentary Association (KEWOPA) which is said to be “a membership association of all women parliamentarians drawn from across all political parties both elected and nominated in the Senate and National Assembly”. Unfortunately KEWOPA does not seem to be very active or influential. KEWOPA highlights one of its achievements as developing gender responsive budgeting guidelines for parliament. The guidelines however indicate that they were developed by the National Gender and Equality Commission and in any event are more focussed on the resource allocation rather than revenue raising aspects of fiscal policy.

The representation of women in the organized interest groups is noteworthy. 6 out of the 15 Board Members of KEPSA, which is arguably the biggest private sector lobby group, are women whereas the management team similarly has 6 women out of 10. The Chief Executive Officers (CEO) of KEPSA and the Kenya Association of Manufacturers (KAM) are both women. 50% of the management team of KAM is comprised of women. These numbers suggest that the representation of women into key elite positions with the ability to influence policy is on the rise. This positions women in the path of recruitment into crucial positions in government. Betty Maina, the current Cabinet Secretary for Industrialization, a government department that has been demonstrated above to hold vast discretion in the grant of tax incentives and exemptions was the CEO of KAM for 11 years. However, just like in the case of women political elite, there does not seem to be a proportionate increase in advocacy for gender sensitive tax policies.

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114 https://www.kewopa.org/?page_id=700
115 Ibid
5. Key Obstacles that Prevent Active and Influential Tax Advocacy

As has been discussed throughout this paper, the power wielded by the elite makes it difficult for the adoption of reform efforts for progressive taxation in order to ensure fair sharing of the burden of taxation. Prichard argues that the unfair laying of the burden of taxation on the poor is a political problem, rooted in unequal political power, and demanding political mobilization to create change. Political mobilisation of the masses is however hampered by various factors including a lack of awareness on tax justice issues, the perception that tax systems are too complex to be understood by ordinary citizens and the lack of resources to efficiently mobilise. We consider in detail below some of the factors that have hampered effective advocacy for tax justice.

5.1 Lack of Expertise and Technical nature of Tax Rules

Tax is by itself technical and complicated in nature which makes it hard even for the most zealous members of the public to effectively engage with tax reform proposals. Other than the fact that tax is technical, there is a perception problem in that for the public, the technicality of tax means that matters of tax should be the preserve of tax experts. The result therefore is that the public rarely proactively seeks to engage policymakers or to hold them accountable on governance and tax issues.

Whereas CSOs are better placed, compared to the public, to understand tax issues, they also often lack adequate technical capacity to be on the lookout and to proactively advocate for tax justice. This is in comparison to the elite who often engage tax consulting firms which have numerous employees with specialised tax expertise.

5.2 Inadequate Public Participation Processes and Structures

Whereas the Constitution and the Public Finance Management Act, 2012 provide elaborate processes for public participation, the process is still largely quite formal and out of reach of ordinary citizens. Although the participatory processes provided for include open forums, the technical nature of tax law makes the attendance and meaningful engagement of ordinary members of the public unlikely. Elites, on the other hand are able to hire tax experts who submit well thought out memorandums on their behalf. This allows them to succinctly lobby for their positions in writing which is more advantageous.

Members of the public on the other hand are often left to at best participate through the open forums where they do not have control over the reports of the discussions in the open forums. Even then information on the timings and venue of open forums is disseminated through the media such as newspapers. These media of communication are often out of reach of the poor.

Further the participatory structures require compliance and submission of views within limited time periods. These limited time periods serve the elite better as they are able to respond to tax proposals promptly due to access to technical expertise.

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5.3 Fragmentation in Advocacy and Lack of Systematic Approach
There is empirical evidence that consensus building is a pre-requisite for successful reforms. The seeking of consensus allows opportunities for the views of various stakeholders to be taken into account which reduces the likelihood of opposition by some stakeholder groups. Fragmentation in advocacy therefore inhibits the ability of the public, including CSOs to make an impact in tax justice advocacy. In contrast, the elite have been successful in capturing the tax making process because they have managed to use collective action through umbrella organisations such as KEPSA. The lack of consistent collective action by the public arguably diminishes the ability of the public to use their voice to hold policymakers accountable for fair and equitable tax policies.

5.4 Lack of Information on Formal Institutions that Formulate Tax Policy
The lack of information on the formal institutions that govern the formulation of tax laws also inhibits tax justice advocacy. Whereas the Constitution and public finance laws have now created a robust framework for the budget making process and the enactment of finance laws, this process requires reactive rather than proactive engagement. The public and CSOs have to wait for budget policy statements and bills to be published in order to begin to engage with policymakers. The public finance system therefore does not anticipate that policymaking institutions will continuously receive views on tax policy formulation. The result of this is that the elite who have networks and personal connections have uninhibited and exclusive access to policymakers which gives them unlimited opportunity to lobby for favourable tax policies unlike the limited engagement available to the public. This access advantage entrenches the informal institutions in tax policy which further entrenches corruption and patronage which in turn makes it more difficult for non-elites to get their voices heard.

5.5 Lack of Adequate Resources
Effective tax advocacy inevitably requires a great deal of investment in time, human resource with technical expertise, and financial resources. These resources allow for research to be carried out on the effect of existing and suggested tax reforms. Resources also allow for effective lobbying. For instance, KEPSA arguably incurs a lot of financial resources in organising for the various seminars and roundtables with policymakers. Further, social capital with stakeholders is also required as an entry point for the beginning of formal engagements. This social capital takes years to build. The elite already have this social capital, having been in the same social stratum and having a mutual interest in their desire to protect their positions. These factors put the public and CSOs at a disadvantage.

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120Ibid
As previously stated, the main policy justifications for tax incentives in developing countries is the need to promote investment. However, research has shown that tax incentives do not play a major factor in decisions as to whether to invest or not. Instead tax incentives often result in revenue losses without the resultant increase in investment. The tax revenue losses stem from the forgone revenues as well as the abuse of tax incentives. In addition incentives and exemptions granted do not undergo cost and benefit analysis to assess whether they are meeting their policy justifications. In many instances incentives granted do not come with ‘sunset clauses’ with the result that incentives remain in place long after the expiry of their policy justification.

Tax expenditures (defined as the government’s estimated revenue loss from giving tax concessions or preferences to a particular class of taxpayer or activity) by Kenyan government are substantial and have increased significantly since 2011. According to a World Bank Report, in 2011/2012 conservative estimates were that Kenya was losing KES 77 billion to tax expenditures (representing about 2.25% of the GDP). Tax expenditures in 2012/2013 increased to about KES 118 billion (equivalent to 2.62% of GDP). By 2017 the IMF estimated the losses as amounting to KES 478 billion and representing close to 5.9% of Kenya’s GDP. In the 2020/2021 budget statement, the Cabinet Secretary for the National Treasury stated that in 2018, tax exemptions and tax incentives cost the country an estimated KES 535 billion. This, he stated amounted to 6% of the country’s GDP and is, according to the Cabinet Secretary, one of the highest tax expenditures in the world.

126 World Bank Group, Decision Time: Spend More or Spend Smart? Kenya Public Expenditure Review, Available at https://openknowledge.worldbank.org/bitstream/handle/10986/21507/940210WPv108obolt0Vo1201400FINAL_pdf?sequence=1 Accessed on 8th February, 2021. This figure was higher than the East African Community Average of 2.4%.
130 Ibid.
Yet despite the high expenditures, the rich receive disproportionately greater benefits from these tax expenditures. The reduced taxation on the rich leads to erosion of the tax base. In 2018 the OECD reported that the tax to GDP ratio in Kenya decreased from 18.5% in 2017 to 17.4% in 2018. The decline was characteristic of the trend from 2010 which saw Kenya's tax to GDP ratio fall by 0.5% compared to an increase by 1.5% in 30 other African countries. The decline in revenue led to the government increasing reliance on labour and consumption taxes. As at 2018, personal income taxes contributed 25% of tax revenue while VAT contributed 24% of total tax revenues compared to the contribution of 11% by corporate income taxes. Reliance on labour and consumption taxes means that there has been a systematic shift of the tax burden to the poor with the effect that the rich get richer as the poor become poorer. This further exacerbates Kenya's income inequality.

In addition, tax expenditures mean that government loses revenue which would otherwise have been made available for the provision of public goods and social amenities. The figures reported above indicate that over the years Kenya has spent more on tax expenditure than it has spent on key sectors of the economy such as health, free primary education and social protection.

In the financial year 2012/2013 government spending on health stood at KES 94 billion compared to KES 118 billion forgone on tax expenditures. In 2018/2019 the public sector expenditure on health stood at KES 207 Billion compared to the KES 535 billion on tax expenditures in the same year. In 2018, the tax expenditures of KES 535 billion had also surpassed the overall expenditure on education which stood at KES 444 billion. The opportunity cost of the tax expenditures has therefore been the provision of public goods and social services.

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133 Ibid.
134 Ibid.
Reduced spending on essential public goods has a significant and disproportionate effect on the poor who are more dependent on public goods. The poor benefit more from government spending on public education and health as they rely more on public schools and public health facilities. Further, reduced spending on healthcare, education and social services tends to affect women more disproportionately than men since women are the primary bearers of care burden. Healthcare spending has stronger impact on improving life expectancy in females than in males meaning that women suffer disproportionately from the lack of sufficient healthcare spending. Reduced investments in physical and social infrastructure increase women’s care burden, which denies women the opportunity for rest and recreation. The reduction in money available for governments spending owing to tax incentives and exemptions therefore undermines efforts of promoting gender equality.

### Opportunity cost in health care

Under the Abuja Declaration, to which Kenya is a signatory, governments committed to allocating at least 15% of their budget towards health. This was in recognition of key role of the sector in providing healthy capital which acts as a catalyst in economic growth. In the Kenya Health Policy 2012-2030, Kenya set out to ensure equity in provision and access to health care services. The policy plan states that it is guided by the provisions of the Constitution and in particular, equity in distribution of health services and interventions.

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140 Jenny Birchall and Marzia Fontana, *Op Cit.*


Health care in Kenya was funded largely through taxes until 1989 when user charges were introduced. These user charges have the potential to impoverish households with available data indicating that 453,470 households were pushed into poverty in 2013 as a result of these out-of-pocket health care costs. The out-of-pocket expenses resulted not only from user fees being charged in public health facilities but also due to the underfunding of the health care sector. The lack of trained personnel and medication in public health care facilities means that more often than not, the vulnerable have to seek alternatives for health care. In addition, the poor distribution of health facilities especially in the rural areas increases the transport burden for accessing health care.

Poor funding of the health care sector not only exacerbates the inequality gap between the rich and the poor but also reinforces the gender inequality. Studies indicate that women led households tend to have lower incomes than the male led households. One study found that women led households in the rural areas made only 58% of the income made by male led households. Accordingly, it is more likely that women led households are likely to find themselves pushed into poverty than male led households.

The tax expenditures resulting from incentives could be used to increase funding in the health care sector. Increased funding of the health sector and in particular increased health facilities in the rural areas with trained personnel and well stocked pharmacies would go a long way in easing the burden of the lower earning households and reducing and one day eliminating households that fall into poverty as a result of health care expenses.

The decline in revenue further means that the government has less money than it needs for service delivery which leads to rising budget deficits. In order to meet the budget shortfall, the government has been forced to increase its borrowing. The IMF reports that Kenya’s public debt has been increasing at a relatively fast pace. By 2020 Kenya’s public debt stood at 65.6% of GDP. The increase in public debt has the effect of raising inflation, lowering investment and economic growth with the overall effect of increasing poverty.


146Ibid.


The negative effects of tax incentives and exemptions are compounded by the lack of accountability and scrutiny. Despite the principles of transparency and accountability enshrined in the Constitution, Kenya does not maintain a tax expenditure register.\textsuperscript{152} Public records of waivers of taxation and the reports of such waivers to the Auditor General are not published or made publicly available.\textsuperscript{153} The result is that it is hard to obtain information that allows the assessment of the impact of tax expenditures. As a result, tax expenditures, compared to normal government expenditure, receive less systematic scrutiny.\textsuperscript{154} This lack of accountability and scrutiny is fertile ground for corruption, lobbying, and other malfeasance which aids the capture of the tax system.\textsuperscript{155}


\textsuperscript{153}Section 15(2)(f) Public Finance Management Act, 2012


7.1 Recommendations

7.1.1 Public Education and Engagement on Tax Matters

Lack of understanding on taxes is a key hindrance to engagement on tax policy and reform. The government, policymakers and CSOs can therefore undertake to educate the public on tax laws and policies in order to build public understanding of tax rules and revenue collection. This will in turn empower the public to use their collective power to exert electoral pressure on policymakers for tax justice. This electoral pressure will do well to counter the tendency of the elite to use their institutional and structural power to strong-arm policies in their favour. Public education needs to be a continuous process and should start immediately.

In the short-term public education can take the form of sensitization through media such as vernacular radio stations which are more accessible to the poor. Campaigns through social media platforms would also be effective in educating the youth. CSOs can also borrow from the lobbying tactics of the big consulting firms who publish alerts for dissemination to the public whenever there are proposals to effect reforms. The alerts have enabled the consulting firms build credibility on tax matters and have given them an ear with policymakers. CSOs can therefore publish alerts highlighting tax justice issues around Finance Bills and Acts as well as Tax Laws (Amendment) Bills and Acts. These alerts should be in simple and user-friendly formats, in local languages such as Kiswahili, and in Braille.

In the long term the government and CSOs can collaborate to develop curriculum that would lead to more tax education being taught in schools so as to build tax understanding and informed citizenry from early on.

7.1.2 Legitimacy Appeals and Framing of Tax Advocacy on Themes of Equity and Fairness

CSOs are already leading advocacy for tax justice. However most large-scale tax mobilization has been effectively anti-tax, rather than being focused on the construction of better, fairer, tax systems. Advocacy has tended to focus on fighting regressive taxes, unfair burden sharing, and demanding expanded taxation for the elite. Framing issues of tax reform around themes of expanded taxation inevitably leads to resistance from the elite. Tax justice advocates should therefore endeavour to frame issues of tax advocacy around themes of equity, effectiveness and fairness. This will make it more difficult for the elite to argue against tax reform proposals said to be intended to bring in equity, justice, and fairness. Accordingly, positive framing of tax justice issues will help dissipate some of the resistance towards tax reforms. This strategy might be particularly helpful around election cycles when

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the political elite feel electoral pressure. This positive framing of advocacy messages should however be a continuous process in all advocacy efforts in the short as well as long term.

As policymakers such as the National Treasury and Parliament have an interest in increasing revenue collection in order to meet government economic and social goals, CSOs can co-opt them in advocacy and in framing tax reform proposals around issues of fairness, effectiveness and equity. In the short-term this can be done in the Budget Policy Statement and Finance Act making processes. These advocacy efforts can be pursued by CSOs working in collaboration with policymakers and other stakeholders towards the development of a National Tax Policy in the long term.

7.1.3 Streamlining of the Public Participation Structures

Although the law provides for public participation structures around the tax law making process, effective participation by the public in these forums may be hard because of the lack of expertise, the strict timelines for participating, or the lack of information on how to participate. In addition, the public do not have much say in the reports generating, for instance from the open forums.

The Government needs to continuously review the public participation structures to assess whether they are actually translating into adequate opportunities for the masses to effectively engage on policy formulation.

In the long term, the national government can work with county governments towards creating ongoing forums for engagement with the public, not just limited to the Budget and Finance Act making processes. The national government can borrow from what county governments such as the Makueni Government have done which is to develop a robust public participation framework with elaborate forums that start with a village forum, a cluster of villages forum, a sub ward forum, a ward forum, sub county forums and then eventually to a county forum. The forums also provide membership from over 20 organised groups representing people from all walks of life. This framework ensures that views from the grassroots are heard and taken into account.

In the medium to long term, the government can open the dialogues that government is already having with interest groups such as KEPSA to members of the public. The government can borrow from the experience in Rwanda with the National Dialogue Council referred to as Umushykirano which is an annual event chaired by the president and which has leaders and policymakers in attendance which allows the public to get an opportunity to ask their questions directly to their leaders. This would foster a culture of dialogue and direct engagement between the public and the leaders who make policy.

7.1.4 Provision of Forums for Engagement with Government and Policymakers

Civil society organisations can establish formal forums for direct engagement between the public and the policymakers. In the short term these forums can take the form of seminars organised by the CSOs

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157 Article 203 of the Constitution, the Public Finance Management Act and Regulations
but inviting policymakers to participate. In the medium to long term, the forums can be expanded to borrow from what business associations such as KEPSA have done in the form of roundtables with Parliament, the President and the KRA.

In order to do so, CSOs can endeavour, in the medium to long term, to come together to create strong interest groups that can speak collectively and accordingly command the attention of policymakers. Private sector lobby groups such as KEPSA have used this strategy by being an umbrella body for various private sector players and therefore presenting itself as the voice of the private sector in Kenya. CSOs may also borrow from the strategies of the private sector including undertaking relevant research to present the government with data and evidence for their policy proposals including estimates for the revenues foregone and how this could be used for social services.

### 7.1.5 Transparency and Rationalisation of Tax Incentives and Exemptions

The public and CSOs should demand for more transparency and rationalisation of tax incentives and exemptions. The Constitution and the Public Finance Management Act, 2012 have already laid a framework for transparency by requiring that tax incentives and exemptions only be granted in accordance with legislation and that a record be kept of all incentives and exemptions granted. This data is however not publicised.

In the short term CSOs can lobby for the list of exemptions granted and the beneficiaries to be publicised and published in easily accessible forums such as the Kenya Revenue Authority and Treasury websites. The information should also be made available to the public through mass communication forums such as newspapers and in other formats such as Braille. The government and policymakers should also, in the short term, work collaboratively with CSOs and development partners to review the legislative framework to rationalise the incentive frameworks in order to remove the opportunities for arbitrary and discretionary grant of incentives.

The lobbying can also be targeted at ensuring that there is parity in the incentives granted to the poor and to the elite so as to address the patterns of incentives granted to the poor being less advantageous for instance through capping of the incentives or through indirect taxes whereas incentives to the wealthy come through direct taxes and are unlimited.

### 7.1.6 Consistent Research on Tax Justice Issues

Policymakers and tax justice advocates need to consistently carry out studies in order to collect data that will inform advocacy for tax justice advocates as well as policy formulation for policymakers. Well conducted research is critical to demonstrate how the tax policies created are affecting the public and how well or poorly they are achieving the government economic and social goals. For instance, the lack of disaggregated tax data at the household level has been a key hindrance towards showing the impact of tax policies on gender equality. Collecting and advocating for gender disaggregated data on taxpayers is therefore a key part of the effort towards tax policies that promote women’s empowerment and more equal gender relations. This should be a continuous and ongoing process and can be directed towards a collaborative development of a National Tax Policy in the long term with inputs from the KRA, Treasury, CSOs, the academia, the private sector and businesses. Further research may include identifying more closely the policy development process and specifically how some provisions are proposed, amended and removed and who benefits from these.
7.1.7 Supporting and Collaborating with Women in advocacy

CSOs can lobby for gender responsive incentives by collaborating with women in advocacy. They can collaborate with the National Gender Equality Commission and to train and build the capacity of women in advocacy and can collaborate and provide support to associations such as KEWOPA.

In the short term the collaboration can be in terms of capacity building and providing technical support in drafting policy papers and legislative proposals that are gender sensitive. In the long term it would be good to assess how the increase in the participation of women leadership in policy making is affecting tax policy and its gender responsiveness.

7.2 Conclusion

Taxation is a critical part of governance. It is the means by which governments raise the revenue required to offer public services in order to provide essential services and infrastructure. In addition, fair tax policies and systems can lead to the redistribution of wealth which helps reduce poverty and inequality. This, however, is seldom realised due to the capture of tax policies and systems by political and economic elites. The result of this is that the wealthy enjoy favourable tax provisions which come in varying forms including reduced tax rates, tax holidays, generous investment allowances, and accelerated depreciation. This leads to the erosion of the tax base which forces the government to shift the burden of tax to the poor in order to raise sufficient revenue to meet its obligations. This entrenches poverty and increases the equality gap between the wealthiest and poorest persons. There must be a change in way in which tax laws and policies are formulated if tax is to play its role in transferring wealth from the wealthy to the poor.
ANALYSIS OF TAX INCENTIVES AND EXEMPTIONS IN THE FINANCE ACTS FROM 2009 – 2019