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11/4/23*

**REPUBLIC OF KENYA
THE NATIONAL TREASURY AND ECONOMIC PLANNING**

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Ref. DFN 429/02/(6)

 THE NATIONAL ASSEMBLY PAPERS LAID		3rd April, 2023
DATE: 11 APR 2023		DAY: TUESDAY
TABLED BY:	Hon Owen <i>[Signature]</i> Deputy Leader of Opposition	
CLERK-AT-THE-TABLE:	Esther Ngunjiri <i>[Signature]</i>	

Mr. Samuel Njoroge
Clerk of the National Assembly
Parliament House
NAIROBI

Dear *Bw. Njoroge,*

RE: PROPOSED CHANGES ON THE RATIFICATION PROCESS OF AGREEMENTS FOR THE ELIMINATION OF DOUBLE TAXATION

The above subject matter refers.

Agreements for the Elimination of Double Taxation (DTA) are agreements entered into between two countries aimed at eliminating double taxation of their residents with respect to taxes on their income, without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance.

When the two negotiating countries reach an agreement on all Articles of the DTA, the Agreement is signed by the competent authorities of either country. In Kenya, this is done by the Cabinet Secretary responsible for Foreign Affairs or the Cabinet Secretary responsible for the National Treasury under delegation of the Cabinet Secretary responsible for Foreign Affairs.

Once the DTA is signed by the competent authorities, each country starts the ratification process. In Kenya, the DTA is first submitted to the Cabinet. Upon approval by the Cabinet, the DTA is gazetted by the Attorney General and subsequently submitted to the National Assembly for consideration. Approval by the National Assembly completes the internal procedure for ratification of the DTA.

In June 2020, the Cabinet Secretary, the National Treasury and Planning published the notice specifying the DTA between Kenya and Mauritius vide Legal Notice No. 114 of 2020. The Notice was submitted to the Clerk of the National Assembly on 6th

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July, 2020 and tabled before the House on **15th July, 2020** and was subsequently referred to the Departmental Committee on Finance and National Planning for consideration.

In consideration of the Notice, the Committee requested for comments from members of the public. However, in their findings, the Committee noted that they could not make any amendments to the Agreement because it was submitted under the Statutory Instruments Act, 2013. The Committee, therefore, recommended that the **law be amended** so that future DTAs are considered under the **Treaty Making and Ratification Act, 2012** (see paragraph 69 of the attached Committee Report).

Subsequently, the **Finance Act, 2021** (copy attached) made amendments to Section 41 of the Income Tax Act, cap 470 so that DTAs are subjected to the provisions of the Treaty Making and Ratification Act, 2012 and not the Statutory Instruments Act, 2013.

DTAs are negotiated guided by standard texts under the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD) DTA Models as well as countries' DTA Models. More importantly, the negotiations follow a **win-win/give-and-take** approach based on the interests of the negotiating countries. In addition, negotiations of DTAs mostly take two or more rounds of negotiations, hence consumes a lot of time and resources.

Considering this unique nature of DTAs, subjecting them to public participation by the Parliament after negotiations have been finalized poses a risk as it could lead to reopening already concluded Agreements. In addition, the other treaty partner may have already ratified the DTA. This is further complicated by the fact that Kenya cannot unilaterally make any change to the signed DTA at this stage.

Against this background, the National Treasury convened a meeting of the DTA Negotiation Committee which comprises of the National Treasury, Office of the Attorney General, Ministry of Foreign and Diaspora Affairs and the Kenya Revenue Authority to deliberate on the DTA ratification process and propose a way forward.

Upon consideration of the matter, the DTA Negotiation Committee noted that, due to the unique nature of DTAs, public participation ought to be concluded before the Agreement is laid to the Parliament for ratification. In this regard, the National Treasury wishes to propose the following process:

- **Step 1:** The National Treasury subjects the draft DTA to public participation after the first round of negotiations between Kenya and a given treaty partner.
- **Step 2:** The draft DTA after incorporation of the public comments be submitted to the National Assembly for **pre-publication scrutiny**.

While submitting the draft DTA to the National Assembly, the National Treasury will attach a detailed document outlining how the DTA Negotiating Committee reviewed and considered the comments received from the public (evidence of public participation). At this stage, the Parliamentary Committee will have an opportunity to consider the DTA, subject it to public participation as well, and also propose changes to it.

- **Step 3:** The changes proposed by the Parliamentary Committee will be considered by the DTA Negotiating Committee in the second or any subsequent rounds of negotiations with the given treaty partner.
- **Step 4:** Once the negotiations are concluded, the DTA will be signed by the competent authorities of the two Contracting States before the commencement of the ratification process, which will start with submitting the DTA to the Cabinet for consideration.
- **Step 5:** Upon approval by the Cabinet, the DTA will be gazetted by the Attorney General and then submitted to the National Assembly for consideration.
- **Step 6:** Approval by the National Assembly will complete the internal procedure for ratification of the DTA.

* [In view of the foregoing, the purpose of this letter is to submit the proposed DTA Ratification process for consideration by the National Assembly. The National Treasury remains ready to provide additional information or make a presentation to the Parliamentary Committee in this regard.

Yours

*Sincerely,
[Signature]*

NJUGUNA NDUNG'U, CBS
CABINET SECRETARY

Encls.

Copy to: **Hon. Justine B. N. Muturi, EGH**
Attorney-General
The State Law Office and Department of Justice
Sheria House
NAIROBI

Hon. Dr. Alfred N. Mutua, EGH
Cabinet Secretary
Ministry of Foreign and Diaspora Affairs
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FCCA, CS Rispah Simiyu, EBS
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