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TISA ADVISORY ON THE KRA “MARKET TAX” IN NAIROBI CITY MARKETS

Background

On the week of 20th July to 24th July, KRA officials in cahoots with a contingent of GSU officials descended on traders at Kawangware market to collect a purported “market tax” of Kshs. 150 on behalf of the Nairobi Metropolitan Services. This incident is by no way an isolated event, but a representation of the arbitrary taxation that the county has resorted to. Reports of similar efforts in City Park, site police officers arbitrarily levying taxes on truck purveyors of bananas to Kangemi Open Air Market. The officers are said to be seeking Kshs. 8000 as an unnamed tax from the drivers, failure to which their consignment is confiscated. *Boda boda* operators similarly face the same harassment within the county. There is enough reason to believe that this confiscatory policy is being implemented in other areas within Nairobi county, albeit unreported. This punitive tax is wanting of both fairness and legality. This advisory seeks to address the following issues:

1. Is the ‘Market Tax’ being levied on informal traders within Nairobi County legal?
2. Is the ‘Market Tax’ just and fair?
3. Is the manner of implementation of the ‘Market Tax’ in line with constitutional requirements?

1. Legality of the ‘Market Tax’

a) Market Tax is a feudal tax

Article 5.5 of the Deed of Transfer of Functions Gazette Notice No. 1609 provides, *For the purposes of general co-ordination of revenue collection, the Nairobi City County Government appoints Kenya Revenue Authority (KRA) as the principal agent for overall revenue collection.* Charging fees for services is not the same as levying

taxes. A tax is a compulsory payment that does not necessarily involve the use or derivation of direct benefits from services, regulation or goods as defined in Article 209(3) of the Constitution. On the other hand, a fee or charge must as a matter of law relate to a service that is provided, while legally a tax is not required to bear any such relationship (a tax is simply the expropriation of private property). Further, the fee must bear a relationship to the cost of providing the service. If the fee is too high, a court will have grounds to classify it as a tax and may decide that it is beyond power. Charges and fees can be classified as either;

- a. User charge is a charge for the use of a product or service and apply per use of the good or service or for the bulk or time-limited use of the good or service i.e water services charge.
- b. User fee is a charge, or impost payment paid as a necessary condition for using a public facility i.e parking fees, market fees, health facility user fees and park entry charges; or
- c. License fee is a fee charged in respect of permission granted to an entity to undertake a certain action and is mainly issued for regulatory purposes

Pertinently, the only charges that informal traders are subject to are as provided under Section 4 of the Nairobi City County Finance Act 2019, which schedules the applicable charges pertinent to informal traders, which are Kshs. 200 per week. While the conduction of business within the county seems to be conditional upon meeting these payment obligations to the KRA, there seems to be no corresponding service for which traders are benefitting. Therefore, it is ostensible that the payments being demanded by KRA fall within the definition of taxes.

However, a tax cannot be levied unless it is expressly provided by statute. Article 210(1) of the Constitution provides that “*no tax or licensing fee may be imposed, waived or varied except as provided by legislation.*” Like the “taxes” being levied on truck purveyors of bananas, the “market tax” has no founding in county statute and seems to have been imposed by fiat. By lacking a legislative mandate, the Kshs. 150 “market tax” was imposed on a tax base without the active engagement of its constituents, hence is devoid of a transparency, accountability, and public participation framework.

“For the purposes of general co-ordination of revenue collection, the Nairobi City County Government appoints Kenya Revenue Authority (KRA) as the principal agent for overall revenue collection”.

A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.¹ The need for an express provision for levying a tax was well stated by Visram J (as he then was) in *Commissioner of Income Tax vs Vestmont Power (K) Ltd*,

“Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity... any ambiguity in such a law must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation.”²

By instructing the KRA to collect taxes by whim, and in the absence of an express enabling legal provision, the NMS is effectively equating Nairobi County to a serfdom, where the peasants are bonded by debt to their feudal lords.

b) Nairobi Metropolitan Services has not business in the markets

The said Deed of Transfer, under Article 3, lists the following functions as unequivocally transferring the following functions to the National Government:

- 3.1 County Health Services;
- 3.2 County Transport Services;
- 3.3 County Planning and Development Services; and
- 3.4 County Public Works, Utilities and Ancillary services.

However, revenue collection is a principal constituent of trade regulation under the Fourth Schedule of the Constitution. Under the Deed of Transfer, the function of trade regulation was not transferred to the National Government, hence was retained by Nairobi County. Trade regulation whose objects include revenue collection is done by way of charging fees to hawkers, a function which lies beyond the jurisdiction of the NMS and is therefore *ultra vires*.

¹ *Vestey vs Inland Revenue Commissioners* [1979] 3 ALL ER at 984;

² [2006] eKLR

2. Is the ‘Market Tax’ just and fair?

Thirdly, justice and fairness are sacrosanct principles of taxation, and require that the payee can pay. This principle is codified under Article 201(b)(i) of the Constitution, which enjoins the government to ensure the public finance system shall promote an equitable society, and the burden of taxation be shared equally.

Further, principles of taxation require:

- *The Tax should not be a burden to non- residents/ residents.*
- *To be acceptable, the tax should be perceived by tax- payers as reasonably fair*
- *A tariff policy may differentiate between different categories of users, debtors, service providers, services, service standards, geographical areas and other matters as long as the differentiation does not amount to unfair discrimination*
- *Tariffs shall reflect the costs reasonably associated with rendering the service, including capital, operating, maintenance, administration and replacement costs, and interest charges;*
- *Tariffs shall be set at levels that facilitate the financial sustainability of the service, taking into account subsidy from sources other than the service concerned;*
- *Full disclosure of the subsidies on tariffs for poor households and other categories of users*

Furthermore, Article 209(5) of the Constitution is instructive that taxation and other revenue-raising powers shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labor. The traders who form the tax base of the “market tax”, have been disproportionately affected by the COVID-19 pandemic. It is therefore unjust to levy a tax that deprives them of an honest day’s work when they are faced with harsh adversity. Furthermore, the taxes on traders are levied even when there hasn’t been a trickle-down of the Economic Stimulus Programme. The need for fairness in taxation is not a mere appeal to the taxman’s humanity; it strikes at the heart of legality of arbitrary taxation. Per Nyamu J in *Keroche Industries Limited v Kenya Revenue Authority*:

“... the principle of fairness has an important place in the law... and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.”³

3. Is the manner of implementation of the ‘Market Tax’ in line with constitutional requirements?

One of the hallmarks of a good tax system is voluntary compliance. Perhaps in knowledge of the inequity of their “market tax”, and in a move meant to intimidate the traders, the KRA is using the GSU police. The use of the GSU to enable illegal taxation by the KRA is a violation of the traders’ economic and social rights that are guaranteed under Article 43.

Article 27(4) enjoins the State, for which the KRA acts, not to discriminate directly or indirectly against any person on any ground. It is not by happenstance that KRA officials, flanked by GSU police, picked on Kawangware traders as their tax base. This decision was influenced by the social status of the traders, against whom the police are known to act. The GSU officers were employed to intimidate the traders; this is not only repulsive, but also flies in the face of economic justification. The administrative and compliance costs of securing the services of a contingent of GSU officers outweigh the revenue to be derived from collecting Kshs. 150 each from a handful of traders. This mismanagement of the security apparatus is a mockery of the primary object of national security organs under Article 239(2), which is to promote and guarantee national security. The use of police to aid in the imposition of an illicit tax runs afoul of the principles of national security under Article 238(2) particularly the requirement that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.

To support the preparation of this brief we sought the views of traders in Kangemi, Harambee and Kinale Markets, who provided a first-hand account of the goings-on. The findings paint a disturbing picture of abuse of power, harassment, intimidation, and corruption much like that of the corrupt city inspectorate and revenue officers which the NMS seeks to sure.

- 1) The traders are concerned about the failure to recognize the three markets in Kangemi, (Harambee mkt and Kangemi Kinale open Air market) and fear this may be a precursor to forced evictions.

³ [2007] eKLR

- 2) During a public participation forum convened by ward administrator, MCA and Market Director concerning the engagement of KRA to collect cess from the market, the traders appealed that its implementation be delayed until businesses stabilize. However, KRA was on the ground a mere month later.
- 3) During the public participation process the traders asked for sensitization on the process. This has not been forthcoming.
- 4) KRA officers have deployed a divide and rule approach to engaging with traders, pitting them against each other to undermine their collective voice and subverting the engagement process.
- 5) The use of regular police has been escalated to the use of GSU- and is being accompanied by threats and intimidation of individual traders either verbally or by phone. Some of the threats are scary like *mjue serekali iko chini ya majeshi*.
- 6) KRA officers are quickly mirroring the corrupt behaviour of city council officers through the use of different pay bills. The traders provided receipts to support this concern. KRA officials are also demanding cash collections- saying *'tunarakota na makubwa akopale ndio ata tuma'*.
- 7) The KRA officers are double charging of wares that are bought from wakulima market by traders yet these wares were already paid for on delivery at wakulima market. Arrest of lorries when they decline to be double taxed, they are being threatened with arrest. The lorry owners have refused to deliver wares to Kangemi until the issue is resolved. The manner of implementation is negatively affecting their business.
- 8) There is evidence of trauma among traders whose hopes of economic recovery are lost. One woman trader suffered high blood pressure and is now admitted at Kenyatta hosp after being force to pay 5000 for her wares.
- 9) There are early signs of conflict – as traders lack legitimate avenues to resolve their concerns.

Observations

We therefore conclude that the Market Tax is illegal, and the manner of its implementation is illegal and unconstitutional. The tax is aggravating the already dire economic conditions of traders, compounding the negative impacts of the Covid pandemic. If not addressed the situation may deteriorate into violent protest as individuals become desperate. We therefore make the following urgent recommendations:

Recommendations

1. That the KRA immediately stop the implementation of the “market tax”, and any such other punitive taxes.
2. That for as long as informal traders suffer the effects of the COVID-19 pandemic, and as long as informal traders do not benefit from the much-touted Economic Stimulus Programme, they should be granted forbearance, moratoria and relief in their tax obligations to the Nairobi City County Government.
3. Without prejudice to Recommendations 1 and 2 above, any taxes should not be imposed by administrative fiat by the NMS but should be subject to passage by the Nairobi County Assembly, and should be enacted by way of amendments to the Nairobi City County Revenue Act. Such enactment should be done with the engagement of informal traders. Any such taxes should be premised on voluntary compliance and administered with utmost regard to human rights, without the employ of security apparatus.
4. The KRA should provide a breakdown of the proceeds from taxation within the county, and the same should be accessible to the public.
5. The Police Service and GSU be immediately withdrawn from the enforcement of revenue laws.
6. That the NMS should abide by Wasilwa J’s decree in *Okiya Omtata Okoiti & 3 others v The Nairobi Metropolitan Service and others*, that the NMS should desist from trade regulation a function which was retained by the Nairobi City County.
7. That the County Assembly to adopt a policy that officially recognizes informal trading, provides relevant guidance to the management, operations and resource collection for markets and other informal trade businesses.
8. There will be the need to involve the relevant stakeholders when coming up with any rules and regulations on the operations of the informal sector. This not only ensures that the regulations are comprehensive and relevant but also that there is adequate buy-in from the sector.