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To:  
Mr. J. M. Nyegenye,  
Clerk of the Senate/ Secretary, Parliamentary Service Commission,  
Office of the Clerk,  
First Floor, Main Parliament Buildings,  
P. O. Box 41842 – 00100,  
Nairobi.

Cc:  
Chairperson,  
Senate Standing Committee on Finance and Budget,  
Parliament Buildings,  
P. O. Box 41842 – 00100,  
Nairobi.



28<sup>th</sup> March 2018

Dear Sir,

**RE: MEMORANDUM ON DIVISION OF REVENUE BILL (NATIONAL ASSEMBLY BILL NUMBER 7 OF 2018)**

#### About The Institute for Social Accountability

The Institute for Social Accountability (TISA) is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya, to uplift livelihoods of, especially, the poor and marginalized. TISA has been operational since March 2008, and is a locally registered trust.

#### Review of the Division of Revenue Bill 2018

The Constitution of Kenya lays out the principles to guide the financing of counties, which are:

- i. The principle of financial autonomy (counties must have reliable sources of revenue that will support the realization of a stronger accountability relationship between county governments and their citizens.
- ii. Equity on the basis of inter-country, intra-county and intergenerational equity between present and future generations.
- iii. Finances must follow functions.
- iv. Finances must be managed prudently and responsibly.

It is noteworthy that the Division of Revenue Bill 2018 is in breach of the constitutional principles of public finance in several regards: -

### **National Interest**

One of the criteria to be considered in the determination of the division of revenue is the national interests. It is a matter of great concern that under the present erroneous definition of national interests, national government is encroaching county government mandates and withholding funds that would rightly go to county governments.

National **interest** must be distinguished from the **needs** of national government as articulated in the ruling party manifesto. National interest rightly focuses on the broader concerns that affect both levels of government and ensures the proper functioning and realization of the overall objectives of devolution of power. For instance, this would entail a focus on securing national goals and objectives of its **national** interests in relation with other nations, through use of force, threat of use of force or influence through security, diplomacy and securing international trade interests. In this regard, the Big Four agenda must be considered a political agenda and not a national interest.

Furthermore, those aspects of the political agenda, which fall under the county mandate of concurrent jurisdiction, must be well articulated in the Budget Policy Statement (BPS) and Division of Revenue. As noted by the Senate Standing committee on Finance and Budget on the 2018 Budget Policy Statement, *“The role of county governments in the realization of the Big Four plans should have been explicitly stated in the BPS 2018 as most of the key initiatives under the plan are devolved”*. The Commission on Revenue Allocation (CRA) also makes a similar observation that, *“The BPS did not define the role of the county governments in actualizing the ‘Big Four’ given the concurrent roles of both the levels of government”*.

### **Conditional grants**

It is noteworthy that the Budget Policy Statement provides numerous conditional grants to go towards county governments. Best practice dictates that to be successful conditional grants must have clear policy objectives, respect the autonomy of recipient sub-national government, ensure adequate management capacity, transparency and predictability, ensure responsiveness (avoid a one size fits all), ensure accountability and clear coordinating mechanism.

**Dangers of conditional grants:** If not well managed, conditional grants can reduce the discretionary spending of county governments because they impact the sharable revenue and also reduce the ability of county governments to respond to local development priorities. Further, the conditions around these grants can improperly disqualify county governments hence reducing the actual share available to county governments.

To mitigate this possibility there is need to place stringent transparency requirements in the Division of Revenue Paper on all conditional grants to include at least;

- a) Strategic goal and purpose of the grant
- b) Outcome statements and outputs of the grant
- c) Priority outcome(s) of government that the grant primarily contributes to
- d) Conditions of the grant
- e) Criteria for allocation between counties
- f) Rationale for funding through a conditional grant
- g) Past performance
- h) The projected life of the grant

- i) Previous year Medium Term Expenditure Framework (MTEF) allocations
- j) The payment schedule
- k) Responsibilities of transferring national department and receiving county departments
- l) Ensure inclusion in county CIDPs (County Integrated Development Plan)

### Public participation

Whereas the BPS is bound by statutory constraints and must be tabled before Parliament by 15<sup>th</sup> February 2017, the BPS is to be informed by the Third Medium Term Plan (MTP III). Indeed, the BPS states, ‘the policies in this BPS are aligned to the medium term priorities and strategies outlined in the Third Medium Term Plan (2018-2022) of the Kenya Vision 2030,’ although this is not possible as the MTP process is incomplete. Whereas, the MTP sector groups were launched prior to the elections period, due to the prolonged electioneering period the process stalled. The MTP III process has not been restarted and most importantly has not undergone public participation and so cannot inform the BPS!<sup>1</sup>

It is also a matter of concern that the time accorded for stakeholder input into the BPS is too short to allow input by most institutions. Although TISA has been able to do so because of our specialist policy nature and ongoing contribution in the sector groups, other stakeholders are functionally locked out of this critical process due to the inadequate and conflicting timelines given by the Treasury in its public communication.

### Debt

Commission on Revenue Allocation observes that Debt servicing adversely affects the equitable share and that it may hinder county service delivery. The senate observes that the Medium Term Debt Strategy does not presently include county governments’ needs. The DoR further provides that if the actual revenue raised nationally exceeds projected revenues, the excess revenue may be used to reduce borrowing or pay debts. This broad sweeping statement may further prejudice county share of revenue and should be removed. (DoR 5(2))

### Audit Reports under Article 229 of the Constitution<sup>2</sup>

Sharable revenue is to be on the basis of the latest audit reports. These in turn are to be prepared at least 6 months after the end of the financial year. This is presently not the case, which implies in real terms county governments are receiving less than the constitutionally mandated amount of revenue.

<sup>1</sup> <http://www.bps.go.ke/wp-content/uploads/2016/08/BPS-2017-2018-2022-1.pdf> paras 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

<sup>2</sup> Article 229

- (4) Within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on—
- (a) the accounts of the national and county governments;
  - (b) the accounts of all funds and authorities of the national and county governments;
  - (c) the accounts of all courts;
  - (d) the accounts of every commission and independent office established by this Constitution;
  - (e) the accounts of the National Assembly, the Senate and the county assemblies;
  - (f) the accounts of political parties funded from public funds;
  - (g) the public debt; and
  - (h) the accounts of any other entity that legislation requires the Auditor-General to audit.
- (5) The Auditor-General may audit and report on the accounts of any entity that is funded from public funds.
- (6) An audit report shall confirm whether or not public money has been applied lawfully and in an effective way.
- (7) Audit reports shall be submitted to Parliament or the relevant county assembly.
- (8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.

### Glaring Gaps and Inconsistencies

- The DoR does not make express provision for the payment of Ksh11.8B provided for in the BPS for the collective bargaining agreements (CBA) payment to doctors, nurses and clinical officers, which should be paid by way of a conditional grant to counties.
- The DoR does not provide adequate justification of why there is no increase in the Equalization grant as proposed by CRA from 4.7 to 6.4B.

Sincerely,

P. P. 

Wanjiru Gikonyo  
National Coordinator