ICPAK POSITION PAPER ON PUBLIC FINANCE AMENDMENT BILL 2019

The information contained in this publication has been prepared by the Institute of Certified Public Accountants of Kenya.

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Background

The tussle experienced between the National Assembly and the Senate over the Division of Revenue Bill 2019 posed challenges to the county governments in terms of service delivery. The contention revolved around proposed allocations to the equitable share for FY 2019/2020. The matter was neither resolved at the Mediation Committee level nor at the Intergovernmental Budget and Economic Council (IBEC) as stipulated by the Intergovernmental Relations Act, 2012. The Council of Governors went to the Supreme Court for interpretation and determination. The Supreme Court is yet to pronounce itself on this matter.

The Constitution 2010, Article 203(2) for every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall not be less than fifteen per cent of all revenue collected by the national government charged on the Consolidated Fund. The amount is calculated based on the recent audited accounts of revenue received, as approved by the National Assembly.

The main objective of the Bill is to put in place interim measures to allow the county governments to access their minimum share of revenue already guaranteed to them by Article 203(2) of the Constitution to enable them offer services to the public pending the enactment of the Division of Revenue Bill. In the event the Bill is not enacted before the commencement of the next financial year. The Bill also empowers the Controller of Budget to authorize withdrawals from the County Consolidated Fund to enable counties offer essential services to the citizens.

In light of the foregoing, the Institute is of the considered opinion that the stalemate such as the one experienced recently between the Senate and National Assembly has far reaching ramifications on the principles of public finance as espoused in the Constitution and Public Finance Management Act, 2012.

ICPAK Concerns

The Institute has reviewed the Bill and supports its provisions albeit the following concerns:

(a) The bill has not addressed the root cause of the delay in enactment of the Division of Revenue Act 2019.

How Much Should Counties in Kenya Receive?

Each year Kenya's Parliament (National Assembly and the Senate) must decide how national revenue will be shared between national and county governments. This discussion is informed by recommendations from the Commission on Revenue Allocation and the National Treasury. CRA must table its recommendations in parliament by the 1st of January while National Treasury's recommendations are contained in the Budget Policy Statement (BPS) that is tabled in the National Assembly on or before the 15th of March each year. The BPS is tabled together with the Division of Revenue Bill and County Allocation of Revenue Bill. This analysis looks at the recommendations made by both agencies on the equitable share and conditional grants.

It is worth noting that the National Treasury and the Commission on Revenue Allocation still do not agree on what is the revenue growth factor that should be used to determine the growth of the equitable share between 2018/19 and 2019/20. **This is the third year that this has happened**. While CRA has proposed using a 3-year inflation average the basis for National Treasury is vague and has varied from one parameter to the other.

(b) The bill might create a bad precedent of perpetual disagreement as long as the counties have accessed the guaranteed minimum allocation.

While this is a precautionary measure to allow counties deliver services, access does not resolve the underlying challenges hindering enactment of the Division of Revenue Act and County Allocation of Revenue Act.

(c) Constitutional framework for equitable share and division of revenue

- Articles 112 and 113; Establish mediation process and committees
- Article 203; The Article gives provision for determination of the equitable share between the National and County Governments
- Article 206; Establishes Consolidated Fund and specifies the circumstances under which money can be withdrawn from the Consolidated Fund
- Article 217; Establishes the basis for revenue sharing between National and County governments.
- Article 218; Provides timeline within which the Division of Revenue Bill must be passed (2months). The Institute notes that these timelines are not often adhered to thereby negatively impacting county operations

It is worth noting that these provisions have not been adhered to in the past leading to difficulties in implementing county government projects. The outcome of the non-adherence was a protracted stalemate between the Senate and National Assembly which paralyzed counties.

Recommendations:

1. Basis for Revenue Growth

The country needs to develop a predictable and consistent revenue growth factor to determine the growth of the equitable share. This has been the basis of contention between the CRA recommendations and Senate on one hand and the National Treasury and National Assembly on the other. The country needs to agree on whether to use a 3-year inflation average or growth in ordinary revenue or any other acceptable basis for revenue share.

2. Consideration and adoption of Audited Financial Statements

Audited financial statements are important in helping private and public entities make decisions on their financial health. Policy makers, bankers, investors, revenue authorities and suppliers rely on audited statements to determine their investment priorities.

In Kenya, the Office of the Auditor General, as established by Article 229 of Constitution, plays a pivotal role in public sector audit and confirming whether or not public money has been applied lawfully and in an effective way. The Constitution further provides under 229(8) that Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.

This information is also essential in the vertical sharing of revenue between the National Government and County Governments as stipulated under 203(2) and (3) that states

> *(2) For every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the national government.*

(3) The amount referred to in clause (2) shall be calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.

Parliament has continued using FY 2013/14 audited accounts till FY 2019/20 when it used FY 2014/15 Audited accounts as the most recent as stipulated in Table 2 below:

Table 1: latest audited revenue accounts

2013/14	**2014/15**	**2015/16**
932, 034 million	1,047,908 million	1,160,727 million

Source: Auditor General reports

It's worth noting that for the past three years, Division of Revenue Act (DORA) has used the same 2013/14 audited accounts. The DORA 2019 has considered FY 2014/15 as the latest audited accounts as illustrated below.

Table 2: Division of Revenue base figures

DORA 2016	**DORA 2017**	**DORA 2018**	**DORA 2019**
935, 653 million	935, 653 million	935, 653 million	1,038, 035 million

Source: DORA 2016/7/8/9

National Assembly's continued delay in debating and considering Auditor General Reports impedes credible analysis of equitable revenue. The use of FY 2017/18 audited accounts will guarantee a higher minimum allocation than using FY 2014/15 audited accounts.

The Institute proposes the following additional amendments to the Bill:

191A (4)

The National Assembly shall within three months after receiving an audit report adopt and approve the report;

In the event that the audit report is not adopted and approved by the National Assembly within three months, it shall be deemed as the most recent audited accounts for purposes of determining sharable revenue.

Therefore, the National Assembly must expedite its process of considering the audited financial statements as submitted by the Auditor General.

3. Amendment to strengthen County PFM

There is need to ensure holders of Head of Finance and Chief Officers Finance offices at the County level are Certified Public Accountants. This will guarantee the quality of financial reporting and prudence in management of financial resources at the County.

The Institute proposes amendment of Section 103 of the Public Finance Management Act 2012 by inserting a new sub-section (4) to read

103(4) The Chief Officer Finance shall be a person appointed in such capacity and is a member of a statutory body responsible for the professional regulation of accountants in Kenya.

103(4) The County Executive Committee Member for Finance shall be a person appointed in such capacity and shall be a holder of Accounting, Finance, Economics degree or any other relevant degree and must have financial management experience.

It is important to insert this amendment to support Public Finance Management (County Governments) Regulations 2015 which stipulates that an accounting officer shall sign financial statements thereby making himself or herself responsible for their correctness.

4. Public officers to comply with laws relating to national government resources- whistleblower protection

Whistleblowing is not adequately outlined in Kenya's legal structures. The Institute proposes an amendment to anchor whistleblower protection when managing and utilizing public resources to read as follows:

Insert a new subsection 79(3)

79 Public officers to comply with laws relating to national government resources.

(1) Every public officer employed in a national government state organ or public entity shall comply with the Constitution and all laws relating to the conduct of public officers when carrying out a responsibility or exercising a power under this Act.

(2) Without prejudice to provisions under subsection (1), a public officer employed in a national government state organ or public entity shall —

(a) comply with the provisions of this Act so far as they are applicable to the officer; and

(b) ensure that the resources within the officer's area of responsibility are used in a way which — (i) is lawful and authorized; and (ii) is effective, efficient, economical and transparent;

(c) within the officer's area of responsibility- (i) ensure that adequate arrangements are made for the proper use, custody, safeguarding and maintenance of public property; and (ii) use the officer's best efforts to prevent any damage from being done to the financial interests of the national government.

(3) Report any misuse of public resources including money, property or powers or such other things in public purview

5. Protection of Public Officers from liability

There has been a trend in the public sector where personal accountability in cases of malpractice and use of public resources has been blamed on the accountants only. Sections 202 and 206 of the Public Finance Management Act, 2012 provide for Liability of public officer for certain losses sustained by national government and Protection of Public Officers from liability respectively. To ensure persons along the budget process are held accountable, the Institute proposes the following amendment:

Insertion of a new subsection 206(2) to read,

206 Protection of public officers from liability.

(1) Nothing done by any authorised person or public officer working under the instructions of the National Treasury or County Treasury, if done in good faith, for the purposes of executing the powers, functions or duties of the National Treasury or County Treasury under the Constitution

or this Act, renders that person or public officer personally liable for any action, claim or demand.

(2) <u>The liability will be deemed from the proposed expenditure to budget execution.</u>

This proposes will ensure all officers from budget preparation to implementation including budget officers, public procurement officers, chief financial officers and accountants are protected from liability.

Conclusion

Even though the interim measures are likely to cushion county governments from the cash crunch due to delay in revenue allocation processes, efforts should be made to ensure absolute compliance with the budgetary timelines to achieve the goals of devolution.

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