



REPRIEVE FOR TAX PAYERS AS CHARGE OF MINIMUM TAX IS DECLARED UNCONSTITUTIONAL BY THE HIGH COURT OF KENYA

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The Finance Act, 2020 amended the Income Tax Act (Cap 470) (Hereinafter the ITA) by inserting Section 12 D which introduced a new Tax known as Minimum Tax at the rate of 1% of the gross turnover effective 1st January 2021. To implement the said amendment, the Kenya Revenue Authority (KRA) in January, 2021, published the "Guidelines on Minimum Tax" whose centrality was the definition of Gross Turnover.

Vide the Constitutional Petitions No. E005 and 001 of 2021, the Petitioners filed a petition with the High Court in Machakos challenging the constitutionality of the amendments as introduced under Section 12D of the ITA.

In support of its Petition, the Petitioners relied on the following grounds in support of their case; -

A. KEY GROUNDS OF THE PETITION

(a) According to the Petitioners, by its very definition, the Minimum tax did not amount to Value-Added Tax, Custom duties nor Excise Tax, yet the KRA purported to include it in the category of income tax. However, by dint of Section 3 as read with Section 15(1) of the ITA, Income Tax is only chargeable on gains or profit and not as gross turnover as implied by Minimum Tax. As such, the Minimum Tax could not be deemed in any manner of form to amount to income tax.

The Petitioners also argued that on the one hand, ITA provides that income which is subject to tax under the Income Tax is income in respect of gains or profits having deducted all expenditure wholly and exclusively incurred in the production of that income while on the other hand minimum tax is chargeable on gross turn over including losses with no possibilities of deducting expenses or costs.

(b) The Petitioners argued that Article 201(a)(i) of the Constitution in setting out the principles of public finance provides for the promotion of an equitable society through the fair and just sharing of the burden of taxation.

However, the imposition of Minimum tax as against gross turnover violates the cardinal principle of public finance. That, with the imposition of the Minimum Tax on gross turnover and not gains or profits, all persons, even those in a loss-making position are required to pay minimum tax. This means that a taxpayer who has no profit or is in a loss-making position will have to pay the minimum tax out of pocket or their capital.

(c) Moreover, that contrary to Article 27 of the Constitution, the amendments in Section 12D of the ITA discriminates against the Petitioners and other traders in the consumer products sector by favoring those in the energy and petroleum sector and in the insurance sector.

Based on this argument, the Petitioners noted that the imposition of the said Minimum Tax essentially meant that it cared less about the ability of the taxpayer to pay, yet an elementary principle in taxation is the principle of economic capacity which states that the percentage of the income of the taxpayers that can be legitimately affected by a tax must not be excessive than the wealth objectively available.

(d) Further, the Petitioners submitted that the Minimum Tax is very likely to occasion double taxation as against the Petitioner and other similar taxpayers. In support of this argument, the Petitioners noted that if a company in a tax loss position becomes profitable in the course of its financial year and is now required to pay corporation income tax, the minimum tax paid during the loss-making period of the company's financial year will neither be a tax-deductible expense nor a tax credit in computing the taxable income and will therefore amount to double taxation of such companies.

To this end thus, the Petitioners noted that the actions of KRA in introducing the Minimum Tax was not only ultra vires but in contravention of the Constitution of Kenya 2010. Further that the said amendment was contrary to and inconsistent with the meaning and purpose of income tax as provided under the Income Tax Act.

