

**COMMENTARY: COURT OF APPEAL DECLARES FINANCE ACT 2023 UNCONSTITUTIONAL**

**INTRODUCTION**

On July 31, 2024, the Court of Appeal in Nairobi, Kenya, ruled that Finance Act 2023 (the Act) is fundamentally flawed and therefore void and unconstitutional. The Appellate Court's rationale is owed to the requirement of the Finance Act to be solely a money bill. However, the Act touched on various amendments outside what the Constitution of Kenya considers what amounts to a money bill. To boot, the Court ruled that there was no Public Participation during the legislative process before the Finance Bill 2023 was assented into law. As such, the Act was declared unconstitutional in totality.

**WHAT NEXT?**

Although the Act was declared unconstitutional, it is important to note that there shall be **no refunds**, as the initial petition at the Court of First Instance (High Court) did not plead that the KRA refunds the unconstitutionally collected revenue. Currently, the Supreme Court has declined to stay the decision of the Court of Appeal pending the appeal of the Court of Appeal decision at the Supreme Court.

The Interpretation and General Provisions Act CAP 2 (IGPA) of the Laws of Kenya provides that when a law (read "Finance Act, 2023") repeals another law (read "Finance Act, 2022") in place or sections of a particular law in place, that law (read "Finance Act, 2022") shall not be revived by having the repealing law (read "Finance Act, 2023") repealed. However, in this case, the Court of Appeal determined that the whole Finance Act, 2023, is unconstitutional (read "not repealing"), which translates to the fact that the repealing of the Finance Act, 2022, by the Finance Act, 2023, was unconstitutionally done, therefore, reviving the application of the Finance Act, 2022.

It is essential to note that in certain instances, the Judiciary's findings have been treated with contempt by some government agencies or organs.

**SOME OF THE CONSEQUENCES OF THE COURT'S DECISION**

INDUSTRY/CATEGORY	FINANCE ACT 2023	COMMENT / EXPECTED IMPLICATIONS
Petroleum Products	Value Added Tax (VAT) on fuel was increased from 8% to 16%, and this caused a drastic increase in the cost of petroleum products.	The VAT now stands at 8%, and this should cause the cost of petroleum products to reduce.
Electronic Tax Invoice Management System (E-TIMS)	Businesses were required to issue E-TIMS invoices to customers and use the same for claiming deductible expenses.	Businesses will no longer have to issue E-TIMS invoices in their transactional course.

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Tax Bands	Higher tax bands for Pay As You Earn (PAYE) were introduced, whereby individuals who earned over KES. 500,000/= and LES. 800,000/= per month were taxed up to 32.5%, and those earning above KES. 800,000/= per month were taxed at 35%.	The former band system, where all income above KES. 388,000/= being taxed at 30%, will now be maintained, resulting in overall lower tax liability.
Housing Levy	The Act introduced a 1.5% deduction of the gross salary of an individual for the government's affordable housing project.	This <b>remains in force</b> as the Court held that the passage of the Affordable Housing Act into law has rendered the petition challenging the Housing Levy provision moot.
Small & Medium Enterprises (SMEs)	SMEs that make between KES. 1,000,000/= and KES. 25,000,000/= were to pay 3% on all the money they get from sales.	SMEs are now not obligated to remit 3% of the proceeds obtained from sales, increasing revenue for the SMEs.
Gaming Industry	The meaning of Winnings was specified to include betting, gaming, lottery, prize competition, gambling or similar transaction under the Betting, Lotteries and Gaming Act without deducting the amount staked or wagered.	The meaning of winnings will remain ambiguous.
Entertainment Industry, Media Industry, Online Commercial Activities	Added new definitions under the "digital content monetization" which was meant to capture commercial or revenue generating activities. The same was taxed a withholding tax of 15% on residents.	The digital monetization activities will cease to attract the 15% withholding tax. These activities will also not be easily identifiable as the previous Income Tax Act did not recognize this category of earners.
Real Estate, Facility Based Industry, Mining & Prospecting Industry	It also Introduced the aspect of a "related person" to mean <i>in the case of two persons where a person who participates directly or indirectly in the management, control or capital of the business of another person.</i>	The responsibilities that were meant to be bestowed on related persons will cease to be effective and the same will remain with the managers in control of their own businesses.
Foreign Exchange Industry	It limits deferring a loss to be claimed to a period of 5 years and deletes a provision that allows accumulated losses to be considered when computing the amount of revenue reserves.	There will be no cap limit on the years within which one may consider accumulated losses for purposes of computing the amount of revenue reserves.
Trusts	The Act deleted the provision that offered tax relief to beneficiaries of trusts for specific payments such as education, medical treatment or early adulthood housing as	Beneficiaries of trusts will now have tax reliefs on specific payments and income as mentioned cumulatively below 10 million shillings in a year.

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	well as income paid to beneficiaries totaling to less than 10 million shillings.	
Employment Industry	<p>Travel allowance within the Automobile Association of Kenya standard mileage rate on official duties was not to be included in the deductible amount.</p> <p>Introduced a tax on employee awarded shares by an <b>eligible start-up</b> payable at a defined period per the ITA.</p>	<p>Travel allowance even for official duties will be included in the deductible figure.</p> <p>Shares earned by employees from an eligible start-up will not be subject to tax.</p>
Digital Asset Tax (cryptocurrencies, among others)	It introduced a withholding tax of 3% to be paid within 5 days of making the deduction.	Transfer or exchange of digital currencies will no longer attract a withholding tax of 3%.
Post Retirement Medical Relief Fund	A resident who has worked for a full year of a given income year was entitled to post-retirement medical fund relief of 15% of the contributed amount or KES. 60,000 PA, whichever is lower if such a resident made such contributions to a fund.	The lack of a tax incentive might discourage individuals from contributing to post-retirement medical funds.
Marketing & Advertising	Any payment of above KES 24,000/= falling under sales promotion, marketing and advertising services was to be subject to tax deductions under WHT of 5%.	Since service providers will no longer need to account for the withholding tax when pricing their services, the cost of marketing, advertising, and sales promotion services could potentially drop.
Human Vaccine	A resident company manufacturing human vaccines was to have a corporate tax rate at 10%.	Eliminating the 10% corporation tax rate provision for resident businesses producing vaccines for humans would increase these businesses' tax obligations, which would lower their net earnings and perhaps drive up the cost of vaccinations.
VAT Registration	A person supplying imported digital services over the internet, an electronic network or through a digital marketplace is limited on enjoying the benefits of not being VAT registered for not having achieved the KES. 5,000,000 gross turnover in any period of twelve months.	Small digital service providers with a turnover below KES 5,000,000 would be required to register for VAT, increasing their administrative responsibilities and costs associated with VAT compliance, such as maintaining detailed records, filing VAT returns, and remitting VAT payments.
Tariffs	Finance Act, 2023, (declared unconstitutional)	Tariffs under Finance Act, 2022, ought to be applicable.

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