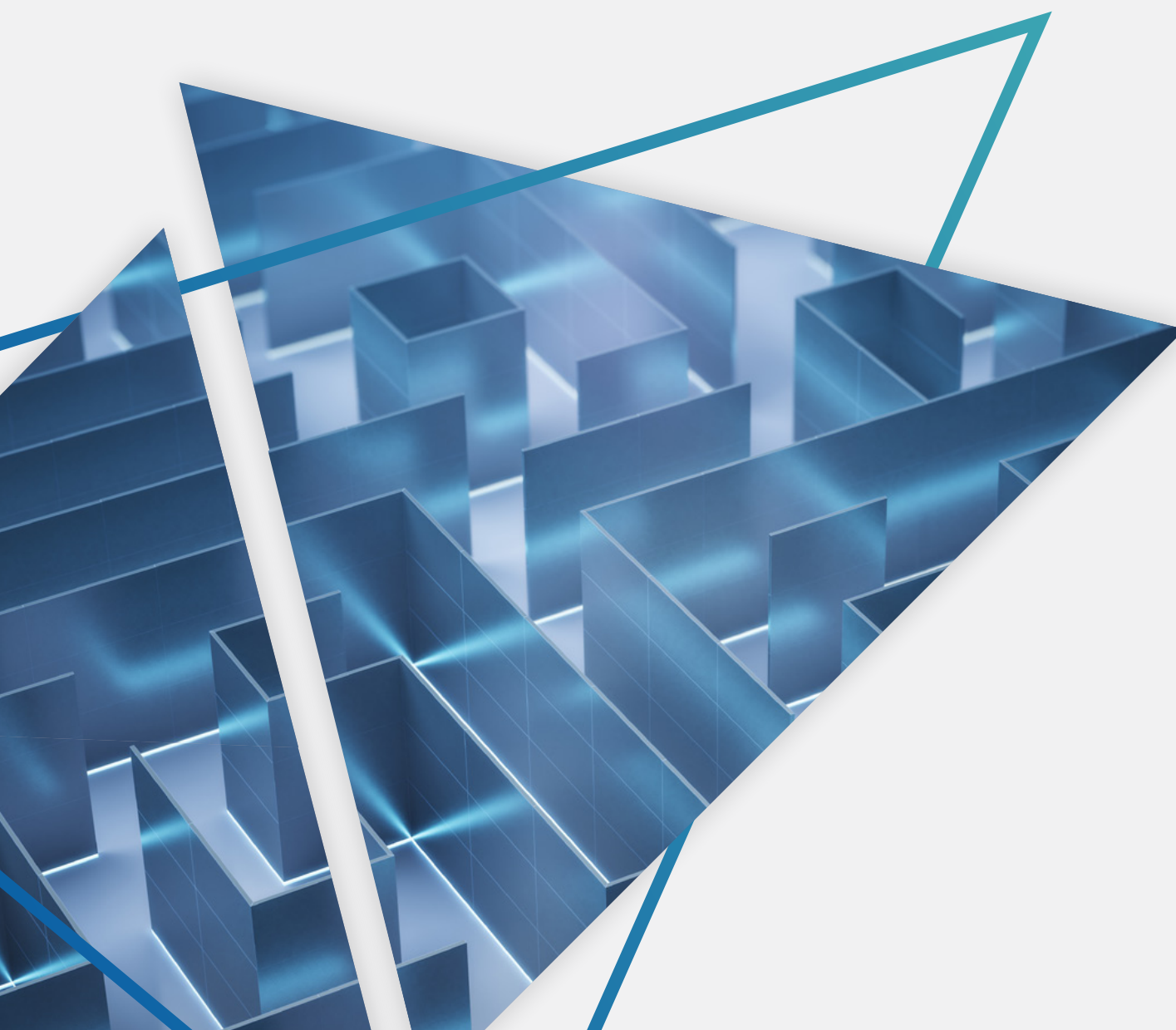


Tax & Exchange Control

ALERT | 20 August 2024



In this issue

KENYA

Temporary relief: Supreme Court suspends the Court of Appeal's declaration of the Finance Act, 2023 as unconstitutional



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Temporary relief: Supreme Court suspends the Court of Appeal's declaration of the Finance Act, 2023 as unconstitutional

The Supreme Court of Kenya (SC) has, through a ruling issued on 20 August 2024, suspended the Court of Appeal's (CoA) judgment delivered on 31 July 2024, which had declared the entire Finance Act, 2023 (Act) unconstitutional. Details on the CoA's decision can be found in our alert [here](#).

In this alert, we discuss the key findings of the SC and examine what they mean for Kenya's tax regime.

Background

Through its judgment, the CoA declared the entire Act to be unconstitutional on various grounds, including:

- the Act contained provisions introduced into the Finance Bill, 2023 after the conclusion of the public participation process; and
- the National Assembly did not give written reasons to the public for not incorporating their views submitted during the public participation process into the Act.

Aggrieved by this decision, the Government of Kenya, through the Cabinet Secretary for the National Treasury and the Kenya Revenue Authority (KRA), among others, filed an appeal against the CoA judgment before the SC. The Government further sought a stay of the judgment, pending the hearing and determination of the main appeal.

The Government's case

In support of its application to suspend the CoA's judgment, the Government advanced the following arguments:

- The CoA misunderstood the enactment procedure of money bills under the Constitution of Kenya, 2010 and the Public Finance Management Act.
- The CoA misunderstood the threshold of public participation required in enacting statutes and whether Parliament can amend bills after the public participation phase.
- The CoA's judgment will cause a revenue shortfall of approximately KES 214 billion, which cannot be recovered unless the judgment is suspended.
- The judgment would require the Government to update all its revenue collection systems to reflect the tax rates that existed in 2022.
- The judgment poses the risk of a constitutional crisis by preventing the Government from lawfully collecting and allocating funds.
- The Government may be compelled to borrow funds to bridge the revenue shortfall, which would exacerbate the current public debt situation.
- The CoA departed from the practice of suspending the declaration of a law's unconstitutionality to give an opportunity for the offending provisions to be remedied.

Temporary relief: Supreme Court suspends the Court of Appeal's declaration of the Finance Act, 2023 as unconstitutional

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- The Government may be required to refund taxes collected under the Act, yet no budgetary allocations for such refunds have been made.
- It would be in the interests of justice to suspend the judgment, for the sake of maintaining the tax regime's predictability.

The respondents' case

In opposing the application to suspend the CoA's judgment, the respondents, who include Honourable Senator Okiya Omtatah and the Law Society of Kenya, among others, advanced the following arguments:

- The Government can adjust its expenditure to accommodate any financial gaps occasioned by changes in law. In support of this argument, the respondents cited the recent rejection of the Finance Bill, 2024 and the enactment of a Supplementary Appropriation (No. 2) Act, 2024, to cut down expenditure.
- The suspension of the judgment would expose Kenyans to paying potentially unconstitutional taxes for a longer period.
- Revenue collection is not dependent on the Act, but on the substantive tax laws currently in force. The Government will therefore still have the capacity to collect revenues, even where the judgment is not suspended.
- The Constitution of Kenya, 2010 has already established mechanisms for the Government to meet its fiscal obligations in cases of emergency or unforeseen circumstances.

The SC's determination

In its analysis and determination, the SC allowed the Government's application to suspend the CoA's judgment on the following grounds:

- The Government's appeal contains arguable questions arising from the judgment, including the place of public participation in the lawmaking process. These questions need to be properly determined by the SC, which warrants the judgment's suspension in the interim.
- The judgment had far-reaching implications on revenue raising measures and the operations of the Government. Such implications may not be reversible should the judgment be overturned by the SC.
- Public interest tilts in favour of suspending the judgment to maintain stability in the budget and appropriation processes, pending determination of the main appeal by the SC.

As such, the SC has suspended the CoA's orders that had declared the entire Act as unconstitutional. The SC has further directed that the main appeal shall be set for hearing on 10 and 11 September 2024.

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ALERT**

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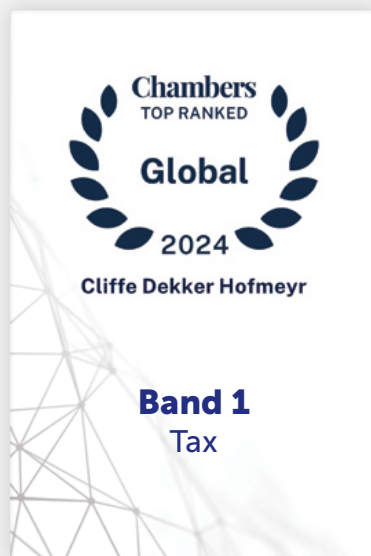
Comment

Following the SC's ruling, the operative framework for tax purposes in Kenya is the tax statutes as last amended by the Act in 2023. These statutes include the Income Tax Act, Value Added Tax Act, 2013, Excise Duty Act, 2015, Miscellaneous Fees and Levies Act, 2016 and Tax Procedures Act, 2015.

Details of the key tax measures introduced by the Act are provided in our analysis [here](#).

Taxpayers should seek independent legal advice on what happens between 31 July 2024 when the CoA nullified the Act and 20 August 2024 when the SC stayed the decision of the CoA.

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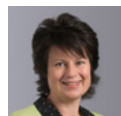
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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