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COURT OF APPEAL LIFTS STAY ON AFFORDABLE HOUSING LEVY

Issue:
29 January
2024

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→ Court of appeal lifts stay on affordable housing levy

Background

In this issue, we discuss the implications of the Ruling delivered by the Court of Appeal in the case of The National Assembly & Another (Applicants) vs. Okiya Omtatah Okoiti & Others (Respondents) Consolidated Civil Application No. E577 of 2023, on 26 January 2023.

The Finance Act, 2023 was assented by the President on the 26 June 2023, which brought about various changes to the various tax laws currently in place. One of the contentious changes brought about by the Finance Act 2023 was the introduction of the 1.5% of gross salary Affordable Housing Levy on employees, with employers being required to match the same contribution amounts. As a result, the Respondents made an application to the High Court, challenging the constitutionality of the enactment of the Finance Act 2023.

The High Court delivered a ruling on 28 November 2023, which declared various sections of the Finance Act 2023 unconstitutional. Amongst the sections declared unconstitutional included section 84, which introduced the Affordable Housing Levy. Aggrieved by this decision, the Applicants appealed to the Court of Appeal and sought a temporary order to suspend the effects of the judgement delivered by the High Court. The High Court allowed a stay of judgement up to 10 January 2024 pending the hearing and determination of an appeal filed by the Applicants at the Court of Appeal. The Court of Appeal issued an extended stay on 5 January 2024 to be reviewed last week on 26 January 2024.

Court finding

- The Court of Appeal cited the ruling delivered by the High Court in Civil Application No. 304 of 2023, in explaining why the argument by the Applicants that the appeal will be rendered invalid on the basis that it is not possible to backdate the taxes in the case that the appeal succeeds, given that in the aforementioned civil application, taxes were backdated

and collected during the pendency of the proceedings.

- The argument brought about by the Applicant on breach of contracts failed as there was not a single contract brought forth by the Applicants as evidence.
- The argument that some government departments may shut down and that jobs could be lost on the lack of a stay on the section relating to statutory instruments, failed for the lack of evidence. The statutory instruments can also be re-enacted by the Parliament.
- The Court would need to hear the appeal on merits regarding sections 30 to 38 and 47 (a)(v) of the Finance Act, 2023 before deciding on the suspension of these sections. The sections would be further annulled should the appeal succeed.
- The Court had limited circumstances to suspend declarations of invalidity and opportunities to bring the impugned legislation into line will only be granted to parliament under certain circumstances.

The Court of Appeal further stated that it would not be in public interest to grant a stay whose effect is to allow a statute that has been found to be constitutionally unfirm to continue in law pending the hearing of the appeal. That public interest lies in awaiting the determination of the appeal. The Court further dismissed all the Four (4) consolidated applications

Implication of the ruling

Employers will not be required to deduct and remit Affordable Housing Levy until the substantive issues raised on the appeal are resolved as directed by the ruling.

Regarding whether taxpayers will be refunded for deductions made from July 2023, the court is yet to address the issue. However, given that the court has ordered an expedited determination of the substantive appeal, there is expectation that this issue will be addressed then

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