

# **Value Added Tax (VAT) On Insurance Agency And Brokerage Services**

---

**Faiyaz Anjarwalla**

**BPP**

Published On 12<sup>th</sup> October 2023

## **VALUE ADDED TAX (“VAT”) ON INSURANCE AGENCY AND BROKERAGE SERVICES**

The Constitutional division of the High Court recently determined that VAT does not apply to insurance agency and brokerage service.

The issue arose in a suit filed by The Association of Kenya Insurers (“AKI”) against the Kenya Revenue Authority (the “KRA”) and others. AKI sought orders that paragraph 10 of Part II of the First Schedule to the Value Added Tax Act as amended by the Tax Laws (Amendment) Act, 2020 (VAT Act) be declared unconstitutional.

The Amendment had the effect of removing insurance agencies and brokerages services from the list of Value Added Tax (VAT) exempt services and thus subjecting the members of the Petitioner to the payment of VAT. However, in contradiction paragraph 2 of Part II of the First Schedule to the VAT Act still provided for the services of the Petitioner’s members to be exempted to VAT.

AKI raised several issues including that public participation was not carried out in the enactment of the Tax Laws (Amendment) Act 2020 and further that the imposition of VAT on the insurance sector whilst other sectors were enjoying tax reliefs amounted to discrimination. Additionally, it was alleged that AKI members were discriminated against as its members could not claim credit input VAT which was enjoyed by other tax payers as its members were exempt from VAT.

In examining the constitutionality of legislation, there is a presumption that the Legislature understood the needs of the people and enacted legislation to deal with problems that were made “manifest by experience”. The presumption (albeit rebuttable) is therefore in favour of constitutionality of an enactment.

Having said that, nothing would bar a Court from declaring unconstitutional legislation which did not meet the constitutional requirements.

AKI challenged both the process and substance of the legislation.

### **Public Participation**

The process of enactment was challenged on the ground of lack of public participation. The Court found that for public participation it ought to be shown that a reasonable opportunity was afforded to the public to meaningfully participate in the legislative process. Once this is done the Court will not interfere simply because due to peculiar circumstances of an individual, he or she failed to get information. It was not necessary for all persons to express their views or that they had to be heard- all that was required was for reasonable steps to be undertaken to facilitate participation. Therefore, the court decided that the National Assembly (3<sup>rd</sup> Respondent) complied with Article 10 (2) of the Constitution of Kenya (the “Constitution”) and did not violate the principle of public participation.

## **Ambiguity, Uncertainty and Absurdity of the Amendment**

One of the ingredients of the rule of law is certainty of law and this particular Amendment created uncertainty, ambiguity and absurdity. This is because it would result in a scenario where the cost of VAT on insurance agency and brokerage services would be borne by AKI's members whose own services are VAT exempt ( under paragraph 2 of Part II of the First Schedule to the VAT Act ) The Court pointed that to this end the Petitioners have a right of certainty and predictability in the applicability of economic activities. The uncertainty and ambiguity of the Amendment makes it impossible for the Petitioner's members to plan for the tax burden that has been indirectly imposed on their services which are VAT exempt. Where therefore it is found that either the purpose or effect of legislation result in deprivation of a right guaranteed by the Constitution, the Statute should be declared unconstitutional. As a result, the Court upon finding that the Amendment created uncertainty, ambiguity and absurdity was bound to declare the impugned section unconstitutional as it failed to satisfy the ingredients of the rule of law.

## **Discrimination**

Moreover, the Court highlighted that VAT is a consumption tax that should be borne by the final consumer of the supply. Section 17 of the VAT Act allows VAT registered tax payers to claim a credit for input VAT against their output VAT to ensure the input VAT is effectively passed to the final consumer (in this case the insurance policy holders). It was noted that the VAT charged by the insurance brokers and agents will be output VAT for them and will be passed to the Petitioner's members which would be classified as input VAT. However, VAT Act limits the amount of input VAT claimable where input VAT is used to make exempt supplies.

This clearly showed that the Amendment discriminates against the AKI's members who would not be able to claim a credit for input VAT which is enjoyed by other tax payers as AKI's members are exempt from VAT and would therefore not be able to effectively pass this input VAT to the final customer who are the insurance policy holders. This was found to be in contravention of Article 27(1) of the Constitution which provides for equality before the Law and would further result in AKI's members being forced to carry a heavier tax burden in violation of Article 201(b) (i) which provides for the tax burden to be shared fairly.

Additionally, the Court noted that section 70 (1) of the Insurance Act set limits on the amount of management fees that insurers can charge. The Amendment would result in these limits being exceeded beyond the prescribed limits and thus create a risk of AKI's members committing a criminal offence under the Insurance Act. Taxation, while essential in democratic societies, should not impose pecuniary burdens which result in penal consequences and thus creating ambiguity,

In conclusion the Court ruled that Paragraph 10 of part II of the First Schedule to the Value Added Tax Act as Amended by the Tax Laws (Amendment) Act 2020, is unlawful, unconstitutional, and

contravenes the provisions of Article 1, 27, 35, 201 (b) (i) of the Constitution. The result of this is that insurance companies are not required to pay VAT on services provided by insurance agents or brokers.

*Should you have any queries or need any clarifications with respect to Value Added Tax ("VAT") On Insurance Agency And Brokerage Services matters, please do not hesitate to contact [Faiyaz Anjarwalla](#) at A.B. Patel & Patel LLP.*



**FAIYAZ ANJARWALLA**

Partner