ARBS

ASSOCIATION OF RETIREMENT BENEFITS SCHEMES

TAXATION OF BENEFITS PAID TO PERSONS AGED 65 YEARS AND ABOVE

The Finance Act 2007 introduced Paragraph 53 of the Income Tax Act (Chapter 470, Laws of Kenya) which provides that monthly pensions and lumpsum benefits granted to a person who is 65 years of age or more are exempt from tax. Section 8(b) of the Finance Act 2020 deleted Paragraph 53 so that only monthly pensions are tax-exempt. The deletion of this exemption impacted not only provident fund lump sum payments but also commutations of pensions which became liable for taxation following the amendment.

The Association of Retirement Benefits Schemes (ARBS) has since lobbied for the continued exemption from taxation of all retirement benefits for persons aged 65 years and above. To have the tax exemption bracket to not only include monthly pensions but also commutations of pensions and provident fund lump sum retirement benefits as was the case prior to the amendment. We noted that Members of Parliament through the Finance and National Planning Committee of the House concurred that taxing these amounts would reduce the pension payable to retirees which were undesirable. This position was adopted after MPs received various stakeholder submissions on this issue including ARBS' submissions.

ARBS wrote a letter to the National Assembly Departmental Committee on Finance and Planning and is yet to receive a response on the same.

ARBS further wrote to the Kenya Revenue Authority (KRA) requesting an amicable private ruling to rectify this error/ omission made in the said amendments to Paragraph 53 by the National Assembly. On 2nd July 2021, KRA issued a private ruling insisting that there was no error or omission made by the National Assembly and reiterated that lumpsum retirement benefits to persons aged 65 years and above are not exempt from income tax. ARBS viewed this as a clear manifestation of KRA's intention to enforce the amendments and decided to take further action to ring-fence retiree's benefits by filing a constitutional petition to challenge the amendment.

A constitutional petition was filed at the High Court (**Constitutional and Human Rights Division Petition No. E028 of 2023**), challenging the manner the law came into force, and seeking orders declaring the amendment unconstitutional.

We are pleased to inform members that the Honourable Court was satisfied that our application meets the test for conservatory orders, and on 31st January 2023 issued the following orders:

1. THAT pending the inter-partes hearing and determination of this application the Court issues a conservatory order suspending Paragraph 53 of Part 1 of The First Schedule to The Income Tax Act, Chapter 470 of The Laws of Kenya as amended by Section 8 (b) And Section 8 (c) The Finance Act, 2020.

2. THAT pending the inter-partes hearing and determination of this Application and/or the Petition herein the Honourable Court is pleased to issue a temporary order prohibiting KRA and the other respondents, whether by themselves or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect, in any way whatsoever, to Paragraph 53 of Part 1 of The First Schedule to The Income Tax Act, Chapter 470 of The Laws of Kenya as amended by Section 8 (b) And Section 8 (c) The Finance Act,2020.

This means that until the matter is fully determined the taxation of benefits for persons aged 65 years and above has been suspended. This is a very positive interim outcome.

We shall continue to keep members appraised of the court proceedings in this matter.

Executive Secretariat
Flamingo Tower 1st Floor corner Mara Rd & Hill Ln, Upper Hill
P.O Box 10285 - 00100 Nairobi, Kenya
Telephone: 254 (0)20 23711461/2; 2711464/5 Fax: 254 (0)20 2711466
Cellphone: 733 748952; 733 748954;
E-mail: info@arbs.co.ke
Website: www.arbs.co.ke

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI LAW COURTS

CASE NUMBER: HCCHRPET/E028/2023

CITATION: THE ASSOCIATION OF RETIREMENT BENEFITS SCHEME VS STATE LAW

ORDERS(COURT DOCUMENT)

THIS MATTER coming up on 31.1.23 for directions on the Petition and Notice of Motion both dated 19.1.23 before Honourable Justice M. Thande UPON considering the same;
IT IS HEREBY ORDERED:
1. THAT I am satisfied that the Application meets the test for conservative orders at this stage. I do therefore grant Prayers 2 and 3 of the Application.
2. THAT the Application and order be served by close of business on 1.2.23.
3. THAT responses to the Petition be filed by 8.2.23.

4. THAT matter be mentioned on 15.2.23 for directions.
GIVEN under my hand and seal of the Honourable Court this 31.1.23.

SIGNED BY: LADY JUSTICE M THANDE

THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT CONSTITUTION AND HUMAN RIGHTS
DATE: 2023-01-31 15:35:34+03

CHR/0026/02/202
AG/CPT/NA/13/23

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E028 OF 2023

IN THE MATTER OF ARTICLES 22(1) & (2)(c), 50(1), AND 258(1) & (2)(c) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1(1); 2(1), (2) & (3); 3(1); 10(2); 73(1)(b); 232(1)(d), (e) & (f), AND 259(1) & (3) OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 40, 43, 46, 47 AND 57 OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLE 231(2) OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 3, 4, AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT AND SECTIONS 2, 3, 4, 5, 5A, 6, 7, 8, 10 AND 11 OF THE STATUTORY INSTRUMENTS ACT.

IN THE MATTER OF IN THE MATTER OF PARAGRAPH 53 OF PART 1 OF THE FIRST SCHEDULE TO THE INCOME TAX ACT, CHAPTER 470 OF THE LAWS OF KENYA AS AMENDED BY SECTION 8 (B) AND SECTION 8 (C) OF THE FINANCE ACT 2020

IN THE MATTER OF IN THE MATTER OF INTERPRETATION AND ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010 RELATING TO THE IMPOSITION OF INCOME TAX ON LUMPSUM RETIREMENT BENEFITS TO PERSONS AGED SIXTY-FIVE (65) YEARS AND ABOVE AS INTRODUCED BY SECTION 8 (B) AND SECTION 8 (C) OF THE FINANCE ACT,2020 UNDER THE INCOME TAX ACT, CHAPTER 470 OF THE LAWS OF KENYA

IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF PERSONS ENGAGED IN THE BUSINESS OF PROVISION OF PENSION SERVICES.

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATIONS.

=BETWEEN=

THE ASSOCIATION OF RETIREMENT BENEFITS SCHEME (Suing through the Chairman Simon Nyakundi).....1ST PETITIONER

ASSOCIATION OF PENSION TRUSTEES AND ADMINISTRATORS (Suing through the Chairman Hosea Kili)..2ND PETITIONER

THE NATIONAL TREASURY RECEIVED 22 FEB 2023 MAIN REGISTRY P.O. Box 30007-00100 NAIROBI

=VERSUS=

THE NATIONAL ASSEMBLY..1ST RESPONDENT
THE KENYA REVENUE AUTHORITY ....2ND RESPONDENT
CABINET SECRETARY FOR THE NATIONAL TREASURY.......3RD RESPONDENT
HON. ATTORNEY GENERAL...4TH RESPONDENT

=AND=

THE RETIREMENT BENEFITS AUTHORITY (RBA) .... INTERESTED PARTY

KENYA REVENUE AUTHORITY LEGAL SERVICES & BOARD CO-ORDINATION DEPARTMENT 22 FEB 2023 Time: 1:53pm Sign: RECEIVED REGISTRY

RECEIVED 22 FEB 2023 Retirement Benefits Authority

IN COURT ON 15TH FEBRUARY,2023
BEFORE HON. LADY JUSTICE M. THANDE

ORDER

UPON THIS MATTER coming up Hon. Lady Justice M. Thande on 15th February, 2023 in the presence of Counsel for the 1st & 2nd Petitioners, Counsel for the Interested Party, Counsel for the 2nd Respondent, Counsel for the 1st Respondents and Counsel for the 3rd & 4th Respondents **AND UPON** hearing the counsel;

IT IS HEREBY ORDERED: -

1. **THAT** the interim conservatory orders were given pending hearing and determination of petition.
2. **THAT** matter will proceed to hearing of petition.
3. **THAT** responses to petition to be filed and served by 01.03.2023.
4. **THAT** Petitioner to file and serve further affidavit, if need be, and submissions by 15.03.2023.
5. **THAT** Respondents and Interested Parties to file and serve submissions by 29.03.2023.
6. **THAT** highlighting on 24.04.2023.

RECEIVED ON BEHALF OF THE SPEAKER / CLERK OF THE NATIONAL ASSEMBLY / PARLIAMENTARY SERVICE COMMISSION RECEIVED: MRIMA 2:45pm

GIVEN under my Hand and Seal of this Honourable Court this **15th** day of **February, 2023.**

ISSUED at Nairobi this......22nd......day of......February......2023.

OFFICE OF THE ATTORNEY GENERAL P.O. BOX 40112-00100, NAIROBI 22 FEB 2023 CIVIL LITIGATION REGISTRY RECEIVED OFFICER........TIME........

DEPUTY REGISTRAR
HIGH COURT OF KENYA, NAIROBI

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL. DATED 22/2/2023
DEPUTY REGISTRAR HIGH COURT OF KENYA NAIROBI