



High Court nullifies EGMS Regulations 2017

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The High Court on 12 March 2018 made a ruling invalidating the Excisable Goods Management System (EGMS) Regulations introduced vide *Legal Notice 53 of 2017* on the premise that they were enacted in a manner that did not conform to the Constitution and the Statutory Instruments Act.

Background

The requirement to affix stamps on excisable goods was introduced under Section 116B of the repealed Customs and Excise Act Cap 472, which empowered the Cabinet Secretary, National Treasury to, through a Gazette Notice, specify goods which were required to be affixed with excise stamps. Consequently, the then Minister of Finance introduced the Excisable Goods Management System (EGMS) Regulations vide Legal Notice 110 of 2013 on 18th June 2013 which required every package of excisable goods, except motor vehicles, manufactured

in or imported into Kenya be affixed with an excise stamp. Further, the regulations imposed the cost of acquiring the stamps; excise stamps applicators, adjustments and adaptations of their equipment and premises necessary to install the System on the manufacturers (The prescribed cost of stamps was KES 1.50 per stamp for all excisable products).

With the repeal of the Customs and Excise Act on 1st December 2015, Section 116B was replaced with Section 28 of the Excise Duty Act 2015. Further, the Cabinet Secretary to the National Treasury introduced new EGMS Regulations vide Legal Notice 53 of 2017 effective 30 March 2017. The new regulations amended the pricing of excise stamps from a fixed price of KES 1.50 per stamp to different prices for the various types of excisable goods (e.g. Stamps on mineral water are charged at KES 0.50 and KES 0.60 on cosmetics and juices).

The installation of the EGMS and requirement to affix stamps was implemented by the Kenya Revenue Authority in 2 phases: Phase 1 covering spirits, wine, beer and cigarettes was implemented in 2013 while Phase 2 was scheduled to take effect on 1 November 2018.

The High Court issued an injunction on implementation of phase 2 following an amended petition filed seeking to invalidate the EGMS regulations issued via Legal Notice no. 53 of 2017 (and the repealed Legal Notice no. 110 of 2013).

Petitioner's case

The Petitioner sued for violations of the Constitution and statutory provisions pertaining to various matters, key of them being the manner of enactment of the EGMS Regulations and award of the tender to implement the EGMS. The petitioner argued that the EGMS regulations were not subjected to public participation as required by the Constitution and that the CS ignored Parliament's Public Investment Committee (PIC) directive not to implement the EGMS until a suitable pricing model was agreed upon.

The petitioner also sought to have the charge to excise duty of bottled water, fruit and vegetable juices be declared a deliberate violation of Article 43 (1) (a), (c) and (d) of the Constitution which grants every Kenyan the right to the highest attainable standard of health, including inter alia the right to clean and safe water in adequate quantities.

Respondent's case

The Commissioner General submitted that due process had been followed in enacting the said regulations, including consultations with organizations such as KAM, Alcoholic Beverages Association and Tobacco Manufacturers, albeit prior to implementation of the first phase of the EGMS in 2013. In addition, all issues of concern were agreed upon including the pricing of stamps and the implementation dates.

The CS National Treasury also submitted that due process was followed, including tabling of the regulations before the National Assembly. Though the regulations were referred to the Committee of Delegated Legislation who invited the CS to discuss the same in vain, the CS averred that by dint of operation of the law, in absence of a report by the Committee, the instrument is deemed to be in conformity with the law.

Issues for determination

Having reviewed the Petitioner's and Respondents' submissions, the Court alienated inter alia, the following issues for determination:

1. Whether there was adequate public participation in the enactment of the impugned legal notices establishing the EGMS; and in the decision to acquire and implement the EGMS;
2. Whether the impugned legal instruments are null and void on grounds that they were enacted in a manner that violated the Constitution and/or the Statutory Instruments Act; and
3. Whether the imposition of excise duty creates an unfair tax burden on the public and manufacturers; and whether it offends Article 43 (1) (a), (c) & (d) rights.

Findings

The judge, in issuing his ruling, made the following fundamental findings in relation to the above issues for determination:

- That there was inadequate public participation prior to the promulgation of Legal Notice 53 of 2017. Meaningful public participation and stakeholder engagement is mandatory before enactment of subsidiary legislation and this was found to be inadequate in this case.
- That Legal Notice 53 of 2017 was enacted in a manner that violated the Constitution and the Statutory Instruments Act; and
- The imposition of excise duty premised on Legal Notice 53 of 2017 which was not promulgated in a manner that conforms to the law has no legal basis. This was based on the reasoning that for a tax to

be lawful, the law introducing it must not only be lawful but should meet Article 24 test in that it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; taking into account all relevant factors, including the nature of the right or fundamental freedom, the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. The judge held that imposition of excise duty on bottled water, fruit and vegetable juices would be an unfair burden in the circumstances of the case.

Our view

The nullification of the EGMS regulations points to the need for inclusive public participation in the process of formulation of tax policies to ensure that all stakeholder concerns are addressed in time. This is likely to result in enactment of tax policies that are deemed not too punitive to taxpayers, are easy to comply with and that KRA can easily administer.

With regard to the whether excise duty on bottled water, fruit and vegetable juices was removed, we are of the considered opinion that the ruling did not exhaustively address the imposition of excise duty as prescribed under Section 5 of the Excise Duty Act 2015 as read together with the First Schedule of the Excise Duty Act, 2015 which lists excisable goods and the applicable excise duty rates. The above mentioned provisions of the Excise Duty Act 2015 were not a subject of the petition, hence would not have been affected by the ruling. The judgement delivered specifically made reference to the imposition of excise stamps on bottled water, fruit and vegetable juices as required under the now nullified EGMS regulations.

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