

High Court of Kenya suspends VAT on insurance agency and insurance brokerage services

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Executive summary

Following a Constitutional petition by the Association of Kenya Insurers (AKI), the High Court of Kenya (the Court), on 16 July 2020, issued a conservatory order suspending Value Added Tax (VAT) on insurance agency and insurance brokerage services as introduced by the *Tax Laws (Amendment) Act, 2020* (the Amendment) on 25 April 2020, pending the hearing and determination of the petition.

Prior to 25 April 2020, these services were exempt from VAT under Paragraph 10 of Part II of the First Schedule to the *Value Added Tax, 2013* (VAT Act).

Detailed discussion

AKI sought a conservatory order pending the hearing and determination of the petition on the grounds that the Amendment contravenes key constitutional provisions such as general provisions relating to the Bill of Rights, national values, the right to equality and freedom from discrimination, public access and participation, principles of public finance and the general provisions of the Constitution.

In arriving at its decision, the Court concluded that the Petitioner had demonstrated that it had an arguable case on whether it was accorded adequate opportunity to engage in public participation, among other pertinent matters.

It was the Court's general finding that the Petition raised triable issues with chances of success. It was, therefore, justified and necessary for the conservatory orders sought to be granted in order to preserve the current state pending the determination of the petition.

Next steps

The issuance of a conservatory order implies that these services will revert to the exempt status they enjoyed prior to the amendment until the suit is heard and determined by the Court.

Should the petition fail, these services shall be deemed to have been subject to VAT effective 25 April 2020. The Kenya Revenue Authority (KRA), shall, therefore, be within its rights to demand VAT on these services.

It is important to note that while this ruling provides temporary relief to insurance companies, the affected parties should consider making a provision for the payment of the VAT in case the petition fails.

Insurance brokers and agents who had registered for VAT between 25 April and 16 July 2020 should evaluate the pros and cons of remaining as registered taxpayers vis-à-vis deregistering, bearing in mind the outcome of the petition is unknown. It is also notable that the deregistration process is in most cases lengthy and a taxpayer is still required to continue filling VAT returns until the deregistration is completed by the KRA.

For those brokers and agents who choose to retain their registration status, they should ensure that they file VAT returns until the petition is heard and determined by the Court. If they supply other taxable services, they should continue charging and remitting VAT to the KRA.

The conservatory order suspended the application of Paragraph 10 of Part II of the First Schedule to the VAT Act as introduced by the amendment. The said paragraph also covers securities brokerage services which were equally amended at the same time. The lack of clear distinction in the order implies that it also covers these services.

It is, however, notable that securities brokers are not party to the current petition and neither have they filed a separate petition. Under the circumstances, providers of securities brokerage services should carefully consider the application of the order.

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