**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CONSTITUTIONAL PETITION NOS. E005 OF 2021**

**(CONSOLIDATED WITH PETITION NO. 1 OF 2021)**

**IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 165 AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: VIOLATION OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 43, 47, 62(1)(f), 62(3), 93, 94 (6), 109, 110, 124, 191, 199(1) 201, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA AS WELL AS THE FOURTH SCHEDULE THERETO**

**AND**

**IN THE MATTER OF: IN THE MATTER OF SECTIONS 3(1), 3(2), 12D, 15(1), 15(4), THE SECOND SCHEDULE AND PARAGRAPH 2, HEAD B OF THE THIRD SCHEDULE TO THE *Income Tax Act*, CHAPTER 470 AS AMENDED BY THE FINANCE ACT,2020 AND THE TAX LAWS (AMENDMENT) (NO.2) ACT, 2020**

**AND**

**IN THE MATTER OF: SECTIONS 125 (2) AND 207 OF THE PUBLIC FINANCE MANAGEMENT ACT OF 2012**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF: ALLEGED ENACTMENT BY THE COUNTY**

**ASSEMBLY OF MACHAKOS OF A LAW THAT IS INCONSISTENT WITH AND/OR IN CONTRAVENTION OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: ALLEGED EXERCISE OF PARLIAMENTARY POWERS AND AUTHORITY IN CONTRAVENTION OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF PERSONS ENGAGED IN THE BUSINESS AND THE CONSUMERS OF THEIR GOODS AND SERVICES**

**BETWEEN**

**STANLEY WAWERU, SAMWEL GITONGA, BENARD ORANGA AND PAUL MUKONO KURIA** (Suing as Officials of Kitengela Bar Owners Association).....**1ST SET OF PETITIONERS**
**THE KENYA ASSOCIATIONOF MANUFACTURERS**
**THE RETAIL TRADE ASSOCIATION OF KENYA** (Suing through the Chairman Leonard Mudachi)
**THE KENYA FLOWER COUNCIL (KFC).....2ND SET OF PETITIONERS**

**VERSUS**

**THE NATIONAL ASSEMBLY.....1ST RESPONDENT**
**THE KENYA REVENUE AUTHORITY .....2ND RESPONDENT**
**THE ATTORNEY GENERAL.....3RD RESPONDENT**

**AND**

**INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK).....1ST INTERESTED PARTY**
**LAW SOCIETY OF KENYA.....2ND INTERESTED PARTY**
**MWANGI & KAMWARO ASSOCIATES...3RD INTERESTED PARTY**

# JUDGEMENT

## Introduction

1. This Judgement is in respect of two petitions being Petition No. E005 and Petition No. 1 both of 2021. The second petition was originally filed before the Constitutional and Human Rights Division in Nairobi as Nairobi E001 of 2021 and was transferred to this Court in order to be consolidated with the first petition.
2. On 10th May, 2021, this Court made the following directions:

    **1) Petition Machakos E005 of 2021 is hereby consolidated with Nairobi Petition E001 of 2021.**
    **2) The hearing will be conducted in Petition E005 of 2021.**
    **3) The 1st Petitioners will be the Petitioners in E005.**
    **4) The 2nd Petitioners will be Petitioners in E001 of 2021.**
    **5) The 1st Respondent will be the National Assembly.**
    **6) The 2nd Respondent will be KRA.**
    **7) The 3rd Respondent will be the Attorney General.**
    **8) The 1st Interested Party will be ICPAK.**
    **9) The 2nd Interested Party will be LSK.**
    **10) The 3rd Interested Party will be Mwangi Kamwaro LPP.**
    **11) Let the parties file and exchange all pending proceedings and furnish the court with soft copies in word format.**
    **12) Further orders on 3rd June, 2021 for hearing and further orders.**

## The 1st Petitioners' Case

3. It was pleaded by the 1st set of petitioners that on 30th June 2020, the President of the Republic of Kenya assented to the ***Finance Act, 2020***

which amended the ***Income Tax Act*** Cap 470 of the Laws of Kenya (hereinafter referred to as the ***Income Tax Act***) by introducing a new Section 12D providing for introduction of Minimum Tax at the rate of 1% of the gross turnover effective 1 January 2021 (Impugned Amendment). Reference was made to section 7 as read with section 9 of the ***Finance Act 2020***. To implement the said amendment, the 2nd Respondent, in January, 2021, published "Guidelines on Minimum Tax" whose centrality was the definition of Gross Turnover.

4. The effect of the said amendment, according to the 1st Petitioners, is that they are threatened with the real and imminent enforcement of what they term as an unconstitutional, unlawful and devastating minimum Tax introduced under the said section 12D by the impugned amendment which if allowed to be imposed will lead to the absolute annihilation of the 1st Petitioners' businesses along with a majority of Small and medium enterprises struggling to earn an income in the already abysmal economy.
5. It was contended that the said impugned Minimum is unconstitutional as it does not fall within the category of taxes imposable by the National Government as envisaged under Article 209 (1) of the Constitution.
6. According to the Petitioners, by its very definition, the said Minimum tax does not amount to Value-added tax, custom duties nor excise tax, yet the 1st respondent purports to include it in the category of income tax.

However, by dint of section 3 (which is the charging provision) as read with Section 15(1) of the ***Income Tax Act***, Income tax is only chargeable on gains or profit and not as gross turnover as implied by Minimum Tax. As such, this novel tax cannot be deemed in any manner of form to amount to income tax. It was therefore contended that the action of the 1st Respondent to introduce the said tax is not only ultra vires but also contra the Constitution of Kenya 2010.

7. While it was appreciated that taxation by the State is necessary for the life of a nation, because it sustains the public welfare and public good, it was contended that since the power to tax is very delicate, vulnerable to abuse by those in authority, the Constitution imputes safeguards to protect against such abuse. It was pleaded that the introduction of Minimum tax requires a taxpayer to pay their income tax based on the higher of (a) 30% of net profit or (b) 1% of gross revenue. The latter provides that the tax shall be applicable on the gross turnover of the Petitioners and other taxpayers before deduction of production and operational costs, blatantly contradicting section 3 as read with section 15(1) of the ***Income Tax Act***.
8. From the foregoing, it was contended that the impugned Minimum Tax is contrary to and inconsistent with the meaning and purpose of income tax as provided under the ***Income Tax Act***. On one hand the ***Income Tax Act*** provides that income which is subject to tax under the ***Income Tax***

***Act*** is income in respect of gains or profits having deducted all expenditure wholly and exclusively incurred in the production of that income while on the other hand minimum tax is chargeable on gross turn over including losses with no possibilities of deducting expenses or costs.

9. This blatant inconsistency, according to the Petitioners, leaves the Petitioners and the taxpayers at large at a position of uncertainty as to what is applicable to them in respect of Income Tax. This inconsistency is not only unlawful but also contravenes the cardinal rule of Legislation, and more so fiscal policies and legislation that legislation must be clear and certain, a right which is enshrined under Article 10 of the Constitution of Kenya 2010 which provides for the sanctity and paramountcy of the Rule of Law in any legislative process.

10. Based on the definition of Income under the ***Income Tax Act***, it was contended that the Minimum tax cannot be deemed as an Income Tax as envisaged and governed under the ***Income Tax Act*** and as such, the same has no place in the ***Income Tax Act*** and consequently ought to be adjudged null and void ab initio. According to the said petitioners, to accentuate this lack of clarity and uncertainty, the ***Income Tax Act*** further provides at Section 12D(2) that minimum tax shall be paid in instalments which shall be due on the 20th day of each period ending on the 4th, 6th, 9th and 12th month of the year of income. However, and in

contradiction thereto, the Minimum Tax Guidelines published by the 2nd Respondent provide that for persons whose more than two-thirds of their income is derived from agricultural, pastoral, or horticultural activities, tax shall be due on the 20th day of each period ending on the 9th and 12th month of the company's financial year which is a provision alien to the ***Income Tax Act*** or the impugned amendment thereto. These ambiguous timelines, coupled with the uncertainty and ambiguity of the Section 12D of the ***Income Tax Act*** leaves the Petitioners and the taxpayers at large at a point of confusion and inability to anticipate and or plan for their tax liability and compliance therewith.

11. Additionally, it was contended, the confusion and or uncertainty is exemplified in the Minimum Tax Guidelines published by the 2nd Respondent which provide that minimum tax shall not apply to income which is subject to withholding tax, including digital service tax, provided that at the end of the accounting period, the tax payable on taxable income exceeds minimum tax payable. However, there is no provision in the ***Income Tax Act*** exempting this income from minimum tax.

12. Secondly, Article 201(a)(i) in setting out the principles of public finance provide for the promotion of an equitable society through the fair and just sharing of the burden of taxation. According to the Petitioners, the imposition of Minimum tax as against gross turnover violates this cardinal

principle of public finance. As the impugned Minimum tax is levied on gross turnover and not gains or profits, all persons, even those in a loss-making position are required to pay minimum tax. This means that a taxpayer who has no profit or is in a loss making position will have to pay the minimum tax out of pocket or their capital. Essentially, what this means is that the impugned tax cares less of the ability of the taxpayer to pay, yet an elementary principle in taxation is the Principle of economic capacity which states that the percentage of the income of the taxpayers that can be legitimately affected by a tax must not be excessive than the wealth objectively available.

13. This again, is manifestly contrary to the stipulation under Section 15(4) and (5) of the ***Income Tax Act*** removing tax-payers in loss making positions from the purview of Income Tax. To wit, Section 15(4) acknowledges that a taxpayer can be in a tax loss position and as such allows them to carry forward the losses incurred in a current year for a period of nine (9) years during which the taxpayer can offset the tax losses against future profits made in future years. Furthermore, section 15(5) allows the taxpayer to apply to the Cabinet Secretary responsible for finance for an extension to carry forward losses beyond the nine (9) years where the taxpayer has not extinguished the tax losses within the ten (10) years.

14. Thirdly, it was contended that the action by the 1st Respondent to enact the impugned amendment and introduce Minimum tax without the reference of the said amendment to the Senate for discussion and passing thereof violates Article 110(1) (c) as read with Article 110 (4) and (5). Minimum Tax being chargeable on gross turnover, affects the finances of County government as the gross turnover of an enterprise includes the County taxes and charges levied and chargeable in its County of business. As such, expropriation thereof amount to the deprivation of the said County's revenue.
15. Fourthly, the levying of Minimum tax on gross turnover as opposed to gains or profit will bring rise to an occurrence where a tax payer, subject to minimum tax (the same being higher than the 30% of his net profit), will pay 'income tax' exceeding the statutory 30% (Corporate Tax) which will consequently mean that the taxation burden on him/her will be heavier than on other taxpayers, contrary to Article 201 of the Constitution of Kenya.
16. To illustrate the point, the Petitioner explored the various scenarios that are likely to face the taxpayers and contended that can be manifestly gleaned from the said scenarios is that compliance with the Minimum tax while adhering to the principles of taxation and the general provisions of the ***Income Tax Act*** is only possible where a Taxpayer has a net interest

(after production costs and operational expenses as envisaged under section 15) of 3.33%. Accordingly, the imposition of Minimum Tax is premised on the Respondents' false notion that all businesses must always make a Net Profit of at least 3.33% at any given time. Referring to the Hansard Report, it was contended that this misconception was appreciated by the Members of Parliament during the debate on the Bill. It was contended that even where the Petitioners' products are lost or damaged, minimum tax will regardless be levied on this loss. It is the Petitioners' contention that this very possibility of loss is what section 3 as read with section 15 were enacted to cushion the taxpayer from since such losses would be considered as deductions as contemplated under section 15(1) before arriving at a taxable income.

17. Again, this oppressive imposition is introduced ignorant of the fact that the Petitioners' businesses alongside many other SMEs, begin from loss making positions owing to the plethora of licenses and permits required to commence the business together with the costs antecedent procuring the said licenses and these are the very costs and expenses contemplated under section 15 of the ***Income Tax Act*** which are recurrent whether or not the Petitioners make a sale. As such, it is only where the Petitioners are able to recover and exceed the said costs and expenses that they can be deemed to be generating income as envisaged under the ***Income Tax Act***.

18. While large corporations with net profits well above the assumed baseline of 3.33% will be least bothered by the introduction of Minimum tax, it was contended that this impugned tax will be the nail on the coffin on small and medium enterprises who will most certainly be forced to pay 'income tax' from capital investment. This tilts the scale in favour of large companies blatantly contravening Article 27 of the Constitution that enshrines equality in the application, protection and benefit of the law.
19. Furthermore, this goes against the very core principle of taxation as enshrined under Article 201 (b) (1) that taxation should be progressive and not regressive. Certainly, minimum tax is regressive taxation, taxing those who earn less more than those who earn more. Undoubtedly, this impugned tax does not promote an equitable society, and is definitely not fair in sharing the tax burden.
20. Additionally, Article 40(2) (a) of the Constitution of Kenya states that Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description. Profit is property. Minimum tax illegally and unfairly threatens some enterprises with tax beyond 30% of and even 100% or more. This amounts to depravation of property contrary to Article 40 and therefore amounts expropriation without due compensation.

21. Similarly, tax losses enjoyed by enterprises are a form of property for such enterprises as the enterprises are allowed to carry forward and set off against its future profits for a period of nine (9) years. Therefore, requiring the enterprises in a tax loss position to pay minimum tax is an arbitrary deprivation of their right to property.

22. Again, to exemplify the contravention of Article 27 of the Constitution that provides for the equality in the application and protection of the law, the impugned amendment in Section 12D of the ***Income Tax Act*** discriminates against the petitioners and other traders in the consumer products sector by favouring those in the energy and petroleum sector and in the insurance sector. The ***Tax Laws (Amendment) (No. 2) Act, 2020*** created an exemption for minimum tax for industries whose prices are regulated by the Government. The rationale for this exemption was that since the prices in the energy and petroleum sector are regulated by government, they would be disadvantaged by minimum tax, since they cannot control their profits. This exemption and its rationale create and unfair tax environment to the suffering of the Petitioners and traders of consumer as it is based on the fallacious misconception that they (the Petitioners) are solely in control of their retail prices and consequently their profits.

23. According to the Petitioners, the Respondents violated the mandatory provisions of Article 2(4) as read with Article 10 of the Constitution by enacting the impugned Amendment that is manifestly riddled with ambiguity, uncertainty, contradictions and lack of clarity as section 12D is inconsistent with Section 3 as read with Section 15 of the ***Income Tax Act***.

24. To them, the Impugned amendment under section 12D violates the Petitioners' right to property as enshrined under Article 40 of the Constitution of Kenya. Minimum tax threatens to arbitrarily expropriate the losses and capital of the Petitioners and other non-profit making entities despite clear protection and exemption from the same under the ***Income Tax Act***. Requiring companies in a tax loss position to pay minimum tax is an arbitrary deprivation of their right to property as imposition of the minimum tax disregards the tax losses that such a company has by requiring the company to pay minimum tax based on its gross turnover.

25. The Impugned amendment violates Article 27 of the Constitution that provides for the equality in the application and protection of the law. The impugned amendment in Section 12D of the ***Income Tax Act*** discriminates against the petitioners and other traders in the consumer products sector by favouring those in the energy and petroleum sector and

in the insurance sector vide their exemption from the application of Minimum tax on the fallacious misconception that the Petitioners and other consumer goods traders are in full control of their prices and profit margins. As hereinabove demonstrated, this misconception has exposed the Petitioners and other consumer goods traders to an unequal and unjust application of the law and an unbalanced shouldering of the Tax burden.

26. Again, as hereinabove demonstrated, the introduction of Minimum tax is founded on the false belief that every business enterprise operating in Kenya generates a profit bottom line of 3.33% at any given point. This misconception in effect means that from the outset, enterprises with a lower profit margin than 3.33% are at risk of being levied a tax higher than the 30% Corporate tax that companies above the expected bottom-line are levied. (based on production costs and operational expenses, some SMEs are at risk of paying 100% income tax or even more).

27. It was contended that Minimum Tax infringes on Consumer Rights as enshrined under Article 46 (1) of the Constitution, by prejudicing the economic interests of consumers. The Minimum Tax Amendment will expose consumers to unreasonably high prices for basic commodities, since Distributors, Wholesalers and Retailers will be forced to increase their profit markups by up to 7% to cater for 3.67% in operational expenses and 3.33% required Net Profit margin.

28. The Petitioners noted that the action by the 1st Respondent to enact the impugned amendment and introduce Minimum tax without the reference of the said amendment to the Senate for discussion and passing thereof violates Article 110(1) (c) as read with Article 110 (4) and (5). Minimum Tax being chargeable on gross turnover, affects the finances of County government as the gross turnover of an enterprise includes the County taxes levied and chargeable in its County of business. As such, expropriation thereof amount to the deprivation of the said County's revenue.

29. The impugned tax further infringes Article 201(b)(i) of the Constitution by imposing an unfair tax burden on the Petitioners. As hereinabove demonstrated, Minimum Tax will expose businesses with high volumes and low profit margins to separate and punitive tax regime beyond the Statutory Scale in the Third Schedule of the ***Income Tax Act*** as compared to large enterprises who post a profit margin of well over 3.33% who will only pay 30% Corporate Tax on their net profits or gains.

30. Again, the said infringement is espoused in the fact that minimum tax does not grant the taxpayer below the 3.33% profit bottom line an opportunity to deduct production costs and operational expenses before taxation as envisaged under section 15 & the Second Schedule of the ***Income Tax Act*** while a taxpayer above the 3.33% bottom line enjoy this

opportunity. Furthermore, the infringement is enunciated in the requirement of loss making entities to pay minimum tax, despite the fact that they are exempted from Corporate tax on account that imposing the same would impose an unfair tax burden on them.

31. Additionally, and most notably, the action by the 1st Respondent to enact the impugned amendment blatantly violates Article 209 of the Constitution by purporting to impose a tax outside and or foreign to the recognized taxes provided thereunder. Minimum tax cannot be classified as value added tax, custom duties, excise tax nor can it be classified as Income tax as per the ***Income Tax Act***, income tax is only imposable on profit or gain and not gross turnover.

32. Apart from the Constitutional violations, the Petitioners contended that the said Act violated several legal principles. In their view, it to uphold the constitutional tenets of the rule of law, transparency, accountability, public participation and good governance by failing to verify that the applicable mandatory constitutional and statutory provisions were complied with before enacting Section 12D of the ***Income Tax Act***, Chapter 470 of the Laws of Kenya as amended by the ***Tax Laws (Amendment) (No.2) Act, 2020***. It also failed to defend the Constitution by enacting Section 12D of the ***Income Tax Act***, Chapter 470 of the Laws of Kenya as amended by the ***Tax Laws (Amendment) (No.2) Act, 2020*** that is riddled with

incurable procedural and substantive defects and which was *ex facie* illegal. Further, it failed to defend the fundamental rights and freedoms in the Bill of Rights by enacting Section 12D of the ***Income Tax Act***, Chapter 470 of the Laws of Kenya as amended by the Tax Laws (Amendment) (No.2) Act, 2020 that is geared towards the arbitrary and whimsical deprivation and or denial of fundamental rights and freedoms contained in Articles 10, 27, 40, 46 and 201 of the constitution, contrary to Article 24 of the Constitution.

33. The 1st Respondent was accused of failing in their duty to uphold, defend and protect the Constitution, as well as in their duty not to infringe on the fundamental rights and freedoms of the people, by enacting Section 12D of the ***Income Tax Act*** as amended by the impugned Act that is unconstitutional, illegal, therefore null and void for the following reasons:

(i) Passing Section 12D of the ***Income Tax Act*** as amended by the impugned Act which legislation in fact infringes, threatens and or violates the constitutional principles of equity and fairness, equality and non-discrimination, rule of law, equal protection of the law, sanctity of property rights, and good governance, contrary to Articles 10, 27, 40, and 201 of the Constitution.

(ii) Fettering the right to access justice in the context of taxation contrary to Article 48 of the Constitution by passing the said tax legislation that:

(a) Unfairly imposes double tax by imposing tax on application for permit and royalties which is already charged under the Mining Act, 2016 thereby imposing an unjust tax system;

(b) Unfairly and unjustly imposing an unreasonable and unsustainable tax burden on industry players engaged in the alcoholic beverage and tobacco industry without due consideration.

(iii) The passing of the impugned amendment blatantly offends the principle of legitimate expectation of the Petitioners and the general public, to wit, that the 1st Respondent would uphold the supremacy of the Constitution and the hereinabove integral tenets of legislation, especially fiscal in nature.

34. It was further contended that the impugned Minimum Tax is very likely to occasion the unlawful punishment of double taxation as against the Petitioner and other similar taxpayers.

35. From the foregoing, the Petitioners contended that it is manifest that the impugned minimum tax is not only unlawful and unconstitutional but also oppressive to the Petitioners and the Small and Medium Enterprises engaged in the distribution and sale of consumer goods with low profit margins and will most certainly sound the death knell of most of their enterprises. The imposition of minimum tax on gross turnover in blatant

disregard of the costs of production and operational expenditure will definitely translate in the Petitioners and other SMEs paying 'income' tax out of capital (out of their pocket).

36. The Petitioners' view is that the impugned amendments threaten the sanctity of the right to life (which includes the right to earn a livelihood and sustain one's life) as well as the right to human dignity as enshrined under Article 26, 28 and 43 of the Constitution. This means that imposition of burdensome and oppressive taxes which are deliberately designed to kill certain types of businesses cannot in any way be constitutional.

## 1st Set of Petitioners' Submissions

37. On behalf of the 1st Petitioners' it was submitted that this Petition is premised on the unconstitutionality of the minimum tax imposed by the 1st Respondent and enforced by the 2nd Respondent as it negates the principles of certainty, simplicity, equity and fairness as well as contravention of cardinal constitutional dictates.

38. While reiterating the contents of the petition and the supporting affidavit, the 1st petitioners identified the following issues for determination:

**(i)** ***Whether this Honourable Court has Jurisdiction to hear and determine a question of Constitutionality of a Legislation and whether this contravenes Article 94 and 95 of the Constitution.***

**(ii)** ***Whether Section 12D of the Income Tax Act contravenes Article 10 as read with Article 209(1) of the Constitution.***

(iii) ***Whether Section 12D of the Income Tax Act imposes an unfair tax burden on the Petitioners contrary to Article 201(b) of the Constitution.***

(iv) ***Whether Section 12D of the Income Tax Act is discriminatory contrary to Article 27 of the Constitution.***

(v) ***Whether Section 12D of the Income Tax infringes on the right to property and Economic and Social Rights contrary to Articles 40 and 43 of the Constitution.***

(vi) ***Whether Section 12D infringes on the principles of taxation.***

(vii) ***Procedural defects- Whether the Senate ought to have been involved in the enactment of the impugned legislation.***

39. As regards the issue whether this Court has Jurisdiction to hear and determine a question of Constitutionality of a Legislation and whether this contravenes Article 94 and 95 of the Constitution, it was submitted that a cursory reading of Article 165(3) of the Constitution of Kenya clothes this Court with Jurisdiction to protect the Constitution and in doing so put to question actions and or omissions of the other arms of government which are alleged to contravene and or infringe on any provisions of the Constitution. In this regard the 1st Petitioners relied on **Re the Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011**, **Speaker of National Assembly -vs- Attorney General and 3 Others (2013) eKLR**, **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11**, **Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC**

**19** and submitted as regards the presumption of Constitutionality allegedly enjoyed by the impugned amendment as argued by the Respondents, that the Constitution itself qualifies this presumption with respect to statutes which limit fundamental rights and freedoms and that such statutes must meet the constitutional criteria. They also relied on **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR** and contended that there is absolutely no impropriety and or unconstitutionality in the power bestowed on this court to test and ascertain whether the impugned amendments meet the constitutional threshold of statutes and whether they infringe on fundamental rights and freedoms.

40. On the issue whether Section 12D of the ***Income Tax Act*** contravenes Article 10 as read with Article 209(1), it was submitted that the Constitution under Articles 1 (3) and 2 (2) explicitly and mandatorily provides that Parliament shall perform its functions only in accordance with the Constitution. Similarly, any law enacted by any legislative body which is inconsistent with or in contravention of the Constitution is null and void.

41. In support of the submissions the 1st Petitioners reiterated the issues set out in the petition and reproduced Article 209 (1) of the Constitution and contended by its very definition, the said Minimum tax does not amount to Value-Added Tax, custom duties nor excise tax. However, from its inclusion

in the ***Income Tax Act***, it is manifest that the 1st respondent purports to include it in the category of income tax. This, it is however absolutely fallacious, misconceived and untenable as by dint of section 3 (which is the charging provision) as read with Section 15(1) of the ***Income Tax Act***, Income tax is only chargeable on gains or profit and not on gross turnover as implied by Minimum Tax. As such, this novel tax cannot be deemed in any manner of form to amount to income tax. In this regard the 1st Petitioners reproduced Section 12D of Impugned Amendment, Sections 7 and 9 of the Finance Act 2020 and the "Guidelines on Minimum Tax" and contended that by providing that the tax shall be applicable on the gross turnover of the Petitioners and other taxpayers before deduction of production and operational costs, the same blatantly contradicts section 3 as read with section 15(1) of the ***Income Tax Act***. According to the 1st Petitioners, a reading of Section 3 (which is titled as the charging section of the ***Income Tax Act***) as read with Section 15, the impugned Minimum Tax introduced by Section 12D is contrary to and inconsistent with the meaning and purpose of income tax as provided under the ***Income Tax Act***. On one hand the ***Income Tax Act*** provides that income which is subject to tax under the ***Income Tax Act*** is income in respect of gains or profits having deducted all expenditure wholly and exclusively incurred in the production of that income while on the other hand minimum tax is

chargeable on gross turn over with no possibilities of deducting expenses or costs and further on losses. Therefore, in the 1st Petitioners' view, Minimum tax cannot be deemed as an Income Tax as envisaged and governed under the ***Income Tax Act*** as Income Tax is only chargeable on gains or profits having deducted all expenditure wholly and exclusively incurred in the production of that income. As such, the same has no place in the ***Income Tax Act*** and consequently ought to be adjudged null and void *ab initio*.

42. It was therefore submitted that the impugned Minimum tax does not fall within the category of income tax howsoever. Being that it is undebatable not the same does not amount to value-added tax, customs duties (or import or export taxes) excise or excise tax, nor does an Act of Parliament exist to introduce the imposition of the novel taxation, the same in contra Article 209 (1) of the Constitution.

43. In submitting that as a trite principle of taxation, a power to levy taxes must be express and not implied**,** the 1st Petitioners relied on **Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR** and **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629** and contended that the 2nd Respondent's contention that in fact, Minimum Tax, being levied on gross turnover, amounts to an income as envisaged under section 3(2)(e) of the ***Income Tax Act*** contradicts the

purpose of the ***Income Tax Act***. The 1st Petitioners, while noting that the ***Income Tax Act*** in its definitions section attempts no comprehensive definition of income, relied on the definition of "income tax" by ***The Oxford English Dictionary (2015)***, ***Mitra's Legal and Commercial Dictionary*** Fourth Edition at Page 424-425 and **Clegg and Stretch** (2015) ***Income Tax in South Africa Commentary.*** It was however their view that section 3, which is titled as the charging section, provides parameters from which a taxpayer and or an ordinary person can deduce the spirit of the law and its drafters and that Income tax is premised and chargeable on gains and or profit and not gross turnover.

44. The 1st Petitioners submitted that it is a cardinal rule of interpretation of statute that legislation must be read as a whole and not sections in isolation and that a statute ought to be looked at, in the context of its enactment and as a whole as opposed to cherry-picking and choosing words in isolation. This proposition was based on the opinion of the Supreme Court of India in **Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd., 1987 SCR (2) 1** and it was therefore submitted that in determining the contextual meaning of the term income as per the ***Income Tax Act***, this court must also give due regard to section 15 which provides for the allowable deductions in determining total income which connotes that the provisions of this section must be considered in

determining total income which would then be taxable as per the provisions of the Act. By arguing that Minimum tax is chargeable on gross turnover by dint of the provision of Section 3(2)(e), it was submitted that there indeed lies a contradiction in what amounts to income under the ***Income Tax Act***, contradiction that causes uncertainty to an ordinary reader of the statute. In this regard the 1st Petitioners relied on **Center for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others, {2012} eKLR** as cited in **Law Society of Kenya vs. Kenya Revenue Authority & another [2017] eKLR, Russel vs. Scott. (1948) 2 ALL ER 5, Olum and another v Attorney General [2002] 2 EA 508, R V Big M Drug Mart Ltd, [1985] 1 S.C.R. 295** and **Katiba Institute & Another vs. Attorney General & Another [2017] eKLR** on principles of statutory interpretation and argued that section 12D contains a non-obstante clause which renders it superior and or overriding over all other clauses of the said Act. In as much as this argument is debatable as the provisions contradicts the very purpose and charge of the Act, it is undeniable as the same is not non-obstante to the Constitution of Kenya. The supremacy of the Constitution is enshrined under Article 2 (4) which provides that any law that is inconsistent with the Constitution is void to extent of its inconsistency based on the observation

of **Chief Justice John Marshall** in **Marbury vs. Madison, 5 U.S. (1 Cranch) 137 (1803)**.

45. According to the 1st Petitioners, in furtherance of the above, non-obstante clauses should be construed in a purposeful manner and take the Act in its entirety and should not be interpreted as clauses that supersede the provisions of the law such as the Constitution and reliance was sought in the Indian case of **RBI vs. Peerless General Finance and Investment Co. Ltd., [(1987) 1 SCC 424]**, and **Paul Ssemogerere and Others vs. The Attorney General, Constitutional Appeal no. 1 of 2002) [2004] UGSC10)**.

46. According to the 1st Petitioners, whereas the 2nd Respondent cited Section 3(2)(e) as the basis upon which Section 12D of the Amendment is imposed, the said Section provides that an amount deemed to be income of any person under this Act or by rules made under the Act. However, Section 12D does no specifically provide for the kind of income to be charged so as to warrant invocation of the amendment under Section 3(2)(e); the 1st and 2nd Respondent have evaded any categorization of the tax being targeted by the Minimum Tax so as to engage in semantics. It is clear that the tax is being charged on the gross turnover as per the Third Schedule which has only been defined in the Guidelines issued by the 2nd Respondent without being referred to Parliament for approval. The wording of Section 3(2)(e) is

very clear that the amount deemed to be income should be as per the Act or by rules made under the Act. In the 1st Petitioners' understanding, there are no rules providing for the charging of that income. While the 1st Petitioners appreciated that the ***Income Tax Act*** does not attempt an outright definition of income or taxable income in the context of Income tax, it was contended that it undoubtedly provides for non-taxable income under the provisions of section 15 of the Act and that the allowable deductions amount to what would ordinarily be deemed as non-taxable income. Therefore, to purport to include them in 'income for the purpose of income tax' would manifestly be contrary to the purpose and effect of the Act.

47. In arriving at the answer as to whether the impugned minimum tax amounts to an income tax as envisaged under the ***Income Tax Act***, and in light of the manifest ambiguity of the legislation, this Court was urged to examine the purpose and effect of the ***Income Tax Act***. Taking into account the manifest contradiction of the impugned amendment as compared with aforesaid sections of the ***Income Tax Act*** which provide for allowable deductions before arriving at a taxable income as well as the provisions of Article 201(b) of the Constitution that provides for the equitable sharing of a tax burden, the right to a fair and equitable economic environment enshrined under Article 46, the right to property as enshrined under Article 40, it was submitted that one cannot infer the amendment to

be within and or furthering the purpose of the legislation or that the effect thereof is indeed constitutional. In the 1st Petitioners' submissions, the minimum tax, being inconsistent with Article 209(1) of the Constitution renders the impugned amendment null and *viod ab initio* and the Respondents cannot in any way hide behind a non-obstante clause to cure a statute inconsistent with the supreme law of the land, the Constitution. Based on the decision in the case of **Institute of Social Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR,** it was submitted that this blatant inconsistency leaves the Petitioners and the taxpayers at large at a position of uncertainty as to what is applicable to them in respect of Income Tax. This inconsistency, it was submitted, is not only unlawful but also contravenes the cardinal rule of Legislation, and moreso fiscal policies and legislation that legislation must be clear and certain. In this regard the said Petitioners relied on **Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR** and according to the 1st Petitioners, contended that this right to certainty is enshrined under Article 10 of the Constitution of Kenya 2010 which provides for the sanctity and paramountcy of the Rule of Law in any legislative process. As such, the contradiction and or inconsistency created by section 12D of the ***Income Tax Act*** undeniably violates this cardinal

facet of the Rule of Law that requires the law to be just and clear. It was the Petitioners' assertion that by the 1st Respondent's own ambiguity in statute, Minimum tax as presently legislated cannot be deemed as an Income Tax as envisaged and governed under the ***Income Tax Act*** as Income Tax is only chargeable on gains or profits having deducted all expenditure wholly and exclusively incurred in the production of that income. As such, the same has no place in the ***Income Tax Act*** and consequently ought to be adjudged null and void *ab initio*.

48. It was further submitted that to accentuate this lack of clarity and uncertainty, the ***Income Tax Act*** further provides at Section 12D (2) that minimum tax shall be paid in instalments which shall be due on the 20th day of each period ending on the 4th, 6th, 9th and 12th month of the year of income. However, for persons who more than two-thirds of their income is derived from agricultural, pastoral, or horticultural activities, the Minimum Tax Guidelines provides that minimum tax shall be due on the 20th day of each period ending on the 9th and 12th month of the company's financial year. These ambiguous timelines, coupled with the uncertainty and ambiguity of the Section 12D of the ***Income Tax Act*** leaves the Petitioners and the taxpayers at large at a point of confusion and inability to anticipate and or plan for their tax liability and compliance therewith.

49. It was further pointed out that the uncertainty and confusion created by Section 12D is further characterized by the following:

a) Companies in capital-intensive sectors such as the manufacturing, telecommunications and hotel sectors require high initial capital and development costs. To incentive investment in these capital-intensive sectors, the Second Schedule to the ***Income Tax Act*** provides for investment allowances to be deducted in computing gains or profits for income tax purposes, by persons who incur capital expenditure investing in these sectors.

b) Paragraph 1 of the Second Schedule to the ***Income Tax Act*** provides that "where a person incurs capital expenditure in respect of an item listed in the first column of the table, an investment allowance may be deducted in computing the gains or profits of that person at the corresponding rate specified in the second column, for each year of income…" The investment allowance applies to capital expenditure on buildings, machinery, acquisition of an indefeasible right to use fibre optic cable by a telecommunication operator and farm works.

c) As a result of deduction of these investment allowances provided for in the Second Schedule to the ***Income Tax Act***, such companies ordinarily end up in a tax loss position in the initial

years of operation. Despite such companies being in a tax loss position due to deducting investment allowances allowed under the Second Schedule to the ***Income Tax Act***, they will still be required to pay minimum tax at the rate of 1% of their gross turnover without the possibility of deducting investment allowances as provided under the law.

d) Section 15(4) of the ***Income Tax Act*** recognises that companies can be in a tax loss position and as such allows taxpayers to carry forward the losses incurred in a current year for a period of nine (9) years during which the taxpayer can offset the tax losses against future profits made in future years. In particular, section 15(4) of the ***Income Tax Act*** provides that: Where the ascertainment of the total income of a person results in a deficit for a year of income, the amount of that deficit shall be an allowable deduction in ascertaining the total income of that person for that year and the next nine succeeding years of income.

e) Additionally, section 15(5) of the ***Income Tax Act*** allows the taxpayer to apply to the Cabinet Secretary responsible for finance for an extension to carry forward losses beyond the nine (9) years where the taxpayer has not extinguished the tax losses within the ten (10) years, by providing that: The Cabinet Secretary on the

recommendation of the Commission may extend the period of deduction beyond nine years where a person applies for such extension through the Commissioner, giving evidence of inability to extinguish the tax losses within the nine years.

f) Based on the provisions of section 15(4) companies in a tax loss position do not pay income tax since such companies do not have any gain or profit on which income tax is to be charged. However, companies in a tax loss position will still be required to pay minimum tax on their gross turnover despite not having any gain or profit.

50. The Petitioners relied on the opinion of the Court of Appeal in **Ecobank Kenya Limited vs. Commissioner for Domestic Taxes [2012]** that the Appellant and other businesspeople have a right of certainty and predictability in the applicability of economic activities. According to the 1st Petitioners, the 2nd Respondent's whimsical rebuttal to the issue of Minimum tax clawing back on investment allowances, that the same investment allowances shall be available to the loss making companies once they turn to profitability, fails to appreciate that some entities may not survive to profitability since it is indeed a fact that every investment intensive business commences from a point of loss owing to the high

amount of investment pumped into the business and that a considerable amount of these entities do not survive to profitability.

51. It was submitted that to allow the Respondents to claw back on the very investment allowances provided to enable entities stay afloat during their initial years and achieve profitability as fast as possible amounts to giving in one hand and taking by the other. This will certainly contribute to the premature death of capital intensive start-ups. As such, the very investment allowances guaranteed by section 15 will not be available to entities that are killed prematurely by the impugned tax. It was contended that the Respondents ought to be clear on the tax that they are charging to enable the taxpayers put their affairs in order since they are the burden bearers. If the goal is to kill the crawling businesses before they can walk that is akin to depriving hardworking citizens a right to their livelihood and subsequently their right to life. In this regard the 1st Petitioners relied on the words of **Sir Francis Bacon** in ***A Treatise On Universal Justice*** quoted in ***Coquiellette*** pp 244 and 248, from *Aphorism* 8 and *Aphorism* 39, **Vestey vs. Inland Revenue Commissioners [1979] 3 All ER at 984, Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR** and **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] 2 KLR 240** and submitted that this multi-faced and multidimensional uncertainty is a creation of the 1st

Respondent being sought to be cured by the 2nd Respondent through the issued guidelines that have no force of law as they are not embedded in regulations as should be the case.

52. It was noted that by the averments of the 2nd Respondent in its Replying affidavit is a clear acknowledgement of the ambiguity in the impugned amendment which then necessitated them to publish guidelines which they couch as 'tax education' which in real sense, make several introductions in the nature of purported legislations in an attempt at curing glaring ambiguities and inconsistencies which were identified by the 1st Petitioners as follows;

    a) It introduces a definition of 'gross turnover', a definition alien to the ***Income Tax Act*** in a bid to provide for the taxable 'income' in the application of minimum tax yet the ***Income Tax Act*** provides a contrary provision on what amount to income.

    b) It further introduces a clause that where a taxpayer has an accounting period ending on a date other than 31st December, the first minimum tax payment shall be due and payable on the date when the earliest instalment due after 1st January 2021. Again, this cannot in any way been termed as 'tax education' as no such provision exists in the ***Income Tax Act***. In fact, what they seek to cure is the ambiguity that exists in respect of the due date of the

impugned tax vis a vis the due date of instalment tax where a company's accounting period is not 31st December.

c) The guidelines further introduce a distinct schedule of computation and remittance of the impugned tax for persons who more than two thirds of their income is derived from agriculture, pastoral and horticultural activities. Again, this is absolutely alien to the ***Income Tax Act***.

d) The guidelines further introduce a term that minimum tax payable shall;

I. Apply where it is higher than instalment tax for the period

II. Be reduced by an Advance Tax, Withholding tax or Digital Service Tax paid for the period;

III. In the case of partnerships, the minimum tax payable shall be computed based on the partnership turnover but paid by the partners according to their profit sharing ratio.

e) They further introduce the term that a person who upon preparation of final return and accounts for the accounting period establishes that:

I. The tax liability is less than the Minimum tax, the Minimum tax shall be the final tax.

II. They are in a loss position, minimum tax paid shall be final.

III. The tax payable from taxable income is greater than the sum of Installment and Minimum tax paid, the balance outstanding shall be paid as balance on tax on or before the last day of the 4th month following the end of the accounting period.

IV. The sum of Minimum tax and/or installment tax paid is higher than the tax payable (which shall not be less than Minimum tax), the excess shall be considered overpaid tax and the provision of section 47 of the Tax Procedures Act (TPA), 2015 shall apply.

f) It further introduces a term that a person whose tax payable from income earned is less than Minimum Tax shall not be eligible for refund of the excess tax.

g) They further provide that where a person is liable to pay Minimum tax and is in a loss position, the loss shall be carried forward, subject to limitations under the ***Income Tax Act***.

53. According to the 1st Petitioners, these provisions disguised as 'tax education guidelines' are alien to the ***Income Tax Act*** and in publishing the same and expecting strict compliance of the citizenry, the 2nd Respondents is attempting to usurp the very same legislative prerogative of the National Assembly prescribed under Article 94 and 95 of the

Constitution. Since the 2nd Respondent bears no legislative powers, the purported guidelines hold no power or force of law and in the 1st Petitioners 'view, are merely a red-herring of the ambiguity that the 2nd Respondent is rushing to cure.

54. It was contended that the said guidelines are non-binding and not enforceable by law as they are not enshrined in any regulations or statute neither were they tabled before Parliament for Approval as contemplated under the law. In this regard the said Petitioners cited the definition of "Statutory Instrument" in Section 2 of the **Statutory Instruments Act** and the Standing Orders of the respective Houses as well as the decision in **Okiya Omtatah Okoiti vs. Commissioner General, Kenya Revenue Authority & 2 Others [2018] eKLR** and submitted that having usurped the authority exclusively enjoyed by the National Assembly, the guidelines have equally not been met the procedural requirements to meet the threshold of legislation such as substantive and meaningful public participation based on **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) vs. Salaries and Remuneration Commission, Petition No. 294 of 2013.** To the 1st Petitioners, from the foregoing, the only conclusion that can be made as regards the purported guidelines is that the same are null and void ab initio

and unenforceable in so far as they purport to introduce provisions alien to the ***Income Tax Act*** in an underhanded ploy to cure patent ambiguities.

55. The said Petitioners' case was that it is a cardinal rule of legislation that fiscal statute and policies must be rooted in the rule of law and should not be so aggressive and oppressive to the extent of imposing undue pressure on businesses experiencing losses as it will be counterproductive to the exercise of taxation. If businesses collapse, then there will be no entity to tax. In this regard reliance was placed on **Republic vs. Kenya Revenue Authority Ex Parte Cooper K-Brands Limited [2016] eKLR**, **Kenya Breweries Association v. Attorney General & another; Central Bank of Kenya (Interested Party) (2019) eKLR**, **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** and while acknowledging that the economic and social environment is evolving, asserted that the Respondents should not contribute to this evolution in a negative way by creating the uncertainty of tax liabilities of entities through imposition of an unfair burden on the tax payers. In this regard they relied on **Inland Revenue vs. Scottish Central Electricity Company [1931] 15 TC 761** cited in **Commissioner of Income Tax vs. Westmont Power (K) Ltd Nairobi High Court Income Tax Appeal No. 626 of 2002**, for the proposition that ambiguity is indeed a fatal

defect to a legislation, and even where the ambiguity seeks to be resolved, it must be done in favour of the taxpayer.

56. On the third issue, whether the impugned amendment imposes an unfair tax burden on the Petitioners and public contrary to Article 201(b), it was sought to rely on Article 201(b) of the Constitution which according to the said Petitioners espouses the principle of fair and equitable sharing of the tax burden. However, in this case, the imposition of Minimum tax as against gross turnover violates this cardinal principle of public finance. As the impugned Minimum tax is levied on gross turnover and not gains or profits, all persons, even those in a loss-making position are required to pay minimum tax which means that a taxpayer who has no profit or is in a loss making position will have to pay the minimum tax out of pocket or their capital. Essentially, what this means is that the impugned tax cares less of the ability of the taxpayer to pay contrary to the elementary principle in taxation which is the Principle of economic capacity that the percentage of the income of the taxpayers that can be legitimately affected by a tax must not be excessive than the wealth objectively available. This, it was submitted, is manifestly contrary to the stipulation under Section 15(4) and (5) of the ***Income Tax Act*** removing tax-payers in loss making positions from the purview of Income Tax. To wit, Section 15(4) acknowledges that a taxpayer can be in a tax loss position and as such allows them to carry

forward the losses incurred in a current year for a period of nine (9) years during which the taxpayer can offset the tax losses against future profits made in future years. Furthermore, section 15(5) allows the taxpayer to apply to the Cabinet Secretary responsible for finance for an extension to carry forward losses beyond the nine (9) years where the taxpayer has not extinguished the tax losses. To the Petitioners, the levying of Minimum tax on gross turnover as opposed to gains or profit will bring rise to an occurrence where a tax payer, subject to minimum tax (the same being higher than the 30% of his net profit), will pay 'income tax' exceeding the statutory 30% (Corporate Tax) which will consequently mean that the taxation burden on him/her will be heavier than on other taxpayers, contrary to Article 201 of the Constitution of Kenya. In an attempt to cure the ambiguity and unconstitutionality created by the contradiction of section 15(4) above, the 2nd Respondent referred to the purported guidelines which bear no force and power of law whatsoever. In the said Petitioners' view, the 2nd Respondent is being conniving by inviting the Court to look at the levying of the Minimum Tax in a simplistic way through its argument that the tax chargeable is just 1% on gross turnover hence leaving taxpayers with 99% of the turnover outside regulation.

57. The said Petitioners explained this by giving three separate scenarios and submitted that the imposition of Minimum Tax is premised on the

Respondents' false notion that all businesses must always make a Net Profit of at least 3.33% at any given time, a misconception which was demonstrated by **Hon. Amos Kimunya** when commenting in Parliament to a report on the Tax Laws (Amendment) (No. 2) Act, 2020. To said the Petitioners, where a taxpayer realizes a Net Profit below 3.33%, the imposition of Minimum Tax will unlawfully and unfairly expose them to the risk of paying income tax at a rate higher that 30%, with businesses facing the risk of being taxed at a rate of 100% of profits earned. Based on tabular exposition, the said Petitioners submitted that the minimum tax is completely ignorant and careless of the possibility of loss that section 3 as read with section 15 were enacted to cushion the taxpayer from. Such losses would be considered as deductions as contemplated under section 15(1) before arriving at a taxable income. Further, it was contended that this oppressive imposition is introduced ignorant of the fact that the Petitioners' businesses alongside many other SMEs, begin from loss making positions owing to the plethora of licenses and permits required to commence the business together with the costs antecedent procuring the said licenses which are the very costs and expenses contemplated under section 15 of the ***Income Tax Act*** which are recurrent whether or not the Petitioners make a sale. As such, it is only where the Petitioners are able to recover and

exceed the said costs and expenses that they can be deemed to be generating income as envisaged under the ***Income Tax Act***.

58. It was however noted that while large corporations with net profits well above the assumed baseline of 3.33% will be least bothered by the introduction of Minimum tax, this impugned tax will be the nail on the coffin on small and medium enterprises who will most certainly be forced to pay 'income tax' from capital investment. This tilts the scale in favour of large companies blatantly contravening Article 27 of the Constitution that enshrines equality in the application, protection and benefit of the law. In the said Petitioners' view, this goes against the very core principle of taxation as enshrined under Article 201(b)(i) that taxation should be progressive and not regressive. Certainly, minimum tax is regressive taxation, taxing those who earn less more than those who earn more. Undoubtedly, this impugned tax does not promote an equitable society, and is definitely not fair in sharing the tax burden.

59. It was submitted that taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its imposition does not necessarily infringe on the citizens' rights unless it is demonstrated to be

out rightly arbitrary and unconstitutional. A court is to consider both "the nature of the tax and the circumstances in which it is levied. It was contended that the rationale presented by the 2nd Respondent for introducing the Minimum tax has been propelled to be that every person pays a fair share of the tax but the real question is to look at what is considered fair and it was submitted that equity in the administration of a tax calls for the tax to be seen as fair in terms of certainty, convenience and efficiency. In this regard the said Petitioners relied on the decision of the Supreme Court of India in the case of **Mysore and Other V. M.L Nagade and Gadag & Others (1983)** and submitted that the 1st and 2nd Respondents have been unreasonable in the enactment and implementation of the impugned law since the main rationale propelled by the Respondents and evidenced from the discussion of the drafters and the responses by the Respondents is to essentially a blanket condemnation of perennial tax avoiders who perpetually declare losses. Suffice to note, it is manifest that this assumption is not only baseless and unfounded but also bereft of any evidence or justification.

60. In the said Petitioners' view, it is unreasonable and outrightly unheard-off to assume that all entities who declare losses do so with the sole purpose of evading taxes. Moreso, to purportedly punish every entity that is unfortunately enduring a loss-making period in its business on the basis of

a misguided assumption is absolutely absurd and unreasonable. To the said Petitioners, the 2nd Respondent has well laid out procedures provided in law to bring to book all taxpayers who they believe are engaged in tax evasion. They have the power to audit books of accounts of these tax avoiders to ensure they comply with their tax obligations. Innocent taxpayers who are already battling with a stifled economy cannot be punished on account of the 2nd Respondent's indolence. In this regard they relied on **The Queen vs. Big M. Drug mart Ltd, 1986 LRC (Const.) 332**, and contended that what is manifest is that both the purpose and effect of the impugned Minimum tax fall short of the threshold required by law. Not only is the purpose irrational and miscalculated but the effect is also undeniably contra the constitution and fundamental rights and freedoms enshrined therein. It was noted that though the 2nd Respondent has presented to this court alleged tabular schedules of companies in loss making positions to demonstrate to this court the mischief they purport to be curing, the said tabular evidence bear no evidentiary value as they have indicated that they have withheld the names of the company, therefore this court is not able to test the veracity of the said evidence. Again, information provided to the 2nd Respondent by taxpayers is confidential and ought not be brandished to the public for the 2nd Respondents purposes.

61. As regards the alleged 'best practice' comparative jurisdiction, it was submitted that circumstances befalling different jurisdictions vary immensely and that one of the most salient variances amongst different jurisdictions is economy and even from the choice of countries the 2nd Respondents have opted to present to this court, it is manifest that the economic standing of the countries ranges widely. In the 1st Petitioners' view, the economic status of a state and that of its citizens as well as the unique and peculiar income generating activities and the circumstances surrounding them are what dictate the taxation policies of the country. 'Best practice' deduced by directly applying tax policies introduced in different jurisdictions with robustly different economic standing to our jurisdiction without regard to the business environment in Kenya, the cost of doing business, the revenue raising power of taxpayers et al. In this regard the said Petitioners relied on **OECD *'Policy Framework for Investment User's Toolkit'*** at page 23 and **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2013] eKLR.**

62. It was further submitted that the very same 'best practice' that the 2nd Respondent is suggesting has turned out not to be 'best' in the portrayed countries and further, there exists salient differences in the manner in which the tax has been introduced as compared to the way the Respondents are purporting to introduce it in Kenya. According to the said Petitioners;

a) Nigeria is now in the same problem, where the impugned tax has killed off both small businesses and businesses in a tax loss position. This will befall the petitioners should the impugned law be allowed to stand. There are three key questions being floated in Nigeria on the basis of the Minimum Tax; should a company pay income tax from its turnover where no profit was made during the year? Would this not amount to paying tax from equity and reserves as was the case under the previous minimum tax regime? Would this not negate one of the canons of taxation, equity?

b) A country like Canada imposes minimum tax on profits only while others provide Minimum Tax as an alternative to Corporate Tax so as to ensure no inequity is met on the tax payers. In Ontario, Canada, the corporate minimum tax is based on the adjusted net income of a corporation.

c) The USA which boasts of being a global economy only imposes the Minimum Tax on a vertical equity basis so that persons with a high income are the ones subject to payment of the Minimum Tax in order to fairly spread the tax burden. Further, the adjustment should be equal to fifty percent of the amount by which a corporation's financial statement income exceeds its regular taxable income. There has since been an amendment to their law to lower the rates.

d) The countries quoted by the 2nd Respondent provide reprieve to companies paying the Minimum tax with rates being low. For example, in Tanzania, the minimum tax is applicable to a company that has tax losses for five consecutive years charged as the percentage of 0.3% turnover of the third year of tax losses while in Nigeria small companies and companies in the first four calendar years of business are exempt from the said minimum tax.

63. It was submitted that the 2nd Respondent should have provided a fair account of the comparative study with the rationale for levying the Alternative Minimum Tax to avoid misleading this court. In their view, Kenya should not be a cut and paste nation and apply foreign tax regimes without testing their context and applicability with our demographic. Even then it would be of no value to borrow supposed 'best practices' from only 4 countries out of 54 states in Africa.

64. It was submitted that the impugned Minimum Tax is very likely to occasion the unlawful punishment of double taxation as against the Petitioner and other similar taxpayers. This is as;

(a) Section 12(1)(a) and section 12D(1)(c) provide that minimum tax is payable where the instalment tax payable is lower than the minimum tax. Instalment tax is an advance tax of estimated income tax paid in anticipation of the tax payable for a year of income. Being an advance

tax, it is generally speculative as the financial year of the paying entity is yet to lapse.

(b) Further, section 12(2) of the ***Income Tax Act***, stipulates that instalment tax shall be paid based on the lower of 110% of the previous year's tax liability or an estimate of the current year's tax liability based on an estimation of the current year's income. Instalment tax, just like minimum tax is paid on the 20th day of the 4th, 6th, 9th, and 12th month of a company's financial year as provided for under paragraph 1(a) of the Twelfth Schedule to the ***Income Tax Act***.

(c) Consequently, a taxpayer in a loss-making position at the start of their financial year will be expected to pay minimum tax on their gross turnover. Where in the course of the year such companies become profitable, they will be liable to pay corporation income tax. Corporation income tax is computed by deducting allowable expenses wholly and exclusively incurred in the generation of income from the gross turnover as provided in section 15(1) of the ***Income Tax Act***. However, under section 16 (2) (c) of the ***Income Tax Act***, a tax paid is not a deductible expense in computing the taxable income of a company. In particular, section 16 (2) (c) of the ***Income Tax Act*** provides that: Notwithstanding any other provision of this Act, no

deduction shall be allowed in respect of income tax or tax of a similar nature, including compensating tax paid on income.

(d) Resulting from section 16 (2) (c) of the ***Income Tax Act***, if a company in a tax loss position becomes profitable in the course of its financial year and is now required to pay corporation income tax, the minimum tax paid during the loss-making period of the company's financial year will neither be a tax-deductible expense nor a tax credit in computing the taxable income and will therefore amount to double taxation of such companies.

65. The 1st Petitioners relied on ***Black's Law Dictionary 5th Edition, 1979***, **Kenya Pharmaceutical Association & Another vs. Nairobi City County and the 46 Other County Governments & Another [2017] eKLR** and **Keroche Industries Limited vs. Kenya Revenue Authority and 5 Others HC Misc. Civil Appl No. 743 of 2006 [2007] eKLR**.

66. According to the Petitioners, it is manifest from the response of the 2nd Respondent to the issue of Double taxation that they have no arguable response. The Petitioners have not raised an issue of cross-border or multi-state taxation as contemplated by the Respondent. In their view, from the evidence and substantiation of the defects of the impugned amendment and its far-reaching effects on the Petitioner and other SME business

owners, it is undeniable that the introduction of minimum tax offends the provision, spirit and purpose of Article 201(b).

67. As regards the fourth issue whether Section 12D of the ***Income Tax Act*** is Discriminatory contrary to Article 27, the Petitioners relied on **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688,** and submitted that for discrimination to be justifiable there must be some intelligible differentia. In matters dealing with violation of rights and fundamental freedoms the law is that the burden is on the person alleging violation to prove that the legislature has violated their rights and freedoms and once that has been established, the burden shifts to the State or that other person, whose acts are being complained of, to justify the restrictions being imposed or the continued existence of the impugned legislation. For this submissions reliance was placed on **Lyomoki and Others vs. Attorney General [2005] 2 EA 127** and **Institute of Social Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR and Obbo and Another vs. Attorney General [2004] 1 EA 265** and it was contended that discrimination which is disallowed under the Constitution cannot be justified where there is no rational basis for the same. In other words, such discrimination cannot be arbitrarily imposed. However, where no reasons are given for the exercise of discretion in a

particular manner, assuming such discretion existed, or the reasons given are irrational or irrelevant, the Court is entitled to infer that there were no reasons for the exercise of the discretion in the matter it was exercised.

68. While appreciating that a tax is a burden to be borne by the taxpayers, it was submitted that this burden should not be unfair so as to overwhelmingly disadvantage certain groups with no financial muscle to even it out with their counterparts. An unfair burden should be viewed as the extent to which groups pay disproportionately more tax with no justification. In support of this submission, the 1st Petitioners cited the case of **Okiya Omtatah (Supra).**

69. To exemplify the contravention of Article 27 of the Constitution that provides for the equality in the application and protection of the law, it was submitted on behalf of the 1st Petitioners that the impugned amendment in Section 12D of the ***Income Tax Act*** discriminates against the petitioners and other traders in the consumer products sector by favouring those in the energy and petroleum sector and in the insurance sector. The Tax Laws (Amendment) (No. 2) Act, 2020 created an exemption for minimum tax for industries whose prices are regulated by the Government on the ground that since the prices in the energy and petroleum sector are regulated by government, they would be disadvantaged by minimum tax, since they cannot control their profits. According to the Petitioners, the phrase

*'excluding persons engaged in businesses whose retail price is controlled by the government'* is a very broad phrase and subject to wide interpretation. It negates the purpose of enactment of the impugned law whose rationale was to spread the tax burden as it appears the tax burden is being shifted to the Petitioners and other SMEs. It proceeds on a false assumption that the Petitioners are in control of their sales and profits.

70. In the 1st Petitioners' view, this exemption and its rationale create and unfair tax environment to the suffering of the Petitioners and traders of consumer as it is based on the fallacious misconception that they (the Petitioners) are solely in control of their retail prices and consequently their profits. This misconception, it was submitted, is totally ignorant of the following factors;

I) The alcohol and beverage sector wherein the Petitioners lie is subjected to over 50% excise duty, critically limiting the margins of profit available; and

II) The consumer products distributors and manufacturers are expected to maintain reasonably low prices, with the government wielding the authority to regulate prices through the Price Control (Essential Goods) Act, 2011.

71. Additionally, the Petitioners and other traders in Consumer goods operate in a business environment characterized by intensive competition which

self-regulates the pricing of goods as a result of high volumes and subsequently leads to from small to minimal profit margins. Therefore, it cannot be said that the Petitioners and trader in this sector are in sole control of their prices and profits and as such the same cannot be a basis to deny them the exemption granted to the energy and petroleum and insurance sectors. The same manifestly violates Article 27 as well as Article 201 (b) (1) of the Constitution of Kenya 2010.

72. It was further submitted that the uncertainty leading to unfairness of the tax burden has also been witnessed by the manner in which the 2nd Respondent has issued exemptions to Kenya Airways who were exempted in March 2021 which do not fall under the exemptions in the ***Income Tax Act*** from paying the Minimum Tax. Additionally, the Respondents have not offered the rationale for the said exemption (Which ideally ought to be provided for in the ***Income Tax Act***). This means that the respondents are in fact wantonly abusing their mandate to issue exemptions without regard to constitutional provisions and the parameters laid out in the ***Income Tax Act*** manifestly giving rise to the very same discrimination that Article 27 frowns upon.

73. It was contended that the Petitioners and or the public at large have not been made aware of the basis under which the said exemption has been granted and reliance was placed on **Aids Law Project vs. Attorney**

**General & 3 Others [2015] eKLR**, **State of Bombay vs. F. N. Balsara AIR 1951 SC 318** at p. 326 where **Professor Willis' *Constitutional Law*, 1st ed. At 578** was quoted with approval, **Kenya Bankers Association vs. Kenya Revenue Authority (2018) eKLR** in which the decision in **R vs. Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Limited [1981] UKHL 2** at page 22 was cited, and **Nelson Andayi Havi vs. Law Society of Kenya & 3 others [2018] eKLR**.

74. The 1st Petitioners disabused the 2nd Respondent's argument that a sectoral approach in granting exemption does not amount to discrimination as being only baseless but also unfounded for the following reasons;

(a) As was succinctly provided in the **Nyarangi & 3 Others vs. Attorney General (Supra)**, for classification in application of the law to be permissible, (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification…"

The said argument falls short of this criteria as for one, the exemption granted to Kenya Airways provides no explanation why other players in the aviation sector have not been exempted.

(b) Secondly, the rational for differentia provided by the Respondents in respect to the oil and petroleum sector is unreasonable and not in consonance with the object of the ***Income Tax Act*** as well as of section 210 of the Constitution. The basis for this exemption is as the sector is government controlled (their prices are regulated) yet the Respondents' have disregarded the fact that the Petitioners and other traders in fast moving consumer goods are not the masters of their prices for reasons enumerated hereinabove.

(c) Again, the 2nd Respondent purports to justify the exemption granted to Insurance Sector as being on the premise that if insurances go to a loss position they are placed under a moratorium, yet they have no problem taxing entities making losses with the effect of shutting down their business entirely.

75. As such, it was argued that it is undeniable that the impugned amendment offends Article 27 of the Constitution and must be declared null and void ab initio.

76. As regards the fifth issue whether Section 12D infringes the Right to Property and Economic and Social Rights contrary to Article 40 and 43, it

was submitted that Article 40(2) (a) of the Constitution of Kenya states that Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description. Profit being property, it was submitted that Minimum tax illegally and unfairly threatens some enterprises with tax beyond 30% of and even 100% or more which amounts to depravation of property contrary to Article 40 and therefore amounts expropriation without due compensation. Reference in support of this submissions was made to **Coalition for Reforms and Democracy (CORD) v Attorney General; International Institute for Legislative Affairs & another (Interested Parties) [2019] eKLR.**

77. According to the 1st Petitioners, Tax inherently infringes the right to property as the Government is taking property from the owner for public use or benefit. In the instant matter, the 1st Respondent in justifying why minimum tax ought to be levied indicated that the tax will apply to all persons whether they are making profits or incurring losses to expand the tax base and ensure that companies that make perennial losses contribute towards provision of infrastructure by the Government. Similarly, tax losses enjoyed by enterprises are a form of property for such enterprises as the enterprises are allowed to carry forward and set off against its future profits for a period of nine (9) years. Therefore, requiring the enterprises

in a tax loss position to pay minimum tax is an arbitrary deprivation of their right to property.

78. Additionally, it was submitted, Article 43 of the Constitution enshrines every citizen's right to an equitable economic environment where he or she is able to earn a meaningful living. Article 21(2) provides that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43. This, according to the said Petitioners, is a right further buttressed in Article 25 of the Universal Declaration of Human Rights (UNDHR), 1948 and reliance was placed on **Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR**. It was further contended that the right to life is meaningless unless people have an opportunity to engage in income generating activities in order to eke a living. As such, an action that threatens the livelihood of a person may well infringe upon the right to life if its effect would be to deprive the person of the means of sustenance.

79. From the foregoing, the 1st Petitioners submitted that it is manifest that the impugned minimum tax is not only unlawful and unconstitutional but also oppressive to the Petitioners and the Small and Medium Enterprises engaged in the distribution and sale of consumer goods with low profit margins and will most certainly sound the death knell of most of their

enterprises. The imposition of minimum tax on gross turnover in blatant disregard of the costs of production and operational expenditure will definitely translate in the Petitioners and other SMEs paying 'income' tax out of capital (out of their pocket). In their view, it will consequently amount to the infringement of the Petitioners' and a host of other owners of SME's socio-economic rights. The Court was therefore implored to consider that the imposition of this tax on the Petitioners who, owing to the closure of their business for more than 10 months as a result of the Covid-19 pandemic, are already in loss-making positions, will be sound the death knell on the said business.

80. It was argued that the Petitioners and many other SME owners, in a bid to avoid falling into the snares of tax evasion or non-compliance, will be forced to close their businesses as the same will no longer be sensible let alone economically viable hence having a direct threat to the livelihood of a myriad of Kenyans.

81. Regarding the sixth issue whether the impugned amendments violate principles of taxation, it was submitted that the Constitution enjoins parliament to impose taxation only in accordance with the national values and principles of governance enshrined therein which include:

(a) Equity and fairness in the distribution of tax burden [Articles 10 (2) (b) and 201 (b)]. Accordingly, the taxing power cannot be

constitutionally exercised unless the legislation imposing the tax strictly adheres to the principles of horizontal and vertical equity as follows;

(i) Horizontal tax equity implies that those businesses engaged at the same business level, whether in the same sector or in a different sector, ought to bear similar tax burden. The impugned minimum tax has been introduced ignorant of the difference in businesses carried out by loss making tax payers and the peculiarities of their industries. Again, the manner in which the Respondents have granted exemptions to the same is irrational and premised on fallacious assumptions.

(ii) Vertical tax equity requires that entities at different levels of production in an economy bear a similar proportion of the tax burden, regardless of the concerned sector. It therefore means that entities in the petitioners' industry as well as in the FMCG industry ought to bear a similar proportion of tax burden compared to entities in the manufacturing sector. As hereinabove demonstrated, these companies will be required to pay corporate tax in the form of minimum tax at the rate exceeding 30% (in some case even 100%) compared to those higher up in the level of production such as telecommunications companies with higher revenue e.g. Safaricom.

This amounts to discrimination between the businesses, in contravention of Article 27 of the Constitution.

(b) Equality and non-discrimination in the distribution of tax burden [Article 10 (2) (b) and 27 (1), (2) and (4)]. This means that there should be equality in the distribution of tax burden and accordingly a taxpayer should not be subjected to punitive taxes because of a belief that the business that he/she carries on is sinful, immoral or simply undesirable.

(c) Rule of law, equal protection of law and the sanctity of property rights [Articles 10 (2) (b), 27 (1), and 40 (2) & (3)]. Accordingly, Parliament cannot pass a legislation (whether disguised as tax or otherwise) which limits or restricts the enjoyment of proprietary rights simply because that person has conscientiously chosen to carry on a business-line that is perceived by others to be immoral, sinful or simply bad especially where such law fails to meet the limitation standards enshrined in Article 24.

(d) Good governance, integrity, transparency and accountability, objectivity and impartiality in decision making, and avoidance of favouritism, improper motives or corrupt practices [Articles 10 (2) (c), 73 (1) & (2), and 201 (a)]. Accordingly, imposition of punitive and oppressive taxes whimsically, maliciously, arbitrarily and capriciously

without following due process or being guided by any objective criteria and influenced by improper motives fails the constitutionality test.

(e) Access to justice (which includes justice in the context of taxation) (Article 48) with the result that the imposition of tax on "income" and a separate tax on "gross revenue" cannot pass the constitutional muster.

(f) Sanctity of the right to life (which includes the right to earn a livelihood and sustain one's life) as well as the right to human dignity [Article 26, 28 and 43]. This means that imposition of burdensome and oppressive taxes which are deliberately designed to kill certain types of businesses cannot be constitutional.

82. Dealing with the seventh issue whether the Senate ought to have been involved in the enactment of the impugned legislation as provided under Article 110, it was submitted that the main function of the Senate is to promote and safeguard the interest of counties thus having a direct mandate to influence national laws that touch on counties. It is for this reason that the Constitution confers legislative competence on both houses of parliament under Article 109 and passed in accordance with Articles 110 to 113 of the Constitution. Article 110 of the Constitution, provides for Bills concerning County Government; it defines a Bill concerning County Government; it also prescribes the procedure for the enactment of such a

Bill into law. As regards what constitutes Bills concerning county government, the 1st Petitioners relied on Article 110 of the Constitution as interpreted in by the Supreme Court in **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR.** It was submitted that the Constitution expressly provides that the Speakers of the two Houses must jointly determine, through a concurrence process whether a Bill is a Bill concerning counties before the Bill is introduced for consideration in any House of Parliament and reference was made to a 3 judge bench in **Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR** in which when faced with the interpretation of Article 110 quoted the **Supreme Court's Opinion in Reference No. 2 of 2013.**

83. In the said Petitioners' view, the action by the 1st Respondent to enact the impugned amendment and introduce Minimum tax without the reference of the said amendment to the Speaker of the Senate for concurrence and to Senate for discussion and passing thereof violates Article 110(1) (c) as read with Article 110 (4) and (5). Minimum Tax being chargeable on gross turnover, affects the finances of County government as the gross turnover of an enterprise includes the County taxes levied and chargeable in its County of business. As such, expropriation thereof amount to the

deprivation of the said County's revenue. Further as constitutional pre-requisite as espoused by the Supreme Court in its advisory opinion, the Speaker of Parliament ought to have referred the Bill to the speaker of the senate to obtain concurrence as to whether the Bill required consideration by the senate as per Article 110. As regards reference by the 2nd Respondent to Article 114 of the Constitution the said Petitioners referred to the holding of the Court of Appeal in **Senate of the Republic of Kenya & 4 others vs. Speaker of the National Assembly & another; Attorney General & 7 Others (Interested Parties)** (Supra) at para 130 and contended that from the 2nd Respondent's assertion that the impugned amendment was in fact not referred to senate for discussion nor concurrence sought from the speaker of the senate with respect to the nature of the bill, it is undoubtable that the same is null and void for want of procedure and as such dead on arrival.

84. According to the 1st Petitioners, in as much as the 2nd Respondent would like to expand its tax base, it should do so with the effect of its action in mind. Article 201 (a) (i) of the Constitution in setting out the principles of public finance provides for the promotion of an equitable society through the fair and just sharing of the burden of taxation. The Imposition of the Minimum is contrary to the provisions of Articles, 10, 26, 27, 40, 43 and 201 of the Constitution on account of ambiguity, frequent changes and

detail complexity arising from numerous rules and exceptions to the guidelines which have no force of law. That degree of complexity has made it hard to interpret the obligations on the part of the tax payers leaving them with no room of finding clarity on their own hence the institution of the current petition.

85. Further, the passing of the impugned amendment further blatantly offends the principle of legitimate expectation of the Petitioners and the general public, to wit, that the 1st Respondent would uphold the supremacy of the Constitution and the hereinabove integral tenets of legislation, especially fiscal in nature. This submission was based **De Smith, Woolf & Jowell, *"Judicial Review of Administrative Action"*** 6thEdn. Sweet & Maxwell page 609.

86. It was noted that even the drafters of the legislation acknowledged this very damage that the impugned minimum Tax will cause when **Hon. (Ms.) Gladys Wanga** - the Chairperson of the Departmental Committee on Finance and National Planning - tabled a report on the Tax Laws (Amendment) (No. 2) Act, 2020, and acknowledged that it will negatively impact businesses with high volumes and low turnover. She stated that wholesale and Retail is the third largest income earner in Kenya's Gross Domestic Product (GDP). Wholesale and Retails trade is the fulcrum that supports Agriculture and Manufacturing which are respectively the first

and second largest GDP contributors in the Country, yet the Wholesale and Retail Trade sector stands to suffer significantly through the application of Minimum Tax. A business with a high turnover does not necessarily translate to high profit margins, citing an example of the sale of scratch cards, one might sell a lot of scratch cards but the margin is small hence the imposition of Minimum Tax will just be a tax on the volume of goods sold.

87. The said Petitioners also found solace in 1st Corinthians Chapters 8 and 9 and urged that public interest will be served if the court prohibits the implementation of an unconstitutional and ambiguous statute. To this end, they relied on the case of **Eco-bank Kenya Limited v. Commissioner for Domestic Taxes (2012) eKLR** and asserted that they clearly made their case by showing that Section 12D of the ***Income Tax Act***, Chapter 470 of the Laws of Kenya as amended by the ***Tax Laws (Amendment) (No.2) Act, 2020*** infringes, threatens and or violates the constitutional principles of equity and fairness, equality and non-discrimination, rule of law, equal protection of the law, sanctity of property rights, and good governance, contrary to Articles 10, 27, 40, and 201 of the Constitution.

88. In response to the 2nd Respondent's submissions, tat Minimum Tax is being charged on an amount deemed to be income under the ***Income Tax Act***, it was contended that the interpretation on gross turnover of the 2nd Respondent amounting to income under the ***Income Tax Act*** is

manifestly misconceived. According to the Petitioners, Section 3(2)(e) relied upon by the 2nd Respondent as qualified by section 34 (n) in its ambiguous nature does not expressly provide that gross turnover is deemed an income under the ***Income Tax Act***. The third schedule only provides a rate of 1% on the gross turnover but the act does not envisage the gross turnover being an income. If indeed the provision was certain nothing would have been easier for the 1st Respondent to do than provide that the gross turnover shall be deemed as a taxable income under the Act and to further define what gross turnover entails under the Act. In their view, it is on the basis of this ambiguity that the 2nd Respondent resorted to issue the Minimum Tax Guidelines in an attempt to define what gross turnover amounts to. While they argue that the guidelines are not binding on the tax payers they are making a case for lack of certainty in the law as without the definition of gross turnover, the tax payers are left with an ambiguous law marred with contradictions.

89. The Petitioners asserted that their argument on the issue of the Minimum Tax Guidelines is pegged on their introduction and enforcement being a response or attempted cure to the ambiguity and uncertainty created by the impugned provision to operationalize it. If indeed the guidelines were issued on a basis of frequently asked questions as preposterously alleged by the 2nd Respondent, nothing prevented them from maintaining the

contents in the said guidelines in the FAQs tab on their website as it is still there. The enactment of the Guidelines, being a statutory instrument, ought to have followed the proper procedure as outlined in our submissions.

90. As regards the discrimination the Petitioners clarified that it is not the power to grant exemptions that the Petitioner raises issue with, but the indiscriminate manner in which the same are granted and the indiscriminate and unknown rationales thereof. If indeed the rationale for exempting Kenya Airways was their government shareholding (of at least 45%) what of all the other plethora of entities owner by Government like Kenya Broadcasting Corporation, Kenya Power and Lighting Company, Kenya Railway Corporation and many others. Needless to say, it is public knowledge that a considerable majority of these entities are perpetual loss making entities, therefore, where the rationale for granting the exemption to Kenya Airways was their loss making nature, then it is manifest that the same is grossly indiscriminate.

91. In response to the 2nd Respondent's submissions with regard to carrying forward of losses, the Court was invited to look at the 2nd Respondent's approbation and reprobation in the interpretation of Section 12D. On one hand their case is made by placing reliance on the impugned provision being a non-obstante clause that should be read in isolation from other

provisions a position that would deny the Petitioners their right to carry forward losses while on the other hand they ask the court to read the impugned section with other provisions of the Act such as section 15 (4) and (5) which allows carrying forward of losses. In furtherance to the above and Paragraph 177 of the 2nd Respondent's submissions, they have taken a contradictory position with regard to claw back on allowed capital deductions. Their argument is that the impugned provision does not repeal the provisions of the 2nd Schedule of the ***Income Tax Act*** but still maintain that is a non-obstante clause that gives it independence and superiority over other provisions of the Act.

92. Regarding the challenge to the effect and constitutionality of the Minimum Guidelines, the 1st Petitioners submitted that in **Petition E079 of 2021 Kenya Association of Manufacturers & 2 Others v. The National Assembly & 3 Others** and **Petition no. E21 of 2021 - Stanley Njuguna Waweru & Others vs. The National Assembly and 3 Others** which form part of this consolidated petitions, the question of the Minimum Guidelines has been raised as a fused point of Petition. It was therefore submitted that the interconnectedness between the impugned section 12D of the ***Income Tax Act*** and the Minimum Guidelines that purport to operationalize the impugned section, render the impugned Minimum Guidelines a proper subject of judicial scrutiny by

operation of articles 94(5) of the Constitution which warrants that all aspects dealing with any legislation have to be conducted by Parliament or as otherwise permitted under the Constitution.

93. It was urged that if the Court were to be persuaded to agree with the 2nd Respondent as they allege in paragraph 93 of their submissions, the Court should be persuaded otherwise not to overly rely on technical rigidity. To the said Petitioners, constitutional litigation and public interest litigation as such is a sphere which shuns rigid application of formality strictures such that if the Petitioners should be deemed to have provided sufficient information to warrant juridical examination of the Minimum Guidelines by the 2nd Respondent as operational means to the impugned section 12D, then the Court stands fortified in making any pronouncement with regards to the Minimum Guidelines as a matter of exercise of proper jurisdiction based on the test set out by the Court of Appeal in the case of **Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 Others [2015] e KLR.**

94. The Petitioners therefore seek the following reliefs:

***(i) A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 10 of the Constitution and as such null and void ab initio;***

***(ii)A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 27 of the Constitution and as such null and void ab initio;***

***(iii) A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 40 (1) (a) and (2) (a) of the Constitution and as such null and void ab initio;***

***(iv) A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 46(1) of the Constitution and as such null and void ab initio;***

***(v)A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 110(1) (c) as read with Article 110 (4) and (5) of the Constitution and as such null and void ab initio;***

***(vi) A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 201(b)(i) of the Constitution and as such null and void ab initio;***

***(vii) A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and***

***contrary to the provisions of Article 209 (1) of the Constitution and as such null and void ab initio;***

***(viii) A declaration that per the provision of Section 3 as read with Section 15 of the Income Tax Act, Income taxable under this Act is net income AFTER deductions of expenditure wholly and exclusively incurred b in the production of that income.***

***(ix) An order of prohibition be and is hereby issued restraining the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of Section 12D of the Income Tax Act, Chapter 470 of the Laws of Kenya as amended by the Tax Laws (Amendment) (No.2) Act, 2020 by collecting and/or demanding payment of the Minimum Tax;***

***(x) The costs of this Petition be borne by the Respondents;***

***(xi) Any other or further order or relief that this Honorable Court deems fit to grant.***

**The 2nd set of Petitioners' Case**

95. The 2nd set of the petitioners on the other hand pleaded that The effect of the introduction of the minimum tax is that since it is based on gross turnover and not gains or profits, all persons, even those in a loss-making position will be required to pay minimum tax. According to them, the introduction of section 12D of the ***Income Tax Act*** which provides for minimum has created a disconnect and/or inconsistency with certain existing provisions of the ***Income Tax Act*** thus causing confusion as to exactly what is expected of the taxpayers.

96. One such inconsistency is that income tax is applied on adjusted taxable income and not on gross turnover under the ***Income Tax Act***. According to them, income tax is charged pursuant to the provisions of the ***Income Tax Act*** and the preamble to the ***Income Tax Act*** as set out in Part I (*Preliminary*) provides that the ***Income Tax Act*** is: an Act of Parliament to make provision for the:

***(a) charge, assessment and collection of income tax;***
***(b) ascertainment of the income to be charged;***
***(c) for the administrative and general provisions relating thereto; and***
***(d) for matters incidental to and connected with the foregoing.***

97. Accordingly, any tax charged, ascertained and administered under the ***Income Tax Act*** is a form of income tax and should be charged in accordance with the provisions of the ***Income Tax Act***. Since minimum tax is administered under the provisions of the ***Income Tax Act***, as set out in Part II (*Imposition of Income Tax*) of the ***Income Tax Act***, it means that minimum tax is a form of income tax and therefore should be charged, ascertained and administered in accordance with the provisions of income tax under the ***Income Tax Act***. The charging section for income tax is, however, section 3 of the ***Income Tax Act*** and Section 3(1) of the ***Income Tax Act*** provides that: "a tax to be known as income tax shall be charged for each year of income upon all the income of a person which accrued in or was derived from Kenya." Section 3(2) of the ***Income Tax***

***Act*** defines what constitutes income by providing that: "subject to this Act, income upon which tax is chargeable under this Act is income in respect of- *"(a)* ***gains or profits*** *from – (i) A business for whatever period of time carried on (ii) Employment or services rendered (iii) A right granted to another person for use or occupation of property…."*

98. According to the 2nd Petitioners, gains and profits for income tax purposes are ascertained in accordance with the provisions of section 15 of the ***Income Tax Act*** under which Section 15(1) of the ***Income Tax Act*** provides that f*or the purposes of ascertaining the total income of a person for a year of income, there shall be subject to section 16, be deducted* ***all expenditure wholly and exclusively incurred*** *by a person in the production of that income.* Section 15(2) of the ***Income Tax Act*** gives a list of expenses to be deducted in computing gains or profits chargeable to tax in a year of income by providing that, *in computing for a year of income the gains or profits chargeable to tax under section 3(2) (a) the following amounts shall be deducted…*

99. Sections (15) (1) and (2) of the ***Income Tax Act*** set out the general principle of income tax in that it applies to adjusted taxable income having deducted allowable expenses which is expenditure wholly and exclusively incurred in the production of the income.

100. The upshot of Section 3 (2) as read together with Sections 15(1) and (2) of the ***Income Tax Act*** is that income tax shall not be applied on the gross turnover of a person, but rather on the gains or profit having deducted expenditure wholly and exclusively incurred by the person in the production of that income. However, based on the provisions of section 12D of the ***Income Tax Act***, minimum tax is to be applied on the gross turnover contrary to section 3(2) of the ***Income Tax Act*** (the charging section) as read together with sections 15(1) and (2) of the ***Income Tax Act***, that income tax should be applied on adjusted taxable income.

101. In effect, minimum tax seeks to tax persons who have realised no gain or profit, effectively taxing the capital of such persons.

102. It was submitted that the minimum Tax claws-back on investment allowances granted under the Second Schedule to the ***Income Tax Act*** since companies in capital-intensive sectors such as the manufacturing, telecommunications and hotel sectors require high initial capital and development costs. To incentives investment in these capital-intensive sectors, paragraph 1 of the Second Schedule to the ***Income Tax Act*** provides for investment allowances to be deducted in computing gains or profits for income tax purposes, by persons who incur capital expenditure investing in these sectors by providing that "*where a person incurs capital expenditure in respect of an item listed in the first column of the table, an*

***investment allowance may be deducted in computing the gains or profits*** *of that person at the corresponding rate specified in the second column, for each year of income…*". The investment allowance applies to capital expenditure on buildings, machinery, acquisition of an indefeasible right to use fibre optic cable by a telecommunication operator and farm works.

103. It was contended that as a result of deduction of these investment allowances provided for in paragraph 1 of the Second Schedule to the ***Income Tax Act***, such companies ordinarily end up in a tax loss position in the initial years of operation. Despite such companies being in a tax loss position due to deducting investment allowances allowed under paragraph 1 of the Second Schedule to the ***Income Tax Act***, they will still be required to pay minimum tax at the rate of 1% of their gross turnover. Therefore, applying minimum tax on the gross turnover of a company in a tax loss position due to utilising investment allowances provided for in the ***Income Tax Act*** is a claw back on the very purpose of the investment allowances.

104. According to the 2nd Petitioners, Section 15(4) of the ***Income Tax Act*** recognises that companies can be in a tax loss position and as such allows taxpayers to carry forward the losses incurred in a current year for a period of nine (9) years during which the taxpayer can offset the tax losses against future profits made in future years. Additionally, section 15(5) of the

***Income Tax Act*** allows the taxpayer to apply to the Cabinet Secretary responsible for finance for an extension to carry forward losses beyond the nine (9) years where the taxpayer has not extinguished the tax losses within the ten (10) years. Based on the provisions of section 15(4), it was argued that companies in a tax loss position do not pay income tax since such companies do not have any gain or profit on which income tax is to be charged. However, companies in a tax loss position will still be required to pay minimum tax on their gross turnover despite not having any gain or profit.

105. Just like the 1st Petitioners, it was argued by the 2nd Petitioners that minimum tax may result in double taxation since under section 16 (2) (c) of the ***Income Tax Act***, if a company in a tax loss position becomes profitable in the course of its financial year and is now required to pay corporation income tax, the minimum tax paid during the loss-making period of the company's financial year will neither be a tax-deductible expense nor a tax credit in computing the taxable income and will therefore be a double cost resulting in double taxation of such companies.

106. It was similarly the 2nd Petitioners' case that **due to the inconsistencies between** Section 12D of the ***Income Tax Act*** as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No.2) Act and section 3(1) and (2), section 15(1) and (2) and

paragraph 1 of the Second Schedule to the ***Income Tax Act***, this has the effect of rendering Section 12D of the ***Income Tax Act*** ambiguous and uncertain contrary article 10 of the Constitution which provides for rule of law as a national value and principle. They also contended that the said section 12D violates:

(i) the right to equality and freedom from discrimination as guaranteed under article 27 of the Constitution;

(ii) the right to property as guaranteed under article 40 of the Constitution, particularly the right not to have legislation enacted that arbitrarily deprives a person of property of any description; and

(iii) the principles of public finance particularly that the public finance system shall promote an equitable society that ensures the burden of taxation is shared fairly.

107. It was contended that the Petitioners have a right of certainty and predictability in the applicability of economic activities. Article 10 (1) (b) and (c) of the Constitution provides that the National values and principles of governance bind all State organs, State officers, public officers, and all persons whenever any of them enacts, applies, or interprets any law or makes or implements public policy decisions. The said national values and principles of governance are provided for under Article 10 (2) and include the rule of law, equality, and non-discrimination. The fundamental

principle of rule of law as encapsulated in Article 10 of the Constitution is that the law must be certain. Certainty of the law is especially more critical in legislation that imposes taxes on members of the public. Since Section 12D of the ***Income Tax Act*** which provides for minimum tax contradicts with Section 3(1) and (2), section 15(1) and (2) and paragraph 1 of the Second Schedule to the ***Income Tax Act***, it was contended that section 12D of the ***Income Tax Act*** does not meet the test of Rule of law as prescribed under Article 10 of the Constitution which requires certainty in laws and militates against contradiction and inconsistency in law and as such any inconsistency ought to be declared unconstitutional.

108. According to the said Petitioners, as seen above, the effect of introduction of section 12D of the ***Income Tax Act*** on minimum tax is that it creates uncertainty and ambiguity: on one hand the taxpayer expects to be charged income tax on gains or profits but on the other hand with the introduction of section 12D of the ***Income Tax Act***, a taxpayer will be expected to pay minimum tax on gross turnover without deducting expenditure wholly and exclusively incurred in the production of such income contrary to section 3 of the ***Income Tax Act*** as read together with section 15(1) of the ***Income Tax Act***.

109. The uncertainty and ambiguity with the introduction of minimum tax through section 12D of the ***Income Tax Act***, is additionally evident

because even companies in a tax loss position, who pursuant to section 15(4) of the ***Income Tax Act*** are not required to pay corporate income tax while in a loss-making position, will now be required to pay minimum tax on their gross turnover.

110. According to the 2nd Petitioners, Section 12D though enacted with a good intention of ensuring taxpayers pay their fair share of tax, has ended up causing unacceptable uncertainty and ambiguity, therefore it is void for want of legal certainty. The introduction of Section 12D of the ***Income Tax Act*** has created an ambiguity as the provisions of the ***Income Tax Act*** now contradict each other and it cannot have been the intention of Parliament to introduce such a contradiction.

111. It was contended that though the 2nd Respondent issued what it termed Minimum Tax Guidelines, the said guidelines cannot be said to have any force of law.

112. Just like the 1st Petitioners, the 2nd Petitioners contended that the imposition of minimum tax is bound to violate the right to protection of property. It was submitted that Tax is burdensome and inherently infringes the right to property as the Government is taking property from the owner for public use or benefit. It is for this reason that the fundamental principle of income tax as set out in sections 3 (1) and (2) and sections 15(1) and (2) of the ***Income Tax Act*** provides that income tax can only be charged on

gains and profits having deducted expenditure wholly and exclusively incurred in the production of that income. This is based on the fact that tax should not be levied on a person who has not made any gain or profit as that would result in such a person paying taxes out of capital making taxes a direct cost for a business.

113. Minimum tax is taxed on a person's gross turnover without allowing such businesses to deduct the expenses incurred in generating the income. As a result, minimum tax violates taxpayers' right to property, as it seeks to tax even taxpayers who have not realised a gain or profit, based on the taxpayer's gross annual turnover which means it seeks to tax a taxpayer out of their own capital. Even where a taxpayer has realised a gain or profit (net profit having deducted allowable expenses under section 15 of the ***Income Tax Act***), if that profit is equivalent to 1% or less of the person's gross turnover, imposition of minimum tax will result in a situation where the minimum tax payable is equivalent to 100% or more of their gain or profit. While appreciating that the Government is entitled to collect taxes, it was contended that the Government is not entitled to take entire profit earned and capital invested by a person in the name of taxation. Where a taxpayer ends up paying 100% of their profit as tax, then this results in violation of the taxpayer's right to property.

114. The Petitioners averred that tax losses enjoyed by companies are a form of property for such companies. It for this reason that section 15(4) of the ***Income Tax Act*** provides that companies in a tax loss position shall not be required to pay corporation income tax and allows the companies to carry forward the tax losses for a period of nine (9) years and offset against its future profits.

115. It was submitted that the right to property being a vertical projection of the principle of economic capacity, the percentage of the income of the taxpayers that can be legitimately affected by a tax must not be excessive than the wealth objectively available.

116. It was further submitted that the minimum tax was introduced in contravention of Article 27 of the Constitution which provides that every person is equal before the law and has the right of equal protection and equal benefit of the law. This is because the ***Tax Laws (Amendment) (No.2) Act, 2020*** amended section 12D of the ***Income Tax Act*** do exempt persons engaged in businesses whose retail price is controlled by the Government (such as oil marketing companies (**OMCs**) and persons engaged in insurance business from minimum tax. It was however submitted that the reason given by the Departmental Committee on Finance and National Planning in its report on the consideration of the ***Tax Laws (Amendment) (No.2) Bill, 2020*** for exempting OMCs from the

requirement to pay minimum tax demonstrates discrimination. The reason given was that'*...the proposal for exemption by oil marketing companies is valid as the industry is already highly regulated by the Energy Petroleum Regulatory Authority (EPRA) in terms of price control. Therefore, there is little or no room to increase price arbitrarily. Given the nature of operations of the petroleum industry particularly the fact that pricing is controlled by Government it will be fair to base their tax on their income before deduction of depreciation, interest and tax on income.*' According to the said Petitioners, OMCs were exempted from on the basis that their prices are regulated by the government and therefore they cannot increase their prices arbitrarily which means they cannot control their profits.

117. They however raised the question whether this is an exceptional issue only applicable in the downstream petroleum sector or whether it is applicable across other sectors as well, such as sellers of essential goods and other sectors with similar economic circumstances such as businesses in the consumer goods sector. The Petitioners aver that minimum tax discriminates against businesses with lower profit margins such as those in the manufacture, sale and distribution of consumer goods. To them, businesses in the consumer goods sector have low profit margins owing to the nature of goods being sold and the high expenditure involved in this business. These businesses have their prices controlled either based on law,

custom or the rules of demand and supply, barring increase in their prices. They added that consumer goods manufacturers, sellers and distributors are expected to maintain reasonably low prices given their essential nature which gives the Government to regulate their prices through the ***Price Control (Essential Goods) Act, 2011*** due to their essential nature. For this reason, such businesses will always have low profit margins. They gave the example of 2017, when the ***Price Control (Essential Goods) Act, 2011*** was used as the basis for enacting the ***Price Control (Essential Goods) (Sifted White Maize Meal) Order, 2017*** which cushioned consumers of sifted maize from exorbitant costs of food when there was a shortage of maize.

118. It was contended that while OMCs were exempted from paying minimum tax on the basis that they do not have the leeway to increase prices arbitrarily, similarly, businesses selling consumer goods do also do not have the leeway to arbitrarily increase their prices due to the essential nature of consumer goods. However, businesses selling consumer goods were not exempted from minimum tax despite having the same economic realities and circumstances as OMCS. The said Petitioners asserted that taxation should seek to be neutral and equitable between forms of business activities. Persons with similar economic circumstances should bear a similar tax burden, irrespective of the source of the income. In this sense,

neutrality entails that the tax system raises revenue while minimizing discrimination in favour of, or against, any economic choice. This implies that the same principles of taxation should apply to all forms of businesses.

119. The impugned amendment does not portray this as OMCs are exempted from minimum tax on the basis that there is no basis to increase price arbitrarily in their sector, yet businesses selling and distributing consumer goods which also have no basis to arbitrarily increase the price of their goods due to their essential nature are required to pay minimum tax.

120. Based on the above, it was submitted that it is evident that section 12D of the ***Income Tax Act*** which provides for minimum tax discriminates between businesses with the same economic realities, by exempting oil marketing companies from minimum tax but requiring businesses selling and distributing consumer goods to pay minimum tax. The said Petitioners lamented that minimum tax based on gross turnover will negatively impact these businesses making it difficult for the businesses to continue to operate. Additionally, since minimum tax is a final tax and it cannot be transferred to the consumer to cushion the businesses from its effect. With low margins and high expenditure, the charge to minimum tax is onerous. Additionally, imposition of minimum tax discriminates against businesses in a tax loss position, particularly those in a tax loss position because of

deducting investment allowances granted in paragraph 1 of the Second Schedule to the ***Income Tax Act***.

121. It was contended that while paragraph 2 of Head B of the Third Schedule to the ***Income Tax Act*** provides for corporation income tax at the rate of 30% on adjusted taxable income (net profit), for companies whose net profit is less is 3.33% or less of their gross turnover, minimum tax results in taxation of their net profit at the rate of 100% or more as opposed to 30%. This effectively results in subjecting companies with low profit margins to separate and punitive tax regime, as compared to other companies, contrary to the 30% corporate tax provided for in the Third Schedule to the ***Income Tax Act***.

122. According to the said Petitioners, Chapter 12 of the Constitution of Kenya provides for the principles that guide all aspects of Public Finance in the Republic of Kenya. A critical principle of public finance as set out in article 201(b)(i) of the Constitution is that it should promote an equitable society and ensure that the burden of taxation is shared fairly. However, imposition of minimum tax as provided for in section 12D of the ***Income Tax Act*** imposes an unfair tax burden on the taxpayers contrary to article 201(b)(i) of the ***Income Tax Act*** as set out above.

123. On jurisdiction, this Court was urged to be persuaded further by the decision of the South African Constitutional Court in **Minister of Health**

**and Others vs. Treatment Action Campaign & Others (2002) 5 LRC 216 to 248** on the Court's role to protect the integrity of the Constitution.

124. It was submitted that Article 259 of the Constitution enjoins this court to interpret the Constitution in a manner that (a) promotes its purposes, values, and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance. Read together with Article 10 on guiding national values and principles, a firm basis for purposive interpretation of the Constitution has been laid.

125. It was submitted that the constitutionality of legislation is a rebuttable presumption; and, where the Court is satisfied that legislation fails to meet the constitutional muster, nothing bars the Court from declaring it unconstitutional. The Impugned Amendment must be considered in its entirety, that is, the purpose, object, and effect. According to the said Petitioners, in determining whether a statutory provision is constitutional or not, the court must examine not only the text of the statutory provision but also its purpose as was held in the case of **Murang'a Bar Operators and Another vs. Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR**. The 2nd Petitioners also cited the Indian case of **Reserve**

**Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others (1987) 1 SCC 424** and the Court of Appeal decision in the case of **The Engineers Board of Kenya vs. Jesse Waweru Wahome & others Civil Appeal No 240 of 2013**.

126. While appreciating the 1st Respondent's legislative duties outlined in Article 94 of the Constitution it was submitted that the said powers are to be exercised within the confines of the Constitution based on the decision of the Supreme Court in the case of **Speaker of National Assembly vs. Attorney General and 3 Others [2013] eKLR**.

127. It was submitted that Article 10 (1) (b) and (c) of the Constitution provides that the national values and principles of governance bind all state organs, state officers, public officers, and all persons whenever any of them enacts, applies, or interprets any law or makes or implements public policy decisions. The national values and principles of governance provided under Article 10 (2) and include the rule of law, equality, and non-discrimination and reliance was placed on the case of **Keroche Industries Ltd vs Kenya Revenue Authority & 5 Others [2007] eKLR** and **Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR**, where the Court reiterated that one of the ingredients of the rule of law is certainty of law and in **Commissioner of Income Tax vs Westmount Power (K) Ltd [2006] eKLR** it was held that laws that

impose taxation obligations should not suffer from lack of clarity or ambiguity. Reliance was also placed on **Council of County Governors vs. Attorney General & Another [2017] eKLR.**

128. The Petitioners reiterated that Section 12D of the ***Income Tax Act*** which provides for Minimum Tax is unconstitutional, because it contradicts sections 3(1) and (2), 15(1), (2) (4) & (5) of the ***Income Tax Act*** and paragraph 1 of the 2nd Schedule to the ***Income Tax Act*** resulting to ambiguities and vagueness in these provisions as demonstrated below. They relied on **Commissioner of Domestic Taxes vs. Kenya Maltings Limited [2013] eKLR** held that essence of taxation is to tax income after deducting all the expenses. Profits can only be ascertained when the accounts are made up. As can be seen in Section 3(2) of the ***Income Tax Act***, it is gains and profits that the Appellant would be entitled to tax on the Respondent's income. The High Court cited with approval the decision in the case of **Usher's Wiltshire Brewery Limited and Bruce (1915) A.C. 433** on computation of gains. It held that the balance of profits or gains of trade is struck by settling against the receipts of all expenditure incidental to trade which is necessary to earn them, and by applying, in computation, the ordinary principles of commercial trading. The 2nd Petitioners refereed to the decision in **Katiba Institute & Another vs Attorney General & another [2017] eKLR**.

129. It was submitted that it is a well settled principle of law that when the literal construction of a statute or a statutory provision results in an anomaly or absurdity, the courts must seek to find out the underlying intention of the legislature and in the said pursuit, can within permissible limits strain the language to avoid such unintended mischief. The 2nd Petitioners submitted that albeit the purpose of Section 12D of the ***Income Tax Act*** is to expand the tax base, a tax that applies on gross turnover rather than gains or profits, not only causes a contradiction between Section 3 (2) as read together with section 15(1), (2), (4) & (5) and Section 16 of the ***Income Tax Act*** but also creates an ambiguity as to what income tax is charged upon. The intention of the ***Income Tax Act*** is clear, to charge tax on gains and profits.

130. According to the 2nd Petitioners, the 2nd Respondent in comparing Minimum Tax to withholding tax is either misguided or deliberately misleading this Court. This is because, withholding tax, despite being charged on gross revenue in most cases is not a final tax. Withholding tax applies on incomes such as management, consultancy or professional fees, royalties and interest amongst other incomes. However, withholding tax is a final tax where it is paid to non-resident persons or in respect of dividends paid to resident persons, because the dividends are paid out of taxed profits. For payments such as management and consultancy fees,

royalties and interest paid to Kenyan resident persons, withholding tax is an advance tax payment and is credited/offset against such a taxpayer's income tax liability. Withholding tax is intended as a tax collection mechanism intended to boost the government's revenue collection.

131. There are two parties in relation to withholding tax- the withholder who is the one paying the income (the payer) (i.e. paying management or consultancy fees or income or royalties) and the withholdee who is the recipient of the income (the payee). The payer will be required to withhold a percentage of the income payable to the payee and remit the withheld amount to KRA on account of the payee. The tax withheld, is not the payer's tax, but rather the payee's tax and that is why the payee is allowed to offset the withheld tax against its income tax liability. Once the payer withholds the tax, they should remit it to KRA which will issue a withholding tax certificate as evidence of payment of this advance tax. It was therefore submitted that the taxpayer's final income tax liability will be computed on their net revenue having deducted expenditure wholly and exclusively incurred in the generation of the income.

132. As regards the imposition of Minimum Tax on gross revenue on digital service tax, turnover tax and residential rental income tax which are all charged on gross income, the 2nd Petition submitted that these forms of tax cannot be compared to Minimum Tax since Minimum tax is an alternative

to business income tax (payable through instalment tax). It is for this reason that pursuant to section12 D of the ***Income Tax Act*** Minimum Tax applies where the instalment tax due is lower than the minimum tax due. This can be contrasted to turnover tax and residential rental income tax, as section 12D of the ***Income Tax Act*** is clear that income subject to turnover tax and residential rental income tax is exempt from Minimum Tax. Similarly, income subject to digital services tax is also exempt from Minimum Tax. This means that Minimum Tax is not an alternative to turnover tax, residential rental income tax and digital services tax, and as such the tax principles applicable to these forms of tax, should not be the same principles applied to Minimum Tax.

133. Given that Minimum Tax is an alternative business income tax, it was submitted that the same principles that apply in computing the business income tax liability should apply in computing Minimum Tax. Business income tax chargeable on the gains or profits of a business having deducted allowable expenses as provided for under section 15(1) and (2) of the ***Income Tax Act***. Where a business, having deducted allowable expenses incurred wholly and exclusively in the generation of the income, ends up in a tax loss position, such a business will not be liable to pay business income tax since it has no gains or profits for which business income tax should be charged. Additionally, pursuant to section 15(4) of the ***Income Tax Act***,

such a business is allowed to carry forward the tax losses offset it against future profits.

134. As regards the contention by the 2nd Respondent that deductibility of allowable expenditure as provided for under section 15(1) and (2) of the ***Income Tax Act*** is limited to corporate income tax liability applicable at the rate of 30% or 37.5%, the 2nd Petitioners submitted that the 2nd Respondent is either misguided or deliberately misleading this Court. This is based on the fact that section 15 (1) and (2) is not limited corporate entities but rather applies to all persons generating business income. Section 15 (1) provides that, for the purpose of ascertaining, the total income of a person for a year of income there shall, subject to section 16, be deducted all expenditure wholly and exclusively incurred by that person in the production of that income. According to the said Petitioners, the fact that business income tax does not apply to corporate entities only is acknowledged by the 2nd Respondent even on its website where in discussing instalment tax provide that, *instalment tax is estimated income tax paid to KRA periodically in anticipation of the tax payable for a year of income**. It is payable by every person subject*** *to tax (individuals and non-individuals).*

135. While pointing out what they termed as other ambiguities/ uncertainties, the 2nd Petitioners submitted that an ambiguity arises as to how on one

hand taxpayers in a tax loss position will not be liable to pay business income tax since they have no taxable income and on one the other hand be expected to pay minimum tax at the rate of 1% on gross turnover. Therefore, imposing minimum tax on taxpayers in a tax loss position due to deducting allowable investment allowances or allowable expenses would be contradictory to the provisions of paragraph 1 of the Second Schedule to the ***Income Tax Act*** and section 15 (4) of the ***Income Tax Act***. According to the said Petitioners, if the intention of the legislators of the ***Income Tax Act*** was to do away with the investment allowances, nothing would have been easier than to amend the ***Income Tax Act*** and delete paragraph 1 of the Second Schedule to the ***Income Tax Act***. To the Petitioners, this inconsistency demonstrates that Section 12D cannot be salvaged from vitiation. Further, they submitted that if the legislators intended to subject taxpayers to tax without allowing such taxpayers to deduct expenses wholly and exclusively incurred in generation of that income, nothing would have been easier than amending section 15(1) and (2) of the ***Income Tax Act***, to do away with the system of allowing taxpayers to deduct expenses wholly and exclusively incurred in the generation of income in computing their taxable income. In addition, it was submitted that if the legislators intended to do away with the system of allowing persons in a tax loss position to carry forward the tax losses incurred in a current year and offset the tax

losses against future tax profits made in subsequent years, nothing would have been easier than amending section 15(4) and (5) the ***Income Tax Act*** accordingly. Since no such amendments were done, the 2nd Petitioners concluded that the legislators intended to allow taxpayers to deduct expenses wholly and exclusively incurred in the generation of income in computing their taxable income, and not to tax their gross revenue; and forward the tax losses and offset the tax losses against future tax profits.

136. 2nd Petitioners asserted that since the Impugned Amendment is contradictory to Sections 15 (1) (2) and (4) of the ***Income Tax Act*** and paragraph 1 of the Second Schedule to the ***Income Tax Act*** and vague as to its application in the context of persons in a tax loss position, this Court should declare it unconstitutional for lack of legal certainty.

137. Since one of the rationales for the Minimum Tax as disclosed by the 2nd Respondent is to bring on board companies who earn income from Kenya but end up declaring losses perpetually to avoid paying corporate taxes, the 2nd Petitioners opined that this illustrates the punitive nature of the Impugned Amendment on other taxpayers merely for the sins of a few taxpayers. To them, compliant taxpayers should not suffer at the hands of the 2nd Respondent as it administers tax laws and, in a bid, to ensure such corporations meet their tax obligations. In their view, though the Impugned Amendment was enacted with a good intention of enforcement, it ended up

causing unacceptable confusion and ambiguity, hence it is void for want of legal certainty. In R vs. Demers, the Canadian Supreme Court adopted the view that if the state in pursuing a legitimate objective uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason.

138. It was urged that interpretation is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument or contract having regard to the context provided by reading the particular provision or provisions considering the document as a whole and in the circumstances attendant upon its coming into existence. Simply put interpretation is the process by which Courts interpret and apply legislation. It was submitted based on **Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd., 1987 SCR (2) 1** that in interpreting statute the court looks at both the text and context of the Statute to ascertain the true legislative intent.

139. According to the 2nd Petitioners, the principles to be kept in mind when construing the effect of a non obstante clause is set out in the decision of the Supreme Court in **Dominion of India vs. Shrinbai [A.I.R. 1954 S.C. 596]** and that while construing section 12D read together with Section 34 (n) of the ***Income Tax Act***, the court must first consider whether the

operative clause without the non obstante clause is clear and unequivocal and if so, what is the meaning of that operative clause. The operative clause in this case can only have one meaning that is, Minimum Tax is charged on gross revenue. The 2nd Petitioners submitted that it would be erroneous for this Court to consider the Impugned Amendment in isolation to the rest of the provisions of the ***Income Tax Act*** when determining its constitutionality or otherwise, more so when the non obstante clause does not refer to any particular provisions it intends to override but refers to the provisions of the ***Income Tax Act***. In this regard the 2nd Petitioners relied on the decision of the Supreme Court of India in the case of **Indra Kumar Patodia & Another vs Reliance Industries Limited and Others** and was submitted that since the Impugned Amendment clearly provides that a tax subject to certain exemptions shall be paid, a tax cannot be paid under the ***Income Tax Act*** without considering other provisions of the ***Income Tax Act***. Section 3 of the ***Income Tax Act*** brings to tax income which is accrued in or derived from Kenya. This therefore means that for any amount to be taxable as income under the provisions of the ***Income Tax Act***, they must fall under Section 3 of the ***Income Tax Act*** which is the charging section.

140. The Court was urged to be guided by the holding in the case of **Republic vs Commissioner of Domestic Taxes exparte Barclays Bank of**

**Kenya [2018] eKLR** where **Cape Brandy Syndicate vs Inland Revenue Commissioners [1920]** was applied and the 2nd Petitioners posed how a taxpayer can be expected to tax based on gross turnover when there is the charging section of the governing Act which has not been repealed and is good law that states tax will be charged based on profit which would be arrived at once the tax payer deducts all expenses.

141. The Court was urged to find that there exists a disconnect in the interpretation and application of the Impugned Amendment and to declare the Section 12D of the ***Income Tax Act*** as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is unlawful, unconstitutional and contravenes the provisions of Article 10, for being contradictory, vague, and inconsistent with the provisions of Section 3 as read together with Section 15 of the ***Income Tax Act*** and paragraph 1 of the Second Schedule to the ***Income Tax Act***.

142. While reiterating that the implication of the Impugned Amendment is that the 2nd Respondent can arbitrarily deprive the 2nd Petitioners and the public of the property contrary to Article 40 of the Constitution, the 2nd Petitioners relied on ***Black's Law Dictionary***, 11th Edition, **Elizabeth Wambui Githinji & 29 Others vs. Kenya Urban Roads Authority & 4 Others [2019] eKLR**, in which the decision of the Supreme Court in

**Rutongot Farm Ltd vs Kenya Forest Service & 3 Others** was cited with approval.

143. It their view, The Impugned Amendment infringes on the right to property as the Government is taking property from the owner for public use or benefit. It is for this reason that the fundamental principle of income tax as set out in sections 3 (1) and (2) and sections 15(1) and (2) of the ***Income Tax Act*** provides that income tax can only be charged on gains and profits having deducted expenditure wholly and exclusively incurred in the production of that income. In other words, under the ***Income Tax Act*** taxes should never be subjected to a person's capital and in addition, taxpayers should be provided with an opportunity to deduct their expenditure before the gains can be subjected to tax. Therefore, section 12D of the ***Income Tax Act***, in the said Petitioners' view, infringes Article 40 of the Constitution in the following ways:

***a)*** Minimum Tax is taxed on a person's gross turnover without allowing such businesses to deduct the expenses incurred in generating the income. This means a taxpayer is forced to satisfy the payment of Minimum Tax, even though he has not received profits in a financial year. To satisfy this obligation the taxpayer must have part or all the source generating income/capital, which implies, in any amount, the

dispossession of capital. This constitutes a disguised confiscation of property/ capital.

***b)*** This situation implies a violation of the principle of tax equity, specifically to the sub-principles of economic capacity, tax progressivity and prohibition of confiscation, the latter in relation to property rights.

***c)*** The right to property is a vertical projection of the principle of economic capacity. In this respect, the percentage of the income of the taxpayers that can be legitimately affected by a tax must not be excessive than the wealth objectively available. The gross turnover to which the Minimum Tax applies (1%), does not consider in any way the costs of production invested or the operation expenses made to generate the income. This tax is to be calculated, without deducting expenditure wholly and exclusively incurred in production of the income and the conservation of its source. The payment of Minimum Tax is unconstitutional since the payment of said tax must be assumed although there is no wealth available to defray public expenses.

***d)*** Regarding the principle of contributory capacity and therefore equitable, even though the gross income perception reflects the existence of quantifiable values of a pecuniary nature, this does not mean the existence of contributory capacity, since the taxpayer does

not have the possibility of deducting from the gross income, costs, expenses, and other expenditures necessary to adjust the tax burden to the actual conditions of the taxable ability of the taxpayer. Taxes should only tax the wealth.

***e)*** The principle of contributory capacity requires not to confuse the generic object of the tax, which in the case of Minimum Tax is to tax the gross revenue at 1%, with the taxable capacity subject to the tax, which is a result of subtracting from the gross income the costs and expenses necessary for the generation of income and deductions allowed by tax law.

***f)*** Further, the principle of contributory capacity requires that a taxpayer's contribution to cover the public expenses increases as the taxpayer's available wealth increases. An example is the PAYE system in Kenya. Payment of Minimum Tax collides with the principle constitutional progressivity, since it is highly regressive, as it imposes a greater tax burden on taxpayers with low net profit margins. Taxpayers with lower net income will pay a proportionally higher tax than those who receive a higher net profit.

***g)*** Even where a taxpayer has realised a gain or profit (net profit having deducted allowable expenses under section 15 of the ***Income Tax Act***), if that profit is equivalent to 1% or less of the person's gross

turnover, imposition of minimum tax will result in a situation where the minimum tax payable is equivalent to 100% or more of their gain or profit.

***h)*** The Petitioners aver that tax losses and the benefit of forwarding the losses enjoyed by companies are a form of property for such companies. Section 12D of the ***Income Tax Act*** does not provide a framework on how a taxpayer can enjoy its tax losses whilst still paying minimum tax and in so doing, arbitrarily depriving such taxpayers off their property in tax losses.

144. Regarding violation of Article 27 of the Constitution, it was submitted that equality at its core, communicates the idea that people who are similarly situated in relevant ways should be treated similarly. According to the 2nd Petitioners, at the genesis of prohibition of unfair discrimination lies in the recognition that the purpose of our constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of groups or status. They relied on the case of **Pevans East Africa Limited vs. Betting Control and Licensing Board & 2 others**; **Safaricom Limited & Another (Interested Parties) [2019] eKLR**, and **Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General [2011] eKLR**, and submitted that the implementation

of the Minimum Tax is discriminatory since it excludes from its application, OMCs and persons engaged in the insurance business and airlines in which the Government of Kenya owns at 45% of its shares. In the said Petitioner's view, the exemption of Kenya Airways from the application of section 12D of the ***Income Tax Act*** is contradictory to the very purpose of imposing minimum tax as contained in the 2nd Respondent's Replying Affidavit, which is to ensure that loss making companies also contribute towards national revenue. It therefore follows that the exclusion of OMCs and Kenya Airways from the application of minimum tax does not serve any legitimate purpose and in accordance with the ***Pevans Case*** (Supra) and the ***Centre of Rights Education Case*** (Supra), Section 12D of the ***Income Tax Act*** is void for unfair discrimination contrary to the provisions of Article 27 of the Constitution.

145. It was further submitted that Section 12D of the ***Income Tax Act*** does not make a provision for the exclusion of businesses with lower profit margins such as those in the manufacture, sale and distribution of consumer goods as well as companies whose net profit is less is 3.33% or less of their gross turnover as the application of minimum tax results in taxation of their net profit at the rate of 100% or more as opposed to 30%. This effectively results in subjecting companies with low profit margins to a separate and punitive tax regime. Such companies have legitimate reasons

of why they should be excluded from the application of minimum tax and not excluding such companies amounts to an unfair discrimination.

146. The 2nd Petitioners contended that imposition of the minimum tax on a select number of persons to the exclusion of others amounts to unfair tax burden contrary to Article 201(b)(i) of the Constitution which provides that the burden of taxation shall be shared fairly. Reference was made to **Kenya Flower Council vs. Meru County Government [2019] eKLR**, and the **Law Society of Kenya (supra)**, and it was submitted that imposition of minimum tax as provided for in section 12D of the ***Income Tax Act*** imposes an unfair tax burden on taxpayer's contrary to Article 201(b)(i) of the ***Income Tax Act*** as demonstrated in the Petition.

147. On the issue whether the minimum tax guidelines have force of law, it was submitted that the 2nd Respondent in making and formulating the Guidelines gave no consideration to the rights and fundamental freedoms of the 2nd Petitioners and Kenyan taxpayers at large as guaranteed by the Constitution of Kenya, 2010. In this regard reference was made to Article 10(2) of the said Constitution and Section 2 of the ***Statutory Instruments Act, 2013*** which provides for the steps and procedures to be followed before enactment of a Statutory Instrument at Sections 5, 6,7, 8, 9 & 11 which in the case of the 2nd Respondent were violated and not followed. According to the said Petitioners, Section 5 of the ***Statutory***

***Instruments Act*** provides for *Consultation before making Statutory Instruments*. This is further sanitized under Article 10 (2)(a) of the Constitution of Kenya, 2010 which provides for Participation of the people as one of the national values and principles of governance. The 2nd Petitioners submitted that the requirement of stakeholder participation is a constitutional imperative at all levels of law-making including issuance of Guidelines as the 2nd Respondent herein purports to have done. The 2nd Respondent has gone to great lengths to show this Court the importance of the Guidelines it circulated to assist taxpayers understand the Impugned Amendment but there is not a single record of any consultative meetings having been conducted prior to issuance of the said Guidelines in complete violation of Section 5 of the Statutory Instruments Act. The 2nd Petitioners sought to rely on **Keroche Breweries Limited & 6 Others v Attorney General & 10 Others [2016] eKLR** and **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 Others v Cabinet Secretary For Transport & Infrastructure & 5 Others JR. No.2 of 2014; [2014] eKLR**. and reiterated that the failure by the 2nd Respondent to comply with the mandatory provisions of the ***Statutory Instruments Act, 2013*** in making of the Guidelines renders the Guidelines invalid since Section 11(4) of the ***Statutory Instruments***

***Act*** provides for the consequences for the failure to lay the instrument before the National Assembly within the stipulated period which is that the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.

148. According to the said Petitioners, the Statutory Instruments Act requires: - (a) Consultation with stakeholders, (b) preparation of regulatory Impact Statement, (c) preparation of explanation memorandum (d) tabling of statutory instrument in the House, (e) consideration of the statutory instrument by the National Assembly. Section 13 of the Statutory Instruments Act provides for guidelines for the relevant Parliamentary committee while examining the instrument. These guidelines focus on the principles of good governance and the Rule of Law. The Committee considers whether the Statutory Instrument conforms with the Constitution; the parent Act or other written laws; whether it infringes the Bill of Rights or contains a matter that ought to be dealt with by an act of Parliament, and whether it contains taxation; directly or indirectly bars the jurisdiction of the Courts; gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power; involves expenditure from the Consolidated Fund or other public revenues; is defective in its drafting or for any reason the form or

purport of the statutory instrument calls for any elucidation; appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; appears to have had unjustifiable delay in its publication or laying before Parliament; makes rights liberties or obligations unduly dependent upon non-reviewable decisions; makes rights liberties or obligations unduly dependent insufficiently defined administrative powers; inappropriately delegates legislative powers; imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation; appears for any reason to infringe on the rule of law; inadequately subjects the exercise of legislative power to parliamentary scrutiny; and accords to any other reason that the Committee considers fit to examine.

149. It was submitted that in view of the nature of section 12D introducing and imposing a new tax and further bearing in mind the criteria set out in Section 13 of the ***Statutory Instruments Act***, it was a constitutional and statutory imperative that sufficient public participation be undertaken prior to implementation of the Guidelines and secondly it was a legal imperative that it be presented to Parliament as the law demands and that such Regulations or policy guidelines must conform to the Constitution and the statute in terms of both their content and the way they are adopted. Failure to comply with manner and form requirements in enacting Regulations or

policy guidelines renders the same invalid and courts have the power to declare such Regulations or policy guidelines invalid. They relied on the case of **Okiya Omtatah Okoiti v Communications Authority of Kenya & 8 others [2018] eKLR**.

150. As regards the comparative analysis of the application of minimum tax in other jurisdictions, it was submitted that the jurisdictions cited by the 2nd Respondent have a different set of economic and legislative environment from that of Kenya. Furthermore, the administration of minimum tax in the said jurisdictions is arguably just and fair as compared to the proposed punitive nature of the Impugned Amendment. The 2nd Petitioners contended that they are not disputing payment of minimum tax but the constitutionality of the same, specifically Section 12D of the ***Income Tax Act*** and the Guidelines and that the issue before this court is whether Section 12D of the ***Income Tax Act*** is within the confines of the Constitution and not what other countries are doing or have done insofar as administration of minimum tax is concerned.

151. Therefore, in determining the constitutionality of section 12D of the ***Income Tax Act***, this Court should consider the object and purpose of ***Income Tax Act*** and the Constitution to the exclusion of any other extraneous factors pertaining to administration of minimum tax in other jurisdictions.

152. In response to the contention that the said Guidelines were a public ruling, it was submitted that the same ought to be struck out as it does not meet the minimum requirements for a public ruling pursuant to section 63(1) and (2) of the TPA, which provides that:

> ***(1) The Commissioner shall make a public ruling by publishing a notice of the public ruling in at least two newspapers with a nationwide circulation.***
>
> ***(2) A public ruling shall state that it is a public ruling and have a heading specifying the subject matter of the ruling and an identification number.***

153. According to the 2nd Petitioners, the 2nd Respondent has not adduced any iota of evidence that the Guideline, as amended in March 2021, was circulated in at least two at least two newspapers with a nationwide circulation. Additionally, the Guideline, on the face of it neither states that it is a public ruling nor contains an identification number.

154. On the challenge to the Guideline not having been included in the Petition, it was submitted that the 2nd Petitioners Petition at Paragraph 70 specifically pleaded on the Guidelines and under prayer (g) of the Petition are requesting this Honourable Court to grant '*Any other remedy or such other orders as this Honourable Court may deem just and expedient in the circumstances to remedy the violation of the Petitioners fundamental constitutional rights and freedoms.*' Any other remedy according to tem means that this Court can grant include a declaration that the Guidelines

are unconstitutional. This submission was based on the decision of **Mwita J.** in **Kenya Hotel Properties Limited vs. Attorney General & 5 others (2018) eKLR** and the Constitutional Court of South Africa case of **Fose vs. Minister of Safety and Security 1997(3) SA786 (CC) (7) BCLR 851 CC.**

155. To the 2nd Petitioners, this is a ripe case for the grant of appropriate remedies by this Honourable Court to grant redress to the Petitioners and the general populace by declaring the Guidelines illegal, null and void.

156. It was the 2nd Petitioners' case that they have proved that the Impunged Amendment violates the provisions of the Constitution of Kenya, 2010 and is therefore unlawful, unconstitutional and null and *void ab intio*. That urged the Court to be guided by what the Court stated in **Tinyefunza vs Attorney General of Uganda** [1997] UGCC 3 that *"If a Petitioner succeeds in establishing breach of a fundamental right, he is entitled to relief in exercise of Constitutional jurisdiction as a matter of course"* and prayed that the Court enters Judgment in favour of the Petitioners and allow the Petition in its entirety.

157. It was therefore sought that:

***a) This Honourable Court be pleased to hold and declare that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is unlawful, unconstitutional and contravenes the provisions of Article 10, for being contradictory, vague, and***

***inconsistent with the provisions of Section 3 as read together with Section 15 of the Income Tax Act and paragraph 1 of the Second Schedule to the Income Tax Act.***

***b) This Honourable Court be pleased to hold and declare that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is unlawful, unconstitutional and contravenes the provisions of Article 40 (1) (a) and (2) (a) and Article 201(b)(i) of the Constitution of Kenya, 2010.***

***c) This Honourable Court be pleased to hold and declare that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is unlawful, unconstitutional and contravenes the provisions of Article 27 due to is discriminatory nature.***

***d) This Honourable Court be pleased to hold and declare that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is unlawful, unconstitutional and contravenes the provisions of Article 201(b)(i) as it imposes an unfair tax burden on the taxpayers.***

***e) An order restraining the Kenya Revenue Authority from commencing, instituting, or proceeding with any enforcement action against taxpayers and specifically, the Petitioners in relation to and/or on account of their failure to file returns on and/or pay taxes charged under Section 12D of the Income Tax Act.***

***f) The costs consequent upon this Petition be provided for.***

***g) Any other remedy or such other orders as this Honourable Court may deem just and expedient in the circumstances to remedy the***

***violation of the Petitioners fundamental constitutional rights and freedoms.***

## Third Interested Party's Case

158. The 3rd Interested Party supported the petitions. According to him, before the enactment of the impugned provision, members of the public were asked to present their proposals to the National Assembly through a public notice sent out by Parliament in what was believed to be an exercise of Public Participation. The general public did respond by presenting their views by way of memoranda and the submissions were made by among others, Kenya Association of Manufacturers, Kenya Bankers Association, Kenya National Chambers of Commerce and Industry Institute of Certified Public Accountants (I.C.P.A.K), CPA Robert Kamwara, Anjarwalla & Khanna LLP. However, despite raising the grave concerns with regards to the impugned provision, Parliament never considered the representations made to it pursuant to the principle of Public Participation which concerns generally include the fact that the minimum tax as envisaged in the impugned provision disregards that profit is a factor of revenue less expenses incurred and in that manner of disregard, the impugned provision leads to unfairness when one has more expenses and is taxed based on turnover.

159. According to him, the introduction of minimum tax legislation was misconceived and poorly researched, and instead ends up punishing low gross margin making organizations.

160. It was submitted that the 2nd Respondent has heavily invested in the i-tax system which is capable of auditing, investigating and monitoring tax-payer activities and single out genuine loss making organizations from tax evaders and should not generalizeits inefficiencies punishing investors.

161. To the 3rd interested party, the impugned provision is a marked departure from International Best Practice Guidelines such as the Organization for Economic Cooperation and Development (OECD's) and the African Tax Administration Forum (ATAF's) alternative views on minimum taxation among member states and that in any case, various jurisdictions that have adopted the minimum tax haveended up abandoning the model of taxation captured in the impugned provision after implementation of the same with a short period and that in any case the minimum tax rate is higher compared to other countries such as Nigeria, Tanzania all at 0.5%.and contrary to rules of fairness in tax administration management.

162. According to him, the impugned provision creates inconsistency with existing sections and schedules of the ***Income Tax Act*** such as sections 3, 15 (1) as brought out by the Petitioners and the 3rd Schedule 5(f) on Withholding Taxes deducted at source for management, professionals and

contractual fees paid. He lamented that the minimum tax is final tax and is not available for utilization against future corporate tax liabilities, endangering business in a perfect competition market where the tax cannot be transferred to consumers creating unfair competition with imported goods.

163. In his submissions the 3rd interested party raised similar issued to those of the petitioners and as regards the jurisdiction, he relied on Article 165(3) of the Constitution and the decision in **Hon. Kanini Kega –v- Okoa Kenya Movement & 6 Others HCCP No. 427 of 2014** and it was submitted that it is the proper constitutional authority of the judiciary to police our democratic project by ensuring that the Constitution is not violated based on the holding in the case of **Law Society of Kenya v Attorney General & another [2016] eKLR; Nairobi Constitutional Petition No. 3 of 2016.**

**1st Respondent's Case**

164. The petitions were opposed by the 1st Respondent, **The National Assembly**. According to the 1st Respondent, the issues raised in the petition relate to the ***Finance Act, 2020*** and the ***Tax Laws (Amendment) (No. 2) Act, 2020*** which introduced amendments to the ***Income Tax Act***, Chapter 470 including the introduction of Section12D that introduces a minimum tax chargeable at the rate of 1% of the gross

turnover of an Individual and businesses. The impugned provision provides as below stated:

> ***"12D. (1) Notwithstanding any other provision of this Act, a tax to be known as minimum tax shall be payable by a person if—***
>
> ***(a) that person's income is not exempt under this Act;***
>
> ***(b)that person's income is not chargeable to tax under sections 5, 6A, 12C, the Eighth or the Ninth Schedules; or***
>
> ***(c) the instalment tax payable by that person under section 12 is lower than the minimum tax;***
>
> ***(d) that person is not engaged in business whose retail price is controlled by the Government;***
>
> ***(e) that person is not engaged in insurance business;***
>
> ***(2) The tax payable under this section shall be paid in instalments which shall be due on the twentieth day of each period ending on the fourth, sixth, ninth and twelfth month of the year of income".***

165. ***The Finance Act, 2020*** further introduced the charging rate of the minimum tax as provided in Section 34(1) of the ***Income Tax Act*** as follows:-

> ***"34. (1) Subject to this section—***
>
> ***(n) tax upon the gross turnover of a person whose income is chargeable to tax under section 12D shall be charged at the rate specified in the Third Schedule".***

166. The third schedule to the ***Income Tax Act*** Cap 470 was amended in Head B to provide as follows:

> ***"11. The rate of tax in respect of minimum tax under section 12D shall be one percent of the Gross Turnover".***

167. The Finance Act, 2020 stipulated that the impugned Tax provision introduced by Section 12D shall come into operation on the 1st of January, 2021.

168. Following the introduction of Section 12D to the ***Income Tax Act Cap 470***, the 2nd Respondent issued guidelines on minimum tax to guide on application of minimum tax and ensure compliance with the provisions of the Act.

> ***"A copy of the Guidelines on Minimum Tax appear at pages*** **[ ]** ***to*** **[ ]** ***of Exhibit MS – 1".***

169. According to the 1st Respondent, The Parliament of Kenya is established under Article 93 of the Constitution of Kenya as the legislative arm of government at the national level, and Parliament exercises its legislative powers through Bills passed by Parliament and assented to by the President in accordance with Article 109 of the Constitution and the Standing Orders of the Houses of Parliament. It was explained that Article 94 further provides that Parliament has a legislative role, expresses the diversity of the nation, represents the will of the people, and exercises their sovereignty. Therefore, Parliament derives its legislative authority from the people.

170. According to the 1st Respondent, the ***Income Tax Act*** is an Act of Parliament that allows the state to make statutory provisions on the raising of revenue by way of taxation as authorized under Article 209(1) of the Constitution which permits the National government to impose taxes while

Article 209(2) authorizes the national government to impose any other tax or duty through an Act of Parliament, except property rates and entertainment taxes.

171. It was therefore contended that the 1st Respondent has a constitutional right to enact, amend or repeal legislation regarding the imposition of tax. Pursuant to this power, the National Assembly enacted the ***Finance Act, 2020*** and the ***Tax Laws (Amendment) (No. 2) Act, 2020*** which introduced amendments to the ***Income Tax Act***, Chapter 470, including the introduction of Section12D. In the 1st Respondent's view, it is within the its authority to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is imposed, calculated and enforced. Consequently, the Petitioners cannot claim any violation of Constitutional provision in the introduction of the impugned amendment. It was asserted that Parliament can exercise their legislative will by enacting laws and amending existing laws as well as bills which are before the House.

172. It was explained that on 5th May 2020, the ***Finance Bill, 2020*** was published and read a first time on 6th May, 2020 and thereafter committed to the National Assembly Departmental Committee on Finance and National Planning to scrutinize and facilitate public participation by way of requesting for memoranda from the public. On Friday 8th May, 2020, an

advertisement was placed in the print media inviting members of the public to present any comments or views on the bill. Following the receipt of submissions and memoranda from the public, the Committee compiled its report proposing that the Bill be approved with the relevant amendments having considered the nature of the concerns raised by stakeholders which Report was laid before the National Assembly on 23rd June, 2020. The National Assembly considered the bill and passed the Finance Bill, 2020.

173. According to the 1st Respondent, the procedure highlighted herein above goes to evidence that the process of enactment of the ***Finance Act 2020*** was procedural and constitutional. On this very point, the constitutionality of the enactment procedure cannot be disputed. Furthermore, it is evidenced from the deliberations of the National Assembly, through the Departmental Committee on Finance and National Planning, that the views and concerns of the public on the impugned provision were noted and responded to.

174. According to the 1st Respondent, public participation does not necessarily mean that the views given by an individual must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the appropriateness of the amendment.

175. In determining the constitutionality of an Act of parliament, the Court was urged to look at the purpose and effect of the impugned statute. If the

purpose and/or effect do not infringe on a right guaranteed by the Constitution, the statute should be deemed as being constitutional. It was averred that in exercising its power under Articles 94 (1), 109 and 210 (1) of the Constitution, the 1st Respondent, in every year enacts the ***Finance Act*** to provide sanction measures and impose taxes to raise national revenue. The said Act, it was averred, is a crucial piece of legislation that impacts on the entire budget of a particular year and if it is interfered with, the operations of government will be affected due to the deficit in expenditure that is required to service development programs. According to the 1st Respondent, the objective, purpose and effect of the impugned amendment to the ***Income Tax Act*** are imposed to increase the revenues collected by the state, and consequently aid in meeting the obligations of the national government in recurrent and development expenditure.

176. It was contended that the introduction of minimum tax is aimed at levelling the operating playfield for business enterprises by ensuring that all persons contribute towards the government's efforts to mobilize resources for growth and development. The Impugned provision therefore sought to introduce a minimum tax at the rate of 1% of gross turnover and Section 12D(1)(c) further provides that the tax shall be payable if the instalment tax payable by that person under section 12 is lower than the minimum tax. Furthermore, it was averred, the Government introduced a minimum tax to

enable the contribution of more businesses towards the provision of funds for the development programs of the state without imposing an unfair and unattainable tax burden.

177. It was the 1st Respondent's case that the Petitioners have not rebutted this presumption of constitutionality of a statute. According to it, since the introduction and imposition of any tax obligation is a policy decision within the mandate of the Government and enacted by Parliament, the 1st Respondent enjoys discretion to introduce amendments through the statute that they deem to be most appropriate in enhancing compliance to the law. To this end, it is within the authority of the National Assembly to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is imposed, calculated and enforced hence the 1st Respondent acted within their constitutional mandate by introducing the impugned provision within the ***Income Tax Act, Cap 470***.

178. In the 1st Respondent's view, Section 3 of the ***Income Tax Act*** specifically addresses the charging of income taxes relating to the income of a business by indicating the types of incomes in which tax shall be charged while Section 15 provides for the ascertainment of total income from which deductions are allowed. It was disclosed that the tax introduced under section 12D seeks to impose a tax separate from the income tax to be known

as the minimum tax which has clearly and without any ambiguity been defined. Contrary to the Petitioner's averment the 1st Respondent's position was that the impugned minimum Tax is not in contradiction with the provisions on income tax. On the contrary, a keen reading of the provisions shall show that the enforcement and implementation of the two taxes are mutually exclusive and depend on each other, whereby, the minimum tax is enforceable in the instance where the instalment tax payable is lower than the minimum tax. The guidelines generated by the 2nd Respondent further clarify the manner in which the minimum tax is to be paid.

179. It was contended that the introduction of the impugned provision in the ***Income Tax Act*** was in line with the intention of the Act which is to ensure that businesses contribute to the generation of revenue through taxes. Being that the ***Income Tax Act*** serves as the main legislation giving direction on the manner in which businesses shall pay taxes, the provision of the minimum tax in the Act serves to enhance the achievement of the purpose and objective of the Act.

180. According to the 1st Respondent, the Petitioners' contention that the National Government does not have power to introduce a minimum tax as it does not fall within the category of taxes imposable under Article 209(1) of the Constitution ignored the provision of Article 209(2) which authorizes the imposition of any other taxes or duty through an Act of Parliament and

that the 1st Respondent has exercised its authority under Article 209(2) by introducing the Minimum Tax. To the 1st Respondent, the provisions of section 3 and section 15 in no way limit the scope of taxes that legislators can introduce through the ***Income Tax Act***. Introduction of any other taxes through the Act, to the extent that the said taxes relate to promoting maximum compliance of all businesses in paying taxes is legal and appropriate within the context of the Act.

181. It was the 1st Respondent's position that the Petitioners have erroneously assumed that the provision of section 12D on the minimum tax is to be interpreted and implemented in a similar manner as the provision of Section 3 and other related income tax provisions of the Act. Furthermore, the Act clearly stipulates that the minimum tax shall be charged on the gross turnover of a business, thereby clarifying that the minimum tax is payable where the instalment tax payable is lower than the minimum tax.

182. To the 1st Respondent, the validity of an Act or its provisions should not be discredited simply on grounds that challenges may arise in the implementation process. It is grossly unreasonable to cast doubt on the appropriateness and validity of a law solely based on assumptions of challenges that may very well not exist upon the implementation of the law. This court should therefore refrain from discrediting the impugned provisions pre-maturely.

183. It was averred that the 2nd Respondent is empowered under the ***Kenya Revenue Authority Act*** Cap. 469 as an agency of the Government for the collection and receipt of all revenue and that Section 5 of the Act provides that the 2nd Respondent has a function of the administration and enforcement of all written laws relating to the assessment, collection and accounting of all revenues. Section 5(2)(b) of the Act further provides that the 2nd Respondent has a function of advising the Government on all matters relating to the administration of, and the collection of revenue under the written laws. To this end, it was averred that the 2nd Respondent has established the *Guidelines on Minimum Tax* which further clarify the provisions on minimum tax introduced in the Act and that the Petitioners have failed to consider the guidelines as a guide to promoting the understanding of the intention and purpose of the minimum tax. It was therefore averred that contrary to the averments made by the Petitioners, the 2nd Respondent has acted within its statutory authority in further clarifying the manner in which instalments shall be paid. Furthermore, the guidelines in no way contradict the provisions of the ***Income Tax Act*** and simply serve to ensure their effective implementation and enforcement.

184. The guidelines provide clarity as to the intended implementation of the imposed tax. Therefore, the guidelines on the instalment dates serve to clarify when the tax obligations of various businesses are due.

185. In response to the averments made in paragraph 18 and 27, it is shown to me by the advocate on record for the 1st Respondent, the provisions of clause 7.3 of the Minimum Tax Guidelines. The Petitioners have blatantly ignored the clear guide given by the 2nd Respondent through the tax guidelines which provide clarity as to the operation of the impugned minimum tax.

186. As regards the role of the Senate and the alleged violation of Article 110(1)(c) as read with sub-article (4) and (5) of the Constitution, it was averred the Impugned provisions were introduced through the ***Finance Act, 2020*** which is not subject to consideration by the Senate because the passing of the Act falls exclusively within the mandate of the National Assembly on grounds that it was a Money Bill which is defined under Article 114 (3) of the Constitution to mean " a Bill other than a Bill specified in Article 218 that contains provisions dealing with;

***a. Taxes***

***b.*** *The imposition of charges on a public fund or the variation or repeal of any of those charges*

***c.*** *The appropriation, receipt, custody, investment or issue of public money;*

***d.*** *The raising or guaranteeing of any loan or its repayment; or*

***e.*** *Matters incidental to any of those matters*

***f.*** *In Clause 3 "tax" "public money" and "loan" do not include any tax, public money or loan raised by a county.*

187. **Article 109 (5)** of the Constitution further provides that a Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114 of the Constitution.

188. Therefore, the averments by the Petitioner that the input of the Senate was mandatory prior to the enactment of the impugned provisions are misconceived.

189. As regards the parliamentary debates, it was averred that Article 117 of the Constitution confers Parliamentary powers, privileges and immunities to Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members. As such, debates in Parliament cannot be used to impute motive. Therefore, any deliberations that may have occurred on the floor of the National Assembly enjoy immunity. The Court was therefore urged not to consider the averments made in that regard since they violate Article 117 of the Constitution.

190. It was however noted that the Petitioners falsely misrepresented the comments made by the **Hon. (Ms.) Gladys Wanga** as being her own. Contrary to the averments made by the petitioner, **Hon. (Ms.) Gladys**

**Wanga** only reported to the house a brief on the various comments received by the Committee from the public participation process and justified the amendments introduced by the ***Tax Laws (Amendment) No. 2) Bill, 2020***. The Honourable member did not present any personal views or opinions in opposition to the impugned amendment as alleged by the petitioner.

191. Contrary to the Petitioner's allegation that the tax imposes an unfair burden on them contrary to the provisions of Article 201(1)(b) of the Constitution, it was averred that the provision shall have the effect of cushioning businesses whose incomes have declined or are unable to meet their tax obligations within a financial year that would have been carried forward to the next financial year. In the 1st Respondent's view, while article 27(1) provides for equality, the same provisions do not prohibit differentiation or classification based on different requirements. What the Constitution requires is that any classification or differentiation based on prohibited grounds set out in Article 27 must bear a rational connection to a legitimate government purpose which they contended has been achieved by the provision of the amendment and the guidelines formulated by the 2nd Respondent.

192. It was therefore the 1st Respondent's position that the Petitioners have failed to provide evidence to prove the alleged contravention of the right to

property protected in Article 40 of the Constitution and have not shown how the provisions of the Act have imposed unfair discrimination.

193. In its view, taxes are a form of raising revenue sanctioned by the Constitution and the imposition of taxes does not deprive the Petitioners of the right to property provided under Article 40 of the Constitution and as such the Petitioners allegations that they have been deprived of their property by paying taxes has no basis in law. In this regard reliance was placed on the case of **Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) vs. Kenya Revenue Authority & 3 others [2014] eKLR**. It was urged that a danger arises from the Petitioners' argument that the minimum tax negatively impacts them. Since the payment of taxes is an obligation imposed on all businesses and individuals, if the Court were to uphold the Petitioners' arguments, it would open the flood gates since nearly all businesses and individuals would raise similar issues about taxation, fairness issues, double taxation, among others with possible abandonment of the need to pay taxes.

194. While appreciating that it is within the mandate of this Court to scrutinize the constitutionality or otherwise of any Act passed by Parliament, it was argued that the court's role is limited to ensuring that the statute does not violate the Constitution and this Court ought not to

consider the merits of the impugned sections of the ***Income Tax Act*** as that is the purview of the 1st Respondent herein. According to the 1st Respondent, in formulating the impugned sections, it considered the constitutional provisions and the quest to have the public interest of citizens protected.

195. According to the 1st Respondent, the petition is a threat to the doctrine of separation of powers and is an encroachment to the legislative mandate of Parliament. An order of the Court granting the Petitioner's prayer would be a negation of the doctrine of separation of powers and this would be an interference of Parliament's constitutional powers by the Judiciary.

**1st Respondent's Submissions**

196. While reiterating the foregoing, the 1st Respondent in its submissions cited the case of **Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 Others vs. Commissioner of Domestic Taxes & 2 others [2014] eKLR** and **Bidco Oil Refineries Limited vs. Attorney General & 3 Others [2013] eKLR** and submitted that it has a right to enact, amend or repeal legislation regarding the imposition of tax. Based on this power, the National Assembly enacted the ***Tax Laws (Amendment) (No. 2) Act, 2020*** which introduced amendments to the ***Income Tax Act, Chapter 470***, including the introduction of Section12D on minimum

tax. In its view, since an Act of Parliament may authorize the National Government to impose taxes and duties, the 1st Respondent has a right to enact, amend or repeal legislation regarding the imposition of tax. Based on this power, the National Assembly had the power to introduce amendments to the ***Income Tax Act***, Chapter 470, including the introduction of Section12D. It was submitted that the enactment of the ***Finance Act, 2020*** followed all procedural and substantive requirements of the law resulting in its enactment hence the ***Finance Act, 2020*** was passed in accordance with the Constitution and the National Assembly's Standing Orders and therefore, should be deemed as constitutional from the onset.

197. It was urged that when considering the constitutionality of an Act, one must bear in mind the rebuttable principle of presumption of Constitutionality of statutes which states that statutes should be presumed to be constitutional until the contrary is proved. In this regard the 1st Respondent relied on **Hambardda Dawakhana vs. Union of India Air (1960) AIR 554.**

198. Accordingly, it was submitted that in determining the constitutionality of an Act of Parliament, the Court should also look at the purpose and effect of the impugned statute. If the purpose and effect do not infringe on a right guaranteed by the Constitution, the statute should be deemed as being constitutional. Further, it was argued that the Court must also consider

whether the purpose and effect of implementing the statute or statutory provision would result into unconstitutionality. If the purpose and effect do not infringe on a right guaranteed by the Constitution, the statute should be deemed as being constitutional and reliance was placed on **Olum and Another vs. Attorney General [2002] 2 EA 508**, **R vs Big M Drug Mart Ltd. [1985] 1 S.C.R. 295** and **Institute of Social Accountability & another v National Assembly & 4 others (2015) eKLR.**

199. In this case it was submitted that during the process of deliberations on the impugned provision by the Committee, it was clarified that the introduction of the impugned provision was aimed at increasing the sources of revenue for the government to finance the national deficit and to be used in other government operations. The Impugned tax is also aimed at cushioning businesses during the Covid-19 Pandemic period by spreading the tax burden through the introduction of a minimum tax which is lower than the instalment tax due. Further, introduction of minimum tax served as a means of responding to a loophole in the system whereby various businesses have avoided the payment of taxes hence leading to loss making positions, enhancing equity in the taxation process by ensuring that loss reporting entities by contributing to the tax burden. Accordingly, the introduction of the minimum tax was necessitated by a gap in the law

which led to a number of businesses reporting perpetual losses even when they have made profits that would be subjected to taxation which led to their lack of contribution to the National revenue. It was therefore contended that the minimum tax therefore has the effect of ensuring that all businesses contribute to the National revenue by imposing a minimum tax in instances where a business is unable to meet their corporate tax responsibility.

200. It was therefore submitted that the Introduction of the impugned provision to the ***Income Tax Act*** was conducted constitutionally and well within the powers and mandate of the National Assembly.

201. As regards the question whether the impugned provision is unclear, uncertain, ambiguous and in violation of Article 10 of the Constitution, it was submitted that the provisions of Section 15 of the Act are not limiting in scope and do not affect the implementation of the provisions on minimum tax. In the 1st Respondent's submissions, Section 12D of the ***Income Tax Act*** has introduced the minimum tax as a tax chargeable on the gross turnover as an income of the business. The 1st Respondent further contended that in construing the meaning and interpretation of sections 3 and 15 of the ***Income Tax Act*** along with other provisions of the Act, the court ought to enable an interpretation of the words of the statute in a manner that enhances clarity. Furthermore, any ambiguity supposed by the

Petitioners should be interpreted in favour of promoting the performance of the obligations imposed by the law to the extent that they are constitutional and lawful. In this regard reliance was placed on **Ndyanabo vs. Attorney General [2001] E. A 495**, **Black-Clawson International Ltd vs. Papierwerke Waldhof-Aschaffenberg AG [1975] AC** and **Seaford Court Estates Ltd. vs. Asher, {1949} 2 All ER 155.**

202. Therefore, it was submitted, where it is evident that the purpose of an introduced amendment to the law is to enhance the compliance and enforcement of payment of taxes, the courts ought to set in motion the constructive task of enhancing the implementation of the intention of Parliament and the Court should do this from a consideration of the social conditions which gave rise to the law and the mischief which is to be remedied and reliance was placed on the case of **Engineers Board of Kenya vs. Jesse Waweru Wahome & Others Civil Appeal No. 240 of 2013**.

203. According to the 1st Respondent, the Courts have also laid down the importance of considering both text and context in interpreting statutes as was emphasized by the Supreme Court of India in **Reference Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd., 1987 SCR (2) 1**. Furthermore, the Court ought to take into

consideration that the introduction of any tax within a society has the effect of requiring some form of intervention in terms of administrative instruction and the conduct of public education and awareness to ensure the effective enforcement and implementation of the intention of a tax law. To this end, the 2nd Respondent has established the *Guidelines on Minimum Tax* which further clarify the application of the provisions of the Act on minimum tax. It was therefore submitted that a wholesome reading of the impugned section together with other provisions of the ***Income Tax Act*** and the Guidelines on Minimum Tax will show that the application of the minimum tax is clear and lacks ambiguity contrary to the Petitioners' averments.

204. As regards the contention that the impugned provision is in violation of Article 201(b)(i) and Article 27 of the Constitution, it was submitted that while article 27(1) provides for equality, the same provisions do not prohibit differentiation or classification based on different requirements of the law. What the Constitution requires is that any classification or differentiation must bear a rational connection to a legitimate government purpose. This has been achieved by the provision of the impugned sections. Furthermore, various sectors are subject to different tax regimes which ordinarily would not also apply to the Petitioners, thereby the Government has the power to generate policies and impose taxes as it deems practical

for the various industry players. In the 1st Respondent's view, selective methods of taxation may be used to address matters on equal distribution of the tax burden. For this proposition reliance was placed on the case of **EG & 7 Others vs. Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & Another (Amicus Curiae)** and **Federation of Women Lawyers Kenya (FIDA-K) & 5 Others vs. Attorney General & Another [2011] eKLR** and it was averred that the Petitioner has failed to provide evidence to prove the discrimination alleged and has not shown how the provisions of the Act have imposed unfair discrimination. On the contrary, the impugned provisions seek to enhance the public interest by increasing revenues available to the state in order to meet the needs of Kenyan citizens. The 1st Respondent also relied on the House of Lords case of **Partington vs. Attorney General (1869): - 4HL 100, 122**, **Scotch Whisky Association and others vs the Lord Advocate and another (2017) UKSC 76** and contended that since taxes are a form of raising revenue sanctioned by the Constitution, the mere imposition of taxes cannot be unconstitutional as the Constitution permits the national government to impose taxes as a means of raising revenue. The government may further impose various conditions and exemptions as it deems fit in the circumstances to ensure the efficient implementation of the law. In this regard it relied on the case of **Okiya Omtatah Okoiti vs.**

**Cabinet Secretary, National Treasury & 3 others [2018] eKLR** and **Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 Others [2018] eKLR** and asserted that the provisions of Article 186(4) of the Constitution which gives powers to Parliament to legislate on any matter for the Republic of Kenya. Further, the Court should discern the intention of the Legislators in raising revenue for the general public in accordance with the Constitution. The Petitioners therefore cannot appear to question the intention of the National Government and the Legislature in introducing a minimum tax to enhance contribution towards the country's revenue.

205. In its view, the application of the minimum tax has in no way discriminated against the Petitioners since the introduction of the tax has been necessitated by a gap in the law that has been considered through policy measures of the Government and the imposition of the minimum tax.

206. As to whether the impugned provision is in violation of Article 40 of the Constitution, it was submitted that the Petitioners have grossly misinterpreted the provisions on minimum tax and its application as espoused in the Act by deliberately ignoring the required guidelines provided by the 2nd respondent regarding the application of the minimum tax. According to the 1st Respondent, the imposition of the minimum tax

has clearly been instituted by dint of a constitutionally legislated law and in this regard it cited **George Lesaloi Selelo & Another vs. Commissioner General, KRA & 4 Others; Pevans EA Limited (t/a Sportpesa) & 3 others [2019] eKLR** and **Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) vs. Kenya Revenue Authority & 3 others [2014] eKLR** and submitted that the imposition of taxes does not deprive the Petitioners of the right to property provided under Article 40 or any other Article of the Constitution and as such the Petitioners' allegations that they have been discriminated against by paying taxes has no basis in law.

207. As to whether **the 1st Respondent is in violation of Article 110(1)(c) as read with Article 110(4) and (5) of the Constitution,** the Impugned provisions were introduced through the Finance Act, 2020 which is an Act of Parliament to make amendment to tax related laws required to finance the estimates of expenditure in the next financial year. The above is anchored by the provisions of Article 221 of the Constitution which provides for the procedure for the introduction and approval of the estimates of revenue and expenditure for the national government. This includes the introductions of any taxes through amendments to tax laws. Therefore, the enactment of the ***Finance Act*** is subject to the approval of

the National Assembly as part of the process of ensuring that the introduced amendments are in line with the national expenditure in the national budget.

208. According to the 1st respondent the ***Finance Act, 2020*** is not subject to consideration by the Senate because the passing of the Act falls exclusively within the mandate of the National Assembly on grounds that it was a Money Bill as defined by Article 114 (3) of the Constitution and that the Constitution strictly provides under Article 109(5) that a money Bill may be introduced only in the National Assembly in accordance with Article 114 of the Constitution by any member or committee of the relevant house of parliament. Therefore, the 1st Respondent submitted that the averments by the Petitioners that the lack of input from the Senate violates the Constitution and invalidates the impugned provisions are misconceived as the power to impose taxes falls squarely with the National Assembly.

209. This Court was therefore urged to find that this Petition lacks merits, it is frivolous, generally argumentative and an outright abuse of the court process and dismisses the Petition with costs to the 1st Respondent.

**2nd Respondent's Case**

210. In opposing the petitions, the 2nd Respondent, the Kenya Revenue Authority, relied on Section 5 of the ***Kenya Revenue Authority Act***, and Parts 1 and 2 thereof and contended that it should be allowed to

continue with the implementation provisions of the ***Income Tax Act*** with regard to minimum tax.

211. According to the 2nd Respondent, in Kenya, there are a significant number of entities which are in perpetual tax losses even when they are in trading profit and that tax losses are usually arrived at after taking into account the trading profit or loss and thereafter applying the allowable deductions and adding back the disallowable deductions as per the provisions of the ***Income Tax Act*** to establish the tax payable. It was averred that some of the entities have adopted schemes or structures that enable them to return tax losses in perpetuity hence they do not pay any taxes to the national kitty. In addition, the ***Income Tax Act*** contains a significant number of incentives for Taxpayers which are aimed at incentivising research, capital investments, or creation of employment in a particular sector with the ultimate objective of not only cushioning investors by reducing the costs of investments but also to allowing speedy returns on capital. It was averred that while some entities have employed mechanisms to ensure that they enjoy the environment created by the government to trade, they persistently post tax loss, to ensure they don't contribute to the national kitty. Similarly, while the returns to shareholders should also contribute to economic development, including increase in payment of taxes on income, for perpetual loss making entities, the returns are in the negative.

212. According to the 2nd Respondent, the Finance Bill, 2020 introduced Minimum Tax, which is chargeable at 1% aimed at:

   i. ***Raising revenue for government operations, this tax measure was to finance the deficit for 2020/21 FY by approximately Kes. 21 billion;***
   ii. ***Cushion businesses whose income declined due to COVID 19 pandemic by spreading the tax burden;***
   iii. ***Ensure that equity in taxation is met by expanding the tax base.***

213. It was further disclosed that the minimum tax was aimed at bringing on board companies who earn income from Kenya but end up declaring losses perpetually to avoid payment of corporate taxes yet they continue to enjoy the infrastructure facilities such as roads, which continue being serviced by the government from tax revenue. The minimum tax, according to the 2nd Respondent, ensures such entities contribute to the development of the infrastructure facilities at a bare minimum of 1% of their turnover.

214. It was disclosed that Section 15(4) of the ***Income Tax Act*** Cap. 470 allows companies to carry loss which are incurred in a particular year to the next years and the same is deducted when ascertaining the taxable profit for the next years. However, some corporate entities in Kenya have increasingly been taking advantage of this provision by declaring huge book profits and paying dividends to shareholders, meanwhile reflecting zero earnings for tax purposes. By way of examples, the 2nd Respondent

contended that the effect of this is that the tax burden is left to a few entities, resulting in the narrowing of the tax base and poor revenue performance.

215. Therefore to address the current problem, the 2nd Respondent's view was that there is need to bring such loss reporting entities under the tax net through the introduction of an alternative minimum tax that ensures that taxpayers pay at least the minimum tax and is designed to prevent Taxpayers from escaping their fair share of tax liability through tax planning, hence the introduction of Minimum tax would ensure that, despite being in a perpetual tax loss making position, such entities are able to contribute a minimum tax to the exchequer which aids in economy development.

216. It was disclosed that currently Tanzania, Nigeria, Cameroon, Ivory Coast, Madagascar, Austria, Taiwan, South Korea, India and USA are implementing the Minimum Tax as proposed in section 12D with a slight difference in the rates.

217. According to the 2nd Respondent, the Budget process that led to the publishing of the ***Finance Bill, 2020*** which introduced the minimum tax underwent a rigorous public participation process involving various stakeholders and members of the public who submitted their comments for consideration by the budget team. On 30th June, 2020, the National

Assembly passed the Finance Bill, 2020 and thereafter, the Bill was presented for Assent to H.E. the President 30th June, 2020 in accordance with the provisions of the Constitution and the National Assembly Standing Orders. According to the 2nd Respondent, the engagements on the Minimum tax law continued and further stakeholder engagements were conducted leading to the enactment of the ***Tax Law (Amendment) Act No. 22 of 2020*** which was published on 24th December, 2020. The Tax Law (Amendment) Act amended the minimum tax to the following extent;

i. ***There was however an inadvertent error in the drafting of the FinanceAct,2020 which stated that minimum tax was payable if the instalment tax payable by a person is higher than the minimum tax. This error was corrected to clarify that the higher of either instalment or minimum tax is payable; and***
ii. ***The provisions on minimum tax was also been amended to exclude persons engaged in businesses whose retail price is controlled by the government and persons engaged in insurance business from payment of minimum tax***

218. According to the 2nd Respondent, the exclusion of the above mentioned persons was necessitated by the realization that profitability of the entities whose retail prices is controlled by the government, is not within their control but that of the government who restrict the amounts they can charge for their products. It was disclosed that for insurance business, the same are taxed under section 19 of the ***Income Tax Act*** with is a non-obstante clause hence the taxing system for the insurance Companies is

different and ring and that subjecting them to minimum tax would not yield the desired result hence the exemption from the provisions of section 12D. According to the 2nd Respondent, the feedback obtained during the public participation on the Finance Bill 2020 and the tax Laws Amendment Bill (No.2) of 2020 as evidenced by the Departmental Report was that some of the participants had an implementation and a new tax impact challenge with the burden placed by the tax but not the constitutionality of the provision. In the 2nd Respondent's view, the Petitioners' issues are administrative fears (bottlenecks) of some of the stakeholders and not constitutional issues.

219. According to the 2nd Respondent while the other provisions are subject to the other provisions of the ***Income Tax Act*** while section 12D starts with the phrase: "***Notwithstanding any other provision of this Act"*** hence it is a ***non-obstante*** clause. In this regard the 2nd Respondent relied on ***Stroud's Judicial Dictionary of Words and Phrases*** 6th Edition, London, Sweet and Maxwell 2000 at page 1732 which defines *notwithstanding* as follows: ***"NOTWITHSTANDING: "Anything in this Act to the contrary notwithstanding" is equivalent to saying that the Act shall not be an impediment to the measure, …"*** *On the other hand,* ***Black's Law Dictionary***, 9th edition, Bryan and Garner, 2009, defines the word *notwithstanding* to mean *"despite, inspite*

*of*". As such the provision is not subjected to the other provisions of the Act and is a non-obstante provision. It was disclosed that this is not the only provision in the ***Income Tax Act*** which is a ***non-obstante*** provision, for example, **Section 15(7)(e)(i) of the *Income Tax Act*** provides that: **Notwithstanding anything contained in this Act and section 19** which deals with business in insurance which is also a non-obstante clause**.**

220. It was therefore submitted that this provision is not subject to any other provision within the Act and also it cannot affect the other non-obstante clauses within the Act hence the reasons that Insurance Companies which are taxed under section 19 are placed outside its application. The provision further acknowledges the different treatments accorded to certain types of incomes and subsequently places such incomes outside its application, for example, placing the incomes under *sections 5, 6A, 12C, the Eighth or the Ninth Schedules*. Based on the foregoing, it was averred that this provision cannot be said to be contrary to any other section within the Act as it is a stand-alone clause with overriding mandate over the other clauses.

221. It was averred that following the enactment of the minimum tax law, the 2nd Respondent, in January 2021 and March, 2021, with a view of increasing tax education to encourage compliance issued guidelines on minimum tax which guidelines defines 'Gross turnover'. As per the guidelines, where a taxpayer has an accounting period ending on a date

other than 31st December, the first Minimum Tax payment shall be due and payable on the date when the earliest instalment tax is due after 1st January 2021. For purposes of computing Minimum Tax, only the gross turnover realised on or after 1st January 2021 shall apply. Further minimum Tax shall be paid in instalments which shall be due on the 20th day of the 4th, 6th, 9th and 12th month of the accounting period at a rate of 1% of the turnover. It was explained that the guideline provides that minimum tax payable shall:

i. Apply where it is higher than instalment tax due for the period.
ii. Be reduced by any Advance Tax, Withholding Tax or Digital Service Tax paid for the period.
iii. In the case of partnerships, the Minimum Tax payable shall be computed based on the partnership turnover but paid by the partners according to their profit sharing ratios.

222. The 2nd Respondent further explained that, a person who upon preparation of final return and accounts for the accounting period, establishes that:

*a) the tax liability is less than the Minimum Tax, the Minimum Tax shall be the final tax.*

*b) they are in a loss position, Minimum Tax paid shall be final.*

c) *the tax payable from taxable income is greater than the sum of Instalment and Minimum Tax paid, the balance outstanding shall be paid as balance of tax on or before the last day of the 4th month following the end of the accounting period.*

d) *the sum of the Minimum Tax and/or Instalment tax paid is higher than the tax payable (which shall not be less than Minimum Tax), the excess shall be considered overpaid tax and the provisions of section 47 of the Tax Procedures Act (TPA), 2015 shall apply.*

223. It was explained further that a person whose tax payable from income earned is less than Minimum Tax, is not be eligible for refund of the excess Tax and that where a person is liable to pay Minimum Tax and is in a loss position, the loss shall be carried forward, subject to limitations under the ***Income Tax Act***.

224. As regards what constitutes 'income', reliance was placed on the ***Black's Law dictionary*** 8th Edition which defines "income" as "

> ***The money or other form of payment that one receives, usually periodically, from employment, business, investments, royalties, gift and the likes.***

225. It was therefore submitted that an Income is any receivable by an entity or person and that Section 3(1) of the ***Income Tax Act*** brings to charge this income if it is derived or accrued in Kenya. According to the 2nd Respondent, pursuant to section 3 (2) (e), *income upon which tax is*

*chargeable under the* ***Income Tax Act*** *is income in respect of an amount deemed to be the income of any person under this Act or by rules made under this Act;*. Gross turnover, on the other hand, is defined under the Guidelines to Minimum Tax as:- *gross receipts, gross earnings, revenue, takings, yield, proceeds, sales or other income chargeable to tax under section 3(2) excluding a person's income which is chargeable to tax under sections 5, 6A, 12C, the Eighth or the Ninth Schedules and exempt income under any provision of the* ***Income Tax Act****, Cap 470*

226. The 2nd Respondent further cited ***Black's Laws Dictionary 8th Edition*** which defines Gross receipts as:-

> ***"the total amount of money or other consideration received by a business taxpayer for goods sold or services performed in a year, before deductions."***

227. In the 2nd Respondent's view, the Petitioners are misleading this Court in stating that gross turnover cannot be subject to tax since Section 3(2)(a) on gains and profits which they rely on is not applicable under the current issue. In the 2nd Respondent's view, no disconnect that has been created by introducing minimum tax since the applicable provision is section 12D as read with section 3(1) which is the charging clause and section 3(2)(e) which states that income tax shall be chargeable against any amount which is deemed to be income of a person under the Act or by rules made under the Act. Since section 12D, section 34 (n) and third schedule brings to tax

the gross turnover as income chargeable to tax under the Ac, the same is therefore properly chargeable. It therefore follows that gross turnover is income capable of being subject to tax under the ***Income Tax Act*** and that does not in any way infringes on Article 209(1) and (2) of the Constitution. Further Article 210 allows the Parliament to impose tax of any manner as long as the legislation is properly enacted.

228. On the issue whether tax can be levied on gross turnover without allowing for deductions, it was contended that this position is misguided and is blind to the applicable provisions for minimum tax. It was contended that it is the ***Income Tax Act*** which dictates when expenditures can be allowed and when the same are not. Further, the ***Income Tax Act*** in section 15(1) dictates which expenditures are allowable as against which income. However, a reading of section 15 is that it is has no overriding mandate over other provisions of the Act hence it is subjected to the limits provided under the ***Income Tax Act***. In this case the 2nd Respondent reiterated that while the other provisions are subject to the other provisions of the ***Income Tax Act***, section 12D starts with the phrase: "Notwithstanding any other provision of this Act" hence it is a non-obstante clause." It was contended that a clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time

being in force, or in any contract' is more often than not appended to a section at the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non-obstante clause. In other words, it is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment. Accordingly, section 12D has an overriding effect on the section 15 (1), further section 15(2) is only applicable in the case of income under section 3(2)(a) which is not the case herein.

229. The 2nd Respondent disclosed that minimum tax is not the only tax that is chargeable on gross under the ***Income Tax Act***, or in other words, where the law does not allow you to deduct expenses. According to the 2nd Respondent a perusal of the Third schedule to the ***Income Tax Act*** that provides for rates of personal reliefs and tax lists some of the taxes. It was its view that a decision of whether or not to allow expenditures before tax is levied depends on a Government's policy of the taxation and the practicability and in this case while the taxes where expenditure are allowed are always at the corporate rate of 30% or 37.5% for non-residents,

the law is only bringing to charge the 1% of the turnover which in essence leaves the taxpayers with 99% of the turnover outside the tax bracket hence sufficient to cover any expenses.

230. On whether the tax denies the Taxpayers any capital allowance granted under the Act, it was contended that in computation of corporate tax for incomes under section 3 (2) (a) and section 4 which relate to computation of gains or profit, the Taxpayers are allowed deductions in respect of capital deduction which are always deductible as against future profits which is not the case of minimum tax as the same is only applicable where the Taxpayer is in tax loss position. The minimum tax represents the least tax payable by a company even when a company is in a tax loss position due to capital allowance. Gains and profit have to be calculated for each year and a return filed. If a business is in a tax loss position due to capital allowances or other factors, the loss is carried forward and is deductible against future taxable income. Hence the business will still enjoy the tax benefit of capital allowances

231. It was therefore averred that the levying of minimum tax when the Taxpayer is in loss position does not in any way disenfranchise the taxpayers of the capital deductions, which are allowable at the point they turn to profitability. However, once the entity turns to profitability, they become liable to corporation tax and not minimum tax and nothing stops

them from deducting the capital allowance as against their corporation tax. In its view, the minimum tax only ensures that everyone contributes to the economic development of the environment they operate and does not disenfranchise them of benefits or obligations which are granted as against their corporation tax liability.

232. According to the 2nd Respondent, capital deductions operate as an incentive which is allowed on the investment to encourage the investor as against corporation tax. The deductions may place the company on a tax loss position but not on trading loss position since tax loss is arrived after taking into account the deductions allowable and disallowable under section 15 and 16 respectively of the ***Income Tax Act***. It was contended that most companies which are in tax loss position are not necessarily in trading loss position. The principles used to arrive at a trading loss position is the accounting principles, which are adopted by the entity, but tax loss is based on the principles outlined in the ***Income Tax Act***. It was therefore the 2nd Respondent's position that it is misguiding for the Petitioners to assert that minimum tax will claw back on the capital deductions which are deductible as against a different tax (corporation tax) and applicable in different circumstance when a person is liable for corporation tax.

233. As to whether the minimum tax will affect the carrying forward of tax losses, it was averred that the introduction of minimum tax does not in any

way affect this benefit, and if for any reason the Taxpayers will not be able to fully exhaust the tax losses accumulated over the years nothing stops them from applying for an extension as provided under section 15 (5) and that this is explained by the 2nd Respondent in its guideline to minimum tax.

234. On double taxation, it was averred that double taxation can either be juridical or economic. Juridical double taxation can be defined as the imposition of comparable taxes by two or more sovereign countries on the same item of income of the same taxable person for the same taxable period. This is not the case herein. Economic double taxation occurs when two separate persons are each taxed on the same income by two or more states. In the 2nd Respondent's view, neither juridical nor economic double taxation arise herein. The 2nd Respondent explained that no tax is deductible as an expense in arriving at the taxable profit or the gain which is subject to tax. This is not only in the case of minimum tax but in the case of all the existing taxes which are advance in nature including instalment tax. Once the taxable profit is established it is what is used to get the payable tax. The tax already paid are thereafter deducted as advance tax to find the tax due which is normally the situation in all tax returns.

235. It was therefore contended that as regards the alleged breach of Article 10 on the national value and especially the rule of law which was

highlighted minimum tax falls under section 3 (2) (e) and not section 3 (2) (a) as such all arguments with regard to gains and profits are misguided. Further the arguments advanced with regard to section 15 (1) and (2) are misguided since Section 15(2) relates to gains or profits under section 3(2) (a) which is not the case herein. In addition, the issue of the tax not allowing for deduction of expenses as discussed herein above the section12D is a non-obstante clause and has an overriding mandate over section 15(1). In the 2nd Respondent's opinion, the provisions provide how minimum tax is to be administered as it different from corporation tax for which deductions are allowable prior to arriving at the tax payable and that it has further been demonstrated that it's not only minimum tax which is chargeable on gross turnover. It therefore follows that if the Petitioners follow the correct applicable provisions for minimum no uncertainty or confusion arise as such no breach of Article 10.

236. The 2nd Respondent took the position that minimum tax having been enacted to bring equity in taxation by ensuring that the tax burden is shared with as many persons as possible, it cannot be said to contradict the national values and principle. To the contrary, the imposition of minimum tax is in line with Article 201 on the principles of taxation and in particular Article 201 (b) that the burden of taxation has to be shared fairly. Minimum tax, it was averred is seeking to ensure the tax burden is placed

on as many people ensure equity in taxation and further ensure that the persons who are already taxed do not suffer more taxation in order to meet the budgetary deficit.

237. On alleged discrimination under Article 27 of the Constitution, it was averred that Article 27 applies to persons and not a sector; it envisions equal protection and equal benefit of the law by all persons irrespective of their political economic, cultural and social sphere. To the 2nd Respondent, section 12D as read with the amendments introduced by the ***Finance Act, 2020*** and ***Tax Law (Amendment) Act, 2020*** applies to all persons in Kenya in similar economic circumstance and that the policy behind exempting Insurance Companies is because of operations and the fact they have different tax regime as provided under Section19 of the ***Income Tax Act***, which is distinct from all the other sectors. The 2nd Respondent explained that the Insurance Sector is highly regularized in terms of premiums chargeable, this is to encourage uptake, which currently is at a mere 3%. Government policy is geared at encouraging uptake insurance policy and the same will be defeated by any policy that places further burden on the sector. It was noted that when an insurance company goes to a loss position its placed under a moratorium hence its circumstances will be impractical with Minimum tax being placed on it.

238. As regards traders whose retail prices are regulated by government, like the oil marketing companies, it was averred that they have no control of their profit margins and the such it will be practical to stop them from increasing their revenue and then place minimum tax on them. The 2nd Respondent however averred that with regard to shifted white maize meal the restriction and price control therein was for temporary period as currently the same is not regulated. The exemption provided under section 12D (1) (d), it was explained, is for all traders dealing in goods for which retails price is determined by government and not only oil marketing companies. All the players in these sectors have been accorded similar treatment as such it cannot be said that the other sectors are being discriminated. Affirmative action demand that sectors to be accorded treatment based on their uniqueness, which is the case herein.

239. In the 2nd Respondent's view, taxation and exemptions are based on the current policy of the government. The government deciding to place a tax on a group or issuing an incentive to enable policy agenda be achieved, for example access to certain commodities cannot be said to be dissemination. Further the decision to place tax on a product is a policy issue and the said is informed by the government's reasons/ needs/ vision and the views of the public which is received through their representatives in Parliament

and their representations made at memorandum submissions and is not in any way discriminative.

240. The 2nd Respondent reiterated that there was public participation in the enactment of the ***Finance Act*** and all the due constitutional and standing order requirements were met. The enactment of a law is a legislative process which is a mandate of the Parliament as provided under Chapter Eight of the Constitution and it has been demonstrated that Parliament properly enacted the law, the same is proper and Court is not at liberty to interrogate wisdom of the legislation. The 2nd Respondent asserted that taxation is an obligation placed on the citizens under the constitution, the burden has to be shared equally as provided under Article 210. It cannot therefore be said to be a contravention of Article 43, in fact taxation is the price the persons pay to enjoy other rights which are guaranteed by the state as provided under the constitution. Further, under social contract, taxation is the price that civilized communities pay for the opportunity of remaining civilized. It is therefore the price for ensuring the government is able to safeguard and enforce the economic and social rights under the Constitution.Therefore taxation is a constitutional burden which cannot be said to infringe Article 40 especially when it is demonstrated that the same was properly enacted as envisaged Constitution.

241. On the role of the Senate, it was averred that the preamble to the ***Finance Act, 2020*** provides that it is an Act of Parliament to make amendments to tax related laws. The Act goes further to make amendments to the ***Income Tax Act*** (CAP470), Value Added Tax Act, 2013 and Stamp Duty Act (CAP 480). Under Article 209 the power to impose Value Added Tax, Income Tax, Customs Duty and Excise Duty is on the national government and the said taxes have nothing to do with the affairs or mandates of the county government and Article 114(1) states that a money bill may not deal with any other matter other than those listed in the definition of a money bill under Sub Article 3. Further, Article 114 (3) provides that a money Bill is a Bill that contains provisions dealing with the tax and Article 114(2) places the duty of debating a motion relating to a money bill and enacting such legislation on the National assembly. The 2nd Respondent therefore averred that the minimum tax have nothing touching on county tax levied by whatsoever which are the mandates of the County Government, the nexus between imposing tax and dealing with plant and animal disease control is farfetched and it cannot be said to breach Article 109 (3) & (4) and A.110 (4).

**2nd Respondent's Submissions**

242. In its submissions, the 2nd Respondent cited the decision of the Supreme Court in **The Matter of the Principle of Gender Representation in**

**the National Assembly and the Senate [2012] eKLR** and contended that while this Court has been invited to interrogate the constitutionality of the Minimum Tax as imposed by section 12D of the ***Income Tax Act*** (***Income Tax Act***), the Court should consider the constitutional obligation of the Petitioners as imposed under Articles 209 and 210 of the Constitution with a view of giving the law a purposive interpretation. The principles enunciated in Article 201(b)(i) should also guide the Court in arriving at its findings.

243. The 2nd Respondent submitted that the Court should apply a holistic interpretation. The Provisions of the ***Income Tax Act*** and any other applicable guidelines in the statute should be read holistically in order to give meaning to what was intended by the draftsman. The impugned provision of section 12D has to be read together with all the other applicable provisions of the ***Income Tax Act***. In this regard the 2nd Respondent relied on **The Engineers Board of Kenya –vs- Jesse Waweru Wahome & Others Civil Appeal No.240 of 2013** and submitted that Section 12D of the ***Income Tax Act*** cannot just be said to be unconstitutional because the Petitioners have refused to read it together with the other provision of the ***Income Tax Act***. The Minimum tax is not administered under section 12D as an island but as a provision of the whole statute, as such it has to be interpreted together with the other provisions.

The Court was urged to consider the **said section 12D** and the Minimum Tax Guidelines which are public ruling issued under section 62 of the Tax Procedures Act and give them a strict interpretation based on the decision of the Court of Appeal in **Kenya Revenue Authority vs. Republic (Exparte Fintel Ltd) [2019] eKLR**.

244. The 2nd Respondent invited the Court to apply these three principles: holistic interpretation, purposive interpretation and strict interpretation in making a determination in the matter herein.

245. According to the 2nd Respondent, the rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. This therefore means that for any income to be charged under the ***Income Tax Act***, the said income must be brought under the charging clause. According to the Respondent the income subject to the Minimum Tax properly falls within the charging clause for the income to be charged Minimum Tax under ***Income Tax Act*** since, minimum tax is being charged on an amount that has been declared as an income. The 2nd Respondent elaborates that a reading of section 12D together with section 34(n) and paragraph 11 of the third schedule to the ***Income Tax Act*** shows that gross turnover has been declared an income and a reasonable person can tell the income chargeable to minimum tax by reading the three

provisions together. It is therefore clear that section 12D as read together with section 34(n) and paragraph 11of the third schedule to the ***Income Tax Act*** provides that Minimum Tax is applicable to the gross turnover of a person. This gross turnover is an Income under section 3(2)(e) of the ***Income Tax Act*** chargeable to tax under section 3(2)(1).

246. It was submitted that the mandate of determining what is or is not an income is a duty for the legislature. All that the legislature ought to observe is the lawful procedure of enactment of a statute, and give reasons for the said enactment. The Respondent relied on the case of **Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union vs. Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013 [2014] eKLR** and the Indian decision in **Karnataka Bank Ltd. vs Union of India on 12 August, 2003.**

247. As regards the effect of section 12D as a Non Obstante Clause, the 2nd Respondent reiterated its contention above and submitted that the effect of a non obstante clause is that such a clause is a self-executing clause and is not subject to the provisions of other Contradictory sections or clauses within the same Act unless it expressly states so and is only subject to enabling provisions. It relied on the ***Bombay Chartered Accountants Society Article on Interpretation of Tax Statutes,*** the **Supreme**

**Court of India, Appeal (civil) 6098 of 1997: State Of Bihar & Others vs Bihar Rajya...on 12 October, 2004** and **Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram, AIR 1987 SC 117.**

248. According to the 2nd Respondent, the Minimum Tax provision is not subject to any other contradictory provision within the Act and also it cannot affect the other non-obstante clauses within the Act hence the reasons that Insurance Companies which are taxed under section 19 are placed outside its application.

249. It was submitted that Section 12D of the ***Income Tax Act*** was enacted in accordance with the provisions of Article 94, 109, 114, 201 and 209 of the Constitution hence passed the constitutionality test. According to it, in so far as procedural enactment of the Minimum Tax provisions is concerned, the 1st Respondent followed all the laid down legal procedures and as such, the minimum tax provision is constitutional on that front.

250. As regards substantive Constitutionality, the 2nd Respondent cited the case of **Council of County Governors vs. Attorney General & another [2017] eKLR**, **Hamdarddawa Khana vs Union of India Air[15, Union Of India vs M/S Exide Industries Ltd. on 24 April, 2020**, **State Of M.P vs Rakesh Kohli & Anr on 11 May, 2012**, and submitted that the Minimum Tax provision is constitutional, in so far as it was enacted procedurally by the National Assembly, and in so far as it is a

non-obstante clause properly within the provisions of the charging section of the ***Income Tax Act***.

251. With regard to its Rationale, the 2nd Respondent explained the rationale behind the enactment of the minimum tax provisions and upon gazettement of the Finance Bill 2020 and later on the Act, various entities issued tax alerts commenting on the various provisions of the Bill and the Act including the minimum tax provisions. This demonstrates that the National Government was informed by policy considerations in the introduction of the tax, which policy considerations are well understood and captured by the various tax alerts by players in the tax industry. Having established the legal purpose and effect of the minimum tax provision, the 2nd Respondent opined that the provision passed the substantive constitutionality threshold.

252. As regards the constitutionality of the Minimum Tax Guidelines it was submitted that in both Petitions, there is no prayer sought with regard to the constitutionality of the Minimum Tax Guidelines. As such, any submission by the Petitioners on the issue should be disregarded. In this regard the 2nd Respondent relied on the decision of the Court of Appeal in **Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited [2015] eKLR** in which the Court quoted the **Supreme Court of Malawi in Malawi Railways Limited vs. Nyasulu [1998] MWSC 3** on the

importance of pleadings and submitted that the Petitioners and the 2nd Interested Party are bound by the Petitions as filed and in so far as there is no prayer as against the Minimum Tax guidelines, then they are estopped from submitting on the constitutionality of the same.

253. It was however submitted that the Minimum Tax Guidelines is a Public Ruling issued pursuant to section 62 of the ***Tax Procedure Act.*** According to the 2nd Respondent, the Public ruling was based on frequently asked questions and concerns raised by taxpayers with regard to the implementation of the Minimum Tax. The Guidelines are purely an interpretation of the law based on holistic reading of the ***Income Tax Act***. and not statutory instruments and are not binding on taxpayers but only binding of the 2nd Respondent. It was explained that public rulings are used by the 2nd Respondent to give its interpretation of a tax law by responding to frequently asked questions by taxpayers. In this instance, it was imperative that the 2nd Respondent issues the said guidelines since this was a new tax being introduced for the first time. Tax practitioners always appreciate the guidelines as the same help them to advice their clients.

254. The 2nd Respondent's submission was that it was a misconception to contend that the guidelines on minimum tax ought to have been tabled in Parliament since a Public Ruling under the ***Tax Procedures Act*** is not a Statutory Instrument. Further, the same is only binding on the 2nd

Respondent and not any party as provided under section 62(3) of the ***Tax Procedures Act***. The 2nd Respondent therefor submitted that the Minimum Tax did not introduce new issues but only respond to the FAQ and applies the law as is. Since it is not binding to the Taxpayers, any disagreement with regard to the content there in should be subject to a normal tax dispute.

255. It was submitted that the term Gross turnover is a dictionary meaning hence not a new term and that the exclusions in the said definitions are the incomes excluded under section 12D (1) (b) of the ***Income Tax Act*** hence nothing new as the definition of persons in the guidelines is the same as the definition of persons as provided under Section 2 of the Tax Procedures Act. According to the 2nd Respondent, with regard to the issue of paragraph 6 of the Minimum Tax Guidelines of March 2021, the same is advised by the effective date for the Minimum Tax amendment which is 1st January 2021. This is further advised by the principle that taxation should not act retrospectively hence also not a law or provision. As regards, payment of income derived from agricultural, pastoral and horticultural activities, the same is in line with section 12D (2) and section 17 of the ***Income Tax Act*** and paragraph a of the 12th Schedule. Section 17 of the ***Income Tax Act*** provides for the ascertainment of Income of farmers in relation to stock. In any event, this Honourable Court shall remember that what the Petitioners

are contesting is section 12D of the ***Income Tax Act*** and not the guidelines. While paragraph 7.2(a) of the Guidelines is provided for under section 12D (1)(c) of the ***Income Tax Act***, paragraph 7.2(b) of the Guidelines was informed by section 12E which provides for Digital Service Tax also being taxed on gross income. Advance tax and Withholding Tax provision is advised by the 3rd Schedule which are also taxed on gross. With regard to paragraph 7.2 (c) of the Guidelines, they have followed the law on taxation of partnerships under the ***Income Tax Act***. Partnerships is not a legal entity hence the reason why profits and losses are share as agreed by the partnerships and when it comes to taxation, the same principle is applied when taxing them. Paragraphs 7.3 to 7.5 are not new provisions/law and are a simplification section 12D of the ***Income Tax Act***. The issue of the accounting period is provided under section 12D (2) and as such, an explanation in the guidelines is not a new issue or provision.

256. While alive to the fact that there have been challenges with regard to implementation of the tax as voiced by various players reproduced in the tax alerts the 2nd Respondent submitted that they are acknowledging the need for the introduction of minimum tax. As to whether the said challenged amount to unconstitutionality, the 2nd Respondent relied on ***Rakesh Kohli case (Supra)*** and submitted that implementation

challenges of a tax law does not equate to the said provision being unconstitutional. These implementation challenges have been reduced by the issuance of the minimum tax guidelines by the 2nd Respondent. In this regard the 2nd Respondent relied on **Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others [2014] eKLR,** and submitted that even though the new tax presents with it the implementation challenges, such do not amount to unconstitutionality, so long as the law was properly enacted.

257. On the issue of ambiguity and uncertainty, it was submitted that the 2nd Respondent has clearly explained that the Minimum Tax provision is properly within the charging section of the ***Income Tax Act*** namely section 3(1) and the Income subjected to that tax is in accordance with section 3(2)(e) of the Act. To that extent, there is no uncertainty or ambiguity created by the Act. It was submitted that there is no contradiction between Section 12D and other sections of the Income Tax to claim ambiguity. In this regard the 2nd Respondent relied on the ***Black's Law Dictionary*** and asserted that there is nothing ambiguous about the minimum tax provision, and it is the Petitioners who are creating an ambiguity where there is none. In this regard reliance was placed on

**Commissioner of Domestic Taxes (Large Tax Payer Office) v Barclays Bank of Kenya Ltd [2020] eKLR**.

258. It was submitted that the National government is mandated under Article 209 to impose Income Tax, VAT, Customs Duties and Excise Duties and pursuant to this power, the National Government amended ***the Income Tax Act*** procedurally and introduced section 12D, section 34(n) and an amendment in the 3rd Schedule of the ***Income Tax Act***. The National Government has therefore included Minimum Tax to be part of the various regimes under the ***Income Tax Act*** that taxes various incomes. The National Government has not only introduced Minimum Tax but it has through section 34(n) of the ***Income Tax Act*** as read together with Section 3(2)(e) of the ***Income Tax Act*** declared gross turnover to be income being subjected to tax under the ***Income Tax Act*** and this does not in any way infringe on Article 209 of the Constitution. In this regard the 2nd Respondent relied on the case of **Gustavson Drilling (1964) Ltd v M.N.R. [1977] 1 S.C.R. 271 at 283 (quoted in Piennaar Brothers Case)** and **United States vs. Carlton** and submitted that Parliament is within the law for legislature to legislate new tax laws within the law to take care of the policies of the day. Just because the legislature has procedurally introduced a new tax regime under the ***Income Tax Act***, different from what the Petitioners are used to being corporation tax under section 3(2)(a)

of the ***Income Tax Act*** does not mean that it is contrary to article 209 of the Constitution. In this regard they relied on the case of **Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union vs. Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013 [2014] eKLR**.

259. The introduction of the minimum tax espouses the public finance principle of sharing the burden of taxation fairly under Article 201(b)(i) of the Constitution. Minimum Tax is meant to expand the tax base so that everyone contributes to the national kitty, especially companies in a perennial tax loss positions who despite enjoying the services of the Government do not contribute to the cost of the Government. It is therefore an oxymoron for the Petitioners to allege that Minimum Tax flouts Article 201 of the Constitution.

260. With regard to the 1st Petitioners averments at paragraphs 58 to 72 of its submissions, the 2nd Respondent submits that the Minimum Tax Guidelines are very clear with regard to the implementation of the tax. The 2nd Respondent further refers this Court to paragraphs 61 to 69 of its Replying Affidavit.

261. Excise Duty Act and Value Added Tax are consumption taxes that are borne by the ultimate consumer. As such, the Petitioners calculations and averments under paragraph 62 to 66 of the Petition is erroneous. The

assumed risk alleged under paragraph 67 has no place in calculation of tax and as such, it is a misplaced allegation.

262. The 2nd Respondent submits that if the Petitioners interpret the Minimum Tax provision correctly, there will be no confusion, or uncertainty as alleged. On the converse, should they comply, every taxpayer will be contributing towards the cost of Government and economic development that will ensure maintenance of a good environment (infrastructure or otherwise) for business.

263. With regard to the 1st Petitioners' averments at page 68 of the Petition, the 2nd Respondent submits that licenses and permits are an integral part of doing business in any civilised society and is the price that a business pays to enjoys the perks of government such as security, a good economy et cetera. The said averment does not have an implication on the constitutionality or otherwise of a taxing statute.

264. The Petitioners allege that minimum tax favours large corporations as against the small and medium enterprises, against the provisions of Article 27 of the Constitution. This is an erroneous way of appreciating the tax. We have already demonstrated the reason for the tax which reason is appreciated by various players in the industry, which is expansion of the tax base. It is therefore erroneous to allege discrimination based on the fact that some companies have a large return against other companies.

265. The Court was invited to note that no taxpayer with similar economic circumstance has been accorded different treatment by the minimum tax to result on an allegation of discrimination and reliance was placed on **Republic vs. Minister for Finance & 2 Others [2006] eKLR**, **Federation of Hotel & Restaurant vs Union of India & Ors on 2 May, 1989** and **Karnataka Bank Ltd. vs. Union of India on 12 August, 2003**.

266. As regards the allegation that the Minimum Tax Provision favours taxpayers in the energy and petroleum sector, it was submitted that Excise Duty and VAT taxes are consumption taxes borne by consumers and taxed under different statutes and not the ***Income Tax Act***. Further, any taxpayer coming within the Excise Duty Act and Vat Act is taxed accordingly and one cannot allege discrimination under the ***Income Tax Act*** by virtue of the fact that their income is being taxed under another statute. It is therefore erroneous for the Petitioners to allege such taxes. As for the issue of competition, it is as a self-regulating mechanism and cannot be likened to statutory regulation of prices which is what the exemption under the Section 12D is concerned with.

267. It was submitted that the issue of the exemption to Kenya Airways is a new issue raised at the submissions staged and not in the Petition. Further, what is in dispute is the exemptions under Section 12D of the ***Income Tax***

***Act*** and not the exemptions to Kenya Airways which is not an issue in the Petition. No evidence has been adduced before this Court in the Petition showing the exemption of Kenya Airways as provided for under section 12D of the ***Income Tax Act***. It was contended that the exemption in Legal Notice No. 27 in the Kenya Gazette Supplement No. 37 Legislative Supplement No. 13 dated 15th March 2021 was issued under section 13(2) and not section 12D of the ***Income Tax Act*** which is the subject to this disputed and as such any submission on the same is misguided.

268. In arguing against the allegations of breach of the aforementioned Articles, the 2nd Respondent shall rely on paragraphs 150 to 158 of its Replying Affidavit.

269. With regard to the alleged breach of article 40 of the Constitution, it was submitted that a properly enacted tax law cannot be said to amount to a breach of the right to property and reliance was placed on **George Lesaloi Selelo & Another vs. Commissioner General, KRA & 4 others; Pevans EA Limited (t/a Sportpesa) & 3 Others [2019] eKLR**, **Helpage International vs. Commissioner of Domestic Taxes [2017] eKLR** and **Raja Jagannath Baksh Singh vs. The State of Uttar Pradesh... on 4 April, 1962.**

270. On the term "arbitrary" the 2nd Respondent relied on the definition under the ***Black's Law Dictionary*** and contended that the Petitioners'

allegations on breach of article 40 do not meet the threshold of such a breach and the same ought to be dismissed.

271. With regard to allegations of breach of Article 43 of the Constitution, the 2nd Respondent submitted that the Government through various measures, taxation included assures and ensures that citizens are able to enjoy various fundamental rights such as article 43 of the Constitution. It is only through taxation that citizens can enjoy provision of amenities that ensured their enjoyment of Economic and Social rights. Therefore, in in establishing the Minimum Tax provision, a valid tax legislation, the allegation of breach of such a right cannot hold.

272. The 2nd Respondent distinguished this case from the case of **Okiya Omtatah Okoiti vs. Commissioner General, Kenya Revenue Authority & 2 Others [2018] eKLR**. where the Court found that the Legal Notice Number 53 of 2017, the law introducing Excise Duty on bottled water was not enacted in a manner consistent with the Constitution and the ***Statutory Instruments Act***, hence, the same was null and void.

273. As regards reference to other jurisdiction, it was submitted that the 1st Respondent in enacting the Minimum Tax Provision was not required anywhere to make reference to other jurisdictions. It was only required to look at the needs of the people which is exercised through the executive and make laws to meet the said needs. In adducing the comparative study of

minimum tax on other jurisdictions, it was demonstrating that this is not a novel tax in the world but has been implemented in other jurisdictions. The 2nd Respondent is not required under any law to provide comparative study of other jurisdictions that is identical to the minimum tax provision so as to justify the levying of the tax which has been procedurally enacted by the 1st Respondent. The Court was however invited to note that the Republic of Kenya is not operating in a vacuum, or as an island. It is therefore important that the Court considers the world as a global village and takes note of international best practices in any area while resolving disputes, despite our sovereignty and reference was made to the case **Unilever Kenya Limited –vs- The Commissioner of Income Tax – Income Tax Appeal No.753 of 2003.**

274. In addressing the issue whether Minimum Tax Provision violates the principles of taxation, the Court was referred to the decision of Supreme Court of India in **Hambardda Wakhana vs. Union of India Air [1960] AIR 554** and **Ndyanabo v Attorney General [2001] E. A 495**, which was a restatement of the law in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534**.

275. It was submitted that the Constitution of Kenya is a social contract entered between the People of Kenya on how they intend to coexist and be governed. This is well captured in the preamble to the Constitution. a

position adopted in **KAPI LTD & Another vs. Pyrethrum Board of Kenya [2013] eKLR** as well as **Charles Onyango-Obbo and Another vs. Attorney General [2004] UGSC 1.** According to the 2nd Respondent, for the state to guarantee the rights in the social contract entered between the People, the people have to relinquish some of their rights like right to property through taxation to the state.

276. It was submitted that the Petitioners have not shown any nexus between these provisions and the section 12D, which merely impose a tax and nothing to do with the right to access justice, right to life and issue of good governance. It therefore follows that taxation is the vessel used by the Government to respect, promote and fulfil the fundamental rights envisioned under the Bill of Right under the Constitution & other recognized human rights instruments, and taxation itself cannot be said to be a breach of the same rights. Nothing on breach of the principles of taxation arise.

277. On the issue of retrospectivity of section 12D, the 2nd Respondent noted that this issue has not been raised in the Petition. However, the ***Finance Act 2020*** was enacted on 30th June 2020 and provided for the commencement date of section 12D of ***Income Tax Act*** as 1st January 2021.

278. It was submitted that in the present case and given our circumstances as a country, the Executive formulated a Policy to impose tax on gross turnover. Unpopular as this action is with the Petitioners, the National Assembly after deliberations enacted a law authorizing the imposition of tax on gross turnover. The body entrusted with legislation has repealed the old order and ushered in a new order to suit our present circumstances. This cannot be termed as a constitutional violation.

279. The 2nd Respondent thus prays that this Honourable Court finds that the Minimum Tax Provision as enacted is constitutional and dismisses the two petitions with costs to the Respondents.

## 3rd Respondent's Case

280. The 3rd Respondent, the Attorney General, similarly opposed the petitions based on the following grounds of opposition:

1) **THAT the orders sought in the Notice of Motion application are final in nature and ought not to be granted at an interlocutory stage.**
2) **THAT the Petitioner has not fulfilled the requirements set out in various authorities for the grant of orders of a conservatory nature at an interlocutory stage as set out in various authorities and case law.**
3) **THAT it is against public interest that the Honorable Court grant the orders sought by the Petitioner herein.**
4) **THAT the Petitioner is seeking to curtail the statutory mandate of the Respondents to enforce laws that are for the benefit of the citizenry in order to sustain his alleged cause of action.**

5) **THAT the orders sought by the Petitioner herein are in complete violation of Articles 94 and 95 among other provisions of the Constitution of Kenya (2010) which provide for the legislative authority of Parliament.**
6) **THAT the orders sought if granted will have the effect of interfering with the Respondents' statutory mandate and limiting the legislative freedom of Parliament which is enshrined within the Constitution.**
7) **THAT the Petitioner has not placed any evidence before this Honorable Court to warrant the interference with the powers of the Respondents.**
8) **THAT no strong or cogent reasons have been advanced by the Petitioner to justify the delay in filing the matter since June 30, 2020, and as such the Petitioner is guilty of laches.**
9) **THAT the impugned act of parliament herein namely the *Income Tax Act* is constitutional in nature having been enacted by Parliament in exercise of its powers under Article 94 of the Constitution of Kenya (2010)**
10) **THAT the impugned act of Parliament enjoys a presumption of constitutionality having been enacted pursuant to the sovereign authority donated to Parliament under Article 94(1) & (5) of the Constitution of Kenya (2010). Further it is not within the Honorable courts' powers to question the legislative wisdom of Parliament.**
11) **THAT the orders sought herein are against public policy and public interest as the Petitioner ought not to be allowed to stop the Respondents' exercise of their legitimate legal mandate in order to sustain his alleged claim.**

12) **THAT public interest tilts in favor of the Respondents as no cogent reasons have been supplied in order to interfere with the powers of the Respondents.**
13) **THAT the Respondents are bound by the provisions of the law and the Petitioner has not produced any cogent evidence before the court to prove that the Respondents are acting/ have acted ultravires.**
14) **THAT the petition and application herein are premised upon imaginary scenarios rather than actual facts.**
15) **THAT the Petitioners are in effect seeking to have court stop the Respondents from carrying out their lawful mandate under the impugned act which law is presumed to be constitutional until determined otherwise.**
16) **THAT the application herein is unmerited, misconceived, misplaced and an abuse of the court process.**
17) **THAT the notice of motion application herein should be dismissed with costs to the Respondents'.**

## 3rd Respondent's Submissions

281. In his submissions, the 3rd Respondent reiterated the position taken by the 1st and 2nd Respondents and added that it is trite law that where the law has granted certain and specific functions to a public office, the courts ought to be slow in interfering with the mandate of that institution. In this case, legislative authority over taxes has been granted to the 1st Respondent acting in concert with the 2nd Respondent herein. In this regard reliance was placed on the decision of the Supreme Court in the case of **Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another**

**[2017] eKLR** and submitted that it is against public interest that the Court grant the orders sought by the Petitioners herein as the same seek to curtail the statutory mandate of the Respondents to make and enforce laws that are for the benefit of the citizenry.

282. Furthermore, it was submitted, the grant of the orders sought by the Petitioners herein will have the effect of interfering with the Respondents' statutory mandate and limiting the legislative freedom of Parliament which is enshrined within the Constitution which power has been exercised in accordance with the provisions of Article 94 of the Constitution of Kenya.

283. To the 3rd Respondent, the Respondents have demonstrated that the provisions of Section 12D of the ***Income Tax Act*** are constitutional by dint of having followed the correct procedure and having met the constitutional threshold on the principles of taxation. The Petitioners have failed to demonstrate the manner in which the Respondents have violated the Petitioners constitutional rights through the enactment of law specifically that which seeks to ensure equity and fairness in taxation.

284. Premised on the above as well as the pleadings of the Respondents herein it was sought that these petitions be dismissed with costs.

## Determination

285. The facts of these petitions are largely not in dispute. What provoked these petitions was the introduction by the 1st Respondent of amendments

to the ***Income Tax Act***, Chapter 470 of the Laws of Kenya through the ***Finance Act, 2020*** and the ***Tax Laws (Amendment) (No) 2 Act, 2020***. The effect of the said amendments was to introduce a tax known as the Minimum Tax at the rate of 1% of the gross turnover.

286. It is that act by the 1st Respondent that the Petitioners contend is unlawful, unconstitutional and unreasonable, therefore should be declared as such by the court.

287. The said minimum tax was introduced by Section 12D of the ***Income Tax Act*** which provides that:

> ***12D. (1) Notwithstanding any other provision of this Act, a tax to be known as minimum tax shall be payable by a person if—***
>
> ***(a) that person's income is not exempt under this Act;***
>
> ***(b)that person's income is not chargeable to tax under sections 5, 6A, 12C, the Eighth or the Ninth Schedules; or***
>
> ***(c) the instalment tax payable by that person under section 12 is higher than the minimum tax;***
>
> ***(d) that person is not engaged in business whose retail price is controlled by the Government;***
>
> ***(e) that person is not engaged in insurance business;***
>
> ***(2) The tax payable under this section shall be paid in instalments which shall be due on the twentieth day of each period ending on the fourth, sixth, ninth and twelfth month of the year of income.***

288. The ***Finance Act, 2020*** further introduced amendment to the rates of tax as provided in Section 34(1) of the ***Income Tax Act*** as follows: -

***34. (1) Subject to this section—***

***(n) tax upon the gross turnover of a person whose income is chargeable to tax under section 12D shall be charged at the rate specified in the Third Schedule.***

289. The third schedule to the ***Income Tax Act Cap 470*** was amended in Head B to provide as follows:

***11. The rate of tax in respect of minimum tax under section 12D shall be one percent of the Gross Turnover***

290. On 29th January 2021, the 2nd Respondent formulated and issued guidelines on minimum tax which define gross turnover to mean:

***"gross receipts, gross earnings, revenue, takings, yield, proceeds, sales or other income chargeable to tax under section 3(2) excluding a person's income which is chargeable to tax under sections 5, 6A, 12C, the Eighth or the Ninth Schedules and exempt income under any provision of the Income Tax Act"***

291. According to the Respondents, this petition is a threat to the doctrine of separation of powers and is an encroachment to the legislative mandate of parliament and that by granting the orders sought herein, this Court would be interfering with Parliament's constitutional powers.

292. As regards as regards the doctrine of separation of powers, in his separation of powers theory, **Montesquieu** had sought to address the eternal mischief of abuse of power by those to whom it is entrusted. He observed [***The Spirit of the Laws*** (1948)]:

***When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty,***

***there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers.***

293. That this principle is reflected in our own Constitution appears in Article 1(3) thereof which provides that sovereign power which pursuant to Article 1(1) of the Constitution ***"belongs to the people of Kenya and shall be exercised only in accordance with this Constitution***":

> ***"...is delegated to the following State organs, which shall perform their functions in accordance with this Constitution––***
>
> ***(a) Parliament and the legislative assemblies in the county governments;***
>
> ***(b) the national executive and the executive structures in the county governments; and***
>
> ***(c) the Judiciary and independent tribunals.***

294. This was appreciated by the High Court in **Trusted Society of Human Rights v. The Attorney-General and Others, High Court Petition No. 229 of 2012; [2012] eKLR**, at paragraphs 63-64 where it held as follows:

> **"Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."**

295. Thus, while the Constitution provides for several State organs, including commissions and independent offices, the people's sovereign power is vested in the *Executive, Legislature* and *Judiciary*. The broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from **Commission for the Implementation of the Constitution vs. National Assembly of Kenya, Senate & 2 Others [2013] eKLR** where **Njoki, SCJ** opined that:

> "**The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting** ultra vires **the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided."**

296. The system of checks and balances serves the cause of accountability, and it is a two-way motion between different State organs, and among bodies

which exercise public power. The commissions and independent offices restrain the arms of Government and other State organs, and *vice versa*. The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers.

297. The Supreme Court has ably captured this fact in **Re the Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

> **"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."**

298. However, Article 2(4) of our Constitution which provides as follows:

> ***Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.***

299. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question

whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore, whereas the legislative authority vests in Parliament and the County legislative assemblies where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution the High Court is the institution constitutionally mandated and empowered to determine such an issue subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. This is in recognition of the fact that there is nothing like supremacy of the legislative assembly outside the Constitution since, under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution. Therefore, there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in my view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its

duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to ***"...*** *institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention*."

300. My position is supported by the decision in **Coalition for Reform and Democracy (CORD) & Another vs. the Republic of Kenya & Another (2015) eKLR** where the court stated *inter alia* at paragraph 125 that:

> **"Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution... Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid..."**

301. Therefore, when an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, it falls upon the laps of the Judiciary to determine the same. As was held in **Jayne Mati & Another vs. Attorney General and Another - Nairobi Petition No. 108 of 2011** at paragraph 31:

> **"...separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution."**

302. On that note, the Supreme Court in **Speaker of National Assembly – vs. Attorney General and 3 Others (2013) eKLR** stated that:

> **"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the**

**Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act."**

303. The Court went on to state as follows:

**"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."**

304. **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** on his part expressed himself as follows:

**"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament,**

**the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation…By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does."**

305. The Court went on to state as follows:

**"While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a)**

**calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution."**

306. The South African Constitutional Court in **Minister of Health and Others vs. Treatment Action Campaign and Others (2002) 5 LRC 216, 248** at paragraph 99 underscored the Court's role to protect the integrity of the Constitution thus:

***"The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it***

**should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."**

307. The same position was appreciated by **Langa, CJ** in **Hugh Glenister vs. President of the Republic of South Africa & Others Case CCT 41/08; [2008] ZACC 19** at para 33 as follows:

**"In our constitutional democracy, the courts are the ultimate guardians of the constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."**

308. I am duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

309. I must however caution that Courts must exercise restraint where the Legislative arm of the State is still undertaking its legislative mandate must

not interfere, save in exceptional circumstances, where the legislative process is still in motion.

310. This is because it is trite law that where the law has granted certain and specific functions to a public office, the courts ought to be slow in interfering with the mandate of that institution and as was held by the Supreme Court in the case of **Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & Another [2017] eKLR**:

> **"[62] A clear inference to be drawn is that, it was the Supreme Court's stand that no arm of Government is above the law. This being a constitutional democracy, the Constitution is the guiding light for the operations of all State Organs. The Court's mandate, where it applies, is for the purpose of averting any real danger of constitutional violation.**
>
> **[63] From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:**
>
> **(a) each arm of Government has an obligation to recognize the independence of other arms of Government;**
>
> **(b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;**
>
> **(c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;**
>
> **(d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;**

**(e) in the performance of the respective functions, every arm of Government is subject to the law."**

311. Tied to this issue is the presumption of constitutionality. It was urged that when considering the constitutionality of an Act, one must bear in mind the rebuttable principle of presumption of Constitutionality of statutes which states that statutes should be presumed to be constitutional until the contrary is proved. The general rule or principle guiding such matters was restated by the Supreme Court of India in **Hambardda Wakhana vs. Union of India Air [1960] AIR 554** as follows:

> **"In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment."**

312. Therefore, the presumption of constitutionality of statutes is not in doubt. This position was affirmed by the Court of Appeal of Tanzania in the celebrated case of **Ndyanabo vs. Attorney General [2001] EA 495** which was a restatement of the law in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534**. In the former, the Court held that:

> **"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction**

**that, if possible, a legislation should receive such a construction as will make it operative and not inoperative"**

313. This was clearly appreciated in **Ndyanabo vs. Attorney General [2001] 2 EA 485** where it was held *inter alia* that in interpreting the Constitution, the Court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation's status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction.

314. Though under Article 1 of the Constitution sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals; the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution. Otherwise Article 2 of the Constitution allows for the recall of any law, including customary law that is inconsistent with the Constitution, or any act or omission in contravention of the Constitution for the purposes of being voided and or invalidated.

315. This position is supported by **Coleman vs. Mitnick, etc. No. 19,955. 137 Ind. App. 125 (1964) 202 N.E.2d 577** where it was state that:

> **"When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made."**

316. Similarly, in **Carr, Auditor v. State ex rel. Coetlosquet, 127 Ind. 204, 215**, as approvingly quoted in **Frost vs. Corporate Commission of Oklahoma - 278 U.S. 515 (1929)**, the Supreme Court of the State of Indiana (USA) held that:

> **"An act which violates the Constitution has no power and can, of course, neither build up or tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality."**

317. That an unconstitutional statute is to be considered as though it had never been enacted by the legislature is also the view of the United States Supreme Court, which in **Chicago, Indianapolis, & Louisville Railway Company, Plff. In Error, v. Haynes l. Hackett. No. 889**, said:

> **"That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."**

318. In **Norton v. Shelby County**, **Justice Field** said:

**"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been."**

319. The Courts have now set out the factors to be considered when faced with allegations of unconstitutionality of statutes. I agree that that the Constitution itself qualifies this presumption of constitutionality and that such statutes must meet the constitutional criteria. In it was held in **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR** as follows;

**"96. However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 which we shall analyse in detail later in this judgment, there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article.**

**97. The Court is also required, in determining whether an Act of Parliament is unconstitutional, to also consider the objects and purpose of the legislation: see Murang'a Bar Operators and Another vs Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR and Samuel G. Momanyi vs Attorney General and Another High Court Petition No. 341 of 2011.**

**98.In addition, in determining whether a statute meets constitutional muster, the Court must have regard not only to its purpose but also its effect. In the case of R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, cited by CIC, the Canadian Supreme Court enunciated this principle as follows;**

**"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."**

**99.The case of <u>Re Kadhis' Court: The Very Right Rev Dr. Jesse Kamau & Others vs The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004</u> also offers some guidance with regard to constitutional interpretation, particularly in so far as the provisions of the Bill of Rights are concerned. In that case, the Court expressed itself as follows:**

**"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner,**

**thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."**

**100. Finally, it is worth bearing in mind the words of the US Supreme Court in U.S vs Butler, 297 U.S. 1[1936] in which the Court expressed itself as follows:**

**"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."**

320. It is therefore clear that the presumption of constitutionality of a statute is a rebuttable one the effect of which is to shift the onus of proof to the person alleging its unconstitutionality. What the Court ought to consider in those circumstances was set out in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** where it was held that:

**"When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court…must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares**

**that the 'Constitution is supreme...; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid..."**

321. In **Katiba Institute & Another vs. Attorney General & Another (supra)** the court delivered itself as hereunder:

**"That there is a presumption of constitutionality of statutes is not in doubt... It is therefore clear that the constitutionality of legislation is a rebuttable presumption; and, where the Court is satisfied that the legislation fails to meet the constitutional muster, nothing bars the Court from declaring it to be unconstitutional. Furthermore, there is no limitation period within which a party should present a petition challenging the constitutionality of a statute. In our view, the Court may interrogate the constitutionality of legislation at any time and grant an appropriate remedy. The Courts have over time fashioned appropriate remedies including the suspension of the declaration of unconstitutionality of statute to enable Parliament take remedial action. Such suspended action does not mean that the impugned legislation is not unconstitutional. It simply postpones the decree that may cause more hardship to the public...The question that we must ask is: what is the effect of ambiguity and or vagueness in a statutory provision? Do they affect constitutionality of those provisions? In our view, ambiguity or vagueness in statutory provision makes that provision void. A provision will be said to be void where when the average citizen is unable to know what is regulated and the manner of that regulation; or, where the provision is capable of eliciting different interpretations and different results. Such a provision would not meet constitutional quality...Therefore elementary justice demands legal certainty of rules affecting the citizen. A legislation or provision can also be**

**unconstitutional on grounds of cause and effect otherwise known as purpose or effect. Where the purpose or effect results into unconstitutional effects the provision or statute may be nullified for being unconstitutional…Therefore whereas the legislative authority vests in Parliament and the County Assemblies, where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution, the High Court is the institution constitutionally empowered to determine the issue. This is of course subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. There is nothing like supremacy of the legislative assembly outside the Constitution. Under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. No person may claim or exercise State authority except as authorised by the Constitution…The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to "… institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention."**

322. In **Olum and Another vs. Attorney General [2002] 2 EA 508**, the Constitutional Court of Uganda stated;

**"To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by**

**the constitution, the impugned statute or section thereof shall be declared unconstitutional…"**

323. Similarly, in the case of **Institute of Social Accountability & Another vs. National Assembly & 4 others (2015) eKLR,** the Court opined that while determining constitutionality of a statute, the court must not only consider the general presumption of constitutionality of the Act, but must also look into the object and purpose of the impugned amendments for it is important to discern the intention expressed in the Act from a historical concept.

324. Taking those pronouncements into consideration this Court therefore ought to interrogate the constitutionality of the Minimum Tax as imposed by section 12D of the ***Income Tax Act*** by taking into account the provisions of Article 201(b)(i) of the Constitution as well as the constitutional obligation of the Petitioners as imposed under Articles 209 and 210 of the Constitution with a view of giving the law a purposive interpretation. That is what a holistic interpretation requires. As was held in **The Engineers Board of Kenya –vs- Jesse Waweru Wahome & Others Civil Appeal No.240 of 2013**:-

**"One of the canons of statutory interpretation is a holistic approach…no provision of any legislation should be treated as "stand alone." An act of Parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act."**

325. I therefore agree with **Mativo, J** in **Council of County Governors vs. Attorney General & Another [2017] eKLR** that:-

> **"Under Article 259 of the constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional)...In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The constitution should be given a purposive, liberal interpretation and that the provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other. It is important to bear in mind that the spirit of the constitution must, preside and permeate the process of judicial interpretation and judicial discretion."**

326. Since the matter before this Court revolves around taxation, it is important to set out the general principles of law regarding taxation. Tax law and any legislation for that matter is guided by and is a reflection of the policy of the government at any one given point in time. In this case the

policy was enacted into law by the 1st Respondent and is to be implemented by the 2nd Respondent since under Section 5(2), the ***Kenya Revenue Authority Act***, the 2nd Respondent, as part of its functions under subsection (1), is required to administer and enforce all provisions of the written laws set out in Part 1 and 2 of the First Schedule for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws. In the Canadian case of **Just vs. R in Right of B.C. (Vancouver No. C822279), Justice McLachlin** of the Supreme Court of British Columbia observed thus:

> **"In general, policy refers to a decision of a public body at the planning level involving the allocation of scarce resources or balancing such factors as efficiency and thrift. The operational function of government, by contrast, involves the use of governmental powers for the purpose of implementing, giving effect to or enforcing compliance with the general or specific goals of a policy decision…one hallmark of a policy, as opposed to an operational, decision is that it involves planning…A second characteristic of a policy decision as opposed to an operational function is that a policy decision involves allocating resources and balancing factors such as efficiency or thrift."**

327. However, it is not for this court to determine whether in arriving at a particular policy decision, the policy maker's decision was wise or merited. It therefore follows that the timing of a policy decision based on the prevailing circumstances do not justify the Court's interference with the policy in question. As was appreciated by **Majanja, J** in **Mark Obuya &**

**Others vs. Commissioner of Domestic Taxes & 2 Others [2014] eKLR**:

> **"The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court licence to declare it unconstitutional...It is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it imposed, calculated and enforced. The arguments made by the petitioner concern how the customs duty is calculated, that is an issue of the application of the Act, rather than its constitutionality."**

328. This was appreciated by the Supreme Court of India in the case of **Hambardda Dawakhana vs. Union of India Air (1960) AIR 554**.

The same Court in case of **Union of India vs. M/S Exide Industries Ltd. on 24 April, 2020** expressed itself as follows:-

> **"11. The approach of the Court in testing the constitutional validity of a provision is well settled and the fundamental concern of the Court is to inspect the existence of enacting power and once such power is found to be present, the next examination is to ascertain whether the enacted provision impinges upon any right enshrined in Part III of the Constitution. Broadly speaking, the process of examining validity of a duly enacted provision, as envisaged under Article 13 of the Constitution, is premised on these two steps. No doubt, the second test of infringement of Part III is a deeper test undertaken in light of settled constitutional principles. In State of**

**Madhya Pradesh vs. Rakesh Kohli & Anr.4, this Court observed thus:**

**'17. This Court has repeatedly stated that legislative enactment can be struck down by Court only on two grounds, namely (i) that the appropriate legislature does not have competence to make the law, and (ii) that it does not take away or abridge any of the fundamental rights enumerated in Part III of the 4 (2012) 6 SCC 312 Constitution or any other constitutional provisions....'**

**That brings us to the next step of examination i.e. whether the said clause contravenes any right enshrined in Part III of the Constitution, either in its form, substance or effect. It is no more res integra that the examination of the Court begins with a presumption in favour of constitutionality. This presumption is not just borne out of judicial discipline and prudence, but also out of the basic scheme of the Constitution wherein the power to legislate is the exclusive domain of the Legislature/Parliament. This power is clothed with power to decide when to legislate, what to legislate and how much to legislate. Thus, to decide the timing, content and extent of legislation is a function primarily entrusted to the legislature and in exercise of judicial review, the Court starts with a basic presumption in favour of the proper exercise of such power."**

329. In **State of M.P vs Rakesh Kohli & Anr on 11 May, 2012**, the same Court had this to say:-

**"29. While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature, the court must have regard to the following principles:**

**(i), there is always presumption in favour of constitutionality of a law made by Parliament or a State Legislature**

**(ii), no enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found**

**(iii), the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law as the Parliament and State Legislatures are supposed to be alive to the needs of the people whom they represent and they are the best judge of the community by whose suffrage they come into existence**

**(iv), hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law and**

**(v), in the field of taxation, the Legislature enjoys greater latitude for classification."**

330. Back home in **Bidco Oil Refineries Limited vs. Attorney General & 3 Others [2013] eKLR** it was held that:

> **"It is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is imposed, calculated and enforced. The arguments made by the Appellant concern how the customs duty is calculated, that is an issue of the application of the Act, rather than its constitutionality. Since statutory application is really the issue here, the consideration whether Article 47(1) has been violated is dispositive. In any case, the collection of taxes through the procedures provided by the law cannot, at least in the circumstances of this case, constitute an arbitrary deprivation of property."**

331. That position resonates with the opinion held in **Association of Gaming Operators-Kenya & 41 Others vs. Attorney General & 4 Others [2014] eKLR** where **Kenya Union of Domestic, Hotels,**

**Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union vs. Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013 [2014] eKLR**, was cited in which it was held that:

> **"Article 209 of the Constitution empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under Article 209 of the Constitution, the legislature retains wide authority to define the scope of the tax."**

332. What comes out from the above authorities is that unless there is an allegation of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the implementation of the statute may be difficult or inconvenient as opposed to being unconstitutional or unlawful, does not warrant it being declared unconstitutional since it is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it imposed, calculated and enforced because such issues go to the application of the Act, rather than its constitutionality. It is therefore within the sole mandate of the

Legislature/Parliament to decide when to legislate, what to legislate and how much to legislate and to decide the timing, content and extent of legislation. Further vague contentions as arbitrariness, unreasonableness or irrationality without more do not warrant the striking out of an enactment unless some constitutional infirmity has to be found. Since it is presumed that Parliament and State Legislatures are alive to the needs of the people whom they represent hence the best judge of the community by whose suffrage they come into existence, the court ought not to concern itself with the wisdom or unwisdom, the justice or injustice of the law. Similarly, hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law since in the field of taxation, the Legislature enjoys greater latitude for classification. Accordingly, it is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is defined, imposed, calculated, calculated enforced or administered. Therefore, it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection.

333. In these petitions, it is alleged that in other jurisdictions which have adopted the minimum tax regime the manner of administering it is not the same as the one adopted by the Respondent herein which is unfair. While I

agree that as regards the 'best practice' comparative jurisdiction, circumstances befalling different jurisdictions vary immensely and one of the most salient variances amongst different jurisdictions is the economic status of a state and that of its citizens as well as the unique and peculiar income generating activities and the circumstances surrounding them, as stated hereinabove, it is presumed that Parliament and State Legislatures are alive to the needs of the people whom they represent hence the best judge of the community by whose suffrage they come into existence are what dictate the taxation policies of the country. It is therefore not for the Court to decide what "the 'best practice' comparative jurisdiction is unless it is shown that the said the taxation regime in force in those other jurisdictions go contrary to our Constitution. It is on that basis that I agree with the opinion expressed in **Unilever Kenya Limited –vs- The Commissioner of Income Tax – Income Tax Appeal No.753 of 2003**, that:

> **"The ways of doing modern business have changed very substantially in the last 20 years or so and it would be fool-hardy for any court to disregard internationally accepted principles of business as long as these do not conflict with our own laws. To do otherwise would be highly short sighted."**

334. However, if the Legislature, based on the said 'best practices' enacts a law that violates or contravenes our Constitution, such a law will not stand. It therefore follows that the Legislature while considering any policy must

ensure that the same whether in its enactment or operations, adhere to the constitutional values and principles.

335. According to the Petitioners, the action by the 1st Respondent to enact the impugned amendment and introduce Minimum tax without the reference of the said amendment to the Senate for discussion and passing thereof violates Article 110(1)(c) as read with Article 110(4) and (5).

336. The starting point here is Article 109 of the Constitution which provides as follows:

***"Article 109-***

***1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.***

***2)Any Bill may originate in the National Assembly.***

***3)A Bill not concerning county government is considered only in the National Assembly and passed in accordance with Article 122 and the Standing Orders of the Assembly.***

***4) A Bill concerning county government may originate in the National Assembly or the Senate and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.***

***5)A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114."***

337. Article 110 of the Constitution, provides as follows:

***110. Bills concerning county government***

***(1) In this Constitution, "a Bill concerning county government" means—***

***(a) A Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;***

***(b) a Bill relating to the election of members of a county assembly or a county executive; and***

***(c) a Bill referred to in Chapter Twelve affecting the finances of county governments.***

***(2) A Bill concerning county governments is—***

***(a) a special Bill, which shall be considered under Article 111, if it—***

***(i) Relates to the election of members of a county assembly or a county executive; or***

***(ii) is the annual County Allocation of Revenue Bill referred to in Article 218; or***

***(b) An ordinary Bill, which shall be considered under Article 112, in any other case.***

***(3) Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.***

***(4) When any Bill concerning county government has been passed by one House of Parliament, the Speaker of that House shall refer it to the Speaker of the other House.***

***(5) If both Houses pass the Bill in the same form, the Speaker of the House in which the Bill originated shall, within seven days, refer the Bill to the President for assent.***

338. From the foregoing, it is clear that a money Bill may be introduced only in the National Assembly in accordance with Article 114 and Article 114 (3) of the Constitution, defines a Money Bill as meaning:

> ***"a Bill, other than a Bill specified in Article 218, that contains provisions dealing with—***
>
> ***(a) taxes;***
>
> ***(b) the imposition of charges on a public fund or the variation or repeal of any of those charges;***
>
> ***(c) the appropriation, receipt, custody, investment or issue of public money;***
>
> ***(d) the raising or guaranteeing of any loan or its repayment; or***
>
> ***(e) matters incidental to any of those matters.***

339. What comes out from above is that a money Bill may be introduced only in the National Assembly. For the purposes of these petitions, a Bill, other than a Bill specified in Article 218, that contains provisions dealing with taxes is a money Bill. Again for the purposes of this petitions, a Bill referred to in Chapter Twelve, that is a Bill dealing with public finance, affecting the finances of county governments is a bill concerning county government. Such a Bill can originate from either of the two Houses. The question that arises here is whether the imposition of minimum taxes affect the finances of county governments. The Supreme Court **In <u>Re the Matter of the Interim Independent Electoral Commission [2011] eKLR,</u>** expressed itself as follows;

**"We consider that the expression "any matters touching on county government" should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government."**

340. To the petitioners, the Minimum Tax affects the finances of county governments because it is chargeable on gross turnover, and the gross turnover of an enterprise includes the County taxes and charges levied and chargeable in its County of business. As such, expropriation thereof amount to the deprivation of the said County's revenue. It is important to note that the preamble to the ***Finance Act, 2020*** provides that it is an Act of Parliament to make amendments to tax related laws and the Act makes provisions for the amendments to the ***Income Tax Act*** (CAP470), ***Value Added Tax Act, 2013*** and ***Stamp Duty Act (CAP 480)***. While it is true that under Article 209 of the Constitution the power to impose Value Added Tax, Income Tax, Customs Duty and Excise Duty is on the national government, it is also true that the exercise of such power may in certain cases affect the finances of county governments. It is however may view that for such action to be said to affect the finances of county governments, the effect ought to be direct. In this case if I understand the petitioners correctly, the effect on the finances of the county governments resulting from the imposition of the Minimum Tax would result from the inability by the tax payers to remit to the County Governments what the County Governments expect. That in my view is not a direct effect on the finances

of the county governments. It ought to be taken note that any decision as regards tax may even in a remote way affect the collection of revenues by the County Governments. That however does not necessarily affect the finances of the county governments. A finding to the contrary in my view would mean that any Bill containing provisions dealing with taxes would be a Bill affecting the finances of the county governments. Such an interpretation would be contrary to the holistic and purposive interpretation of Article 109(5) of the Constitution.

341. It is therefore my finding that the amendment introducing the Minimum Tax did not require consideration by the Senate.

342. According to the Petitioners, the introduction of the Minimum Tax is likely to lead to double taxation. This is due to a proper application of section 16(2)(c) of the ***Income Tax Act***. Under that section, if a company in a tax loss position becomes profitable in the course of its financial year, having already paid the minimum tax during the loss-making period of the company's financial year, it will now be required to pay corporation income tax. However, the minimum tax paid during the loss-making period of the company's financial year will neither be a tax-deductible expense nor a tax credit in computing the taxable income. In that event the company shall have been subjected to double taxation.

343. The Respondents on the other hand contend that since there is no prayer sought with regard to the constitutionality of the Minimum Tax Guidelines, any submission by the Petitioners on the issue should be disregarded.

344. I have considered the issue raised by the petitioners regarding the possibility of double taxation and it is my view that the same cannot be wished away simply on the ground that no prayer is sought as regards the same. The Respondents have instead of dealing with the issue sought to introduce the issue of cross-border or multi-state taxation as opposed to the issue of double taxation. The matter having been placed before this Court and the parties having been put on notice thereof, this Court must deal with it. The Court of Appeal appreciated this in **Transworld Safaries (K) Limited vs. Robin Makori Ratemo [2008] KLR 339** where it held that:

> **"Generally speaking, pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the court. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties."**

345. However, as held in by the Court of Appeal in the case of **Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 Others [2015] e KLR,** where the Court stated thus in page 7 of its decision:

**"...so long as there is a sufficiency of information, as to the constitutional right violated with particulars supplied, then a court of competent jurisdiction ought, in the spirit of a rights-centric constitutional dispensation such as ours, to take the matter up, investigate and provide redress or relief if merited, careful not to defeat substance at the altar of procedure."**

346. In this case the issue raised is a substantial one. The Respondents were put on notice that it was an issue in the matter and in an attempt to deal with it, they skirted round it and instead dealt with a totally different issue. According to ***Black's Law Dictionary 5th Edition, 1979***, double taxation is defined in the following terms:

**"To constitute 'double taxation', that tax must be imposed on the same property by same governing body during same taxing period and for same taxing purpose."**

347. In **Kenya Pharmaceutical Association & Another vs. Nairobi City County and the 46 Other County Governments & Another [2017] eKLR**, **Mativo, J** held that a double tax is the taxing of the same income twice.

348. I associate myself with the holding in **Kenya Flower Council vs. Meru County Government [2019] eKLR**, where the court noted that:

**"the Constitution is alive to the fact that the burden of taxation should be shared fairly, as the national and county government raise revenue through imposition of taxes and charges. This is to avoid double taxation or creating a heavier burden of taxation on concerned taxpayers. Therefore, there is absolute necessity of a mechanism that does not produce unnecessary duplication of taxes**

**and one that averts creation of unduly heavy burden of taxation on particular category of taxpayers."**

349. I agree that it is not only unconstitutional and unlawful to subject one to double taxation but the same is also economically punitive in nature. In **Keroche Industries Limited vs. Kenya Revenue Authority and 5 Others HC Misc. Civil Appl No. 743 of 2006 [2007] eKLR** it was observed that:

**"It is of course regarded as penal for a person to be taxed twice over in respect of the same matter."**

350. According to Article 201(b)(i) one of the principles guiding public finance in this country is that the burden of taxation shall be shared fairly. A system of taxation that lends itself to possibility of double taxation cannot be said to be fair. Such a system fails the test prescribed in Article 201(b)(i). It matters not that such a system may be in other jurisdictions. According to Article 2(4) of our Constitution, any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. Therefore, a legislation that does not pass the constitutional muster cannot be justified based on the ground that similar legislation exists in other jurisdictions since our Constitution in Article 2(1) and (2) that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution.

Accordingly, any law or practice cannot survive if it is contrary to the Constitution. While there is nothing wrong in importing practices from the other parts of the world, our Constitution has been hailed the World over as one that is reformative. Our Constitution, being a value-oriented Constitution as opposed to a structural one, its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The distinction between the two was made by **Ulrich Karpen** in ***The Constitution of the Federal Republic of Germany*** thus:

> **"...the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements."**

351. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in **Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51)** noted as follows:

> **"But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the**

**society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit."**

352. The foregoing position was aptly summarised by the South African Constitutional Court in **Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC)** in t following terms:

**"Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.' The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed."**

353. In distinguishing transformative constitutions from structural ones, the Supreme Court in **The Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012** expressed itself as follows:

**"A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other."**

354. At paragraph 54 of the said decision the Court held that:

**"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the**

**development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm."**

355. Therefore, the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as "a transformative instrument is the key instrument to bring about a better and more just society". See **Michaela Hailbronner** in ***Traditions and Transformations: The Rise of German Constitutionalism***.

356. This was the position of the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] EKLR** where it expressed itself as follows:

**"Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*. This is clear right from the preambular clause which premises the new Constitution on – *"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human***

***rights, equality, freedom, democracy, social justice and the rule of law."*** **And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system. Karl Klare, in his article, "*Legal Culture and Transformative Constitutionalism*," *South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: *"At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent."* The scholar states the object of this South African choice: *"By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."* The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the**

**comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".**

357. Therefore, in applying and interpreting the 2010 Constitution by any of the three arms of the State, the nature of our transformative Constitution must always be kept in mind and its spirit promoted. We must therefore be cautious in borrowing policies from other jurisdictions whose Constitutions may not be similar to ours. Accordingly, the law passed in other jurisdictions must be tested against the provisions of our Constitution in order to determine whether they pass the constitutional muster.

358. Therefore, in so far the introduction of minimum tax in the manner contemplated opens the window for violation of Article 201(b)(i) of the Constitution, this Court in the exercise of the powers conferred upon it by Article 165(3)(b) of the Constitution is enjoined to intervene. The said Article provides that this Court has the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Once it is proved that there is a threat to right or fundamental freedom this Court does not have to wait until such a threat becomes a reality.

359. The 2nd Respondent has acknowledged that it is alive to the fact that there have been challenges with regard to implementation of the tax. It is however its view that the said challenges do not amount to

unconstitutionality. While I agree that hardship does not necessarily warrant the declaration of the constitutional invalidity of a fiscal statute or economic law, where what is in contention is not hardship but illegality that is likely to be occasioned by the implementation of an otherwise constitutional statute, the Court cannot turn a blind eye to it.

360. In this case two issues are raised as regards the violation of Article 201(b)(i) of the Constitution which provide that one of the principles guiding public finance in this country is that the burden of taxation shall be shared fairly. A system of taxation that lends itself to possibility of double taxation cannot be said to be fair. Such a system fails the test prescribed in Article 201(b)(i) and it matters not that such a system is being applied in other jurisdictions. Apart from that, the introduction of the Minimum Tax means that those people who genuinely make losses will be forced to fall back on their capital in order to pay the Tax while those who make profits will be paying the income tax from their profits.

361. The Departmental Committee on Finance and National Planning justified the Minimum Tax by stating that:

> ***The minimum Tax shall apply to all persons whether they are making profits or incurring losses seeks to expand the tax base and also ensure that companies that make perpetual losses contribute towards enabling the Government in the provision of services. The rationale for tis tax is that even where companies are making losses, they continue enjoying facilities, such as***

***infrastructure, whose cost of construction continues being services by the Government.***

362. No reasonable person would doubt the need for tax payers to pay their taxes in order to enable the Government meet its constitutional obligation in rendering services. The people have delegated their sovereignty to the Government and the Government must be facilitated in undertaking its obligations. However, in delegating that sovereignty, the people have entered into a contract between them and the Government and that contract is the Constitution of Kenya. Therefore, in carrying out its mandate, the Government must ensure that all its actions are undertaken pursuant to the constitutional dictates and that the payment of taxes is constitutional and lawful. The imposition of taxes must be undertaken for the purposes of fulfilling its obligations owed to the people and therefore must be constitutional and lawful. In this case the Constitution provides that that one of the principles guiding public finance in this country is that the burden of taxation shall be shared fairly. Taxation cannot be fair when a system of taxation is introduced that has the potential effect of diminishing the capital for those making losses while for others making profits, their capital base is unaffected. Taxation ought not to be applied so that those who have more are added while those who have little, have even that little taken away from them. Such a system cannot be said to be fair and in my view that system fails the test of fairness prescribed under Article 201(b)(i)

of the Constitution. I agree that the 2nd Respondent must devise a way in which the tax evaders can be identified and lawfully dealt with rather than adopting a system under which even the innocent are ensnared. A statute, particularly one that deals with taxation must be certain. Like fire which converts everything to itself, it must remove and convert the dark spots. Like guided missiles, it must hit only the target. It must only trap those against whom it is targeted. It must only burn the chaff and not the wheat. It cannot by legislation say: "Since I cannot tell who is telling me the truth when it comes to tax loss, I am going to assume that you fall in the same category and impose a figure upon you, based on your turnover."

363. As regards the issue of enjoyment infrastructural facilities, the Government can devise a system and it has done this before, whereby those enjoying those facilities meet their expenses. That can be done without violating the law. Such taxes ought not to be introduced through the backdoor as was attempted in this case.

364. It was contended by the Petitioners that contrary to Article 27 of the Constitution, the impugned amendment in Section 12D of the ***Income Tax Act*** discriminates against the petitioners and other traders in the consumer products sector by favouring those in the energy and petroleum sector and in the insurance sector. According to the Petitioners, the reason given for this being that the energy and petroleum sector are regulated by

government and they would be disadvantaged by minimum tax, since they cannot control their profits. This exemption and its rationale create and unfair tax environment to the suffering of the Petitioners and traders of consumer as it is based on the fallacious misconception that they (the Petitioners) are solely in control of their retail prices and consequently their profits.

365. According to the Petitioners, the phrase *'excluding persons engaged in businesses whose retail price is controlled by the government'* is a very broad phrase and subject to wide interpretation that negates the purpose of enactment of the impugned law whose rationale was to spread the tax burden as it appears the tax burden is being shifted to the Petitioners and other SMEs. It proceeds on a false assumption that the Petitioners are in control of their sales and profits.

366. It was further submitted that the uncertainty leading to unfairness of the tax burden has also been witnessed by the manner in which the 2nd Respondent has issued exemptions to Kenya Airways who were exempted in March 2021 which do not fall under the exemptions in the ***Income Tax Act*** from paying the Minimum Tax.

367. Article 201(b)(i) and (ii) of the Constitution provides that some of the principles meant to guide all aspects of public finance in the Republic

include the fact that the public finance system shall promote an equitable society, and in particular the burden of taxation shall be shared fairly.

368. I therefore agree with the position expressed in **State of Bombay vs. F. N. Balsara AIR 1951 SC 318** at p. 326 in which the opinion of **Professor Willis' *Constitutional Law*, 1st ed. At 578** where it is stated that:

> **"The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred & in the liabilities imposed. The inhibition of the amendment…was designed to prevent any person or class of persons from being singled out as a special subject for discriminating & hostile legislation.' It does not take from the states the power to classify either in the adoption of police laws or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, & nullifies what they do only when it is without any reasonable basis."**

369. In **Kenya Bankers Association vs. Kenya Revenue Authority (2018) eKLR** the Court relied on the decision in **R vs. Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Limited [1981] UKHL 2** at page 22 where the Court was:

**"...persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within complex comprised in the management of tax, every part of which it is their duty, if they can, to collect."**

370. The Petitioners however clarified that it is not the power to grant exemptions that they have an issue with, but the indiscriminate manner in which the same are granted and the indiscriminate and unknown rationales thereof.

371. The reason given was that*'...the proposal for exemption by oil marketing companies is valid as the industry is already highly regulated by the Energy Petroleum Regulatory Authority (EPRA) in terms of price control. Therefore, there is little or no room to increase price arbitrarily. Given the nature of operations of the petroleum industry particularly the fact that pricing is controlled by Government it will be fair to base their tax on their income before deduction of depreciation, interest and tax on income.*'

372. I agree with the decision in **Pevans East Africa Limited v Betting Control and Licensing Board & 2 others; Safaricom Limited & another (Interested Parties) [2019] eKLR**, where the Court cited with approval the test applied in the case of **Harksen vs. Lane NO and**

**Others (1997) 11 BCLR 1489 (CC)** where the South African Constitutional Court established the criteria for determining whether a provision of law is discriminatory as follows:

a) ***Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.***
b) ***Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: -***
c) ***Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.***
d) ***If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.***

e) ***If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause of the ..Constitution, being Article 24 of the Constitution in the instant case.***

373. That was the position in **Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General [2011] eKLR**, of the court citing the South African case of **Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000** held that to determine whether or not there is infringement of the right to equality, then it ought to determine:

a) **whether the provision under attack that makes a differentiation bears a rational connection to a legitimate government purpose. If the differentiation bears no such connection, there is a violation of Section 9 (1). If it bears a rational connection, the second enquiry arises.**
b) **That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9 (3).**
c) **If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.**

374. The Impugned Amendment and the Guidelines exempt persons engaged in businesses whose retail price is controlled by the Government (such as

oil marketing companies (**OMCs**) and persons engaged in insurance business) from Minimum Tax.

375. OMCs were exempted from Minimum Tax on the basis that their prices are regulated by the government and therefore they cannot increase their prices arbitrarily which means they cannot control their profits while the airlines were exempted on the basis that the Government of Kenya owns at 45% of its shares. The question then becomes whether the inability to increase prices arbitrarily is an issue that is so unique in the downstream petroleum sector that an exclusion from the implementation of the minimum tax was indispensable, and the fact that the Government of Kenya owns shares in an airline is a justifiable reason to warrant the discrimination.

376. It is worth noting that the inability to increase prices arbitrarily is a situation that is present in other sectors such as sellers of essential goods and in the consumer goods sector. In addition, the rationale applied by the 1st and 2nd Respondents that the prices levied by OMCs are regulated by the Government is baseless. It is worth noting that there are other sectors where the State has a say in the prices charged by the persons engaged in those sectors. Just by way of illustration, in 2017, the ***Price Control (Essential Goods) Act, 2011*** was used as the basis for enacting the ***Price Control (Essential Goods) (Sifted White Maize Meal)***

***Order, 2017*** which cushioned consumers of sifted maize from exorbitant costs of food when there was a shortage of maize.

377. In the said Petitioner's view, the exemption of Kenya Airways from the application of section 12D of the ***Income Tax Act*** is contradictory to the very purpose of imposing minimum tax, which is to ensure that loss making companies also contribute towards national revenue. It therefore follows that the exclusion of OMCs and Kenya Airways from the application of minimum tax does not serve any legitimate purpose.

378. Dealing with the allegations that the exclusion of Kenya Airways from the application of minimum tax amounts to unfair discrimination, the Respondents' response was that that is a new issue raised at the submissions staged and not in the Petition. While that may not be a reason to ignore an allegation of violation of the Bill of Rights, the Respondents however contend that what is in dispute is the exemptions under Section 12D of the ***Income Tax Act*** and not the exemptions to Kenya Airways which is not an issue in the Petition. According to them, the exemption of Kenya Airways was contained in Legal Notice No. 27 in the Kenya Gazette Supplement No. 37 Legislative Supplement No. 13 dated 15th March 2021 and was issued under section 13(2) and not section 12D of the ***Income Tax Act*** which is the subject to this dispute.

379. It is true that the subject of these petitions is the introduction of Minimum Tax pursuant to section 12D of the ***Income Tax Act***. I agree that the Petitioners do not have a carte blanche to challenge any provisions of the ***Income Tax Act*** in these proceedings. In these proceedings, they can only challenge the said amendment and the steps taken in pursuance thereof. Therefore, to the extent that the exemptions extended to Kenya Airways were pursuit to a provisions other than section 12D of the ***Income Tax Act***, that exemption cannot properly form the subject of inquiry in this judgement.

380. That however is not the same position as the OMCs and the Insurance Companies. As stated hereinabove, the minimum tax is not payable by those engaged in business whose retail price is controlled by the Government those engaged in insurance business. It is therefore clear that the said provision does not deal specifically with petroleum companies. However, the lid was lifted by the Departmental Committee on Finance and National Planning in its report on the consideration of the ***Tax Laws (Amendment) (No.2) Bill, 2020*** justifying the exempting OMCs from the requirement to pay minimum tax in the following terms:

> ***"...the proposal for exemption by oil marketing companies is valid as the industry is already highly regulated by the Energy Petroleum Regulatory Authority (EPRA) in terms of price control. Therefore, there is little or no room to increase price arbitrarily. Given the nature of operations of the petroleum industry***

***particularly the fact that pricing is controlled by Government it will be fair to base their tax on their income before deduction of depreciation, interest and tax on income."***

381. It is this justification that the Petitioners are questioning since according to them, minimum tax discriminates against businesses with lower profit margins such as those in the manufacture, sale and distribution of consumer goods. To them, businesses in the consumer goods sector have low profit margins owing to the nature of goods being sold and the high expenditure involved in this business. These businesses have their prices controlled either based on law, custom or the rules of demand and supply, barring increase in their prices. They added that consumer goods manufacturers, sellers and distributors are expected to maintain reasonably low prices given their essential nature which gives the Government power to regulate their prices through the ***Price Control (Essential Goods) Act, 2011***. For this reason, such businesses will always have low profit margins. They gave the example of 2017, when the ***Price Control (Essential Goods) Act, 2011*** was used as the basis for enacting the ***Price Control (Essential Goods) (Sifted White Maize Meal) Order, 2017*** which cushioned consumers of sifted maize from exorbitant costs of food when there was a shortage of maize.

382. In response to this contention the Respondents aver that traders whose retail prices are regulated by government, like the oil marketing companies,

have no control of their profit margins and the such it will be practical to stop them from increasing their revenue and then place minimum tax on them. The 2nd Respondent however averred that with regard to shifted white maize meal the restriction and price control therein was for temporary period as currently the same is not regulated. The exemption provided under section 12D (1) (d), it was explained, is for all traders dealing in goods for which retails price is determined by government and not only oil marketing companies. All the players in these sectors have been accorded similar treatment as such it cannot be said that the other sectors are being discriminated. Affirmative action demand that sectors to be accorded treatment based on their uniqueness, which is the case herein.

383. In the 2nd Respondent's view, taxation and exemptions are based on the current policy of the government. The government deciding to place a tax on a group or issuing an incentive to enable policy agenda be achieved, for example access to certain commodities cannot be said to be discrimination. Further the decision to place tax on a product is a policy issue and the said is informed by the government's reasons/ needs/ vision and the views of the public which is received through their representatives in Parliament and their representations made at memorandum submissions and is not in any way discriminative.

384. My understanding of the Petitioners' case is that since their prices is regulated by the nature of goods being sold and the high expenditure involved in this business, these businesses have their prices controlled either based on law, custom or the rules of demand and supply. As far as the government control is concerned, it is true that through the ***Price Control (Essential Goods) Act, 2011,*** the Government may control the prices of essential goods such as consumer goods. If that were to happen then the sectors concerned would no doubt be entitled to exemption from Minimum Tax Regime. In this case what Section 12D provides is that the minimum tax is not payable by those engaged in business whose retail price is controlled by the Government. While the Departmental Committee on Finance and National Planning in its report specifically pointed the exemption of oil marketing companies the law as enacted is not restricted to the Oil Marketing Companies but applies to all businesses whose retail price is controlled by the Government. The reason given for this is that they do not have the leeway to determine their prices. In my view such enterprises cannot be said to fall under the same circumstances as the entities whose retail prices are controlled by the rules of demand and supply. I therefore find that as long as the exemption applies to all those engaged in business whose retail price is controlled by the Government including the petitioners herein whenever the Government decides to

control their retail prices, the minimum tax cannot be said to be unfairly discriminatory on that score.

385. I agree that Article 27(1) of the Constitution does not prohibit differentiation or classification based on different requirements of the law and that what the Constitution requires is that any classification or differentiation must bear a rational connection to a legitimate government purpose. In this case the reason given for differentiation between those business entities whose retail prices are controlled by the Government and those that are not is that the former have little or no room to increase price arbitrarily since pricing is controlled by Government and hence it would be fair to base their tax on their income before deduction of depreciation, interest and tax on income. Even if this Court was to disagree with that reason, that alone would not be a justifiable reason to strike out the provision that reason being a policy decision. I therefore agree with the holding in the case of **EG & 7 Others vs. Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & Another (Amicus Curiae)** (supra) where the court stated that:

> **".....The test for determining whether a claim based on unfair discrimination should succeed was laid down by South Africa Constitutional Court in Harksen v Lane NO and others... in which the court said:**
>
> **They are:-**

**(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the Constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.**

**(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:-**

**(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.**

**(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the Complainant. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation…**

**(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the**

**provision can be justified under the limitations clause (of the Constitution).”**

386. A similar position was taken in **Federation of Women Lawyers Kenya (FIDA-K) & 5 Others vs. Attorney General & Another [2011] eKLR** wherein the Court stated that:

**“In our view mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary that it does not rest on any basis having regard to the object which the legislature has in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution.”**

387. In this case the Respondents have given a legitimate reason to differentiate between the two sets of entities and while such reason may be unwise in the opinion of the Court it is not rendered illegitimate by that mere fact. It based on this reasoning that I agree with the holding in **Scotch Whisky Association and others vs. the Lord Advocate and Another (2017) UKSC 76** where the supreme Court of Scotland stated as follows;

**“The Scottish Parliament and Government have as a matter of general policy decided to put great weight on combatting alcohol-related mortality and hospitalisation and other forms of alcohol related harm. That was a judgement which it was for them to make and their right to make it militates against intrusive review by a**

**domestic Court that minimum pricing will involve a market distortion, including the EU trade and competition is accepted. However, I find it impossible even if it is appropriate to undertake the exercise at all in this context, to conclude that this can or should be regarded as outweighing the health benefits which are intended by minimum pricing."**

388. As appreciated in **Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 Others [2018] eKLR**:

**"Where the Constitution had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the courts do not normally have. We must accordingly shun invitation to dabble in matters of national economic policy, when what is placed before us are the views of only two players in one industry."**

389. I further agree that in determining this issue the test to be applied is the one set out in the case of **Okiya Omtatah Okoiti vs. Cabinet Secretary, National Treasury & 3 Others [2018] eKLR** where the Court found:

**"...that it is not disputed that State has the obligation to collect taxes, and that Parliament therefore has the obligation to legislate to this effect. Indeed, Article 209(1) of the Constitution empowers the national government to impose taxes. The respondents' case was that the impugned legislation(s) was not intended to harm the public but rather intended to facilitate the fulfilment of the responsibility of the State to collect taxes. 45. My humble view is that the importance of taxation and the collection of taxes for any government cannot be gainsaid. The respondents' position was that this court should not interfere with the legislative process. To my mind however, what is before this Court is not a question on whether the respondents have fulfilled/are fulfilling a constitutional mandate but rather, whether the impugned legislation(s), and the processes leading thereto, met the relevant legal and constitutional thresholds, and whether the citizen's rights have been violated and/or are threatened with violation in the circumstances of this case".**

390. That now brings me to the issue regarding the Guidelines on the Minimum Tax. It was urged that there was no compliance with the provisions of Article 10(2) of the said Constitution and Sections 2, 5, 6,7, 8, 9 & 11 of the ***Statutory Instruments Act, 2013*** in the process leading to the enactment of the said Guidelines. According to the petitioners Section 5 of the ***Statutory Instruments Act*** by providing for consultation before making Statutory Instruments, is a reflection *of* Article 10 (2)(a) of the Constitution of Kenya, 2010 which provides for Participation of the people as one of the national values and principles of

governance. Despite the justification of the Guidelines based on their importance in assisting taxpayers understand the Impugned Amendment, the petitioners insisted that there is not a single record of any consultative meetings having been conducted prior to issuance of the said Guidelines in complete violation of Section 5 of the ***Statutory Instruments Act***. The Petitioners contended that the said Regulations had both direct and a substantial indirect effect on businesses of the Petitioners and that as a result of their implementation, the Petitioners incurred enormous losses. Therefore, the Regulations fell squarely with the contemplation of section 5(1) of the ***Statutory Instruments Act***.

391. It was submitted that the Statutory Instruments Act requires: - (a) Consultation with stakeholders, (b) preparation of regulatory Impact Statement, (c) preparation of explanation memorandum (d) tabling of statutory instrument in the House, (e) consideration of the statutory instrument by the National Assembly. Section 13 of the Statutory Instruments Act provides for guidelines for the relevant Parliamentary committee while examining the instrument. These guidelines focus on the principles of good governance and the Rule of Law. The Committee considers whether the Statutory Instrument conforms with the Constitution; the parent Act or other written laws; whether it infringes the Bill of Rights or contains a matter that ought to be dealt with by an act of

Parliament, and whether it contains taxation; directly or indirectly bars the jurisdiction of the Courts; gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power; involves expenditure from the Consolidated Fund or other public revenues; is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation; appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; appears to have had unjustifiable delay in its publication or laying before Parliament; makes rights liberties or obligations unduly dependent upon non-reviewable decisions; makes rights liberties or obligations unduly dependent insufficiently defined administrative powers; inappropriately delegates legislative powers; imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation; appears for any reason to infringe on the rule of law; inadequately subjects the exercise of legislative power to parliamentary scrutiny; and accords to any other reason that the Committee considers fit to examine.

392. Regarding the Respondents' position that the said Guidelines were in the nature of a public ruling, the Petitioners contended that contrary to the minimum requirements for a public ruling pursuant to section 63(1) and (2) of the ***Tax Procedures Act***, there was no evidence that the

Guidelines, as amended in March 2021, was circulated in at least two at least two newspapers with a nationwide circulation and that on the face of it, it neither states that it is a public ruling nor contains an identification number.

393. In their response, the Respondents contended that the Minimum Tax Guidelines is a Public Ruling issued pursuant to section 62 of the ***Tax Procedure Act*** which provides as follows:-

> ***"62. Binding public rulings***
> ***(1) The Commissioner may make a public ruling in accordance with section 62 setting out the Commissioner's interpretation of a tax law.***
> ***(2) A public ruling made in accordance with section 63 shall be binding on the Commissioner until the ruling is withdrawn by the Commissioner.***
> ***(3) A public ruling shall not be binding on a taxpayer.***

394. According to the 2nd Respondent, the Public ruling was based on frequently asked questions and concerns raised by taxpayers with regard to the implementation of the Minimum Tax and that they are purely an interpretation of the law based on holistic reading of the ***Income Tax Act***. Not being statutory instruments, they are not binding on taxpayers but only binding of the 2nd Respondent.

395. The 2nd Respondent therefore submitted that the Minimum Tax did not introduce new issues but only respond to the FAQ and applies the law as is.

Since it is not binding to the Taxpayers, any disagreement with regard to the content there in should be subject to a normal tax dispute.

396. In the Respondents' view the term Gross turnover is a dictionary meaning hence not a new term and that the exclusions in the said definitions are the incomes excluded under section 12D(1)(b) of the ***Income Tax Act*** hence nothing new is introduced. Similarly, the definition of persons in the guidelines is the same as the definition of persons as provided under Section 2 of the ***Tax Procedures Act***. As regards paragraph 6 of the Minimum Tax Guidelines of March 2021, the same is advised by the effective date for the Minimum Tax amendment which is 1st January 2021. This is further advised by the principle that taxation should not act retrospectively hence also not a law or provision. As regards, payment of income derived from agricultural, pastoral and horticultural activities, the same is in line with section 12D (2) and section 17 of the ***Income Tax Act*** and paragraph a of the 12th Schedule. Section 17 of the Income Tax Act provides for the ascertainment of Income of farmers in relation to stock. According to the Respondents, while paragraph 7.2(a) of the Guidelines is provided for under section 12D (1)(c) of the ***Income Tax Act***, paragraph 7.2(b) of the Guidelines was informed by section 12E which provides for Digital Service Tax also being taxed on gross income. Advance tax and Withholding Tax provision is advised by the 3rd Schedule

which are also taxed on gross. With regard to paragraph 7.2 (c) of the Guidelines, they have followed the law on taxation of partnerships under the ***Income Tax Act***. Partnerships is not a legal entity hence the reason why profits and losses are share as agreed by the partnerships and when it comes to taxation, the same principle is applied when taxing them. Paragraphs 7.3 to 7.5 are not new provisions/law and are a simplification section 12D of the ***Income Tax Act***. The issue of the accounting period is provided under section 12D (2) and as such, an explanation in the guidelines is not a new issue or provision.

397. Section 5(1) of the ***Statutory Instruments Act, 2013*** provides as follows:

> ***(1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—***
>
> ***(a) have a direct, or a substantial indirect effect on business; or***
>
> ***(b) restrict competition;***
>
> ***the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.***

398. In **Keroche Breweries Limited & 6 Others vs. Attorney General & 10 Others [2016] eKLR** the Court found that:

> **"This provision is a clear reflection of the provisions of Article 10(2)(a) of the Constitution which provides that one of the national values and principles of governance which bind all State organs,**

**State officers, public officers and all persons whenever they inter alia enacts, applies or interprets any law and makes or implements public policy decisions is participation of the people…."**

399. Section 2 of the ***Statutory Instruments Act*** provides:

***"statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.***

400. Section 11(4) of the ***Statutory Instruments Act*** provides for the consequences for the failure to lay the instrument before the National Assembly within the stipulated period which is that the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void. That was the position in the case of **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 Others vs. Cabinet Secretary for Transport & Infrastructure & 5 Others JR. No.2 of 2014; [2014] eKLR**, where the Court held that:

**"I am persuaded by the reasoning in all the decisions above and in my view, Section 11(4) does not give the Court an option since the Section is couched in mandatory terms and the consequences for**

**non-compliance are similarly provided. It also follows that the requirement must be read in mandatory terms as opposed to being merely directory."**

401. According to the Respondents the Minimum Tax Guidelines were made pursuant to the powers conferred under section 62 of the ***Tax Procedure Act*** under which the Commissioner may make a public ruling setting out the Commissioner's interpretation of a tax law. While such rulings are binding on the Commissioner, they are not binding on the tax payer.

402. Section 63 section 63(1) and (2) of the ***Tax Procedures Act***, provides that:

***(1) The Commissioner shall make a public ruling by publishing a notice of the public ruling in at least two newspapers with a nationwide circulation.***

***(2)A public ruling shall state that it is a public ruling and have a heading specifying the subject matter of the ruling and an identification number.***

403. In this case the "Guidelines on Minimum Tax" did not state anywhere that it was a public ruling. Similarly, it had no identification number. Accordingly, it did not meet the prescription of a public ruling under the ***Tax Procedures Act*** in order to distinguish it from the other statutory instruments.

404. That being the position this Court must now consider whether the Guidelines amounted to a statutory instrument. Minimum Tax Guidelines as the name indicates are guidelines. If purportedly issued in execution of

a power conferred by or under section 62 of the ***Tax Procedure Act***, as the 2nd Respondent purports, then they are guidelines issued pursuant to an Act of Parliament under which the said Rulings are expressly authorised to be issued. They therefore meet the definition of "statutory instruments". While section 5(1)(a) of the ***Statutory Instruments Act*** emphasises the need for consultation in particular where the proposed statutory instrument is likely to have a direct, or a substantial indirect effect on business, the provision does not state that consultation is unnecessary where the instrument has no direct or substantial effect on business. In this case however, it is not contended that the term "Gross Turnover" is defined under the Act. It is the Guidelines that have defined the said term. In order to calculate the Minimum Tax, however, a determination has to be made as to what constitutes "Gross Turnover", since it is the "Gross Turnover" that determines the amount of tax payable under section 12D of the ***Income Tax Act***. In other words, without a determination of the gross turnover, the minimum tax payable may not be determined. It is therefore clear that a determination as to what constitutes "Gross Turnover" for the purposes of section 12D of the ***Income Tax Act***, is likely to have a direct, or a substantial indirect effect on businesses of the petitioners. The Respondents therefore ought to have complied with the provisions of the ***Statutory Instruments Act*** and the failure to do so

renders the Minimum Tax Guidelines null and void and of no effect. In their absence, I do not see how section 12D of the ***Income Tax Act*** can be implemented.

405. That now brings me to the issue whether the Minimum Tax as introduced by section 12D of the ***Income Tax Act*** is in violation of Articles 10 and 209 of the Constitution. Article 209 (1) of the Constitution which provides that;

> ***209 (1). Only the national government may impose-***
> ***a) Income tax;***
> ***b) Value-added tax;***
> ***c) Custom duties and other duties on import and export of goods; and***
> ***d) Excise tax;***
> ***(2) An Act of Parliament may authorize the National Government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).***

406. Whereas the Constitution empowers Parliament to enact legislation that may authorise the National Government to impose any other tax apart from Income Tax, Value Added Tax, Custom duties and other duties on import and export of goods and Excise Tax, in this case the Minimum Tax was introduced by section 12D of the ***Income Tax Act*** and is therefore part of the Income Tax. The Petitioners however contend that the said Minimum Tax cannot properly be income tax since it does not meet the

definition of income tax under section 3(2)(a) of the ***Income Tax Act*** which states that:

> ***(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—***
> ***(a) gains or profits from—***
> ***(i) any business, for whatever period of time carried on;***
> ***(ii) any employment or services rendered;***
> ***(iii) any right granted to any other person for use or occupation of property;***

407. According to the 1st Petitioners, a reading of Section 3 (which is titled as the charging section of the ***Income Tax Act***) as read with Section 15, the impugned Minimum Tax introduced by Section 12D is contrary to and inconsistent with the meaning and purpose of income tax as provided under the ***Income Tax Act***. On one hand the ***Income Tax Act*** provides that income which is subject to tax under the ***Income Tax Act*** is income in respect of gains or profits having deducted all expenditure wholly and exclusively incurred in the production of that income while on the other hand minimum tax is chargeable on gross turn over with no possibilities of deducting expenses or costs and further on losses. Therefore, in the 1st Petitioners' view, Minimum tax cannot be deemed as an Income Tax as envisaged and governed under the ***Income Tax Act*** as Income Tax is only chargeable on gains or profits having deducted all expenditure wholly and exclusively incurred in the production of that income. As such, the same

has no place in the ***Income Tax Act*** and consequently ought to be adjudged null and void *ab initio*.

408. Section 15(1) of the ***Income Tax Act*** which falls under Chapter IV of the Act (Ascertainment of Total Income) and which is headed "Deductions Allowed" provides as hereunder:

> ***For the purpose of ascertaining the total income of any person for a year of income there shall, subject to section 16 of this Act, be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of that income, and where under section 27 of this Act any income of an accounting period ending on some day other than the last day of such year of income is, for the purpose of ascertaining total income for any year of income, taken to be income for any year of income, then such expenditure incurred during such period shall be treated as having been incurred during such year of income.***

409. It is therefore clear that, absent section 12D of the ***Income Tax Act*** that introduced minimum tax, income upon which tax is chargeable under the Act is income in respect of gains or profits. Clearly therefore minimum tax, in the absence of section 12D cannot be deemed as income upon which income tax can be levied. Secondly, pursuant to section 15 aforesaid, in the absence of section 12D aforesaid, for the purpose of ascertaining the total income, all expenditure wholly and exclusively incurred by a person in the production of income in a year of income is to be deducted. This means that in determining what constitutes income, the expenditures wholly and

exclusively incurred by a person in the production of income in a year of income is to be excluded. To that extent I agree with the decision in **Republic vs. Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR** where it was held that:

> **"The approach to this case is that stated in the often cited case of Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64 as applied in T.M. Bell v Commissioner of Income Tax [1960] EALR 224 where Roland J. stated, " ...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." As this case concerns the interpretation of the Income Tax Act, I am also guided by the dictum of Lord Simonds in Russell v Scott [1948] 2 ALL ER 5 where he stated, "My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him" adopted in Stanbic Bank Kenya Limited v Kenya Revenue Authority CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR per Nyamu JA (See also Jafferali Alibhai v Commissioner of Income Tax [1961] EA 610, Kanjee Naranjee v Income Tax Commissioner [1964] EA 257). Any tax**

**imposed on a subject is dictated by the terms of legislation and taxing authority must satisfy itself that the transaction fits within the definition of the statute. In Adamson v Attorney General (1933) AC 257 at p 275 it was held that, "The section is one that imposes a tax upon the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect- if it be in view of the Crown a defect can only be remedied by legislation."**

410. This position was restated in **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629,** where it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language**.**

411. While appreciating the argument that section 12D contains a non-obstante clause which renders it superior and or overriding over all other clauses of the said Act, the Petitioners argued that this argument is debatable as the provisions contradicts the very purpose and charge of the Act and further, the same is not non-obstante to the Constitution of Kenya. I agree with the general legal proposition in Indian case of **RBI v. Peerless General Finance and Investment Co. Ltd., [(1987) 1 SCC 424]**, where it was held;

**"that interpretation is best which makes the textual interpretation match the contextual." Speaking for the Court, Chinappa Reddy, J. noted the importance of rule of contextual interpretation and held:- "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted."**

412. I therefore agree with the opinion of the Supreme Court of India in **Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd., 1987 SCR (2) 1** that:

**"No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."**

413. As regards the application of non-obstante provisions, it was contended that it would be erroneous for this Court to consider the Impugned Amendment in isolation to the rest of the provisions of the ***Income Tax Act*** when determining its constitutionality or otherwise, more so when the non obstante clause does not refer to any particular provisions it intends to override but refers to the provisions of the ***Income Tax Act***.

414. In response the Respondents submitted that the tax introduced under section 12D to be known as the minimum tax which has clearly and without any ambiguity been defined, seeks to impose a tax separate from the income tax. Accordingly, the impugned minimum Tax is not in

contradiction with the provisions on income tax. On the contrary, a keen reading of the provisions shall show that the enforcement and implementation of the two taxes are mutually exclusive and depend on each other, whereby, the minimum tax is enforceable in the instance where the instalment tax payable is lower than the minimum tax.

415. According to Respondent while the other provisions are subject to the other provisions of the Income Tax Act while section 12D starts with the phrase: "***Notwithstanding any other provision of this Act"*** hence it is a ***non-obstante*** clause.

416. It is clear that Section 12D(1) of the ***Income Tax Act*** opens with the phrase "***Notwithstanding any other provision of this Act…"*** The word "notwithstanding" is an English word derived from the Latin, *non obstante*. According to ***Black's Law Dictionary***, 10th edition, Bryan A. Garner, the word means "Despite, in spite of". ***Stroud's Judicial Dictionary of Words and Phrases*** 6th Edition, London, Sweet and Maxwell 2000 at page 1732 states as follows:

> ***"NOTWITHSTANDING: "Anything in this Act to the contrary notwithstanding" is equivalent to saying that the Act shall not be an impediment to the measure, …"***

417. The ***Bombay Chartered Accountants Society Article on Interpretation of Tax Statutes*** which defines Non-obstante Clauses as follows:-

**"The expression "non obstante" means notwithstanding. Ordinarily, it is a legislative device to give such a clause an overriding effect over the law or provision that qualifies such clause. When a clause begins with "notwithstanding anything contained in the Act or in some particular provision/provisions in the Act", it is with a view to give the enacting part of the section, in case of conflict, an overriding effect over the Act or provision mentioned in the non obstante clause. It conveys that in spite of the provisions or the Act mentioned in the non obstante clause, the enactment following such expression shall have full operation. It is used to override the mentioned law/provision in specified circumstances.**

**"A non-obstante clause is usually used in a provision to indicate that the provision should prevail despite anything to the contrary in the provision mentioned in such non-obstante clause. In case there is any inconsistency or a departure between the non-obstante clause and another provision, one of the objects of such a clause is to indicate that it is the non-obstante clause which would prevail over the other clause." [Parasuramaiah vs. Lakshamma AIR 1965 AP 220]**

418. In the **Supreme Court of India, Appeal (civil) 6098 of 1997: State Of Bihar & Others vs Bihar Rajya ... on 12 October, 2004**, the Court expounded on Non Obstante Clauses as follows:-

**"A non-obstante clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the non-obstante clause. It is equivalent to saying that inspite of the provisions or Act mentioned in the non-obstante clause, the provision following it will have its full operation or the**

**provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs. [See 'Principles of Statutory Interpretation', 9th Edition by Justice G.P. Singh Chapter V, Synopsis IV at pages 318 & 319]...Normally the use of phrase by the Legislature in a statutory provision like 'notwithstanding anything to the contrary contained in this Act' is equivalent to saying that the Act shall be no impediment to the measure [See Law Lexicon words 'notwithstanding anything in this Act to the contrary']. Use of such expression is another way of saying that the provision in which the non-obstante clause occurs usually would prevail over other provisions in the Act. Thus, non-obstante clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principle enacting provision to which the non-obstante clause is attached. [See Bipathumma & Ors. v. Mariam Bibi; 1966(1) Mysore Law Journal page 162 and at page 165]**

**See also the case of Union Of India vs M/S Exide Industries Ltd. on 24 April, 2020 where the Supreme Court of India stated that:-**

> **"As per settled principles of interpretation, a non obstante clause assumes an overriding character against any other provision of general application. It declares that within the sphere allotted to it by the Parliament, it shall not be controlled or overridden by any other provision unless specifically provided for."**

419. In the case of **Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram, AIR 1987 SC 117,** the same India observed that:

> **"A clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in**

**some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section, in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned in the enactment following it will have its full operation, or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment. The above principles were again reiterated in Parayankandiyal Eravath Kanapravan Kalliani amma vs. K. Devi AIR 1996 SC 1963 and are well settled."**

420. It is therefore clear that section 12D is a non obstante provision and therefore other provisions are to be read subject to it. However as was noted by the Supreme Court of India in **Indra Kumar Patodia & Anr. vs. Reliance Industries Ltd. and Ors. AIR 2013 SC 426**:

**"...It is clear that the non obstante clause has to be given restricted meaning and when the section containing the said clause does not refer to any particular provisions which intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. In other words, there requires to be a determination as to which provisions answers the description and which does not. While interpreting the non obstante clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the non obstante clause is used."**

421. While therefore the said section 12D is not unlawful by the mere fact that it is a non obstante provision, it must be read in such way that it is not seen as a clause outside the Act. It is only in situations where there is a conflict between it and any other provision of the Act that it prevails. Where, the provisions can exist side by side with the other clauses without causing injury to either then that co-existence will be upheld. However, where there is a conflict between section 12D and any other provision in the ***Income Tax Act***, section 12D of the ***Income Tax Act*** being a non obstante provision would prevail.

422. I have considered the issues which were placed before me in these consolidated petitions. It is true that section 12D is a new provision which is meant to be an alternative to Corporate Tax. There is nothing inherently unlawful or unconstitutional in changing the law or the nature of the income tax as long as the same is in accordance with the law since the Legislature is undoubtedly empowered to legislate new tax laws depending on the policies of the day. As appreciated by **Dickson, J** in the case of **Gustavson Drilling (1964) Ltd v M.N.R. [1977] 1 S.C.R. 271 at 283 (quoted in Piennaar Brothers Case)**:

> **"No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed".**

423. Similarly in **Federation of Hotel & Restaurant vs. Union of India & Ors on 2 May, 1989,** the Supreme Court of India expressed itself as hereunder:-

> **"3.1 Though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal- policy, legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc., for taxation. A legislature does not, have to tax everything in order to be able to tax something. if there is equality and uniformity within each group, the law would not be discriminatory. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. [948G-H] 3.2 In examining the allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. The classification must be rational and based on some qualities and characteristics which are to be found in all the persons grouped together and absent in the others left out of the class. Besides, differentia must also have a rational nexus with the object sought to be achieved by the law. However, no precise or set formulae or doctrinaire tests or precise scientific principles of exclusion or inclusion are to be applied. The test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience. [949A, C-E] 3.3 Classification based on differences in the value of articles or the economic superiority of the persons of incidence are well-recognised. A reasonable classification is one which includes all who are similarly situated and none who are not. In order to ascertain whether persons are similarly placed, one must look beyond the classification and to the purposes of the law. [949E-F] Jaipur Hosiery Mills Ltd. v. State of**

**Rajasthan, [1970] 2 SCR 26; Hiralal v. State of U.P., [1973] 2 SCR 502; State of Gujarat v. Sri Ambika Mills Ltd., [1974] 3 SCR 760; G.K. Krishnan v. Tamil Nadu, [1975] 2 SCR 715; I.T.O. v. N. Takim Roy Limbe, [1976] 3 SCR 413; Secretary of Agriculture v. Central Roig Refining Co., [1949] 338 U.S. 604; M/s. Hoechst Pharmaceuticals Ltd. v. State of Bihar, AIR 1983 SC 1019 and Wallace Mendelson: Supreme Court Statecraft; The Rule of Law and Men, p. 4, referred to.**

**.....**

**4. A taxing statute is not, per-se, a restriction of the freedom under Article 19(1)(g). The policy of a tax, in its effectuation, might, of course, bring in some hardship in some individual cases. But that is inevitable, so long as law represents a process of abstraction from the generality of cases and reflects the highest common-factor. The mere excessiveness of a tax or even the circumstance that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not, per-se, and without more. constitute, violation of the rights under Article 19(1)(g). [954F-G] Per Ranganathan, J. (Concurring), 5.1"**

424. As long as the Legislature operates within the law, the policy guiding its decision is not a matter for determination by this Court unless it is shown that the policy itself is constitutionally infirm. As was stated in the case of **Karnataka Bank Ltd. vs. Union of India on 12 August, 2003**:

**"19. In Khandige Sham Bhat v. Agricultural Income Tax Officer AIR 1963 SC 591, this court laid down the tests to find out whether there are discriminatory provisions in a taxing statute. Therein this court observed that in order to judge whether a law was discriminatory what had primarily to be looked into was not its phraseology but its**

**real effect. If there was equality and uniformity within each group, the law could not be discriminatory, though due to fortuitous circumstances in a peculiar situation some included in a class might get some advantage over others, so long as they were not sought out for special treatment. Although taxation laws could be no exception to this rule, the Courts would, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the legislature in the matter of classification so long as there was no transgression of the fundamental principles underlying the doctrine of classification. The power of the legislature to classify must necessarily be wide and flexible so as to enable it to adjust its system of taxation in all proper and reasonable ways.**

**20. It must be noticed that generally speaking the primary purpose of the levy of all taxes is to raise funds for public good. Which persons should be taxed, what transaction should be taxed or what goods should be taxed, depends upon social, economic and administrative considerations. In a democratic set up it is for the legislature to decide what economic or social policy it should pursue or what administrative considerations it should bear in mind...." (Emphasis here italicised in print supplied) (p. 223)"**

**19. Again, in the case of Venkateshwara Theatre v. State of Andhra Pradesh (1995) 96 STC 130 (SC) the Hon'ble Supreme Court has observed that in the field of taxation, the decisions of the Honble Supreme Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes so long as it refrains from clear and hostile discrimination against particular persons or classes. It is well settled that mere fact that a tax falls more heavily on some in the same category, it is not by itself a ground to declare the law invalid. In this connection, it is useful to refer to the observation made by the Hon'ble Supreme**

**Court in the case of N. Takin Roy Rymbai (supra). In the said decision at paragraph 27 the Hon'ble Supreme Court has observed as follows :**

**"While it is true that a taxation law cannot claim immunity from the equality clause in article 14 of the Constitution, and has to pass, like any other law, the equality test of that article, it must be remembered that the State has, in view of the intrinsic complexity of fiscal adjustments of diverse elements, a considerable wide discretion in the matter of classification for taxation purposes. Given legislative competence, the legislature has ample freedom to select and classify persons, districts, goods, properties, incomes and objects which it would tax, and which it would not tax. So long as the classification made within this wide and flexible range by a taxing statute does not transgress the fundamental principles underlying the doctrine of equality, it is not vulnerable on the ground of discrimination merely because it taxes or exempts from tax some incomes or objects and not others. Nor the mere fact that a tax falls more heavily on some in the same category, it by itself a ground to render the law invalid. It is only when within the range of its selection, the law operates unequally and cannot be justified on the basis of a valid classification, that there would be a violation of article 14." (Emphasis here italicised in print supplied) (p. 88)**

**21. From the law laid down by the Hon'ble Supreme Court in the decisions referred to by us above, it is clear that the test could only be one of the palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience; the burden is on the person to establish the invalidity of the legislation. Therefore, in the light of the tests referred to above, if the validity of the impugned legislation is examined, we have no hesitation to hold that the impugned Act cannot be nullified by this**

**court on the ground that the provisions of the Act contravenes the right guaranteed to the appellant under article 14 of the Constitution of India. Therefore, the third submission of Sri Sarangan is also liable to be rejected."**

425. However, where it is shown that the Legislature or the executive in the process of enacting the law or implementing it has transgressed the law, this Court must step in and bring them back on track.

426. I have considered the issues raised in these petitions. I find that the ***Finance Act, 2020*** which amended the ***Income Tax Act*** Cap 470 of the Laws of Kenya (hereinafter referred to as the ***Income Tax Act***) by introducing a new Section 12D providing for introduction of Minimum Tax at the rate of 1% of the gross turnover effective 1 January 2021 was not enacted in accordance with Article 201(b)(i) of the Constitution since its application violates the principle that the burden of taxation is to be shared fairly. The imposition of the said tax has the potential of not only subjecting the people to double taxation but also unfairly targeting people whose businesses, for whatever reason, are in loss making positions, to pay taxes from their capital rather than from their profits, an advantage enjoyable by others merely because their businesses are thriving.

427. Whereas the Respondents may well have identified the virus that had infected the revenue collection system as being the dishonest returns of losses by some entities, it was the vaccine developed for this virus that is inappropriate in dealing with it. The solution was not to cast the net wide in

order to catch the culprits as well as non-culprits as was done but to develop a system which was tailored to target only the culprits. To develop a system, as was done by the Respondents whereby even those for whom the law was not meant to be enacted would thereby find themselves lumped together with the culprits cannot be said to be a fair legislation.

428. I associate myself with the position adopted in **Dileep Manubhai Patel & 3 Others vs. Municipal Council of Nakuru& Another [2014] eKLR**, as cited in **Republic vs. Kwale County Government Ex parte Kenya Airports Authority [2016] eKLR** that:

> **"it is the duty and obligation of every person liable to pay tax, to pay that respective tax, for that is the price of modern civilization, and in particular of living in planned urban areas, townships and cities. It is the price of collective benefits of the provision of clean water, public lighting, roads and ancillary facilities and maintenance thereof..."**

429. However, the role and interpretation of tax laws as appreciated in **Republic vs. Kenya Revenue Authority Ex-parte Bata Shoe Company (Kenya) Limited [2014] eKLR** is that:

> "**Payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obliged to pay a single coin more than is due to the taxman. The taxman on the other hand is entitled to collect up to the last coin that is due from a taxpayer**."

430. That being the position, the Court in **R vs. Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Limited [1981] UKHL 2** at page 22 was:

> **"...persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims."**

431. The impugned amendment will clearly lead to favourites and sacrificial victims. Those who are able to pay taxes from their profits will not have their capital affected while those who are genuinely in a loss making position will be sacrificed at the altar of those who dishonestly conceal their profits. The Respondents have instead of putting in place systems that can enable them detect the dishonest entities, opted for an easier way out by casting the revenue net into the deep sea without bothering what the net will catch as long as the culprits are also caught. With due respect that is how not to enact a fiscal legislation. A fiscal legislation must be precise and must be specifically targeted to meet its objective.

432. It would seem from the 2nd Respondent's argument that the minimum tax is meant to deal with those companies which, though are in tax loss position, are not necessarily in trading loss position. However, the imposition of the tax will also affect these who are in trading loss position.

To that extent, the tax also violates the right to dignity under Article 28 of the Constitution since it assumes that all those in tax loss position are evading taxes. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to take into consideration the circumstances under which tax payers finds themselves in a loss making position, but instead subjecting them to the same law and placing them in the same class as those whose tax loss is not trading loss thereby treating them as an undifferentiated mass, violates their right to dignity. By so doing the 2nd Respondent is abdicating its mandate of identifying the real tax evaders from those who ought not to be treated as such.

433. I have also found that the failure by the Respondents to comply with the provisions of the ***Statutory Instruments Act*** renders the Minimum Tax Guidelines null and void and of no effect and in the absence of the said Guidelines particularly as regards the definition of "Gross Turnover"", section 12D of the ***Income Tax Act*** cannot be operationalised.

434. Accordingly, I find merit in these petitions and I hereby issue the following orders:

**(1) A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act,2020 and amended by the Tax**

**Laws (Amendment) (No. 2) Act, 2020 violates Article 201(b)(i) of the Constitution and as such null and void.**

**(2) A declaration that the failure by the Respondents to comply with the provisions of the Statutory Instruments Act renders the Minimum Tax Guidelines null and void and of no effect.**

**(3) An order prohibiting the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of Section 12D of the Income Tax Act, Chapter 470 of the Laws of Kenya as amended by the Tax Laws (Amendment) (No.2) Act, 2020 by collecting and/or demanding payment of the Minimum Tax;**

**(4) As the matter touches on the public interest, there will be no order as to costs.**

435. It is so ordered.

**Judgement read, signed and delivered virtually at Machakos 20th day of September, 2021**

**G V ODUNGA**
**JUDGE**

**Delivered the presence of:**

**Ms Luther for Mr Okwach for the 1st Petitioner**

**Ms Macharia with Ms Ouma and Mr Odhiambo for the 2nd Petitioner**

**Ms Akama for Mr Mwendwa for the 1st Respondent**

**Ms Almadi with Mr Nyagah and Mr Ochieng for the 2nd Respondent**

**Mr Ogada for the 3rd Interested Party**

**CA Martha**