



THE TAXATION MASTER CLASS

15TH-19TH MARCH 2021

TOPIC: Case Law on Tax Principles
BY: Mercy Mbithi

PRINCIPLES OF TAXATION :



A. Canons/ Maxims of Taxation

recap

PRINCIPLES OF TAXATION :



A. Canons/ Maxims of Taxation

- **Equity** (Vertical/Horizontal Equity , Proportionality/Ability to pay)
- **Certainty** (time, manner and quantum of payments)
(Clear and predictable tax laws)
- **Convenience** (The time and manner in which taxes are levied)
(Which tax heads would likely fall under this category?)
- **Economy** (Limiting deadweight loss)
- **Modern economists:**
Productivity , Elasticity , Simplicity, Diversity

Principles of Interpreting Tax statutes:



Rules of Interpretation:

- **The Literal rule** - Intention of the legislation must be found in the words used by the legislature itself
- **The Golden rule** - Words should be given their ordinary sense unless that would lead to some absurdity or inconsistency with the rest of the instrument.
- **The Mischief rule** -
- **Harmonious rule** – *“every part of the statute must be understood in a harmonious manner by reading and construing every part of it together.”* **L. J. Denning in Seaford Court Estates vs. Asher**
- **Ejusdem generis rule** - where in a statute general words follow particular and specific words, the general words must be confined to things of the same kind as those specifically mentioned

Principles of Interpreting Tax statutes:



WHOM? WHY? WHEN?:

Bhatia International vs. Bulk Trading S.A. - [(2002) 4 SCC 105]

.....Three bodies which divide government power; legislature, the executive and the judiciary. The legislature to make laws, executive to execute these laws and the court to interpret them.The main body of the law is to be found in statutes, together with the relevant statutory instruments and in case law as enunciated by Judges in the Courts.

Petition No.39 Of 2017: Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR

Petitioner's case:

- The constitutionality of paragraph 11A of the Eighth Schedule of the ITA
- The above par. Is inconsistent with the provisions of paragraph 2 of the Schedule as read with Paragraph 6 (1) (a) of the schedule
- violates provisions of the constitution, namely; Articles 10 (1) (2), 40 (2) (a) and 201 (b) (i)

Respondent's case:

- KRA is mandated to enforce the provisions of the ITA and the Stamp duty Act
- Inserting the challenged provision was in order to improve the implementation of the Tax provisions
- Was meant to prescribe the due date when " tax" should be remitted, hence does not contradict paragraph 2 and 6 (1) of the Schedule.

Petition No.39 Of 2017: Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR



Issues for determination:

1. whether or not paragraph 11A of the schedule is vague, contradicts the other provisions of the same schedule and whether it is unconstitutional;
2. When does liability to pay Capital Gains Tax accrue?

Petition No.39 Of 2017: Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR



- Par. 2 -** the income in respect of which tax is chargeable under- section 3(2)(f) is the whole of a gain which accrues "on the transfer" ...of property situated in Kenya...
- 6 (1) (a)-** Subject to this schedule there is a transfer of property for the purpose of this schedule when property is sold, exchanged, conveyed or otherwise disposed of in any manner whatever (including by way of gift), whether or not for consideration.“
- Par. 11A-** The due date for tax payable in respect of property transferred under this Part shall be on or before the date of application for transfer of the property is made at the relevant Lands Office.”

Petition No.39 Of 2017: Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR



1. Literal rule : Language of Statute should be read as it is

Petition No.39 Of 2017: Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR

*“There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself”. **Judge John M. Mativo***

Petition No.39 Of 2017: Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR:



1. **Legal Certainty Case Law:** *Petition No.39 Of 2017: Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR*

*“the need for legal certainty demands that rules by which the citizen is to be bound should be ascertainable by him by reference to identifiable sources that are publicly accessible, clear and not vague. two principles emerge:- (a) no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and (b) no one should be punished for any act which was not clearly ascertainably punishable when the act was done.”. **Judge John M. Mativo***

Petition No.39 Of 2017: Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR:



Judgement Snippets:

- *“To me, the above provisions clearly contradict each other.*
- *Agreed with petitioner citing of Halsbury’s Laws of England[59] on when transfer takes place (a) The disposal of an asset;(b) The accrual from that disposal of a chargeable gain; and (c) The accrual of that gain to a person chargeable to Capital gains tax-.*

Judge John M. Mativo

Petition No.39 Of 2017: Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR:



Judgement Snippets:

- *It is trite law that a statute may be called void for vagueness reasons when an average citizen cannot generally determine what persons are regulated, what conduct is prohibited or what punishment may be imposed or when tax is legally due and payable. (Uncertainty)*
- *If the literal construction thereof results in anomaly or absurdity, the courts must seek to find out the underlying intention of the legislature In my view, the construction suggested by the first Respondent..... creates an ambiguity inand it cannot have been the intention of parliament to introduce such a contradiction.” **Judge John M. Mativo***

Petition No.39 Of 2017: Law Society of Kenya v Kenya Revenue
Authority & another [2017] eKLR:



Judgement Snippets:

- *That Paragraph 11A of the Eighth Schedule of the Income Tax Act is UNCONSTITUTIONAL!*

Judge John M. Mativo

EXERCISE: APPEAL NO. 114 OF 2018

Taxpayer:

- private ruling from CDT in 2 letters dated 20th December 2016 and 16th May 2017 addressed to the Applicant zero rating their supply.
- The private ruling as at the time of assessment had not been withdrawn.
- Violation of its legitimate expectation rights

CDT:

- Issued Assessments on 24th March 2018. VAT (payable position as well as rejection of VAT refunds applied for) as per par. 20 and 51 of the VAT Act 2013
- The National Treasury had already advised the taxpayer that the project and all supplied to it were exempt for AVT purposes
- That the law exempting official aid funded projects was long in existence rendering the letters null and void.

EXERCISE: APPEAL NO. 114 OF 2018



Ruling Snippets:

- ***Unfiled evidence (Letters dated 10th November 2016 and 16th December 2017)***
- ***Why was the Appellant seeking for a private ruling when the Respondent's principal had already given the required advise?***
- ***The two letters were in contravention to the VAT Act 2013 and were issued afer the law exempting such supplies was enacted***
- ***That legitimate expectation cannot be created on instances where a private ruling is inconsistent with a clear provision of law.***

Case Laws touching on principles of taxation and rules of interpretation:



- ***Kenindia Assurance Company Limited v Commissioner of Domestic Taxes [2020] TAX APPEAL NO. 2 OF 2016***
- ***Kenya Revenue Authority v Republic (Exparte Fintel Ltd) [2019] eKLR CIVIL APPEAL NO. 311 OF 2013***
- ***KEROCHE INDUSTRIES LIMITED v KENYA REVENUE AUTHORITY & 5 OTHERS [2007] Misc Civ Appli 743 of 2006***
- ***Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited [2019]***

The 4R Principle



Role of Taxation

1. Revenue

2. **Redistribution** – Addresses Income inequality by lifting the poor members of society out of poverty, Through progressive tax systems

3. **Re-pricing** – Example: by increasing the cost of certain goods in order to address certain negative externalities.

4. Representation

Cobham, A. (2005). Taxation Policy and Development. OCGG Economy analysis no.2. The Oxford council on good governance.



THANK YOU