



Kenya Revenue Authority v Waweru & 3 others; Institute of Certified Public Accountants & 2 others (Interested Parties) (Civil Appeal E591 of 2021) [2022] KECA 1306 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1306 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E591 OF 2021
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA
DECEMBER 2, 2022**

BETWEEN

KENYA REVENUE AUTHORITY APPELLANT

AND

STANLEY NJUGUNA WAWERU 1ST RESPONDENT

**THE KENYA ASSOCIATION OF MANUFACTURERS, THE RETAIL
TRADE ASSOCIATION OF KENYA, THE KENYA FLOWER
COUNCIL 2ND RESPONDENT**

THE NATIONAL ASSEMBLY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS .. INTERESTED PARTY

LAW SOCIETY OF KENYA INTERESTED PARTY

MWANGI & KAMWARO ASSOCIATES INTERESTED PARTY

(An Appeal against the Judgment of the High Court of Kenya at Machakos (G. V. Odunga, J.) dated 20th September, 2021 in Machakos Constitutional Petition No. E005 of 2021, consolidated with Petition No. 1 of 2021)

Section 12D of the Income Tax Act on minimum tax violates tax payers' rights to fair treatment and dignity

Reported by Kakai Toili

Statutes – interpretation of statutory provisions – interpretation of section 12D of the Income Tax Act – where section 12D provided for the introduction of minimum tax at the rate of 1% of the gross turnover – claim that



section 12D had the potential of subjecting taxpayers to double taxation and loss-making businesses to payment of taxes from their capital – factors to consider in determining whether there was double taxation - whether section 12D amounted to subjecting taxpayers to double taxation – whether levying of minimum tax on gross turnover would lead to a loss making taxpayer bearing a heavier burden than other taxpayers contrary to article 201 of the Constitution on the principles of public finance – whether the minimum tax under section 12D violated the right to fair treatment and dignity of taxpayers in loss making positions - Constitution of Kenya, 2010, articles 28 and 201; Income Tax Act, Cap 470, section 12D.

Brief facts

The Finance Bill, 2020, included an amendment to the Income Tax Act at section 12D, which introduced the minimum tax. The amendment provided for the minimum tax at the rate of 1% of the gross turnover. To implement the impugned amendment, the appellant published Guidelines on Minimum Tax, whose central feature was the definition of gross turnover. Aggrieved by the amendment to the legislation, two petitions were instituted by the 1st and 2nd respondents at the trial court.

The petitions sought declarations that: section 12D of the Income Tax Act was illegal and contrary to the provisions of articles 10, 27, 40, and 46 of the Constitution of Kenya, 2010 (Constitution) and that under section 3 as read with section 15 of the Income Tax Act, the taxable income was the net income after deduction of expenditure wholly and exclusively incurred in the production of that income. The appellant, the 3rd and 4th respondents opposed the petition and argued that the process of the enactment of the impugned legislation met the constitutional and procedural threshold; that it did not create any ambiguity; and that it was not discriminatory.

The trial court declared section 12D of the Income Tax Act null and void as it violated article 201(b) of the Constitution, and that failure to comply with the Statutory Instruments Act rendered the Guidelines on Minimum Tax void. Accordingly, the trial court granted an order of prohibition restraining the implementation, administration or enforcement of the contested amendment on the following grounds: that the imposition of the tax had the potential of subjecting people to double taxation and that the amendment unfairly targeted businesses which were in genuine loss making positions, to pay taxes from their capital rather than from their profits while placing thriving businesses at an advantage. Aggrieved, the appellant filed the instant appeal.

Issues

- i. What were the factors to consider in determining whether there was double taxation?
- ii. Whether section 12D of the Income Tax Act which provided for introduction of minimum tax amounted to subjecting taxpayers to double taxation.
- iii. Whether levying of minimum tax on gross turnover would lead to a loss-making tax payer bearing a heavier burden than other taxpayers contrary to article 201 of the Constitution on the principles of public finance.
- iv. Whether the minimum tax under section 12D of the Income Tax Act violated the right to fair treatment and dignity of taxpayers in loss making positions by failing to take into consideration the circumstances under which taxpayers found themselves in loss-making positions.

Relevant provisions of the Law

Income Tax Act, Cap 470

Section 12D - Minimum tax

(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.



(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.

Held

1. To determine what guided modern democracies in tax collection and administration of state resources, nations developed policies and legal frameworks founded on sound principles that attracted public approval. Any policy or legislation that fell short of such approval by all, or by a majority of the citizenry in a defined process of public participation, triggered resistance and disquiet that called for judicial intervention, as was in the instant appeal.
2. Public revenues were a portion that each subject gives of his property, to secure or enjoy the remainder. To fix those revenues properly, regard should be given both to the necessities of the state and to those of the subject. The real wants of the people should never give way to the imaginary wants of the state. Imaginary wants were those that flowed from the passions and the weakness of the governors, from the vain conceit of some extraordinary project, from the inordinate desire of glory, and from a certain impotence of mind incapable of withstanding the impulse of fancy.
3. Public revenues should not be measured by the people's abilities to give, but by what they ought to give. The policy and legislative frameworks for revenue collection should also ensure that their ability to give should be reasonably assessed to guarantee constancy.
4. The court's mandate on a first appeal, as set out in rule 29(1) of the Court of Appeal Rules, 2022, required the court to reappraise the evidence and to draw its conclusions.
5. On the issue of double taxation, the trial court did not set out which two taxes were of a similar nature, imposed on the same income and in the same period, to justify the conclusion of double taxation. The trial court only noted that the imposition of minimum tax had the possibility of double taxation, the key word there being "possibility", but, nowhere in its judgment did the court show the possibility of double taxation.
6. Section 12D of the Income Tax Act eliminated the possibility of the same income being taxed twice, as it excluded a person who had already remitted minimum tax under section 12D, which effectively excluded such a person from corporation tax or taxation under section 2(a)(i) of the Income Tax Act. On the other hand, if a loss-making entity subsequently moved to a profit-making position, then section 12(3) and (4) of the Act would apply, thereby eliminating any possibility of double taxation.
7. The trial court ought to have considered the nature of the tax, the circumstances under which it was levied, and the period in which it was levied. The trial court misconstrued how the tax was to be effected; it considered the sole issue of the tax burden, without taking into account that the imposition of different taxes concurrently did not necessarily result in double taxation.
8. From a reading of the entire section 3(2) of the Income Tax Act it would appear that the trial court assumed that income tax was levied only in respect of gains and profits, which was provided for under section 3(2)(a) yet that was just one of the seven types of incomes upon which income tax was levied under that provision. The number of incomes upon which income tax was levied was listed under section 3(2) (a) to (h) of the Act.
9. In the construction of a taxing Act, the court had primary regard to the statutory words themselves. From the interpretation given by the trial court, the trial court erred in considering the wording of section 3(2)(a) of the Income Tax Act only, instead of considering the other incomes alluded to in paragraphs (a) to (h) of section 3(2) and to that extent applied a rather limiting definition of the term "income" for tax purposes. That was not what was envisioned by the Act.
10. Under section 12D of the Income Tax Act, being a non-obstante clause, it in effect removed all obstructions that would arise in its implementation. Section 12D was not subject to any contradicting clause in the Income Tax Act, and the income to which minimum tax was levied under section 12D was not subject to sections 15 and 16 of the Act, which dealt with deductions.



11. Tax became payable by an assessee by the charging provision in a taxing statute. Sections 15 and 16 of the Income Tax Act shed light on what was considered taxable income. Certain deductions in the form of expenses had to be allowed and, therefore, for the appellants to now claim that minimum tax was to be levied on gross turnover without allowing for deductions as provided for under the Act would be contrary to the purpose and objects of the Act as provided for under section 3 of the Act, which was titled as the charging section of the Act.
12. As a general rule, when a taxing provision was ambiguous, it had to be construed in favour of the assessee. Such an interpretation was also in consonance with ordinary notions of equity and fairness, and would further fortify the trial court in adopting such a course of interpretation. The concept of fair taxation or a fair tax burden had no linear definition. The threshold for fairness was ensuring that everyone bore their fair share of taxation and paid the correct amount, which was seen to be fair by vigorous pursuit of tax avoidance and evasion.
13. The ultimate purpose for imposing the minimum tax was to net tax evaders, by placing all loss-making entities under the appellant's bracket (as they nonetheless benefitted from infrastructure maintained by the Government), and prevent tax evaders from escaping their fair share of tax liability. Levying of minimum tax on gross turnover as opposed to gains or profit would lead to a situation where a loss-making taxpayer would bear a heavier burden than other taxpayers, contrary to article 201 of the Constitution.
14. Punishing entities that were already battling with a stifled economy because of a few miscreants was the epitome of unfairness. Both the purpose and effect could invalidate legislation. Given the nature of the tax and the circumstances under which it was to be levied, the purpose was irrational, miscalculated, and did not reflect the spirit of article 201(b)(i) of the Constitution.
15. The trial court failed to appreciate the difference between tax losses carried under section 15(4) of the Income Tax Act and huge deductions in respect of capital expenditures as provided under the 2nd schedule to the Income Tax Act, and tax evasion, which was the wilful attempt to defeat or circumvent the tax law to illegally reduce one's tax liability.
16. Respect for dignity meant not being devalued as a human being or treated in a degrading or humiliating manner. Surely, there could be no lesser humiliation than the imputation of criminal conduct for one who was grappling with a difficult economic environment. Accordingly, there was no error in the trial court's finding that the imposition of a minimum tax would undoubtedly lump innocent businesses that were in a loss-making position with evaders, which violated the innocent taxpayers' right to dignity.
17. The trial court erred in its findings relating to double taxation and in failing to resolve the applicability of section 12D as a non-obstante clause not subject to any provision to the contrary vis-à-vis the provisions of sections 15 and 16 of the Income Tax Act. Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and as amended by the Tax Laws Amendment (No 2) Act, 2020 was null and void to the extent that the levying of minimum tax on gross turnover as opposed to gains or profit would lead to a situation where a loss-making taxpayer, would bear a heavier burden than on other taxpayers contrary to the spirit of article 201 of the Constitution; and lumping innocent entities that were in a loss-making position with tax evaders in a bid to expand the tax base violated the innocent taxpayers' constitutional right to fair treatment and dignity.

Appeal dismissed; judgment of the High Court upheld.

Orders

Each party to bear their own costs of the appeal.

Citations

Cases

Kenya



1. *Commissioner of Income Tax v Pan African Paper Mills (EA) Limited* Civil Appeal 29 of 2005; [2018] KECA 585 (KLR) - (Mentioned)
2. *Kenya Pharmaceutical Association & another v Nairobi City County & 46 other County Governments & another* Constitutional Petition 97 of 2016; [2017] KEHC 3281 (KLR) - (Followed)

Tanzania

Ndyanabo v Attorney General (2002) AHRLR 243 (TzCA 2002); [2001] EA 495 - (Followed)

South Africa

Doctors for Life International v Speaker of National Assembly and Others CCT 12/05 [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) - (Followed)

India

1. *AG Varadarajullu v State of Tamil Nadu & others* [1998] SC 1388 - (Mentioned)
2. *Associated Cement Co Ltd v Commercial Tax Officer* [1981] AIR 1887; [1982] SCR (1) 563 - (Applied)
3. *Aswini Kumar Ghose & another v Arabinda Bose & another* AIR 1953 SC 75; (1953) 55 BOMLR 278; (1953) MLJ 211 - (Explained)
4. *Commissioner of Income Tax v Madho Prasad Jatia* [1977] AIR 420; [1977] SCR (1) 665 - (Applied)

Canada

R v Big M Drug Mart Ltd [1985] 1 SCR 295 - (Applied)

Australia

Amalgamated Society of Engineers v Adelaide Steamship [1920] 28 CLR 129 - (Mentioned)

Regional Court

Peters v Sunday Post Limited [1958] EA 424 - (Applied)

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9. Osambo, AT., (Ed) (2009), *Income Tax Accounting, Law & Practice* Nairobi: Bluechip Copy Services Chapter 2 para 2.2

Statutes

Kenya

1. Constitution of Kenya article 10, 27, 28, 40, 46, 110(1)(c)(4)(5); 165 (3)(d)(i)(ii); 201(1)(b); 209(2); 210 - (Interpreted)
2. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 29(1)- (Interpreted)
3. Income Tax Act (cap 470) section 2(a)(i); 3(2); 5; 6A; 12C; 12D; 15; 16(2)(c); 34(n); Schedules 2, 3, 8, 9 - (Interpreted)
4. Public Finance Management (Amendment) Act, 2020 (cap 412A) In general - (Cited)
5. Statutory Instruments Act (cap 2A) section 2, 5, 6, 7, 8, 9, 11 - (Interpreted)



6. Tax Laws (Amendment) Act, 2020 (Act No 2 of 2020) In general - (Cited)

Advocates

None mentioned

JUDGMENT

1. The age-old practice of revenue collection for effective administration of public institutions and social welfare programmes in ancient civilisations, despotic domains, monarchies and modern democracies, have been the subject of contest between states and their citizenry. To determine “what belongs to Caesar,” so as to guide modern democracies in tax collection and administration of state resources, civilised nations have developed policy and legal frameworks founded on sound principles that attract public approval. Any policy or legislation that falls short of such approval by all, or by a majority of the citizenry in a defined process of public participation, triggers resistance and disquiet that call for judicial intervention as is the appeal before us.
2. In his book *The Spirit of the Laws* (Batoche Books 2001, Book XIII Chapter 1 at p 232, Charles de Secondat, Baron de Montesquieu laid down the immutable principles that govern the levying of taxes and tax administration in the following words:

"Book XIII. Of the relation which the levying of taxes and the greatness of the public revenues bear to liberty."
3. Of the public revenues.

The public revenues are a portion that each subject gives of his property, in order to secure or enjoy the remainder. To fix these revenues in a proper manner, regard should be had both to the necessities of the state and to those of the subject. The real wants of the people ought never to give way to the imaginary wants of the state. Imaginary wants are those which flow from the passions and the weakness of the governors, from the vain conceit of some extraordinary project, from the inordinate desire of glory, and from a certain impotence of mind incapable of withstanding the impulse of fancy. Often have ministers of a restless disposition imagined that the wants of their own mean and ignoble souls were those of the state. Nothing requires more wisdom and prudence than the regulation of that portion of which the subject is deprived, and that which he is suffered to retain. The public revenues should not be measured by the people’s abilities to give, but by what they ought to give; and if they are measured by their abilities to give, it should be considered what they are able to give for a constancy."
4. In the words of Baron de Montesquieu, “... public revenues should not be measured by the people’s abilities to give, but by what they ought to give” According to him, “nothing requires more wisdom and prudence than the regulation of that portion of which the subject is deprived, and that which he is suffered to retain.” In principle, the policy and legislative frameworks for revenue collection should also ensure that “... their abilities to give” should be reasonably assessed so as to guarantee constancy. It is in the backdrop of these principles that the Finance Bill, 2020 stands to be tested on appeal to this court.
5. On May 5, 2020, the Finance Bill, 2020 which included an amendment to the *Income Tax Act* at section 12D, introducing the minimum tax, was published and subsequently passed as the *Finance Act, 2020*. The amendment provided for the minimum tax at the rate of 1% of the gross turnover, and was to become operative on January 1, 2021. To implement the impugned amendment, the appellant published "*Guidelines on Minimum Tax*," whose central feature was the definition of gross turnover.



6. Aggrieved by the amendment to the legislation, two petitions were instituted by the 1st and 2nd respondents herein in Machakos Constitutional Petition No E005 of 2021 and Nairobi Petition No 1 of 2021 seeking a declarations that: section 12D of the *Income Tax Act* as introduced by the Finance Act, 2020 and as amended by the *Tax Laws (Amendment) Act (No 2), 2020* was illegal and contrary to the provisions of articles 10, 27, 40, and 46 of the *Constitution*; and that under the provisions of section 3 as read with section 15 of the *Income Tax Act*, the taxable income is the net income after deduction of expenditure wholly and exclusively incurred in the production of that income. The respondents also prayed for orders restraining the implementation, administration, or enforcement of the impugned amendment. The petition was supported by the interested parties.
7. The appellant, the 3rd and 4th respondents opposed the petition, and maintained that the process of the enactment of the impugned legislation met the constitutional and procedural threshold; that it did not create any ambiguity; and that it was not discriminatory.
8. The trial court found merit in the petition and declared that section 12D of the *Income Tax Act* as introduced by the Finance Act, 2020 and as amended by the Tax Laws (Amendment) Act (No 2), 2020 was null and void as it violated article 201(b) of the Constitution; and that failure to comply with the *Statutory Instruments Act*, rendered the minimum tax guidelines null and void. Accordingly, the trial court granted an order of prohibition restraining the implementation, administration, or enforcement of the contested amendment on the following grounds: that the imposition of the said tax had the potential of subjecting people to double taxation; and that the amendment unfairly targeted businesses which were in genuine loss making positions, to pay taxes from their capital rather than from their profits while placing thriving businesses at an advantage.
9. The background to the petition was that the amendment contained in section 12D of the *Income Tax Act* was discriminatory. The amendment provided as follows:
10. "12D. Minimum Tax
 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."
 3. Section 34 of the act prescribes the chargeable rate of tax and provides: "34. Rates of tax
 - (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;”

“Third Schedule - Head B – Rates of Tax

11. The rate of tax in respect of minimum tax under section 12D shall be one per cent of the gross turnover.”

The 1st and 2nd respondents contended that the minimum tax thereby introduced was discriminatory and imposed an unfair tax burden on them because it meant that all persons, even those in loss making situations, would be required to pay the minimum tax; that the amendment contradicted the provisions of section 3 as read with section 15(1) of the *Income Tax Act*, as well as fiscal policies in respect of gains or profits *vis a vis* the gross turnover, resulting in uncertainty as to what was applicable; and that the amendment infringed on the right to property, and on socio-economic rights.

12. The main argument in the two petitions was that the minimum tax created uncertainty, which was exemplified in the *Minimum Tax Guidelines* published by the appellant; and that its imposition against gross turnover violated the principles of public finance as set out in article 201(a)(i) of the *Constitution*, and placed a heavier tax burden on the petitioners. It was further contended that the imposition of the impugned tax obligation ignored the economic capacity of the taxpayer, which is an elementary principle in taxation, namely that the percentage of the income of the taxpayer that may be affected by a tax obligation must not be in excess of the wealth available so as to subject the taxpayer to double taxation.
13. It was further contended: that the impugned amendment was made without reference to senate for debate in violation of article 110(1)(c) as read with article 110(4) and (5); that, although the appellant had issued minimum tax guidelines, those guidelines did not have the force of law, and that the minimum tax was bound to violate the right to protection of property.
14. Section 12D of the *Income Tax Act* was also viewed as discriminating between businesses with the same economic realities by exempting oil marketing companies from the minimum tax obligations, and yet requiring businesses selling and distributing consumer goods to pay a minimum tax. It was also contended that the minimum tax obligations based on gross turnover would negatively impact the businesses making it difficult for them to operate. This is because it was a final tax which could be transferred to the consumer to cushion the business from its effects.
15. The petitioners urged the trial court not to consider the impugned amendment in isolation from the rest of the provisions of the *Income Tax Act* when determining its constitutionality or otherwise, in construing whether the operative clause in section 12D as read with section 34(n) of the *Income Tax Act* without the *non obstante* clause is clear and unequivocal and, if so, the meaning of that operative clause.
16. While acknowledging that before the enactment of the impugned provisions members of the public were asked to present their proposals in what was believed to be public participation, the 3rd interested party contended that the public responded by way of memoranda raising grave concerns which were never considered; and that the impugned legislation was misconceived and poorly researched, thereby punishing low gross margin making organizations and creating inconsistency with existing sections and schedules of the *Income Tax Act*.
17. The parties opposing the petition were categorical that parliament had authority to enact legislation governing the manner in which a particular form of tax is administered, calculated and enforced; that the process of enactment of the impugned legislation met the constitutional and procedural threshold; that the purpose and effect of the impugned statute did not infringe on any constitutional



- rights as it aimed at levelling the operating playing field for business enterprises by ensuring that all businesses contribute to the generation of revenue through taxes; that the Constitution did not prohibit differentiation or classification, as long as it had a rational connection to a legitimate government purpose; that the guidelines served to ensure the effective implementation and enforcement of the Income Tax Act so as to meet the budgetary deficit, and that this did not contradict national values; that, in any event, the guidelines were merely an interpretation of the law based on the holistic reading of the Income tax Act binding only on the 2nd respondent; that the mode of charging minimum tax was addressed in section 3(1) and 3(2)(e), and that, to that extent, there was no ambiguity created by the Act; and that there was no contradiction between section 12D and other sections of the Income Tax Act.
18. The appellant urged the trial court to allow the implementation of the provisions of the Income Tax Act, pointing out that many entities had adopted structures that enabled them to return perpetual tax losses even when trading in profits so as to evade paying any taxes to the national kitty, thus narrowing the tax base and leading to poor revenue performance; that the minimum tax was aimed at bringing on board companies which earned income from Kenya, but were perpetually declaring losses to avoid payment of corporate tax while enjoying infrastructure facilities serviced by government from tax revenue; and that this tax would ensure their contribution to infrastructure development.
 19. While contending that the Finance Bill, 2020 underwent rigorous public participation, the 3rd respondent argued that section 12D was not subject to any other provision within the act, and that no disconnect had been created by introducing minimum tax since the applicable provision was section 12D as read with section 3(1); that the levying of minimum tax when the taxpayer is in a loss position would not disenfranchise the tax payers of capital deductions, which were allowable at the point when they turned to profit, and that, once the corporation turned to profitability, they would become liable to corporation tax and not minimum tax; and that the minimum tax ensured equity in taxation, met budgetary deficit, and got everyone to contribute to the economic development.
 20. Opposing the petition, the 3rd respondent, the National Assembly, argued that it had a constitutional right to enact, amend or repeal legislation regarding the imposition of taxes; that the minimum tax aimed at levelling the operating playing field for business enterprises by ensuring that all businesses contribute to the generation of revenue through taxes; that it had exercised its authority under article 209(2) by introducing the minimum tax; that a sectoral approach in granting exemption did not amount to discrimination; that the enforcement and implementation of the Income Tax and minimum tax taxes were mutually exclusive, though dependent on each other, and that the guidelines served to ensure effective implementation, and to fulfil the intention of the act; that the provisions of sections 3 and 15 did not in any way limit the scope of taxes that legislators can introduce through the Income Tax Act.
 21. The 4th respondent reiterated the appellant's position adding: 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; that granting the orders sought by the petitioners would have the effect of interfering with parliament's statutory mandate and limiting the legislative freedom; that there was no material demonstration that the impugned legislation had violated the petitioners' constitutional rights.
 22. The trial court, by dint of the provisions of article 165(3)(d)(i) and (ii), held that it had jurisdiction to hear and determine any question respecting the interpretation of the Constitution, including the determination of the question whether any law is inconsistent, and interrogated the constitutionality of the minimum tax, taking into account the provisions of article 201(b)(i) as well as the constitutional obligations of the petitioners under article 209 and 210 of the Constitution with the view of giving the law a purposive interpretation- a holistic interpretation.



23. Guided by the decision in *Ndyanabo v AG* [2001] EA 495, which addressed the factors to be considered when faced with allegations of unconstitutionality of statutes, and the presumption that the constitutionality of a statute is rebuttable when its effect shifts the onus of proof to the person alleging its unconstitutionality as was set out in *Doctors for Life International v Speaker of National Assembly and Others* (CCT 12/05)[2006] ZACC 11;2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), the trial court interrogated the constitutionality of the minimum tax and held that the amendment was introduced without reference to the senate for discussion, thus violating article 201(1)(b) of the *Constitution*.
24. As regards double taxation, the court found that a system of taxation that had the potential of diminishing for those making losses, while for those making profits, their capital base was unaffected, and that this was unconstitutional and economically punitive; that the tax violated the right to dignity under article 28 as it was based on an assumption that all those in loss positions were evading taxes; and that the appellant was abdicating its mandate of identifying the real tax evaders.
25. The court noted the impugned amendment and the exemptions under the guidelines and acknowledged that, whereas article 27 of the *Constitution* did not prohibit classification based on different requirements of the law, section 12D was not enacted in accordance with article 201(b)(i) since its application violated the principle that the burden of taxation ought to be shared fairly. The imposition of tax had the potential of not only subjecting the people to double taxation, but also unfairly targeting people whose businesses were in loss making positions to pay taxes from their capital rather than from their profits; that “the impugned amendment would lead to favourites and sacrificial victims, and that the respondents had the... of putting in place systems to enable them detect dishonest entities they opted for an easier way out.”
26. As regards the guidelines on minimum tax, the court held that there was no compliance with the provisions of article 10(2) and sections 2, 5, 6, 7, 8, 9 & 11 of the *Statutory Instruments Act*, and that the guidelines did not meet the prescription of the act, particularly with regard to the definition of “gross turnover.” Consequently, section 12D could not be operationalized.
27. The findings were not acceptable to the appellant, who now challenges the ruling of the High Court on 25 grounds, which we need not replicate here, but which we have taken the liberty to summarise and reframe into 7 thematic issues, namely that the learned judge erred in law and fact: in failing to appreciate the concept of double taxation; misconstrued the provisions of the *Income Tax Act* in respect of gains and profits thus contradicting the express provisions of section 3(2) of the *Income Tax Act*; having made a finding that section 12D of the *Income Tax Act* was a *non obstante* clause, in failing to make a finding that the income to which minimum tax is levied under section 12D was not subject to section 15 and section 16 of the *Income Tax Act*; in failing to appreciate the difference between the gross turnover of an entity and capital of the entity, hence the levying of the minimum tax did not amount to any unfairness; in failing to appreciate the rationale for minimum tax, and that it was levied on every loss making entity of similar nature, and that the issue of unfairness under article 201(b) (i) did not arise in its implementation; in making determination on the constitutionality of the minimum tax guidelines, which was not part of the prayers sought in the petitions, and in failing to note that section 12D of the *Income Tax Act* was a self-sustaining provision, capable of being implemented in the absence of the minimum tax guidelines; in failing to appreciate the that the definition of the term “gross turnover” in the minimum tax guideline is a dictionary meaning, and not an artificial legal definition unique to the act, and that what constitutes “gross turnover” could be determined without reference to the minimum tax guidelines; in finding that levying minimum tax on everyone assumed that they are tax evaders, which violates the right to dignity guaranteed by article 28 of the *Constitution*.



28. Our mandate on a first appeal as set out in rule 29(1) of the *Court of Appeal Rules, 2022* requires us to reappraise the evidence and to draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this court, the Court of Appeal for Eastern Africa, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

29. We are thus guided by the above threshold in light of the record as put to us.

30. On the issue of misapprehension as to what constitutes double taxation, the appellant referred to the definition given in *Black’s Law Dictionary* 6th Edition, as well as the decision in *Kenya Pharmaceutical Association and another v Nairobi City Council and 46 other County Governments & another* [2017] eKLR to support its submission that the imposition of different taxes concurrently does not amount to double taxation. The appellant argued that, for double taxation to exist, the taxation must be carried out on the same person, same income, same tax head and within the same financial year, and that the absence of any one of the components means that the same is not double taxation, and that the present case did not meet all the components.

31. On the other hand, the 1st and 2nd respondents argued that the impugned minimum tax is regressive and amounts to double taxation, and does not share the tax burden fairly. The 1st respondent submits that, under impugned the tax, a loss making taxpayer will be expected to pay minimum tax, and that when the taxpayer becomes profitable, then they will be liable to pay corporation tax. According to them, the impugned tax is neither a deductible expense nor a tax credit and that, therefore, this amounts to double taxation.

32. The 3rd respondent, the Attorney General, submits that the government policy to introduce minimum tax was rational and justifiable for the purpose of ensuring inclusiveness and sharing of the tax burden, and that the fact that the impugned provision of statute merely raises some technicalities and/or difficulty in comprehension/implementation cannot be the reason to declare it unconstitutional. The Attorney General also submitted that the court misconstrued/misunderstood the manner in which the tax was to be effected thereby arriving as a wrong decision that the impugned provision amounted to double taxation.

33. We take note that on the issue of double taxation, the learned Judge did not set out which two taxes were of a similar nature, imposed on the same income, and in the same period to justify the conclusion of double taxation. The trial court only noted that the imposition of minimum tax had the possibility of double taxation, the key word here being “possibility”, but, with the greatest respect to the learned judge, nowhere in its judgment did the court show this possibility of double taxation.

34. As a matter of fact, the trial court evaluated and analysed the issue regarding, a taxpayer loss-making position at the start of their financial year; the payment of minimum tax on their gross turnover; the place of corporation tax in the course of the year when such companies become profitable; and whether the provisions of section 16(2)(c) of the *Income Tax Act*, in computing the taxable income of a company would amount to double taxation of such companies.

35. However, the appellant clarified that, where a loss-making entity is involved, then minimum tax applies, but that, once this position changes and it becomes a profit-making entity, then section 12 of the *act* kicks in. That means that no more minimum tax would be payable, but that corporation tax



- then applies. From the record, the appellant had explained the approach in instances of transition of a person at loss position, who subsequently moves to a profit position, in which case both corporation tax and minimum tax, being taxes paid in instalments at the point of preparation of final returns and accounts would apply in the different instances.
36. Having carefully considered the provisions of section 12D, we concur with the appellant that the provision eliminates the possibility of the same income being taxed twice, as it excludes a person who has already remitted minimum tax pursuant to section 12D, which effectively excludes such a person from corporation tax or taxation under section (2)(a)(i) of the *Income Tax Act*. On the other hand, if a loss making entity subsequently moves to a profit making position, then section 12(3) & (4) of the *act* set in, thereby eliminating any possibility of double taxation.
 37. In view of the foregoing, it is clear to us, that the court ought to have considered the nature of the tax, the circumstances under which it is levied, and the period in which it is levied. We therefore find that, on this limb, the learned judge misconstrued the manner in which the tax was to be effected; considered the sole issue of the tax burden, without taking into account that the imposition of different taxes concurrently did not necessarily result in double taxation.
 38. Addressing the issue as to whether the *Income Tax Act* provides for incomes chargeable to tax other than gains and profits, the appellant contends that, whereas the learned judge acknowledged that in determining income for which income tax is to be levied, expenditure wholly incurred in the production of that income is to be deducted, the judge then made a finding that minimum tax, in the absence of section 120 could not be deemed as income upon which income tax could be levied as the same did not allow for deduction of expenditure.
 39. The appellant referred to the definition given to the term “income” in *Black's Law Dictionary* to contend that the foregoing position misreads section 3(2) to assume that income tax is levied only in respect of gains and profits, which is provided for under section 3(2)(a), yet income in respect of gains and profit is just one of the seven types of incomes upon which income tax is levied in accordance with the sub-section; that the number of incomes upon which income tax is levied are listed under paragraphs (a) to (h) of section 3(2) of the *Income Tax Act*. The appellant is emphatic that minimum tax is levied under section 3(2)(e), and buttresses this position by the enumeration given in the text by *Osambo A T "Income Tax Accounting, Law & Practice at Chapter 2 paragraph 2.2*, that other taxable incomes as enumerated in section 3(2) of the *Income Tax Act* include dividends or interest; pension, charge or annuity; amount deemed to be income; gains accruing under the eighth schedule; net gain derived on disposal of an interest from immovable property and a natural resource income.
 40. In opposition, the respondents invited us to consider the appellant’s reference to tax returns being made subject to the establishment of a taxable profit, which meant that they appreciated the essence of taxing income on gains and profits, and that the appellant cannot keep approbating and reprobating to suit the narrative that the minimum tax is charged subject to section 3(2)(e).
 41. The 3rd respondent, submitted that the government policy to introduce minimum tax was rational and justifiable for the purpose of ensuring inclusiveness and sharing of the tax burden, and that the fact that the impugned provision of the statute merely raises some technicalities and/or difficulty in comprehension/implementation cannot be the reason to declare it unconstitutional.
 42. The 3rd respondent further argues that the minimum tax was intended to curb tax evasion; that the imposition of the said tax was a necessary measure of raising revenue; and that the state may impose taxes on several transactions of a business in order to ensure equal share of the tax burden.



43. From our reading of the entire provisions in section 3(2) of the Act, it would appear that the learned judge assumed that income tax is levied only in respect of gains and profits, which is provided for under section 3(2)(a) yet, as pointed out by the appellant, that is just one of the seven types of incomes upon which income tax is levied under that provision. Indeed, the number of incomes upon which income tax is levied are listed under section 3(2)(a) to (h) of the Act.
44. In order to appreciate the import of the aforesaid provision, we apply the first canon of statutory interpretation, which deals with a statute's plain language, and that in the absence of any expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive, and give it a contextual interpretation necessary to meet the ends of justice [See Amalgamated Society of Engineers v Adelaide Steamship [1920] 28 CLR 129 at 161-2).
45. Indeed, this court has previously pronounced itself to the effect that, in the construction of a taxing act, the court has primary regard to the statutory words themselves. (See Commissioner of Income Tax v Pan Africa Paper Mills EA Ltd [2018] eKLR. From the interpretation given by the trial court, we find that the learned Judge erred in considering the wording of section 3(2)(a) only, instead of considering the other incomes alluded to in paragraphs (a) to (h) of section 3(2) of the Act and, to that extent, applied a rather limiting definition of the term "income" for tax purposes. This is not what is envisioned by the Act.
46. On the issue as to whether section 12D is a non-obstante clause, that is, designating a licence from the state to do a thing notwithstanding any laws to the contrary, was subject to sections 15 and 16 of the act, the appellant argues that section 12D is not subject to sections 15 and 16 of the Income Tax Act. The appellant argues that section 12D, being a non obstante clause, removed all obstruction that may arise in the way of the operation of the principle enacting provision. In his judgment, the learned judge acknowledged that section 12D was not unlawful by the mere fact that it is a non - obstante provision, further, that if there was a conflict between section 12D and any other provision of the Income Tax Act, then section 12D prevails.
47. The response to this is that section 12D should not be read in isolation and, while interpreting a non-obstante clause, the court is required to find out the extent to which the legislature intended to give it overriding effect. We are urged to look at the provisions of section 15, which provides for the parameters of ascertaining what amounts to a taxable income.
48. The respondents submit that non-obstante clauses should not be interpreted as provisions which supersede provisions of the law, but as clauses which should not render the operation of the law impossible; and that they should be construed in line with the provisions of the Act, its purpose and charge. It is also contended that section 12D, section 15 as read with section 16 of the Income Tax Act allows for deductions in ascertaining the total income of a person, which is subject to taxation.
49. Further, section 15(4) of the Income Tax Act allows taxpayers in a business loss making position to carry forward the losses for a period of up to 10 years, with possible extension on application to the cabinet secretary. It is on the basis of this provision that companies in a loss making position do not pay any tax since they do not have profits to pay out the tax from. It therefore follows that it is contradictory and ambiguous to allow such companies to be exempt from payment of business income and also require them to pay minimum tax.
50. The respondents now fault the appellants for going afoul the provisions of section 15 and 16 of the Act by claiming the superiority of section 12D as a non-obstante clause. According to them, this will result in denying the respondents the deductions allowed under section 15(1) of the Act, which was not the purpose of the act in ascertainment of the total income of a person subject to tax. In support of



this submission, reference is made to the Indian Supreme Court decision in [AG Varadarajulu v State of Tamil Nadu](#), Air 1998 SC 1388, D 1392 which held that, even though the

“notwithstanding” clause is very widely worded, its scope may be restricted by construction, having regard to the intention of the legislature gathered from the enacting clause or other related provisions in the act, especially when the notwithstanding clause “does not refer to any particular provisions of the statute generally.”

51. It is the respondents’ contention that a reading of section 12D in isolation would deny the 15 respondent’s the relief accorded by sections 15(1) and 16 of the act, which allows for deductions on expenditure incurred in the production of the income to be taxed, and which goes against article 10 of the [Constitution](#) that calls for certainty in legislation. Reference was made to the decision by the Supreme Court of India’s observation in [Aswini Kumar Ghosh v Arabinda Bose](#) supra, AIR 1952 SC 369 with regard to the interpretation of non-obstante clauses to the effect that the enacting part of the statute should control the non-obstante clause where both cannot be read harmoniously.
52. In holding that section 12D was non obstante, the learned Judge nonetheless pointed out that it must be read in such a way that it is not viewed as a clause outside, or independent of, the Act. This position was based on the approach that, in order to ascertain the legislative intent, all the constituent parts of the statute should be taken together and each word, phrase or sentence be considered in light of the general purpose and object of the Act itself. In light of this, a critical issue that needed to be resolved by the trial court, was whether section 12D, which provided for levying of tax on the gross turnover was subject to sections 15 and 16 of the Act, which provided for deduction of expenses in arriving at the taxable income.
53. Our considered view is that by virtue of section 12D being a non-obstante clause, it in effect removed all obstructions which would arise in its implementation. Accordingly, we concur with the appellant that section 12D was not subject to any contradicting clause in the [Income Tax Act](#), and that the income to which minimum tax is levied under section 12D is not subject to sections 15 and 16, which deal with deductions.
54. On the issue as to whether the minimum tax is levied on gross turnover or capital, the appellant submitted that the trial court erred in limiting the definition of income tax, pointing out that the issue as to whether minimum tax is levied on gross turnover and not capital, and argued that section 12D read with section 34(n) provides that the minimum tax is chargeable on gross turnover, and that there is no provision that the tax is to be charged on capital. The contention is that minimum tax is levied under section 3(2)(e) of the act, which refers to “... an amount deemed to be the income of any person under the act.”, thus, it does not refer only to income in respect of gains and profits, but to all incomes.
55. Referring to the definition of “turnover” in [Webster’s Dictionary](#), and in the article by Lauren Hellicar: [What is turnover in business and how you work it out?](#), the appellant maintains that “turnover” is the net sales generated by a business, while profit is the residual earnings of a business after all expenses have been charged against net sales, and should be distinguished from capital, which is the proprietor’s investment in the business; that it is therefore erroneous to treat the two terms, capital and turnover, as though they were synonymous and interchangeable.
56. On the other hand, the 1st respondent argues that the minimum tax is charged on gross turnover without allowing for deductible expenses as provided for under the act. According to them, that has the effect of compelling the taxpayer to pay the impugned tax from either capital or out of pocket despite having not made any profit.



57. The 1st respondent submits that there is no fairness in a taxation system that diminishes the capital for loss making entities while the tax base for profit making entities remain intact. The 2nd respondent echoes the 1st respondent's submission; save to add that there is no definition of gross turnover in the minimum tax guidelines, which the 2nd respondent argues do not constitute rules under the act.
58. To our mind, the main contention here is with regard to the applicable section under which tax should be charged. The Supreme Court of India in Associated Cement Co Ltd v Commercial Tax Officer AIR 1981 SC 1887 held that tax becomes payable by an assessee by virtue of the charging provision in a taxing statute. From the dictionary definition as well as the various texts referred to in a bid to appreciate what amounts to taxable income under the act, we hold the considered view that sections 15 and 16 of the Income Tax Act sheds light as to what is considered as taxable income. Certain deductions in form of expenses must be allowed and, therefore, for the appellants to now claim that minimum tax is to be levied on gross turnover without allowing for deductions as provided for under the act would be contrary to the purpose and objects of the act as clearly provided for under section 3 of the act, which is titled as the charging section of the act.
59. The court in CIT v Madho Prasad Jatia (1976) 105 ITR 179 (SC) enunciated that, as a general rule when a taxing provision is ambiguous, it must be construed in favour of the assessee. Such an interpretation is also in consonance with ordinary notions of equity and fairness, and would further fortify the trial court in adopting such a course of interpretation.
60. On the issue as to whether the imposition of the minimum tax results is unfair and contrary to section 201(b), the appellant and the parties who support the appeal argue that the Departmental Committee on Finance and National Planning gave the rationale for the minimum tax as being to ensure equity in taxation by expanding the tax base to involve as many people as possible in sharing the tax burden, hence the inclusion of loss making companies in paying tax at the rate of 1% of their gross turnover.
61. The respondents describe the appellant's explanation as a misconceived notion and submitted that the trial court rightly noted that there were mechanisms available to the appellant to carry out audits in order to determine those entities that seek to evade payment of taxes, without punishing everyone because of a few miscreants, which would be the epitome of unfairness.
62. Indeed, the trial court understood and accepted this rationale regarding the minimum tax, and the appellant argues that this rationale was in consonance with article 201(b)(i) of the Constitution, which recognises that the burden of taxation shall be shared fairly.
63. We concur with the appellant's submissions that the concept of Fair taxation or a fair tax burden has no linear definition as addressed in Discussion Paper: "Perspectives on Fair Tax," by Francis Chittenden, and Hilary Foster. The threshold for fairness is "... ensuring that everyone bears their fair share of taxation and pays the correct amount and which is seen to be fair by vigorous pursuit of tax avoidance and evasion."
64. The respondents maintain that the learned judge rightly noted that section 12D violated the principle of fair sharing of the burden of taxation set under article 201(b)(1) of the Constitution, as it unfairly targeted entities in loss making positions to pay taxes from their capital while thriving business paid taxes from their profits, and left their capital base intact.
65. It is indeed apparent from the appellant's explanation that the ultimate purpose for imposing the minimum tax was to net tax evaders, by placing all loss making entities under the appellant's bracket (as they nonetheless benefitted from infrastructure maintained by the government), and prevent tax evaders from escaping their fair share of tax liability.



66. In view of the foregoing, we agree with the respondent that levying of minimum tax on gross turnover as opposed to gains or profit would lead to a situation where a loss making tax payer, would bear a heavier burden than other taxpayers contrary to article 201 of the Constitution. Little wonder then that the learned judge pointed out that the appellant was well equipped with the necessary mechanisms to carry out auditing in order to determine entities that are avoiding payment of tax. We share the same sentiments with the respondent on this aspect that punishing entities who are already battling with a stifled economy because of a few miscreants is the epitome of unfairness. Taking into consideration both the purpose and effect of the impugned legislation, we are inclined to adopt the sentiments expressed in the Canadian case of The Queen v Big M Drug Mart Ltd, 1986 LRC (Const) 332, that both the purpose and effect can invalidate legislation. Given the the nature of the tax, and the circumstances under which it is to be levied, makes the purpose irrational, miscalculated, and does not reflect the spirit of article 201(b)(i) of the Constitution.
67. As to whether the imposition of minimum tax infringes the right to dignity, the appellant contends that in holding that loss making entities would be regarded as tax evaders, the learned judge failed to appreciate the difference between tax losses carried under section 15(4) and huge deductions in respect of capital expenditures as provided under the 2nd schedule to the Income Tax Act, and “Tax Evasion,” which is defined in Black Law's Dictionary 8th Edition as the wilful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability.
68. The respondents submit that the appellant did not adduce any evidence showing audited accounts of any establishments that purport to have made losses in order to avoid payment of taxes. According to them, the appellant has failed to justify the imposition of a broad tax regime that stands to punish genuinely compliant entities that deserve legal protection.
69. If indeed there is a wide world of difference between tax evaders/avoiders, and those who are unable to pay taxes due to genuine losses in their businesses, what would be the rationale for lumping them all together? From the explanation given by the appellant, the first implies devious criminal conduct, while the other is a victim of an odd cluster of inhibitions, not out of wilful design. We can only reiterate our earlier reference to Justice Chaskalson "Dignity as a Constitutional Value: A South African Perspective," (*supra*) that respect for dignity means not being devalued as a human being or treated in a degrading or humiliating manner. Surely, there can be no lesser humiliation than the imputation of criminal conduct for one who is grappling with a difficult economic environment. Accordingly, we hold that there was no error in the learned judge's finding that the imposition of a minimum tax will undoubtedly lump innocent business that are in a loss making position with evaders, which violates the innocent taxpayers' right to dignity.
70. That said, we find that the learned judge erred in his findings relating to double taxation; and in failing to resolve the applicability of section 12D as a non-obstante clause not subject to any provision to the contrary vis a vis the provisions of sections 15 and 16 of the Income Tax Act. However, we agree with the learned judge's declaration that section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and as amended by the Tax Laws Amendment (No 2) Act, 2020 was null and void to the extent that: the levying of minimum tax on gross turnover as opposed to gains or profit would lead to a situation where a loss making tax payer, would bear a heavier burden than on other taxpayers contrary to the spirit of article 201 of the Constitution; and that lumping innocent entities that are in a loss making position with tax evaders in a bid to expand the tax base violates the innocent taxpayers' constitutional right to fair treatment and dignity. To that extent, the judgment of the learned judge on these issues was sound and well-founded within the confines of the law, and in the interpretation of the validity and the constitutionality of section 12D of the Income Tax Act with regard to the imposition of an unfair tax burden, and in devaluing the dignity on the 1st respondents and other taxpayers.



71. Having carefully considered the record of appeal as put to us, the impugned judgment, the statute law on taxation as amended, the respective written and oral submissions of the parties, and the cited authorities, we reach the inescapable conclusion that the appellant's appeal fails and is hereby dismissed. Accordingly, judgment of the High Court of Kenya at Machakos (GV Odunga, J) dated September 20, 2021 is hereby upheld.
72. In view of the public nature of the appeal, we hereby order and direct that each party bears their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. I. K. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

