

Updates on the NSSF after the Supreme Court Ruling

What Next After the Supreme Court Decision on
The NSSF Act?

Tax Alert Issue No. 3 of 2024





Introduction

The Supreme Court of Kenya, on 21st February 2024 overturned the decision of the Court of Appeal that had declared that the NSSF Act 2013 was constitutional. In the case of Kenya Tea Growers Association & 2 others vs. The National Social Security Fund Board of Trustees and 13 others SC Petition No. E004 of 2023 as consolidated with Petition No. E002 of 2023, the Supreme Court held that, the Employment and Labour Relations Court (ELRC) has jurisdiction to determine the constitutional validity of a statute in matters concerning employment and labour as provided under article 162(2) (a) of the constitution. The Supreme Court then ordered the case to be remitted back to the Court of Appeal for determination of the ELRC judgement.

This begs the question:

- ▶ Is the NSSF Act 2013 unconstitutional as it was determined by Employment and Labour Relations Court?
- ▶ What is the current law on the enhanced NSSF Tier II deductions, as the enhanced deductions are premised on the constitutionality of the NSSF Act 2013?
- ▶ Should employers continue deducting the enhanced NSSF Tier II deductions?
- ▶ What will happen if the court of appeal after determination of the ELRC judgement agrees with ELRC that the NSSF Act is unconstitutional? Will the deductions be refunded?

This alert addresses the above questions.

Background

The National Social Security Fund (NSSF) Act No. 45 of 2013 was enacted by parliament in 2013 December, the Act increased NSSF contribution rates from the previous standard rate of KES 200 matched by another KES 200 from the employer amounting to a total contribution of KES 400 to 12% of an employee pensionable wages/salaries being 6% deduction from the employee matched by another 6% from the employer.

Following the enactment of the NSSF Act 2013, the ELRC pronounced the NSSF Act of 2013 unconstitutional. However, the Court of Appeal, in 2023 reversed the decision of ELRC by holding that ELRC had no jurisdiction in determining the NSSF Act of 2013 was unconstitutional.

The Court of Appeal stressed that the ELRC lacked jurisdiction to determine the matter as the dispute was not within the ambit of an employer-employee dispute, but was rather a question of the constitutionality of the NSSF Act.

This decision of the Court of Appeal was appealed to the Supreme Court which overturned the decision on the basis that the ELRC has jurisdiction to determine the constitutional validity of a statute in matters employment and labour while remitting the case back to the Court of Appeal.

What are the implications of the Supreme Court decision on NSSF-enhanced contribution rates?

The NSSF board of trustee, pursuant to the decision of the Supreme Court, issued a statement saying that the Supreme Court decision did not lift the Court of Appeal orders issued on February 3 2023. Therefore requiring employers to proceed to deduct and remit NSSF Tier I and II contributions.

We note that the Supreme Court was silent on whether the judgement of the ELRC deeming the NSSF Act, 2013 unconstitutional and whether the Court of Appeal decision setting aside the ELRC is inapplicable. Consequently, there is a lacuna in regards to what law and judgement is currently applicable.

The Supreme Court took the position that the ELRC has the powers to determine the constitutionality of an act regarding affairs between an employer and employee.

Consequently, it can be inferred that given the fact that the Supreme Court stated that the ELRC has the power to determine constitutionality of an act it follows that the decision of the ELRC in deeming the NSSF Act, 2013 unconstitutional was right and that the ELRC was well within its rights to deem the act unconstitutional.

We therefore fall back to the position pre-Court of Appeal judgement where employees contributed KES 400 as to the scheme.

We note that this is open to interpretation and, where in doubt, it is better to err on the side of caution and follow the notice as issued by the NSSF Board on 3rd February 2024.

We will continue to monitor further developments on this matter and as always update you on any further changes and their implications.

In the meantime do not hesitate to contact for any clarifications or need for further guidance.

About Us

Grant Thornton is one of the world's leading organisations of independent assurance, tax and advisory firms. These firms help dynamic organisations unlock their potential for growth by providing meaningful, forward looking advice. More than 73,000 people across over 150 countries, are focused on making a difference to clients, colleagues and the communities in which we live and work.



Name: Samuel Mwaura

Title: Partner - Grant Thornton Taxation Services Limited

Email: Samuel.Mwaura@ke.gt.com

Address:

Nairobi

5th Floor
Avocado Towers
75 Muthithi Road, Westlands
P.O. Box 46986 – 00100
Nairobi, Kenya

T +254 20 3747691

T +254 20 2699540

T +254 728 960963

W grantthornton.co.ke

E info@ke.gt.com

Kampala

3rd Floor
Lugogo One, Plot 23,
Lugogo Bypass
Kampala, Uganda

T +256 200 907333

T +256 414 535145

T +256 312 266850

W gtuganda.co.ug

E info@ug.gt.com

Dar es Salaam

1st Floor, Viva Towers
Ali Hassan Mwinyi Road
P.O. Box 7906
Dar es Salaam, Tanzania

T +255 784 936888

W grantthornton.co.tz

E info@tz.gt.com



© 2024 Grant Thornton Taxation Services Limited . All rights reserved.

"The information contained in this alert is confidential, privileged and only for the information of the intended recipient and may not be used, published or redistributed without the prior written consent of Grant Thornton. The opinions expressed are in good faith and while every care has been taken in preparing these documents, Grant Thornton makes no representations and gives no warranties of whatever nature in respect of these documents, including but not limited to the accuracy or completeness of any information, facts and/or opinions contained therein.

"Grant Thornton" refers to the brand under which the Grant Thornton member firms provide assurance, tax and advisory services to their clients and/or refers to one or more member firms, as the context requires. Grant Thornton International Ltd (GTIL) and the member firms are not a worldwide partnership. GTIL and each member firm is a separate legal entity. Services are delivered by the member firms. GTIL does not provide services to clients. GTIL and its member firms are not agents of, and do not obligate, one another and are not liable for one another's acts or omissions.