



# **Plenary of the Supreme Court of Justice declares that the legal provision granting benefits to expatriates holding a "SEM Visa" is not unconstitutional**

**KPMG in Panama**

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## Basis of the claim and the concept of infringement

Through the unconstitutionality lawsuit, a request was filed before the Supreme Court of Justice to declare the unconstitutionality of the last paragraph of Article 26 of Law No. 41 of August 24, 2007 - which creates the Special Regime for the Establishment and Operation of Headquarters of Multinational Companies - as amended by Article 13 of Law No. 57 of October 2018, due to the consideration that it directly infringes Articles 20, 73 and 264 of the Political Constitution of the Republic of Panama, since it grants, in their opinion, an unfair privilege to foreigners holding a Multinational Company Headquarters Permanent Staff Visa (hereinafter "The SEM Visa"); given that, while nationals must pay Income Tax on the income they receive, those are exempt from such tax obligation; the hiring of foreign workers under the modality of SEM Visa weakens the working conditions and living standards of the national worker and the Law should be inclined towards that any tax should be levied on the taxpayer in direct proportion to his contributive capacity, assuming that those who are in the same income situation, should pay the same amount of tax and pay the same amount of tax.

## The criteria of the plenary session of the supreme court of justice

The Plenary of the Supreme Court of Justice declared that the norm accused by the plaintiff is NOT unconstitutional, under the following relevant aspects:

- The Principle of Equality must be measured by virtue of the **legitimate purpose and the proportionality** between the rule that establishes the differentiated treatment and the purpose pursued. In the case under discussion, the reasonable proportionality is the tax incentive granted to foreigners with SEM Visa, **which is closely linked to the legitimate purpose of the conception of Law 41 of 2007**, whose objective is to attract and promote investment, job creation and technology transfer, as well as to make the Republic of Panama more competitive in the global economy, stimulate domestic economic growth, the attraction of foreign technology and the generation of jobs locally.
- **No such inequality can be alleged**, since national and foreign workers are in very different circumstances from each other, due to the fact that **foreigners are categorized as temporary residents** for special policy reasons in contrast to the permanent residence of nationals.
- Foreign workers cannot work in companies outside the SEM regime, while nationals can. Therefore, **the rule in question does not involve arbitrary or discriminatory treatment**, since it is not based on factors of race, birth, disability, social class, gender, religion or political ideas, but on the basis of socio-political and economic policies.
- The taxing power is limited to the Constitutional Principle of legal reserve, by which through the Law, not only it may establish, modify or extinguish taxes, but it may also **create tax exemptions**, as is the case of Income Tax, Social Security and Educational Insurance, provided **that it is aimed at developing public policies** that seek to attract foreign investment and the creation and existence of those jobs that the State can guarantee in decent working conditions, therefore, such exemptions are based on socio-political and economic purposes, projected to achieve the sustained economic growth of the country, the promotion of employment, as well as decent work.

- The power of the legislator is broad and discretionary in tax matters and must be legitimately based on the principles of legality and reasonableness when creating taxes or their exemptions; therefore, in the case in question, the paragraph denounced as unconstitutional is legitimate, reasonable and in direct proportion to the **purposes of the general economic and social interest pursued and is not arbitrary or discriminatory in nature.**

If you have any questions, you can contact the Partner or Manager in charge at KPMG in Panama.

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