



TAX ALERT: THE COURT OF APPEAL NULLIFIES THE 1% MINIMUM TAX

"Minimum Tax is null and void to the extent that tax on gross turnover as opposed to gain 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 that lumping innocent entities with tax evaders in the bid to expand tax base violates innocent taxpayers' Constitutional rights to fair treatment and dignity:- Court of Appeal in the Judgement of Civil Appeal No E591 OF 2021

Minimum Tax Law

On 20th September 2021, the High Court nullified Section 12D of the Income Tax Act.

Minimum Tax was an alternative to lower installment tax where losses or low profits are realized.

The new law on minimum tax will not be applicable to exempt incomes, employment income, persons subject to turnover tax, incomes taxed under 10% residential rental tax or Capital Gains Tax, the insurance, extractive, or industries whose retail prices are controlled by Government.

Court Dispute :

Kitengela Bar Owners Association, KAM, Kenya Flower Council and Retail Trade Association contested the law as follows:

- It is unconstitutional
- It imposes an unfair tax burden
- It is discriminatory
- It infringes on property, economic and social rights
- Is inconsistent with other provisions of the Income Tax Act and principles of taxation

The High Court agreed with them and KRA appealed.

On 2nd December 2022, the Court of Appeal upheld the High Court position.

Court Ruling

Minimum Tax imposes an unfair tax burden

It violates Article 201(b)(i) of the Constitution and is null and void

The goal of the doctrine of separation of powers is to uphold good governance not to defeat the rights under the law

The Court has rights to check excesses and abuse of the constitution and Parliament is bound to follow the Constitution

KRA is barred from collecting minimum tax

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