



TAX ALERT

STATEMENT ON THE HIGH COURT DECISION DECLARING MINIMUM TAX UNCONSTITUTIONAL.

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INTRODUCTION

The High Court ("Court") delivered on 20 September 2021 a judgement in the case of Stanley Waweru- Chairman & 3 others (Suing as Officials of Kitengela Bar Owners Association) v National Assembly & 2 others, Constitutional Petition Nos. E005 of 2021 (Consolidated with petition No 1. of 2021). In this judgement, the High Court declared that the 'minimum tax' provisions in the Kenya Income Tax Act to be unconstitutional.

The landmark High Court decision is expected to give a multitude of struggling businesses nationwide a much needed abatement.

Minimum tax, when initially introduced was met with extreme dissent as businesses around the country felt that they were being unconstitutionally over taxed.

THE RULING

The Court made a finding that minimum tax did lend itself to a possibility of double taxation. Further, it also noted that people who genuinely make losses will be forced to fall back on their capital in order to pay minimum tax while those who make profits will be paying income tax from their profits.

The Court was also of the view that taxpayers genuinely in a loss-making position would be penalised unfairly by the acts of a small number of dishonest entities that conceal profits.

BACKGROUND

This Petitioners in the case had sought a declaration that Section 12D of the Income Tax Act which imposed a 'minimum tax' was unconstitutional for the following reasons:

- It does not fall within the category of taxes that can be imposed by the National Government as per the Constitution;
- It contravenes the principle of fairness and just sharing of the burden of taxation as espoused by the Constitution;
- It is discriminatory in nature;
- It is riddled with ambiguity, uncertainty and contradictions contrary to principles of taxation; and,
- It infringes on the right to property and economic and social rights provided for in the Constitution.

THE IMPLICATIONS

The decision by the Court means that the minimum tax provisions in the Income Tax Act are no longer enforceable.

However, the High Court made it clear that income taxes introduced in the Income Tax Act that do not relate to 'gains or profits' or 'income' but are based on turnover (e.g turnover taxes and digital taxes) are legal.

KRA has decided to challenge the ruling in the Court of Appeal.