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TAX ALERT

Court of Appeal declares VAT is chargeable on sale of Commercial properties.

Summary

This alert highlights the recent Court of Appeal judgment delivered on 21 March 2025 in **re Kenya Revenue Authority versus David Mwangi Ndegwa (CIVIL APPEAL NO. 65 OF 2019)**.

The CoA clarified and held that commercial buildings are subject to VAT, emphasizing that tax exemptions must explicitly be stated in law, consequently overturning the High Court Judgement.



Background

The Appeal arose from a dispute concerning the interpretation of Section 5 of the Value Added Tax (VAT) Act, 2013 as read with Paragraph 8 part II of the First Schedule of the VAT Act.

The High Court had ruled in favor of David Mwangi Ndegwa (**Respondent**), holding that the provision was ambiguous and that VAT was not chargeable on the sale of land, including both residential and commercial premises. Consequently, the High Court had ordered the Kenya Revenue Authority (**Appellant**) to refund the VAT that the Respondent had paid in protest when purchasing the commercial property (Kiambu Town Block 11/74) from Standard Chartered Bank.

Appellant's Arguments

The Appellant argued that the VAT Act distinguishes between land and buildings, with only land and residential premises being exempt from VAT. Since commercial buildings were not listed among the exemptions, it contended that they remained taxable. The authority further emphasized that the legislative intent was clear, as Parliament had deliberately omitted commercial buildings from the list of VAT exempt properties, reinforcing the position that VAT should be applied to such transactions.

Additionally, KRA stressed the principle of strict interpretation of tax laws, asserting that exemptions should be applied only where explicitly stated in law. Any attempt to broaden the scope of exemptions would go against established tax principles. Finally, the Appellant submitted that the respondent's VAT refund claim was time-barred under Section 30 of the VAT Act, which mandates that refund claims for tax paid in error must be filed within 12 months. Therefore, since the respondent filed the claim after this period, KRA maintained that it was invalid and should not be granted.

Respondent's Arguments

The Respondent, opposed the appeal by arguing that Article 260 of the Constitution defines land broadly to include buildings. Based on this definition, he maintained that the VAT exemption for land should automatically extend to both residential and commercial buildings. He further contended that taxing buildings separately from land created an illogical and impractical distinction, as land and the structures on it are

inherently linked. In his view, exempting land while taxing the buildings on it was inconsistent with fundamental legal principles.

Additionally, the respondent relied on legislative history, noting that previous VAT laws had treated both residential and commercial buildings similarly for tax purposes. He pointed out that the VAT Act, 2013 did not explicitly state that commercial buildings were taxable, suggesting that they remained exempt from VAT. Regarding the VAT refund, the Respondent argued that he had paid the tax under protest, meaning it was not an erroneous payment. Therefore, maintaining that the 12-month time limit under Section 30 of the VAT Act did not apply, and was entitled to a full refund.

Issues for determination

The CoA identified the following issues for determination:

- i. Does the term "land" in the VAT Act include buildings, whether residential or commercial?
- ii. Is Paragraph 8 of Part II of the First Schedule to the VAT Act ambiguous regarding VAT on commercial premises?
- iii. Was the refund of VAT properly ordered by the High Court?



Court of Appeal holding

The Court of Appeal overturned the High Court's decision, ruling that land and buildings are distinct entities for VAT purposes and should not be treated as the same. It rejected the High Court's interpretation that equated land with buildings, emphasizing that land can exist independently of structures. The court found no ambiguity in the VAT Act, stating that only land and residential premises are exempt from VAT, while commercial buildings remain taxable due to their absence from the exemption list. Consequently, the court held that the respondent was not entitled to a VAT refund, as the tax was lawfully charged, and the High Court had erred in ordering KRA to reimburse the amount paid, which was incorrect and thus set aside.

Our Opinion

The Court of Appeal's judgment is a sound interpretation of tax law, reinforcing the principle that tax exemptions must be explicitly stated in legislation. The judgment correctly distinguishes land from buildings, ensuring that commercial buildings remain taxable, as Parliament did not expressly exempt them. This approach aligns with strict statutory interpretation, preventing unintended loopholes that could undermine tax administration.

However, the court also made a crucial clarification on VAT refunds. While KRA had argued that the refund was time-barred under Section 30 of the VAT Act, the Court of Appeal rejected this argument, stating that the provision was inapplicable in this case. Instead, the court held that the refund was not due because the VAT was lawfully charged on a taxable transaction, and not because of a procedural time limit. This distinction is important, as it prevents tax authorities from relying on technical time bars to deny refunds in cases where tax was improperly levied. Overall, the decision upholds clarity and consistency in tax law while ensuring that taxpayers are only charged taxes explicitly required by law.

Contacts

Fuqrudin Hassan

Managing Partner

E: fhassan@fhmconsultants.com

Maryam Mohamed

Senior Consultant

E: mmohamed@fhmconsultants.com

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