

# Tax Alert

## Court of Appeal rules that VAT is payable on the sale of commercial property



### Summary

This alert highlights the Court of Appeal's judgment delivered on 21 March 2025, in the case of **Kenya Revenue Authority v. David Mwangi Ndegwa Civil Appeal No.65 of 2019**.

On 21 March 2025, the Court of Appeal (CoA) delivered a significant judgment in this case. In the precedent-setting decision, the CoA overturned a High Court ruling that had declared that Value Added Tax (VAT) was not payable on the sale of commercial property.

### Background

In 2013, David Mwangi Ndegwa (The Respondent) purchased a property in Kiambu from Standard Chartered Bank Kenya for **KES 70,000,050**. The property was sold with buildings and improvements erected thereon.

Following the transaction, KRA demanded 16% VAT amounting to KES 11,200,080 on the transaction. The Respondent objected to the demand, arguing that the transaction was not subject to VAT. He was however compelled to pay the VAT, albeit under protest, by the vendor's advocates to complete the transfer.

The Respondent subsequently engaged the KRA requesting for a refund of the VAT paid on purchase of the property. KRA declined. The Respondent, aggrieved by KRA's decision, moved to the High Court seeking a determination that no VAT was chargeable on the purchase of the commercial property under the VAT Act, 2013.

The High Court, on 29 November 2018 held that no VAT was chargeable on the sale of land, whether the premises thereon were residential or commercial. Accordingly, the Court ordered KRA to refund the VAT that David Mwangi had paid upon purchase of the commercial premises from Standard Chartered Bank.



Aggrieved by the High Court's decision, KRA appealed to the Court of Appeal.

### Appellant's arguments

The Appellant challenged the decision of the High Court on three key grounds as follows:

- i. "Land" and "buildings" are distinct items under the law. Citing the Land Act, 2012, KRA was of the view that "land" refers to the surface and subsurface, while "buildings" refer to structures on the land. According to KRA, the High Court had erred by adopting the constitutional definition of "land" to include buildings.
- ii. Paragraph 8 of the VAT Act was clear and unambiguous, exempting only land and residential premises, but not commercial premises from VAT.
- iii. Refunds under Section 30 of the VAT Act applied only to payments made in error and within 12 months. Since the Respondent paid VAT voluntarily under protest, the claim for refund was invalid.
- iv. The High Court should have applied the principle of strict construction of tax legislation as expounded in the decided case of **Kenya Revenue Authority v. Universal Corporation Ltd [2024] KECA 1103 (KLR)**.

### Respondent's arguments

- i. The Respondent relied on Article 260 of the Constitution, which defines "land" to include the surface, subsurface, and airspace, encompassing buildings. He argued that separating buildings from land was legally untenable, as buildings cannot exist independently of the land they are built on.
- ii. The Respondent contended that before the VAT Act, 2013, both residential and non-residential premises were exempt from VAT, and the inclusion of "land" in the exemptions eliminated the need to separately exempt buildings.
- iii. He argued that any ambiguity in tax laws must be resolved in favor of the taxpayer.
- iv. The Respondent claimed that he paid VAT under protest and was therefore entitled to a refund, as the payment was not voluntary.

## Issues for determination

The CoA alienated the following issues for determination:

- Whether the definition of land in the Constitution includes buildings as determined by the High Court;
- Whether paragraph 8 of Part II of the First Schedule to the VAT Act, 2013 is ambiguous regarding payment of VAT for the sale or letting of commercial buildings; and
- Whether the refund claimed by the respondent was payable.

## Court of Appeal's determination

### On the issue of interpretation of land and buildings:

- The Court of Appeal disagreed with the High Court's interpretation, reinforcing the distinction between land and buildings under the VAT Act.
- The court referenced the **Attorney General of Belize v. Belize Telecom Ltd. [2009]** case to emphasize that courts must not add terms or ignore clear ones within legislation.
- The ruling supports the interpretation that commercial buildings are taxable under the VAT Act, aligning with the legislative intent.

### As to whether there was an ambiguity in Paragraph 8 Part II of the First Schedule to the VAT Act, 2013:

- The Court held that Paragraph 8 of the VAT Act is not ambiguous. It specifically exempts residential premises and land but does not extend the same exemption to commercial premises.

- Quoting the **Stanbic Bank Ltd v. Kenya Revenue Authority [2009]** case, the Court affirmed that the words in the statute should be given their ordinary meaning.

### On whether the Respondent was entitled to a refund of the VAT paid under protest:

- Since the Court had already determined that the VAT Act is clear in not exempting commercial premises, it ruled that the KRA had lawfully applied VAT on the sale of commercial property.

The Court of Appeal ultimately overturned the High Court's decision, confirming that the sale of commercial property is subject to VAT.

## Our Opinion on the judgement

The Court of Appeal's ruling reinforces the position that Parliament would have explicitly exempted commercial buildings in the First Schedule of the VAT Act if it intended to do so. This decision provides clarity on VAT applicability to commercial property sales, confirming that VAT is payable on such transactions.

For real estate developers, this ruling has significant implications. Developers must now incorporate VAT into their pricing and ensure compliance in all commercial property sales. The decision also underscores the importance of accurate tax planning, as seeking refunds for VAT paid under protest may not succeed without strong legal grounds.

It may be prudent for businesses affected by this ruling to review their commercial property transactions and address any potential tax exposures before disputes arise.

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