



## VAT on Commercial Property

High Court declares VAT not applicable on sale or purchase of land irrespective of the nature of buildings situated thereon.

The High Court of Kenya, Commercial & Admiralty Division, sitting in Nairobi, on 29 November 2018 delivered judgement declaring that Value Added Tax (VAT) is not applicable on transactions for the sale or purchase of land. The Court further noted that for VAT purposes, it is immaterial whether the buildings situated on the land are residential or commercial.

### Background and Facts

The Judgement of the High Court follows a suit against the Kenya Revenue Authority by one David Mwangi Ndegwa, who sought, inter alia, a declaration that VAT is not payable on transactions for the sale or purchase of land, regardless of whether or not the buildings standing thereon are residential and commercial buildings.

David Mwangi Ndegwa, the Plaintiff, purchased property from a willing vendor, Standard Chartered Bank Kenya Limited, on 11 December 2013. The property comprised of a parcel of land, together with buildings erected thereon, which included stores and a toilet. In concluding the transaction, the vendor intimated that the purchaser,

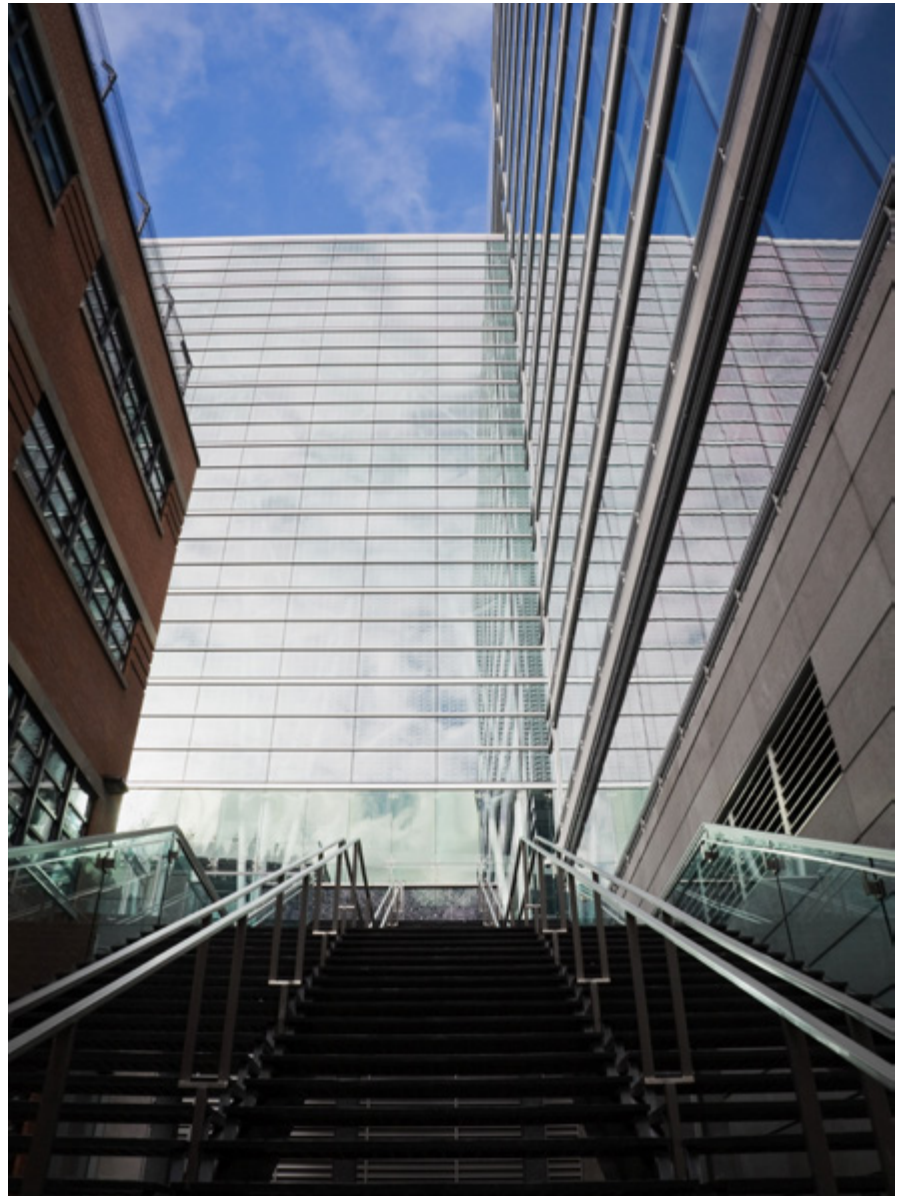
the Plaintiff herein, would be required to pay and account for VAT on purchase of the property. The Plaintiff, having no recourse but to pay the VAT, paid the amount of KES 11,200,008 and thereafter initiated a legal suit against the Defendant herein.



In his pleadings, the Plaintiff argued that the VAT Act (VATA) 2013, under Paragraph 8, Part II of the First Schedule, specifically exempts the 'supply by way of sale, renting, leasing, hiring, letting of land or residential premises' from VAT. The Plaintiff proceeded to argue that 'land', as defined by Article 260 of The Constitution of Kenya 2010, includes 'the surface of the earth and the airspace above the surface'. Consequently, the Plaintiff concluded that since the definition of land includes 'the surface of the earth and the airspace above the surface', and that land is specifically exempt from VAT by virtue of Para. 8, Part II of the First Schedule, VATA 2013, it follows therefore that the sale or purchase of land, and anything situate on the said land, whether residential or commercial, is exempt from VAT.

This argument, however, was strongly opposed by the Defendant who averred that the wording of Para 8, Part II of the First Schedule, VATA 2013 clearly introduces a distinction between residential premises and commercial premises. The Defendant proceeded to define commercial premises as 'Land or buildings not occupied or not capable of being occupied as residential premises.'

On this basis, the Defendant concluded that Para. 8 referred to above specifically exempts the sale of residential premises, while the sale of commercial premises remains Vatable at the standard rate of 16%.



### **Judgement and Determination**

In its Judgement and Determination, the High Court of Kenya, presided by Justice Mary Kasango, agreed with the Plaintiff in concluding that the definition of 'land' as proffered by Article 260 of the Constitution of Kenya 2010, captured both residential and commercial structures situated on the land.

Consequently, the court held that VAT is not applicable on transactions involving the sale or purchase of land, regardless of the commercial or residential status of any buildings/ structures situated on the land.

## Our View

We note that the judgement of the High Court serves as a major blow to the KRA, and its well established practice of requiring the charge of VAT on transactions for the sale or purchase of commercial property. This judgement reverses this practice and notes that save for further clarity on the issue from the legislature, VAT should not be applicable on the sale or purchase of land, irrespective of the nature of buildings, if any, situated thereon. Pending any appeals at the higher courts, going forward, this ruling sets precedence on the VAT treatment of transactions involving land.

The High Court, in the foregoing judgement, directed the KRA to refund the VAT paid by the Plaintiff. While the KRA contended that the order by the Plaintiff for refund was outside the 12 months' time limit prescribed by

Section 30 of the VAT law, the judge ruled that the VAT paid by the Plaintiff did not qualify as tax paid in error. This was because the Plaintiff paid the tax in question under protest and even applied for refund which application was rejected by the KRA. Seemingly therefore, the judge held the view that the Plaintiff was entitled to refund even where this was outside the 12 months' time limit prescribed in law.

A few questions linger from the judgement. Firstly, would purchasers of land that has commercial developments only be entitled to refund of VAT where they have put in an action against the revenue authority at the courts? Our reading of the judgement is that this should not be the case. The judge clearly declared that the sale of land whether or not it has commercial developments should be exempt. On this basis therefore, persons who have

previously paid VAT on purchase of land which has commercial developments may rightfully claim that they paid tax in error or overpaid tax. Such persons can seek a refund of tax paid in error. In line with the provisions of the VAT law, such claims should however be lodged within 12 months from the time the tax on the transaction became due or payable.

Secondly, we understand that the KRA has appealed/intends to appeal against this ruling. Would any claims lodged by aggrieved persons be processed pending a decision on the appeal? In our view, persons who have paid VAT in error may still make a claim for refund from the KRA. It is however likely that the processing and settlement of the refund may be deferred if the KRA has obtained a stay of execution on the decree of the High Court.

Taxpayers who may wish to pursue a refund of VAT paid on the purchase of land that has commercial developments should bear this in mind.

Should you have any question or happen to be affected by this ruling, kindly contact your relationship manager at Deloitte who will be more than glad to offer you guidance and assistance.

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