

High Court Declares Minimum Tax Unconstitutional

The High Court, led by Justice George Odunga has declared minimum tax provisions unconstitutional and the minimum tax guidelines void. KRA has been barred from further implementing or enforcing the provisions of Section 12D of the Income Tax Act.

CONTEXT OF THE MATTER

The Finance Act, of 2020 introduced a tax known as minimum tax to be applicable to all businesses regardless of whether they made a profit or loss, at the rate of 1% on the gross turnover.

The Officials of Kitengela Bar Owners Association filed a petition at the High Court, in Machakos challenging the new tax. The petition filed was to seek conservatory orders to stop KRA from implementing Minimum Tax. The Kenyan High Court sitting in Machakos, issued conservatory orders suspending the implementation of Kenya's new minimum tax on business gross revenues on April 19 2021 to restrain KRA from implementation, further implementation, administration, application and/or enforcement of Section 12D of the Income Tax Act by collecting and /or demanding payment of Minimum Tax awaiting for the hearing and determination of the case.

Today, the **20th day of September 2021**, Justice Odunga has ruled the tax is unconstitutional.

BASIS OF THE RULING

Justice George Odunga declared the tax unconstitutional on the basis that It results in diminishing capital for those making losses, while for those making profits the capital base is unaffected.

He also indicated the tax would result to double taxation, and this would be unfair to companies that are already paying so much taxes.

OUR OPINION ON THE RULING

This is a welcome move considering the tax would be based on the turnover other than the business affluence. The tax would have mainly affect low margin businesses, new businesses and loss-making companies.

The land mark ruling by Justice George Odunga is timely, considering the negative impact of covid-19 on businesses, which has resulted to businesses slowing down and even others coming to a halt.

In as much as we appreciate the need for Kenya Revenue Authority to increase its tax base, the tax would have more harm than good on businesses that are already struggling to stay afloat.



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