

# Rödl & Partner

## NEWSFLASH KENYA

### MINIMUM TAX RULING AND OTHER TAX CASES

Issue:  
30 September  
2021

Latest news on law, tax and business in Kenya

[www.roedl.de/kenia](http://www.roedl.de/kenia) | [www.roedl.com/kenya](http://www.roedl.com/kenya)



# Rödl & Partner

NEWSFLASH KENYA

MINIMUM TAX RULING  
AND OTHER TAX CASES

Issue:  
30 September  
2021

Read in this issue:

---

→ Background

→ Minimum Tax Ruling

→ Cases filed and won by Rödl & Partner

- K.L.M. Royal Dutch Airlines vs Commissioner of Domestic Taxes (Misc. Application No. 22 of 2021)
- H.P. Gauff Ingenieure GmbH & Co KG vs Commissioner of Domestic Taxes (Tax Appeal No. 165 of 2017)

## → Background

The High Court of Kenya sitting at Machakos issued a ruling on the 20 September 2021 in Constitutional Petition Nos. E005 of 2021 consolidated with Petition No. 1 of 2021 challenging the newly introduced minimum tax.

The Judge ruled against the imposition of minimum tax by invoking some important articles of the Kenyan constitution that were not complied with.

Separately, Rödl & Partner recently represented its two clients, K.L.M. Royal Dutch Airlines and H.P.Gauff Ingenieure GmbH & Co KG at the Tax Appeals Tribunal and obtained a favorable judgment and ruling for each respective case.

In this issue we have summarized the facts of the cases and analyzed the Judge's decision. We have also presented the various legislative provisions relied on.

## → Minimum Tax Ruling

### Background

The case was fronted by two sets of petitioners namely:

- a. First Petitioners – Stanley Waweru, Samwel Gitonga, Benard Oranga and Paul Mukono Kuria (Suing as Officials of Kitengela Bar Owners Association)
- b. Second Petitioners – The Kenya Association of Manufacturers, The Retail Trade Association of Kenya (Suing through the Chairman Leonard Mudachi) and The Kenya Flower Council (KFC)

The first set of Petitioners sought the following reliefs:

1. A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 10 of the Constitution and as such null and void ab initio;
2. (A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 27 of the Constitution and as such null and void ab initio;
3. A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 40 (1) (a) and (2) (a) of the

Constitution and as such null and void ab initio;

4. A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 46(1) of the Constitution and as such null and void ab initio;
5. A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 110(1) (c) as read with Article 110 (4) and (5) of the Constitution and as such null and void ab initio;
6. A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 201(b)(i) of the Constitution and as such null and void ab initio;
7. A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is illegal and unlawful and contrary to the provisions of Article 209 (1) of the Constitution and as such null and void ab initio;
8. A declaration that per the provision of Section 3 as read with Section 15 of the Income Tax Act, Income taxable under this Act is net income AFTER deductions of expenditure wholly and exclusively incurred b in the production of that income.

9. An order of prohibition be and is hereby issued restraining the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of Section 12D of the Income Tax Act, Chapter 470 of the Laws of Kenya as amended by the Tax Laws (Amendment) (No.2) Act, 2020 by collecting and/or demanding payment of the Minimum Tax;
10. Any other or further order or relief that this Honorable Court deems fit to grant.

The second set of 2nd Petitioners sought the following orders:

- a. This Honourable Court be pleased to hold and declare that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is unlawful, unconstitutional and contravenes the provisions of Article 10, for being contradictory, vague, and inconsistent with the provisions of Section 3 as read together with Section 15 of the Income Tax Act and paragraph 1 of the Second Schedule to the Income Tax Act.
- b. This Honourable Court be pleased to hold and declare that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is unlawful, unconstitutional and contravenes the provisions of Article 40 (1) (a) and (2) (a) and Article 201(b)(i) of the Constitution of Kenya, 2010.
- c. This Honourable Court be pleased to hold and declare that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is unlawful, unconstitutional and contravenes the provisions of Article 27 due to its discriminatory nature.
- d. This Honourable Court be pleased to hold and declare that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 is unlawful, unconstitutional and contravenes the provisions of Article 201(b)(i) as it imposes an unfair tax burden on the taxpayers.
- e. An order restraining the Kenya Revenue Authority from commencing, instituting, or

proceeding with any enforcement action against taxpayers and specifically, the Petitioners in relation to and/or on account of their failure to file returns on and/or pay taxes charged under Section 12D of the Income Tax Act.

- f. Any other remedy or such other orders as this Honourable Court may deem just and expedient in the circumstances to remedy the violation of the Petitioners' fundamental constitutional rights and freedoms.

## Decision

The decision delivered by Justice G.V. Odunga gave the following orders:

1. A declaration that Section 12D of the Income Tax Act as introduced by the Finance Act, 2020 and amended by the Tax Laws (Amendment) (No. 2) Act, 2020 violates Article 201(b)(i) of the Constitution and as such null and void.
2. A declaration that the failure by the Respondents to comply with the provisions of the Statutory Instruments Act renders the Minimum Tax Guidelines null and void and of no effect.
3. An order prohibiting the 2nd Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of Section 12D of the Income Tax Act, Chapter 470 of the Laws of Kenya as amended by the Tax Laws (Amendment) (No.2) Act, 2020 by collecting and/or demanding payment of the Minimum Tax;

## Our Comment

The Honourable Judge has set a precedence in outlining constitutional principles that must be adhered to when formulating tax laws. The principles of fairness in tax administration and ensuring public participation in the law formulation process will be key hurdles that future tax laws must comply with.

The KRA confirmed on the delivery date that it will appeal the judgement.

## → Cases filed and won by Rödl & Partner

### K.L.M. Royal Dutch Airlines vs Commissioner of Domestic Taxes (Misc. Application No. 22 of 2021)

#### Background

Rödl & Partner filed an application at the Tax Appeals Tribunal on behalf of its client, K.L.M. Royal Dutch Airlines, through a Notice of Motion dated 25 February 2021 seeking the following Orders:

- a. That the Tribunal be pleased to declare that the Applicant's fundamental right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action under Article 47 of the Constitution of Kenya, 2010 and Section 4 of the Fair Administrative Action Act has been violated by the Respondent.
- b. That an order of mandamus be directed to the Respondent compelling it to expeditiously issue a refund decision and disbursement order in accordance with the law on its outstanding VAT refund claims for the months of November 2016, December 2016, and March 2017.
- c. That an order of mandamus be directed to the Respondent compelling it to expeditiously reconcile the online PAYE ledger for the months of February 2014 to February 2016, and subsequently rectify the system errors identified and update the individual online tax ledgers for the Applicant's aggrieved employees.

#### Decision

The Honourable Chair Eric N. Wafula gave the following orders:

1. The matter is referred to the Respondent to verify the Applicant's refund claim timeously based on the information provided by the Applicant and communicate its decision by either paying the outstanding refund claims or giving reasons why the same cannot be

paid based on the basis of the verification process undertaken and which process ought to be completed and a decision issued within a period of ninety (90) days from the date of delivery of this Ruling.

2. The Respondent to undertake the reconciliation of the online PAYE Ledger for the months of February 2014 to February 2016 and issue an appropriate decision of the process of reconciliation and rectification of any systematic errors within a period of ninety (90) days from the date of delivery of this Ruling.

#### Our Comment

The Ruling in this case set a new precedence in the application of Article 47 of the Constitution (which guarantees the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action) as follows:

- The KRA being a public officer is under a statutory duty to discharge its mandate in an expeditious, efficient, lawful, reasonable and procedurally fair manner.
- The preamble to the Tax Appeals Tribunal Act affirms the intention of the Legislature to clothe the Tribunal with residual jurisdiction beyond merely handling appeals from the Commissioner to determine tax disputes ancillary to the Commissioner's discharge of his statutory mandate.

This ruling is set to open the floodgates for the myriad of taxpayers who feel aggrieved by various procedural hurdles imposed by the KRA without clear timelines. Rödl & Partner is willing to assist any taxpayer who feels aggrieved by actions of the KRA or is experiencing inordinately delays.

→ Cases filed and won by Rödl & Partner

## H.P. Gauff Ingenieure GmbH & Co KG vs Commissioner of Domestic Taxes (Tax Appeal No. 165 of 2017)

### Background

Once again Rödl & Partner lodged an Appeal at the Tax Appeals Tribunal on behalf of its client, H.P. Gauff Ingenieure GmbH & Co KG, against KRA's objection dated 4 October 2017 demanding for additional taxes. The Appeal was based upon the following grounds:

1. That the Respondent failed to take into account all information and explanations provided in order to appreciate all the issues placed before him before arriving at the objection decision;
2. That the Respondent wrongfully attributed the entire amended VAT assessment in the objection decision as arising from a single reason of unissued exemption certificates for KENHA and Ministry of Roads contracts. This is contrary to the Respondent's letter of verification findings dated 19 June 2017 which correctly adds a reason of inaccurate input tax restriction.
3. That the Respondent failed to consider and refer to the applicability of The Value Added Tax (Remission) (Official Aid Funded Projects) Order, 2003 of the VAT Act Cap 476 (hereinafter called "the repealed Act") in the objection decision, which sets out the conditions for remission of VAT payable on projects contracted prior to enactment of the VAT Act 2013.
4. That the Respondent failed to consider and refer to the applicability of Section 68 of VAT Act 2013 in the objection decision, which set out an extension period for validity of VAT remissions granted under the repealed Act.
5. That the Respondent wrongfully charged VAT on the Merille-Marsabit Road project income that purely related to employment income that was to be paid to the Appellant's staff for overtime work put in the project.
6. That the Respondent wrongfully charged VAT by application of an erroneous formula of restricting input tax in accordance with the repealed Act.

7. That the Respondent's demand of Kshs 42,645,374 is excessive, punitive and beyond the ability of the Appellant to pay contrary to generally accepted cannons of taxation.

### Decision

The Honourable Chair Patrick Lutta gave the following orders:

1. The Appellant seeks the completion of obtaining exemption certificates within 120 days of this Ruling.
2. The Respondent is hereby ordered to stay the tax demanded until the matter comes up before this Tribunal.
3. The Appellant to move the Tribunal within 15 days upon expiry of 120 days in Order 1 above for the purposes of reporting the conclusion of this matter and making of further orders.

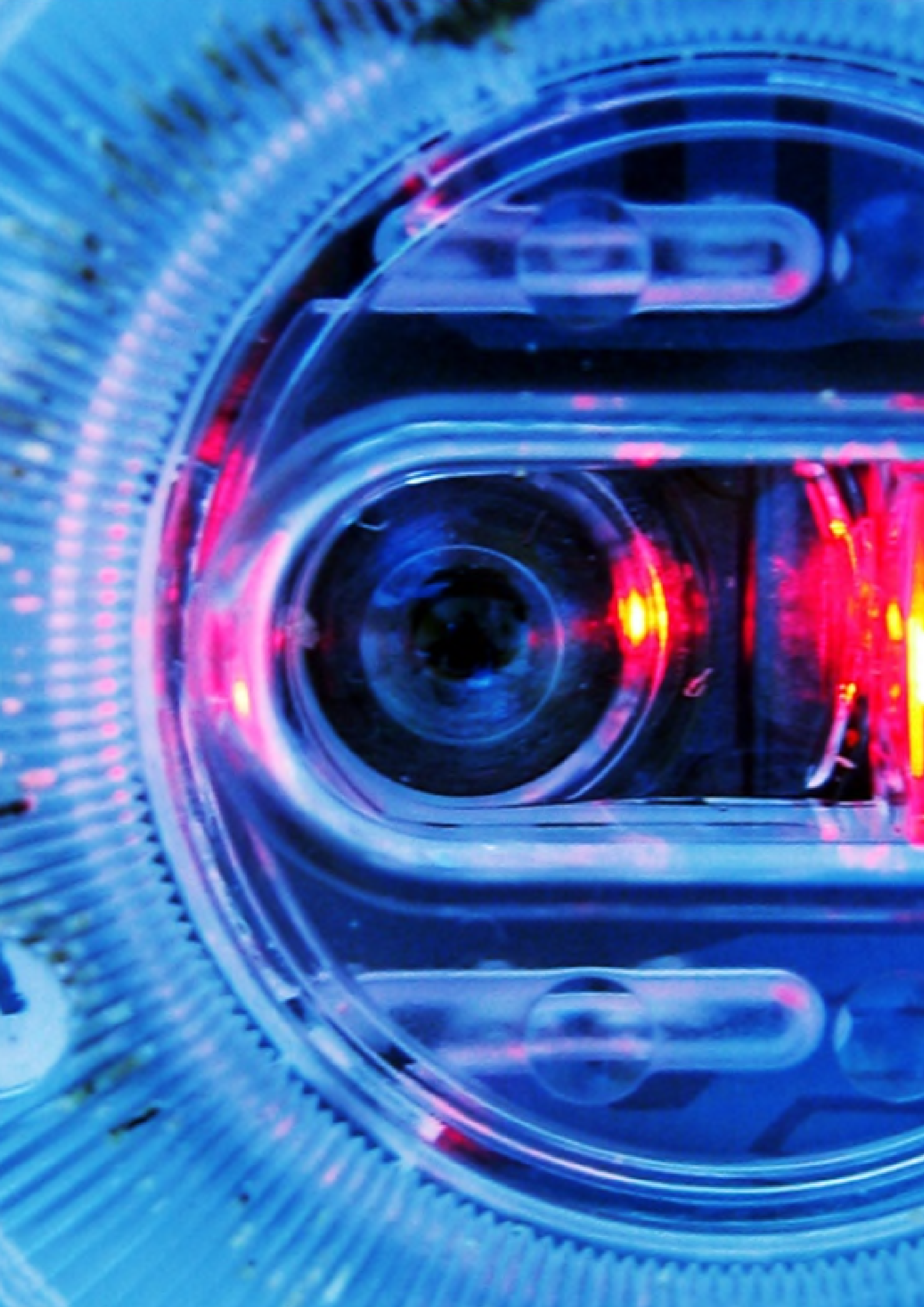
### Our Comment

This Judgement established a place for the doctrine of legitimate expectation in tax laws. The Honourable Chair determined as follows:

*"To put it simply, legal certainty births legitimate expectation and to levy tax based on administrative procedure not expressly provided for and when it's quite clear that the Appellant relied on express provisions would amount to infringing on its legitimate expectation created by the wording of the law."*

Once again taxpayers now have a remedy against tax procedures whose compliance is beyond the control of taxpayers. The doctrine of legitimate expectation protects such taxpayers from being punished in instances where they clearly paid their part. Rödl & Partner welcomes any taxpayer who requires assistance in resolving tax disputes of this nature.





## Contact for further information

---



George Maina  
T +254 775 9740 50  
M +254 711 2249 51  
[George.Maina@roedl.com](mailto:George.Maina@roedl.com)



Samuel Okumu  
T +254 775 9740 50  
M +254 723 6089 82  
[Samuel.Okumu@roedl.com](mailto:Samuel.Okumu@roedl.com)



Benjamin Niragire  
T +254 775 9740 50  
M +254 721 3863 93  
[Benjamin.Niragire@roedl.com](mailto:Benjamin.Niragire@roedl.com)

---

This is a general guideline tax and legal alert and should not be a substitute for proper advice. For queries and clarification, kindly get in touch with Rödl & Partner.

## Imprint

Newsflash Kenya  
Issue: 30 September 2021

Publisher:  
Rödl & Partner Limited  
3rd Floor, K.A.M House  
(opp. Westgate Mall)  
Peponi Road, Nairobi  
+254 775 974 050  
[www.roedl.com/kenya](http://www.roedl.com/kenya)

Responsible for the content:  
George Maina  
[George.Maina@roedl.com](mailto:George.Maina@roedl.com)

Layout/Type:  
Lucy Matito  
[Lucy.Matito@roedl.com](mailto:Lucy.Matito@roedl.com)

This Newsletter offers non-binding information and is intended for general information purposes only. It is not intended as legal, tax or business administration advice and cannot be relied upon as individual advice. When compiling this Newsletter and the information included herein, Rödl & Partner used every endeavour to observe due diligence as best as possible, nevertheless Rödl & Partner cannot be held liable for the correctness, up-to-date content or completeness of the presented information.

The information included herein does not relate to any specific case of an individual or a legal entity, therefore, it is advised that professional advice on individual cases is always sought. Rödl & Partner assumes no responsibility for decisions made by the reader based on this Newsletter. Should you have further questions please contact Rödl & Partner contact persons.