Commissioner of Domestic Taxes v Royal Floraholland Kenya Limited (Income Tax Appeal E219 of 2024) [2025] KEHC 10008 (KLR) (Commercial and Tax) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10008 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E219 OF 2024

RC RUTTO, J

JULY 4, 2025

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

ROYAL FLORAHOLLAND KENYA LIMITED ..... RESPONDENT

(Being an Appeal against the Judgment delivered on 28th June 2024 at the Tax Appeals Tribunal in Tax Appeal Tribunal Case No. E050 of 2023)

JUDGMENT

1. This appeal arises from the judgment delivered by the Tax Appeals Tribunal in Tax *Appeal No. E050 of 2023*. In that case, the Respondent challenged the Appellant's objection decision dated 19th January 2023, which upheld the rejection of the Respondent's VAT refund applications submitted between 24th October 2022 and 31st October 2022.

2. The Respondent claimed that the refund applications stemmed from services it rendered to FloraHolland NL under an intercompany agreement. These services included marketing, logistics, and customer support, which the Respondent argued qualified as exported services under the *Value Added Tax Act* (VAT Act) and were therefore zero-rated. The Respondent further contended that the Appellant disregarded detailed explanations and documentation that would have enabled it to verify the nature of the services provided and the invoiced amounts relevant to the refund claims and its implication on the refund application.

3. The Appellant, however, argued that the Respondent's parent company is engaged in sourcing and exporting flowers from Kenya to overseas buyers. According to the Appellant, this activity constitutes an agricultural service, which is classified as exempt under the First Schedule, Part III, Paragraph 5 of the *VAT Act,* 2013. Consequently, the Appellant maintained that the services provided by the Respondent

to FloraHolland NL were agricultural in nature and, being exempt, could not be reclassified as zero-rated simply because they were exported. The Appellant also submitted that the facts in the current case differed from those in the earlier case of *Royal FloraHolland Kenya Limited (formerly F.H. Services Kenya Limited) v Commissioner of Domestic Taxes* (2012), and that changes in the law and factual context rendered the earlier ruling inapplicable.

4. Additionally, the Appellant asserted that the costs incurred and inputs claimed by the Respondent belonged to FloraHolland NL, regardless of the services rendered. The Appellant stated that it had requested a detailed breakdown of invoices from the Respondent, but the Respondent indicated that it did not maintain such records. As a result, the Appellant argued that it was unable to verify the nature and value of the services rendered, which hindered the assessment of the refund claims. The Appellant therefore concluded that the Respondent had failed to discharge the burden of proof and maintained that the objection decision dated 19th January 2023, rejecting the VAT refund claim of Kshs. 4,825,954, was properly issued.

5. Upon hearing the appeal, the Tax Appeals Tribunal identified two key issues for determination:

   (i) whether the Respondent's refund applications were deemed allowed by operation of law, and

   (ii) whether the Appellant's objection decision dated 19th January 2023 was proper in law.

   The Tribunal allowed the appeal and set aside the Appellant's objection decision. It held that the refund applications were deemed to have been ascertained and approved by operation of law, as the Appellant had failed to issue its decisions within the statutory timelines. The Tribunal also found that the Respondent had sufficiently demonstrated that the services provided to FloraHolland NL constituted taxable supplies that were zero-rated during the periods under review, and did not constitute "agricultural services" as alleged by the Appellant. The Tribunal concluded that the Respondent had discharged its burden of proof and that the Appellant's rejection of the VAT refund was erroneous and unsupported by law. Accordingly, the Tribunal directed the Appellant to refund the excess input VAT for the tax periods of August 2018, September 2018, December 2018, April 2019, May 2019, November 2019, January 2020, July 2020, December 2020, and January 2021 to June 2021, in accordance with Section 47 of the *Tax Procedures Act*, within sixty (60) days from the date of the judgment.

6. Dissatisfied with the Tribunal's judgment, the Appellant filed this appeal through a Memorandum of Appeal dated 23rd August 2024. The Appellant raised several grounds, including that the Tribunal erred in law and fact by finding that the Appellant's decision to reject the refund claims was unjustified; failed to consider the evidence presented by the Appellant; misapplied the law and facts; and therefore, arrived at the wrong decision in setting aside the Appellant's objection decision. The Appellant also contended that the Tribunal failed to adequately consider its responses and submissions in rendering its judgment.

7. The Appellant prayed that this Honourable Court allow the appeal with costs and set aside in its entirety the findings and orders of the Tax Appeals Tribunal that are the subject of this appeal.

8. In response to the Memorandum of Appeal, the Respondent filed its Statement of Facts dated 20th September 2024. On the first issue whether the refund applications were deemed allowed by operation of law, the Respondent submitted that it had lodged various refund claims between 14th November 2018 and 14th July 2021 under the now-repealed Section 47 of the *Tax Procedures Act*. The Respondent pointed out that the Appellant issued its refund decisions on 24th, 25th, 27th, 28th, and 31st October 2022, well beyond the 90-day statutory period prescribed for determining refund

claims. Accordingly, the Respondent supported the Tribunal's finding that the refund applications were deemed approved by operation of law pursuant to Section 47(3) of the *Act*.

9. Regarding the second issue, whether the Appellant's objection decision dated 19th January 2023 was proper in law, the Respondent argued that it had submitted all the necessary documentation and explanations to support its refund claims. However, the Appellant disregarded this evidence and proceeded to reject the applications. The Respondent further contended that the Appellant acted inconsistently by initially acknowledging that the services in question were exported and therefore zero-rated, only to later reverse its position and classify them as exempt agricultural services. This reversal, the Respondent maintained, violated its right to legitimate expectation and fair administrative action.

10. The Respondent also challenged the competence of grounds 2 to 4 of the appeal on the basis of vagueness and lack of specificity. It argued that ground 2 failed to identify the specific legal provision that was allegedly misapplied or the precise legal error made by the Tribunal in setting aside the objection decision. Similarly, ground 4 did not specify which of the Appellant's submissions were purportedly ignored by the Tribunal. The Respondent submitted that these grounds improperly sought to introduce factual disputes for review, contrary to Section 56(2) of the *Tax Procedures Act*, which restricts appeals to the High Court from the Tax Appeals Tribunal to questions of law only.

11. The appeal was canvassed through written submissions. The Appellant's submissions were dated 31st October 2024, while the Respondent's submissions were dated 17th October 2024.

Appellant's Submissions

12. Counsel for the Appellant began by providing a brief background of the dispute, consistent with the summary already outlined above. The Appellant's distilled a single issue for determination namely: whether the Respondent was entitled to claim input VAT on expenses allegedly incurred on behalf of its principal company, FloraHolland NL.

13. The Appellant submitted that a review of the Intercompany Services Agreement revealed that the Respondent acted purely as an agent of FloraHolland NL, and that all services rendered were exclusively for and on behalf of the said principal. On this basis, the Appellant relied on Section 13(5) of the *Value Added Tax Act*, 2013, which provides that only a principal may deduct input VAT incurred by an agent acting on its behalf.

14. The Appellant further argued that the services provided by the Respondent, namely coordination, marketing, flower sourcing, and logistical support, were performed within Kenya and amount to agricultural services. As such, these services fell under the category of exempt from VAT under Part II, Paragraph 5 of the First Schedule to the *VAT Act*. Consequently, the Appellant contended that any input VAT associated with these services was not deductible.

15. Additionally, the Appellant maintained that the costs and input VAT in question belonged to FloraHolland BV, and not the Respondent, regardless of the nature of the services rendered. Reference was made to Clause 5.2 of the Intercompany Services Agreement, which stipulates that the service fee payable by FloraHolland BV is calculated on a cost-plus basis—specifically, reimbursement of the Respondent's costs plus a 10% markup.

16. The Appellant argued that this pricing model evidenced the lack of an arm's-length relationship between the parties and underscored the existence of a principal–agent relationship wherein all costs incurred and inputs claimed rightfully belonged to FloraHolland NL. Accordingly, the Appellant submitted that the Respondent lacked the legal standing to claim input VAT refunds on such costs.

17. In support of its position, the Appellant cited the decision in Nairobi High Court Income Tax Appeal No. E101 of 2020 – *Commissioner of Domestic Taxes v Dutch Flowers Group Kenya Limited*. In that case, the Court held that a taxpayer is not entitled to claim input VAT incurred on behalf of a principal. The Appellant argued that the facts and legal reasoning in the present matter closely mirrored those in the *Dutch Flowers case*. In the absence of a contrary appellate decision, the Appellant urged this Court to apply the doctrine of stare decisis and adopt a consistent interpretation of the law in cases involving materially similar facts.

18. The Appellant also relied on the case of *Geoffrey M. Asanyo & 3 Others v Attorney General* [2020] eKLR to emphasize the importance of consistency and predictability in judicial decision-making. In the Appellant's view, the Tribunal erred in law by holding that the Respondent was entitled to claim input VAT refunds on behalf of its principal, despite the nature of the relationship between the parties.

19. In conclusion, the Appellant submitted that the Respondent lacked the legal capacity to claim VAT refunds in respect of services rendered on behalf of its principal. The Appellant contended that the Tribunal erred in awarding such refunds and urged this Court to be guided by the relevant statutory provisions and persuasive judicial precedents. The Appellant therefore prayed that the Court allow the appeal, set aside the entire judgment of the Tax Appeals Tribunal dated 28th June 2024, and reinstate the objection decision issued on 19th January 2023.

Respondent's Submissions

20. Counsel for the Respondent commenced submissions by outlining the background of the matter and setting out the legal framework governing the Court's jurisdiction in appeals from the Tax Appeals Tribunal. In doing so, reference was made to Section 56 of the *Tax Procedures Act*, which limits such appeals to questions of law. The Respondent relied on the decisions in *Oceanfreight (EA) Limited v Commissioner of Domestic Taxes* [2018] eKLR and *June Mununve Mati v Returning Officer, Mwingi North Constituency & 2 Others* [2018] eKLR to underscore this jurisdictional limitation.

21. The Respondent submitted that Grounds 2 to 4 of the Appellant's Memorandum of Appeal improperly invited the Court to re-evaluate the Tribunal's factual findings without demonstrating that such findings were so unreasonable or unsupported as to amount to errors of law. The Respondent argued that the Appellant failed to identify the specific legal provisions allegedly misapplied, the evidence purportedly overlooked, or the submissions said to have been disregarded. On this basis, the Respondent contended that the Appellant had not met the threshold for appellate intervention under Section 56(2) of the *Tax Procedures Act*. Accordingly, the Tribunal's finding that the refund applications were deemed allowed by operation of law due to the Appellant's delay should remain undisturbed.

22. The Respondent framed the central issue for determination as whether the Tribunal erred in law and fact in finding that the Appellant's decision to reject the VAT refund claims was not justified.

23. On this issue, the Respondent submitted that Section 47 of the *Tax Procedures Act* imposes a statutory obligation on the Commissioner to ascertain, audit, and determine refund claims within a prescribed 90-day period. In the present case, the Appellant issued its decisions well beyond this statutory timeline. The Respondent therefore argued that, pursuant to Section 47(3), the refund applications were deemed to have been allowed by operation of law due to the Appellant's inaction.

24. In support of this position, the Respondent cited the High Court's decision in *Equity Group Holdings Limited v Commissioner of Domestic Taxes* [2021] eKLR, which affirmed that failure by the tax authority to issue a timely decision result in the refund application being deemed approved. The

Respondent submitted that the Tribunal correctly applied this principle in finding that the refund claims stood allowed by operation of law.

25. On the substantive merits, the Respondent noted that the Tribunal nonetheless proceeded to consider the substantive merits of the Respondent's appeal. The Respondent submitted that it had provided the Appellant with detailed explanations and documentation outlining the nature of its operations, including the specific services rendered, the amounts invoiced for each service, and the relevance of these services to the refund claims

26. Despite this, disclosures, the Appellant rejected the claims on the basis that the services were agricultural or horticultural in nature and therefore exempt from VAT. The Respondent argued that the Appellant failed to specify which services it considered exempt, and that its decision lacked both evidentiary support and legal justification.

27. The Respondent urged the Court to adopt the reasoning of the Tribunal, which relied on the decision in *Republic v Kenya Revenue Authority & Attorney General ex parte Fontana Limited*, JR Misc. Civil Application No. 442 of 2013. In that case, the Court held that services involving the identification and sourcing of flowers for an overseas entity do not constitute "agricultural services" for purpose of VAT exemption. The Respondent submitted that, similarly, the services it provided to FloraHolland NL were wrongly classified by the Appellant as exempt agricultural services.

28. The Respondent further submitted that in a letter dated 25th March 2022, the Appellant had acknowledged that the Respondent was engaged in the export of services, which are zero-rated under the *VAT Act* and therefore not chargeable to VAT. The subsequent reversal of this position, in rejecting the refund claims on grounds of exemption, violated the Respondent's legitimate expectation and the right to fair administrative action under Article 47 of the *Constitution*. The Respondent also criticized the Appellant's failure to consider binding precedent from the Tribunal itself in *Royal FloraHolland Kenya Limited (formerly F.H. Services Kenya Limited) v Commissioner of Domestic Taxes*, TAT Appeal No. 6 of 2012, which affirmed that the Respondent's services constituted exported services.

29. The Respondent submitted that it had discharged its burden of proof under Section 30 of the *Tax Appeals Tribunal Act* by demonstrating that the services supplied to FloraHolland NL were zero-rated and did not fall within the category of exempt agricultural services. In support, the Respondent cited Section 2 of the *VAT Act*, which defines "exported services" as services provided for use or consumption outside Kenya. The Respondent emphasized that under this definition, the place of performance is irrelevant; rather, the test lies in where the service is consumed. To buttress this view, the Respondent relied on the decision in *Commissioner of Domestic Taxes v Total Touch Cargo Holland* [2018] eKLR, where the Court held that services performed in Kenya but consumed abroad qualify as exported and are therefore zero-rated. The Respondent argued that the Tribunal correctly applied this principle in classifying the services as exported.

30. In conclusion, the Respondent submitted that it had fully discharged its burden of proof under both Section 30 of the *Tax Appeals Tribunal Act* and Section 56 of the *Tax Procedures Act*. It maintained that the Tribunal's judgment was sound in law and fact, and urged the Court to dismiss the appeal with costs.

Analysis and Determination

31. This Court begins by acknowledging the limits of its jurisdiction as set out under Section 56(2) of the *Tax Procedures Act* (TPA), which provides that:

> "An appeal to the High Court or to the Court of Appeal shall be on a question of law only."

Accordingly, this Court is not permitted to re-evaluate or substitute its own findings of fact for those of the Tribunal. However, it retains the duty to ensure that the Tribunal's conclusions are supported by the evidence on record and are not so unreasonable or perverse as to amount to errors of law. This principle was affirmed in *John Munuve Mati v Returning Officer, Mwingi North Constituency & 2 Others* [2018] eKLR and further elaborated by the Court of Appeal in *Peter Gichuki King'ara v IEBC & 2 Others*, Nyeri Civil Appeal No. 31 of 2013, where the Court clarified what constitutes a question of law.

32. Guided by the above authorities, and having carefully considered the record of appeal, the parties' written submissions, and the authorities cited, the following two issues arise for determination:

    i. Whether the Respondent's VAT refund applications were deemed allowed by operation of law under Section 47 of the *Tax Procedures Act*; and

    ii. Whether the Respondent was entitled to claim input VAT in respect of services rendered to its parent company, FloraHolland NL, and whether such services qualified as exported services or exempt agricultural services under the *VAT Act*.

Whether the Respondent's VAT refund applications were deemed allowed by operation of law under Section 47 of the Tax Procedures Act

33. At the time the Respondent lodged its VAT refund applications, the applicable law was the now repealed Section 47 of the *Tax Procedures Act*. The relevant provisions stated:

> 47. Refund of overpaid tax
>
> (1) When a taxpayer has overpaid a tax under a tax law the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within five years of the date on which the tax was paid.
>
> Provided that for value added tax the period of refund shall be as provided for under the *Value Added Tax Act*, 2013 (No. 35 of 2013).
>
> (2) The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit.
>
> (3) The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the application within ninety days of receiving the application for a refund.

34. In addition, Section 17(5) of the *VAT Act* provides that:

> (5) Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the period, the amount of the excess shall be carried forward as input tax deductible in the next tax period:
>
> Provided that any such excess shall be paid to the registered person by the Commissioner where;
>
> (a) The Commissioner is satisfied that such excess arises from making zero rated supplies; and

(b) The registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable."

35. The statutory intent behind Section 47 was to protect taxpayers from administrative inactivity by compelling the Commissioner to act within a defined timeframe. The provision was couched in mandatory terms, and failure to comply with the 90-day deadline had legal consequences.

36. In the present case, the Respondent filed its VAT refund applications on various dates between 14th November 2018 and 14th July 2021, covering the tax periods of August 2018, September 2018, December 2018, April, May and November 2019, January and July 2020, December 2020, and January to June 2021. The Appellant issued credit adjustment vouchers rejecting the refund claims between 24th and 31st October 2022 well beyond the 90-day statutory window.

37. The record further shows that the parties continued corresponding on the refund applications until 22nd September 2022. The Appellant subsequently issued rejection notices dated 25th October 2022. The Respondent filed an objection to the rejection on 24th February 2023, and the Appellant issued its objection decision on 29th March 2023.

38. In addressing this issue, the Tribunal held as follows:

> " 118. Both the repealed Section 47(3) of the *Tax Procedures Act* and the amendment to Section 47(3) are couched in mandatory terms. The refund decisions that the Respondent issued out of time rendered those refund decisions null by operation of law.
>
> 119. Consequently, the Tribunal finds that because the Respondent rendered its refund decisions out of time, in this case, the Appellant's refund applications were allowed by operation of law."

39. This Court agrees with the Tribunal's interpretation. Section 47(3), though previously silent on the legal effect of non-compliance, was clearly mandatory in nature. The subsequent amendment merely clarified what was already implied in the original provision. The Appellant's failure to issue a decision within the prescribed 90-day period rendered the refund applications deemed allowed by operation of law.

40. This position is supported by the High Court's decision in *Commissioner of Domestic Taxes v Sony Holdings Limited* [2021] KEHC 7071 (KLR), where the Court held:

> " The law concerning refund of overpaid tax is to be found in Section 47 of the *TPA*, which underpins the taxpayer's statutory right to apply to the Commissioner for a refund. It imposes on the Commissioner the duty to consider the application, audit the claim if necessary, and thereafter make a decision on it within 90 days of application as provided by Section 47(3)..."

41. The Court emphasized that failure to act within the statutory period entitles the taxpayer to a refund by operation of law.

42. I agree with the reasoning and holding of the Court in the authority above and find no fault in the Tribunal's conclusion that the Appellant's refund decisions were rendered outside the statutory 90-day period. Consequently, the Tribunal was correct in holding that the Respondent's refund applications

were deemed ascertained and approved by operation of law. There is therefore no basis for this Court to interfere with that finding.

43. While this conclusion effectively resolves the dispute, the second issue raised by the parties remains relevant for completeness of the issues raised. Accordingly, the Court proceeds to address the second issue.

Whether the Respondent was entitled to claim input VAT in respect of services provided to its parent company, FloraHolland NL, and whether such services qualified as exported services or exempt agricultural services under the VAT Act

44. Section 2 of the *VAT Act* defines "services exported out of Kenya" as services "provided for use or consumption outside Kenya." This definition emphasizes the destination or consumption of the service, rather than the place of performance.

45. Section 13(5) of the *VAT Act* further provides:

> 13. Taxable value of supply
>
> (5) In calculating the value of any services for the purposes of subsection (1) there shall be included any incidental costs incurred by the supplier of the services in the course of making the supply to the client:
>
> Provided that, if the Commissioner is satisfied that the supplier has merely made a disbursement to a third party as an agent of his client, then such disbursement shall be excluded from the taxable value.

46. Additionally, Part II, Paragraph 5 of the First Schedule lists "agricultural services" as exempt from VAT.

47. The Appellant contended that the Respondent acted merely as an agent of FloraHolland NL, whose principal activity was the sourcing and exportation of flowers from Kenya. It was argued that such activities constituted agricultural services, which are exempt from VAT, and therefore any input VAT incurred in connection with those services was not recoverable.

48. The Respondent, however, maintained that it provided marketing, logistical, and customer support services under a formal Intercompany Services Agreement. These services, it argued, were rendered in Kenya but consumed by FloraHolland NL in the Netherlands. The Respondent further asserted that the services were zero-rated as exported services and that the Appellant had previously acknowledged this classification. In support, the Respondent cited *Republic v Kenya Revenue Authority & the Attorney General ex parte Fontana Limited*, JR Misc. Civil Application No. 442 of 2013, where the Court held that services involving the identification and sourcing of flowers for an overseas entity did not constitute agricultural services for VAT purposes.

49. In addressing this issue, the Tribunal held:

> " 147. The Tribunal finds that the legal citations applied, case laws referred to and the evidence adduced by the Appellant regarding the services it provided to FloraHolland which included sales and purchases ledgers, sales invoices, an intercompany services agreement between FloraHolland NL and the Appellant, sufficiently demonstrated that the services that the Appellant supplied to FloraHolland NL for periods in dispute were not "agricultural services".

148. It therefore follows that the services supplied by the Appellant to FloraHolland NL, having not been expressly listed as exempt supplies in the VAT Act 2013, are taxable supplies, thus, being services exported outside Kenya, were zero-rated in the periods under review. The Tribunal therefore finds that the Respondent could not apply its interpretation that the Appellant's services comprised "agricultural services" to the detriment of the Appellant.

149. Consequently, the Tribunal also finds that the Appellant sufficiently discharged its burden of proving that the Respondent's Objection Decision rejecting the Value Added Tax refunds for the periods of August 2018, September 2018, December 2018, May 2019, April 2019, November 2019, January 2020, July 2020, December 2020 and January 2021 to June 2021 was erroneous and not supported in law.

50. This Court agrees with the Tribunal's reasoning. The VAT system in Kenya is destination-based, meaning that exports are zero-rated, while locally consumed services may be taxed or exempt, depending on their classification. To determine whether a service qualifies as export, courts have consistently applied a "consumption test" that is, identifying where the service is ultimately used or enjoyed. In this case, the services were contracted by FloraHolland NL in Netherlands, invoiced and paid for by the foreign entity and designed to benefit FloraHolland NL's business overseas. The court in the case of *Commissioner of Domestic Taxes v Total Touch Cargo Holland* [2018] eKLR relied also by the Tribunal provided that

> "the fact that the services are performed in Kenya does not negate their classification as exported, provided they are consumed outside Kenya"

51. Applying that principle, the services rendered by the Respondent fall squarely within the definition of "exported services" under Section 2 of the VAT Act and therefore qualify for zero-rating. As such, the input VAT incurred in delivering those services is recoverable. The Court is satisfied that the Respondent was not merely acting as an agent of FloraHolland NL, but rather as a service provider operating under a structured intercompany agreement with clearly defined deliverables and value attribution. Accordingly, the Respondent was entitled to claim input VAT refunds associated with the provision of those services.

52. Based on the foregoing analysis, the Court makes the following orders.

    a. The appeal is hereby dismissed.

    b. The judgment and orders of the Tax Appeals Tribunal delivered on 28th June 2024 are affirmed in their entirety.

    c. Each party shall bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 4TH DAY OF JULY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent