Hapag-Lloyd Kenya Limited v Commissioner of Domestic Taxes (Income Tax Appeal E009 of 2025 & E230 & E231 of 2024 (Consolidated)) [2025] KEHC 13331 (KLR) (Commercial and Tax) (26 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13331 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E009 OF 2025 & E230 & E231 OF 2024 (CONSOLIDATED)

CM KARIUKI, J

SEPTEMBER 26, 2025

BETWEEN

HAPAG-LLOYD KENYA LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

JUDGMENT

Introduction

1. What is before this Court is an appeal by Hapag-Lloyd Kenya Limited (the "Appellant") from the decision of the Tax Appeals Tribunal delivered on 22nd November 2024 in Tax Appeal No. E952 of 2023. The Appellant, dissatisfied with the Tribunal's determination, filed a Memorandum of Appeal dated 17th January 2025. The appeal is opposed by the Commissioner of Domestic Taxes (the "Respondent").

Background

2. The Appellant is a company incorporated in Kenya and duly registered for Value Added Tax (VAT). It operates as a shipping agent for Hapag-Lloyd AG, a company incorporated in the Federal Republic of Germany. The Respondent is charged under the *Kenya Revenue Authority Act* with the responsibility of assessing, collecting and accounting for all revenues due to the Government.

3. On 2nd October 2023, the Appellant lodged a claim with the Respondent for a refund of KShs. 1,691,316/-. It contended that this sum represented excess input VAT incurred in the course of making zero-rated supplies for the period between 1st April 2023 and 31st July 2023. The Respondent, however, rejected the claim through a VAT Claim Rejection Order dated 14th November 2023, citing

provisions of the agency agreement between the Appellant and its principal as justification for its decision.

4. Dissatisfied, the Appellant appealed to the Tribunal. By its judgment of 22nd November 2024, the Tribunal upheld the Respondent's decision, reasoning that the Appellant, being an agent, was not entitled to claim the refund since the economic burden of the input VAT fell on its foreign principal.

5. The Appellant has now moved this Court, seeking to set aside the Tribunal's decision and to have judgment entered in its favour for the refund amount. The grounds of appeal, as set out in the Memorandum of Appeal, include that the Tribunal erred in law by:

    i. Upholding the Respondent's rejection of the claim contrary to section 17(5) of the VAT Act, 2013 and the Second Schedule thereto;

    ii. Finding that the Appellant could not claim input VAT refunds under an agency arrangement, contrary to section 17 of the VAT Act and Regulation 8 of the VAT Regulations, 2017;

    iii. Failing to recognize the Appellant as a distinct legal person within the meaning of section 2 of the VAT Act; and

    iv. Misapplying the facts relating to the agency agreement, particularly in light of the Tribunal's own earlier decision in TAT Appeal No. E444 of 2023.

6. The Appellant, through submissions dated 6th May 2025, argued that the Tribunal misdirected itself in law and in fact by conflating private contractual arrangements with statutory tax obligations. Counsel urged that the Appellant, being a registered taxpayer in Kenya, had incurred VAT in its own name and was therefore entitled to a refund when such VAT arose from zero-rated supplies. To support this proposition, the Appellant relied on National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd [2001] eKLR and Ushago Diani Investment Ltd v Jabeen Manan Abdulwahab [2018] eKLR, emphasising the principle that parties are bound by their contracts and that the statutory relationship between taxpayer and tax authority cannot be subordinated to private agreements.

7. The Respondent, in submissions dated 2nd May 2025, countered that the agency arrangement disentitled the Appellant from seeking VAT refunds since the economic incidence of the expenses rested with the foreign principal. In support, reliance was placed on the decision in Commissioner of Domestic Taxes vs Dutch Flower Group Kenya (ITA no E11 of 2020) where the High Court held that an agent reimbursed by its principal could not seek input VAT refunds.

8. The central question for determination, therefore, is this: whether the Appellant, in its capacity as an agent of a foreign principal but also as a registered person in Kenya, is entitled in law to claim a refund of input VAT attributable to its zero-rated supplies.

Analysis and Determination

9. The jurisdiction of this Court is provided in section 56(2) of the *Tax Procedures Act*, which states that an appeal to the High Court or to the Court of Appeal shall be on a question of law only. The Court of Appeal in John Munuve Mati vs. Returning Officer Mwingi North Constituency & 2 others [2018] eKLR settled what constitutes a question of law, positing that matters of law include the interpretation or construction of *the Constitution*, statutes or regulations, and their application to a set of facts as established by the trial court. . This Court must therefore determine whether the Tribunal correctly interpreted and applied the provisions of the VAT Act to the facts before it.

10. It is common ground that the Appellant rendered shipping agency services to its foreign principal. It is equally common ground that these services qualify as exported services within the meaning of section 2

of the VAT Act, which defines exported services as "a service provided for use or consumption outside Kenya." Paragraph 6 of the Second Schedule to the VAT Act expressly zero-rates "the supply of taxable services to international sea and air carriers." Thus, by statutory design, the Appellant's output is zero-rated.

11. Section 17 of the *Value Added Tax Act* sets out the regime for input tax credits. Subsection (5) thereof provides in mandatory terms 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) such excess arises from making zero rated supplies;

The legislative intention is unequivocal: once a registered person makes zero-rated supplies, they are entitled to a cash refund of excess input VAT.

12. The Tribunal, however, concluded that the agency arrangement disentitled the Appellant from claiming such refunds. It reasoned that the Appellant merely incurred costs on behalf of its principal and that the economic incidence of VAT was ultimately borne by the principal. This reasoning, though pragmatic from a commercial perspective, is legally flawed when tested against the plain language of the statute.

13. Our courts have consistently held that in matters of taxation, there is no room for equity or judicial legislation: the statute must be construed strictly and literally. In Republic v Kenya Revenue Authority Ex parte Aberdare Freight Services Ltd [2004] eKLR, the High Court observed that "a tax statute must be construed strictly, and nothing is to be read in, nothing is to be implied." Similarly, in Cape Brandy Syndicate v IRC [1921] 1 KB 64, it was held that "in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment." These principles underscore that the Tribunal was not entitled to override the express wording of section 17(5) by importing considerations of economic incidence or contractual arrangements.

14. The *Value Added Tax Act* is clear in its operation. It imposes obligations and confers rights upon a "registered person." Under Section 2 of the VAT Act, a "person" includes a company. The Appellant, Hapag-Lloyd Kenya Limited, is a distinct legal entity registered in Kenya and is a registered person for VAT purposes. The German principal, Hapag-Lloyd AG, is a separate legal entity. The VAT incurred on local purchases made by the Appellant to enable it to provide its agency services is, in the first instance, incurred by the Appellant. The VAT invoice is issued to the Appellant, and it is the Appellant's name that appears on the VAT return.

15. The Respondent's argument, and the Tribunal's finding, seeks to pierce the corporate veil in a manner not sanctioned by law in this context. The case of National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2001] eKLR, cited by the Appellant, reinforces the principle of privity of contract. The contract of agency is between the Appellant and its Principal. The VAT Act creates a statutory relationship between the Appellant and the Respondent. The two relationships are separate. The terms of the agency agreement regarding cost reimbursement are a matter of private commercial arrangement between the Appellant and its Principal. They do not, and cannot, extinguish the statutory right to an input tax credit conferred upon the registered person by Section 17 of the VAT Act.

16. The Respondent's reliance on the Dutch Flower Group case is distinguishable. In that case, the core issue revolved around whether the local agent was the importer of record and the beneficial owner of the goods, which would entitle it to claim input VAT on imports. The Court found that the agent was acting in the name and for the account of the principal, making the principal the true importer. The present case is different. Here, the Appellant is not importing goods on behalf of the principal; it is procuring local services (e.g., utilities, office supplies, professional services) in its own name to run its business of providing agency services. These are costs intrinsic to the Appellant's own operations as a going concern.

17. The purpose of zero-rating exported services is to ensure that Kenyan services are competitive in the international market by relieving them of the burden of VAT. This is achieved by allowing the exporter to recover all input VAT attributable to those exports. To disallow the Appellant's claim because its principal will reimburse the cost is to undermine this very policy. The reimbursement from the principal is for the cost of the services purchased, not a reimbursement of the Kenyan VAT element, which is a tax matter between the Appellant and the Kenyan revenue authority. If the Appellant is not allowed to claim this input VAT, the cost of providing the exported service effectively increases by the VAT amount, making Kenyan shipping agents less competitive—a result contrary to the policy behind zero-rating.

18. Regarding the Appellant's reference to a previous Tribunal case (TAT Appeal No. E444 of 2023) involving the same agency agreement, while this Court's jurisdiction is limited to questions of law, the factual finding by the Tribunal in that case that the Appellant is not reimbursed for input VAT costs is pertinent. It significantly undermines the Respondent's fundamental premise that the VAT cost is borne by the principal. Even if it were reimbursed, for the reasons stated above, it would not be legally decisive.

19. Consequently, I find that the Tribunal erred in law by failing to correctly apply the definition of a "registered person" under the VAT Act and by allowing the commercial terms of a private agency agreement to override the clear statutory right to an input tax credit granted by Section 17. The Appellant, as a distinct legal entity making zero-rated supplies, has met the conditions for a refund under Section 17(5) of the VAT Act.

Conclusion and Orders

20. In light of the foregoing, I am persuaded that this appeal has merit and so are appeals E230 of 2024 and E231 of 2024 and are allowed in the following terms: -

    i. The decision of the Tax Appeals Tribunal delivered on 22nd November 2024 is hereby set aside. The Respondent’s VAT Claim Rejection Order dated 14th November 2023 is consequently vacated.

    ii. Judgment is hereby entered in favor of the Appellant for the sum of Kshs. 1,691,316/, being the rightful VAT refund claim for the period 1st April 2023 to 31st July 2023. The Respondent shall process this refund expeditiously.

    iii. The result of the instant appeal binds the outcome in appeals noE230 of 2024 with effect that, The Tribunal judgement delivered on 12th July 2024 is set aside and substituted with and order the respondent to expeditiously process and pay the appellants refund claims of Ksh 1,634,610/.

    iv. And for appeal no E231 of 2024 the objection dated 31st March 2023 is hereby set aside and respondents are ordered to pay appellant expeditiously VAT refund claims of Ksh 4,561,000.

iv. The parties to bear their own costs of the Appeals.

v. It is so ordered

DATED AND DELIVERED VIA MICROSOFT TEAMS/THIS 26TH SEPTEMBER 2025

.....

CHARLES KARIUKI

JUDGE