Commissioner of Domestic Taxes v Sendy Limited (Income Tax Appeal E137 of 2024) [2025] KEHC 14814 (KLR) (Commercial and Tax) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14814 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E137 OF 2024

H NAMISI, J

OCTOBER 23, 2025

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

SENDY LIMITED ..... RESPONDENT

(Being an appeal from the Judgement of the Tax Appeals Tribunal delivered at Nairobi on 5 April 2024 in Tax Appeal Tribunal Appeal No. TAT E167 of 2023)

JUDGMENT

Judgement

1. The Appellant is a principal officer appointed under section 13 of the *akn ke act 1995 2 Kenya Revenue Authority Act*, Cap 469 and the Kenya Revenue Authority, mandated to collect and receive all Government revenue in accordance with the various tax statutes.

2. The Respondent is a digital marketplace platform provider connecting third party transporters to third party customers requiring transportation delivery services for the third parties' goods.

3. The salient facts leading to the appeal are derived from the audit process initiated by the Appellant's audit office following an analysis of the Respondent's filed returns, declarations and taxes paid. An audit notice was issued on 1 November 2021. Subsequently, additional assessments for Corporation Tax and VAT were issued on 22 December 2022, after audit tests revealed variances in the Respondent's turnover as compared to filed returns. These variances were established based on expected income derived from banking analysis, which the Appellant treated as under-declared sales and brought to charge.

4. On 18 January 2023, the Respondent objected to these assessments. On 15 March 2023, the Appellant issued an Objection Decision, confirming the VAT liability but vacating the Corporation Tax liability. It is against the confirmed VAT liability that the Respondent lodged its original appeal at the Tribunal on 26 April 2023.

5. The gravamen of the Respondent's case before the Tribunal was that the Appellant had fundamentally mischaracterised its business model. The Respondent contended that it does not provide transport services but rather operates as a technology company that provides a digital marketplace – an online platform that connects independent third-party transporters with customers requiring delivery services. The Respondent's revenue was limited to a commission charged to the transports for the use of the platform, and it had duly accounted for and remitted VAT on this commission income.

6. In its judgment, the Tribunal found in favor of the Respondent. The Tribunal determined that the Respondent was not a provider of transport services but a platform provider. It made a finding of fact that the actual taxable supply of transport was made by the third-party transporters to the end customers. The Tribunal reasoned that under section 5(1) of the VAT Act, the obligation to account for VAT lies with the person making the supply. In this transactional structure, the third-party transporter was the supplier of transport services, while the Respondent was the supplier of a platform service to the transporter. The Tribunal noted that the Respondent was an asset-light company that did not own any of the vehicles used for the deliveries, a fact that buttressed its finding that the Respondent was not engaged in the transport business itself. The Tribunal consequently allowed the appeal and set aside the Objection Decision in its entirety.

7. Aggrieved by the judgement and order of the Tribunal, the Appellant lodged this appeal on the following grounds:

    i. That the Honourable Tribunal erred in law and fact in finding that the Respondent did not provide transport services that are chargeable to VAT subject to section 5(1) of the VAT Act;

    ii. That the Honourable Tribunal misguided itself on the services provided by the Respondent and the payments made to it by its customers thereby arriving at an erroneous decision;

    iii. That the Honourable Tribunal erred in law and fact in failing to consider that the Respondent's Request for Payments (RFPs) are basically invoiced that demand for payment on delivery services which amount is the full amount for the service provided thus the variances established where chargeable to tax;

    iv. That the Tribunal erred in law and fact in failing to consider that the Respondent failed to produce documentation to support its case contrary to the various propositions of the tax legislations;

    v. That the Honourable Tribunal erred in fact and in law in failing to appreciate the evidence tendered by the Appellant before it before rendering its judgement;

    vi. That the Honourable Tribunal misapplied and misdirected itself on the law and therefore came to the incorrect decision.

8. The appeal was canvassed by way of written submissions.

9. The Appellant argued that the Tribunal failed to look beyond the contractual form to the economic and commercial reality of the transactions facilitated by the Respondent. The Appellant's submission was that the Respondent is the principal supplier of the transport service. This is demonstrated by the degree of control it exercises over the entire transaction. The Appellant highlighted that the

Respondent controls the customer relationship through its digital application, dispatches the nearest available driver, determines the price, issues the demand for payment (RFP), and most critically, collects the full consideration for the service directly into its own bank accounts. The subsequent payment made to the driver is merely a disbursement or cost of sale, not a remittance of funds belonging to the driver.

10. The Appellant submitted that this arrangement constitutes a single composite taxable supply of transport services made by the Respondent to the end customer. As such, pursuant to section 5 of the VAT Act, VAT is chargeable on the full consideration received. The Appellant further contends that the RFPs issued by the Respondent function as tax invoices under section 42 of the VAT Act, as they represent the demand for payment for the supply. The Appellant relied on the UK Tribunal decision in Reed Employment Ltd -vs- Revenue & Customs (2011) UKFT to support the proposition that the nature of a supply is determined not just by contractual terms but by the economic reality of what is being supplied.

11. The Appellant argued that the Respondent failed to discharge its burden of proof under section 56(1) of the *akn ke act 2015 29 Tax Procedures Act* by not providing sufficient documentation to reconcile the variance between its declared turnover and bankings. Reliance was placed on the cases of Commissioner for Investigations and Enforcement v Menengai Oils Limited [2021] KEHC 13028 (KLR).

    Tile and Carpet Centre Limited v Commissioner of Domestic Taxes [2020] KEHC 7090 (KLR) and

12. On the other hand, the Respondent first raised a preliminary objection on jurisdiction, submitting that this appeal is incompetent and inadmissible before the Court. The Respondent argued that section 56(2) of the *akn ke act 2015 29 Tax Procedures Act* unequivocally limits appeals from the Tribunal to the High Court to questions of law only. The Respondent contended that the Appellant's grounds of appeal are, in substance, a challenge to the Tribunal's findings of fact, namely, the characterisation of the Respondent's business model. The Respondent asserted that the Tribunal, as a specialist body, heard the evidence, including the uncontroverted testimony of a witness, and made a conclusive finding of fact on the nature of the business. It is argued that this Court, in its appellate capacity under the *akn ke act 2015 29 Tax Procedures Act*, lacks the jurisdiction to re-evaluate these primary facts. The Respondent relied on Commissioner of Domestic Taxes v Sketchers Limited [2024] KEHC 5569 (KLR).

13. The Respondent maintained that it is a technology company providing a digital marketplace, a fact it proved before the Tribunal through its audited financial statements, sample commission agreement with transporters, and the unchallenged witness statement of Mr. Aman Patel. The Respondent emphasised that the Appellant opted not to cross-examine this witness, thereby leaving his testimony on the operational mechanics of the platform uncontroverted.

14. The Respondent relied on a ruling issued by the Appellant itself on 30 June 2020, and submitted that this Ruling, issued upon a full and frank disclosure of its business model, confirmed that the transporters were responsible for accounting for VAT on the transport services, while the Respondent was liable for VAT on its commission income. By virtue of section 65(4) of the *akn ke act 2015 29 Tax Procedures Act*, this ruling is binding on the Appellant. The Respondent argued that the Appellant's attempt to renege on its own ruling is unlawful and gives rise to a breach of the Respondent's legitimate expectation that the Appellant would abide by its own representations.

Analysis & Determination

15. I have carefully considered the Record of Appeal, the Statement of Facts and the submissions by parties. The following issues lend themselves for determination:

    i. Whether the appeal is competent before this Court;

    ii. Whether the Tribunal erred in law in finding that the Respondent did not provide transport services and was, therefore, liable to account for VAT on the gross receipts from customers.

16. On the first issue, the jurisdiction of this Court is circumscribed by statute. Under section 56(2) of the *akn ke act 2015 29 Tax Procedures Act*, "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". An appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. The Court of Appeal in John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR summarised what amounts to "matters of law" as follows:

    (38) [T]he interpretation or construction of *akn ke act 2010 constitution the Constitution*, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court."

17. The Appellant submits that the issues herein constitute matters of law, specifically concerning whether transport services were correctly brought to charge under section 5 of the VAT Act, and whether the RFPs issued by the Respondent equate to invoices under section 42 of the VAT Act and Regulation 9 of the Value Added Tax Regulations. While acknowledging the established principle that an appellate court will not interfere with findings of fact by the trial court or tribunal unless they were based on no evidence, or a misapprehension of it, the Appellant asserts that the Tribunal had a misapprehension of the evidence tabled before it. As such, the Appellant submits that the issues of fact are intertwined with that of law, permitting this Court to examine the matter.

18. This Court affirms that an appeal from the Tribunal must primarily concern a point of law. However, where a finding of fact is demonstrated to be so perverse or unsupported by evidence as to constitute an error of law, the Court may interview. Given that the determination of the supply of service rests upon the legal interpretation of the Respondent's contractual role and documentation, I am satisfied that the appeal raises significant matters of law concerning the application of the VAT Act and *akn ke act 2015 29 Tax Procedures Act*.

19. On the second issue, the primary provision governing the imposition of VAT in Kenya is section 5(1) of the VAT Act, which provides that VAT shall be charged on a taxable supply made by a registered person in Kenya. The Act defines 'supply of services' broadly, but does not contain specific provisions or detailed tests for determining who the supplier is in complex, multi-party transactions facilitated by digital platforms. This legislative silence on the specific challenges posed by the platform economy necessitates that the Court interprets the general principles of the Act, guided by sound legal reasoning and, where appropriate, persuasive authority from other jurisdictions with comparable VAT systems.

20. A key contention is the nature of the RFPs issued by the Respondent. The Appellant argues that these are basically invoices for the full delivery service, making the Respondent liable for VAT on that amount. Section 42 of the VAT Act sets out the requirement for a valid tax invoice, which is the primary document for accounting for VAT. Whether the RFPs meet the functional or legal definition of a tax invoice for the underlying transport service is a matter of legal interpretation tied to the central question of who is making the supply.

21. This case is further complicated by the existence of a private ruling issued by the Appellant to the Respondent on 30 June 2020. In that ruling, the Appellant advised that "Transporters who have VAT obligation should charge VAT at the standard rate" and that the Respondent ought to account for VAT on its commissions. Under section 65(4) of the *akn ke act 2015 29 Tax Procedures Act*, a private ruling is binding on the Commissioner, with respect to the applicant to whom the ruling is issued.

22. In its objection decision, the Appellant sought to disregard this ruling, claiming it was beyond the scope of the review and did not advise on the taxable value. This action raises significant questions regarding the principle of legitimate expectation, a cornerstone of administrative justice. A taxpayer is entitled to rely on clear, unambiguous and unqualified representations made by a tax authority. For the Appellant to unilaterally resile from its own binding ruling without compelling justification risks undermining legal certainty and fairness in tax administration. While the Appellant's conduct is a matter of concern, a private ruling cannot, however, override the correct statutory interpretation of the law by a court of competent jurisdiction. The ultimate duty of this Court is to interpret and apply the law as enacted by Parliament.

Comparative Analysis

23. Given the legislative gap in Kenyan law regarding the VAT treatment of the platform economy, it is instructive to examine the jurisprudence of the Court of Justice of the European Union (CJEU), which has grappled extensively with these issues under the harmonised EU VAT system. Furthermore, the European Union VAT jurisprudence heavily influences the Kenyan VAT structure.

24. A foundational principle in EU VAT Law is that the characterization of a transaction must be based on its objective characteristics, reflecting its economic and commercial reality. The "substance over form" doctrine means that contractual labels are not decisive. Courts are required to look beyond the formal terms of an agreement to ascertain the true nature of the supply. In HMRC v Newey (t a Ocean Finance) (Case C-653 11), the Court affirmed that contractual terms may be redefined where they do not reflect economic reality and have been structured with the sole aim of obtaining a tax advantage. This principle mandates an analysis of the entire transaction to determine what is actually being supplied to the customer from their perspective.

25. To address the ambiguity of intermediary transactions, EU law employs a legal fiction known as the 'deemed supplier' or commissionaire rule, codified in Article 28 of the EU VAT directive. The Article provides that intermediaries acting in the name but on behalf of a principal (so-called undisclosed agents) are deemed to buy-sell the services provided by the principal, therefore creating a fiction of two transactions for VAT purposes that the principal sells the services to the undisclosed agent who resells the services to the customers. The effect of this is to split a single commercial transaction into two separate supplies for VAT purposes: (a) a supply for the underlying service provider (the driver) to the platform; and (b) a supply from the platform to the final customer. Consequently, the platform becomes the principal for VAT purposes and is liable to account for VAT on the full consideration paid by the final customer, not merely on its commission or fee.

26. The most definitive guidance on the application of the deemed supplier rule to online platforms from the CJEU's judgement in Fenix International Limited v HMRC (Case C-695 20), popularly known as the "OnlyFans" case, which concerned a platform connecting content creators with fans. The platform collected payments from fans, retaining a 20% commission, and remitted the balance to the creators. Fenix argued that it was only liable for VAT on its commission. The Court confirmed that a platform is presumed to be acting in its own name (and therefore the deemed supplier) it is involved in the supply. This presumption becomes irrebuttable if the platform authorises the charge to the customer, or authorises the delivery of the service or sets the general terms and conditions of the supply. The core of the decision is that where a platform controls the key aspects of the transaction, it is no longer a mere intermediary but is, for VAT purposes, the supplier.

27. The degree of control a platform exercises over the underlying supply is the critical determinant. This is illustrated by the CJEU's contrasting decisions in cases concerning Uber and AirBnB.

28. In Asociación Profesional Elite Taxi v Uber Systems Spain SL (Case C-434 15), the Court took the view that the service provided by Uber is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey. The Court found that that intermediation service must be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as 'an information society service' but as 'a service in the field of transport'. The reasoning was that Uber exercises decisive influence over the conditions of service. It does this by, inter alia, setting the price (or the method of calculation), controlling the quality of the vehicles and drivers, and determining the conduct of the drivers. The intermediation service provided by the application was deemed to form an integral part of an overall transport service controlled by Uber.

29. In contrast, in Airbnb Ireland (Case C-390 18), the Court found that the Airbnb's platform service was an "information society service' distinct from the underlying accommodation service, The Court reasoned that Airbnb did not exercise the same decisive influence over the essential elements of the accommodation rental. For instance, the hosts set their own prices, and the platform's role was not indispensable to the provision of the accommodation itself, unlike the Uber application.

30. This jurisprudential arc, from the general principle of economic reality to the specific tests in the Fenix case (supra) and the control analysis in the Uber case (supra), demonstrates a clear and consistent direction in modern VAT law. Tax authorities and courts are increasingly looking beyond the contractual formalities to impose VAT liability on the party that economically controls the transaction: the platform. This is driven by the need for effective tax collection and to ensure a level playing field between the digital and traditional economies.

31. Applying the foregoing legal principles to the undisputed facts of the Respondent's operations, this Court must determine whether the Respondent's role is that of a principal supplier or a mere agent. The analysis must focus on the economic and commercial reality of the transactions, assessing the degree of control that the Respondent exercises over the essential elements of the delivery service. The criteria established in the Fenix International case (supra) provide a structured and persuasive framework for this assessment.

32. The Respondent controls the legal and operational framework within which the service is provided. This is a strong indicator of acting as a principal, akin to the platform in Fenix case (supra). By controlling the billing process and demanding payment in its own name, via RFPs, the Respondent authorises the charge. The contractual term that the driver "charges' the customer is a formality that

does not reflect the economic reality of the payment flow, where the customer's payment obligation is to the Respondent.

33. The Respondent dispatches the nearest available driver to the customer. The customer does not choose a specific driver, they accept the one assigned by the Respondent's algorithm. This algorithmic dispatch is a form of authorising the delivery. The Respondent controls which transporter performs the service, a key element of control highlighted in the Uber case as exercising decisive influence over the service conditions.

34. Finally, the payments are made directly to the Respondent's bank accounts. The customer interacts exclusively with the Respondent's application and brand. The RFP is from the Respondent. From the customer's perspective, the service is supplied by the Respondent. The platform is not a transparent intermediary but the face of the transaction. The customer's legal and financial relationship is with the Respondent, not the individual driver.

35. The analysis above leads to an inescapable conclusion. The Respondent does not merely introduce a customer to a driver. It sets the rules of engagement, controls the allocation of the job, determines the price, and, most critically, takes responsibility for the entire billing and payment process. The customer pays the Respondent, not the driver. The fact that the Respondent's commission agreement purports to make the driver responsible for billing is contradicted by the economic reality where the Respondent issues the RFP and collects the full amount. This level of integration and control places the Respondent squarely in a position of principal supplier for VAT purposes. Its role is far more analogous to that of Uber than to that of Airbnb.

36. The Tribunal's focus on the lack of asset ownership is misplaced in the context of the digital economy. A platform's power lies not in physical capital but in its control over the network, the data and the transaction itself. The Tribunal's finding that the transporter is the supplier because they "charge" the customer elevates form over substance. In reality, the Respondent authorises and executes the charge.

Disposition

37. For the foregoing reasons, this Court finds that the Tribunal erred in law in its characterization of the supplies made through the Respondent's platform. An analysis based on the economic and commercial reality of the transactions, informed by persuasive jurisprudence on the VAT treatment of the platform economy, demonstrates that the Respondent exercises a decisive degree of control over the essential elements of the delivery service. By setting terms, authorising the delivery, and authorising and collecting the charge in its own name, the Respondent acts as a principal in the transaction. It is, therefore, deemed, for VAT purposes, to have received the transport service from the third-party transporter and to have supplied that same service to the end customer. Consequently, the Respondent's liability for VAT is on the full value of the consideration paid by the customer, and not merely on its commission.

38. While this Court notes the Appellant's questionable conduct in disregarding its own binding private ruling, such a ruling cannot estop a court from applying the correct interpretation of a statutory provision. The duty of the Court is to interpret and enforce the law as enacted, and an administrative opinion, while creating a legitimate expectation for the taxpayer against the administrator, cannot override a judicial determination of the law.

39. In the premise, this appeal is meritorious. I make the following orders:

i. The appeal is hereby allowed.

ii. The judgement and orders of the Tax Appeals Tribunal delivered on 5 April 2024 in Tax Appeals Tribunal Appeal No. E167 of 2023 are hereby set aside;

iii. The Appellant's Objection Decision dated 15 March 2023, confirming the Value Added Tax assessment against the Respondent in the sum of Kshs 82,248,150.74 is hereby upheld;

iv. Each party shall bear its own costs of the appeal and of the proceedings before the Tribunal.

DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF OCTOBER 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Appellant: Mrs. Njoroge h b Sega

For the Respondent: Nderitu h b Waruiru

Court Assistant: Lucy Mwangi