Commissioner Legal Services & Board Coordination v PVH Kenya Limited (Income Tax Appeal E112 of 2023) [2025] KEHC 14833 (KLR) (Commercial and Tax) (23 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14833 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E112 OF 2023

H NAMISI, J

OCTOBER 23, 2025

BETWEEN

THE COMMISSIONER LEGAL SERVICES & BOARD COORDINATION ..... APPELLANT

AND

PVH KENYA LIMITED ..... RESPONDENT

(Being an appeal from the Judgement of the Tax Appeals Tribunal delivered at Nairobi on 26 May 2023 in Tax Appeal Tribunal Appeal No. TAT 712 of 2021)

JUDGMENT

1. The Appellant is a principal officer appointed under section 13 of the *Kenya Revenue Authority Act*.

2. The Respondent is a limited liability company incorporated in Kenya, whose principal business is providing sourcing support services to PVH Far East Limited situated in Hong Kong. PVHFEL deals in sourcing services for apparel for affiliated non-resident companies. The Respondent performs sourcing support services, including identifying local suppliers in Export Processing Zones (EPZs) in Kenya, ensuring compliance with PVHFEL's specifications, and conducting quality testing on finished products. The Respondent bills PVHFEL for these services on a cost-plus markup basis monthly. The relationship is governed by a Buying Support Services Agreement.

3. This appeal is brought by the Appellant against the judgement of the Tax Appeals Tribunal delivered on 26 May 2023. In the impugned decision, the Tribunal allowed an appeal lodged by the Respondent herein, which decision effectively set aside the Appellant's Objection Decision dated 24 September 2021 rejecting the Respondent's VAT refund claim. Consequently, the Tribunal directed the Appellant to process and pay the Respondent's refund claim amounting to Kshs 3,232,755/-.

4. The core dispute centres on the interpretation of 'service exported out of Kenya' under the *Value Added Tax Act*, 2013 and whether the services rendered by the Respondent to its non-resident parent company, PVHFEL, in Hong Kong, qualify as zero-rated supplies.

5. On 21 August 2019, the Respondent lodged a VAT refund claim with the Appellant for Kshs 3,232,755/-. The basis of the claim was that the services provided to PVHFEL are exported services, which are zero-rated under the *VAT Act*. As the Respondent incurs input VAT on its local operational expenses but makes zero-rated supplies, it does not charge output VAT, leading to a perpetual credit position and an entitlement to a refund under section 17(5) of the Act.

6. The Appellant rejected the refund claim, initially through a system-generated email on 28 April 2021, which stated that there were no zero-rated sales to support the claim. A subsequent clarification from the Appellant on 4 May 2021 indicated that the rejection was based on Paragraph 1(b) of Regulation 13 of the *VAT Regulations*, 2017. The Appellant formalised its position in an objection decision dated 24 September 2021, where it maintained that the services rendered by the Respondent were not exported services but were, in fact, services consumed locally in Kenya by the apparel vendors. The Appellant reasoned that these vendors were the direct beneficiaries of the quality control and co-ordination services. Accordingly, the Appellant deemed the services taxable at the standard rate of 16%.

7. The Respondent lodged an appeal at the Tax Appeals Tribunal. In its considered judgement, the Tribunal found that appeal to be merited. The Tribunal correctly identified the primary issue for determination as whether the Appellant was justified in rejecting the Respondent's VAT refund claim. After a careful review of the Buying Support Services Agreement, the Tribunal made a finding of fact. In its judgment, it held: "From the above agreement, it was notable that the Appellant was providing services to PVH Far East (Recipient) and not any local companies in Kenya as averred by the Respondent."

8. The Tribunal identified the statutory definition of a service exported out of Kenya as provided in section 2 of the *VAT Act* and concluded that from this definition, the sole legal test prescribed by the parent Act is the "use or consumption test". The Tribunal rejected the Appellant's decision, finding that PVHFEL in Hong Kong was the consumer of the services, and relying on the principle that primary legislation overrides subsidiary legislation in case of conflict.

9. 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 in misconstruing paragraph 1(b) of the *Value Added Tax Regulations*, 2017;

    ii. That the Honourable Tribunal erred in law and fact in failing to correctly identify the user and consumer of the services offered by the Respondent herein as defined in section 2 of the *VAT Act*, 2013 and well elaborated in several decided cases;

    iii. That the Honourable Tribunal erred in law and fact in failing to appreciate the definition of "supply of service" as defined at section 2 of the *VAT Act*;

    iv. That the Honourable Tribunal misapplied the law and facts and therefore arrived at the wrong decision.

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

11. The Appellant contends that the Tribunal erred in law by misconstruing and failing to apply Regulations 13(1)(b) of the 2017 Regulations It is the Appellant's position that this regulation was the

applicable law for the period under review and its text was unambiguous. It explicitly excluded from the definition of exported services any taxable services provided in Kenya but paid by a person who is not a resident of Kenya. Since the Respondent's services were admittedly provided in Kenya, this regulation was determinative and should have applied to disallow the refund claim.

12. The Appellant urges this Court to look beyond the contractual form and examine the economic reality of the transactions. It submits that the direct and immediate beneficiaries of the Respondent's services are the local Kenyan vendors. These services enhance the quality of their products and their capacity to meet international standards, thereby enabling their participation in the global supply chain. It is argued that this benefit is realized and consumed in Kenya. The Appellant cites authorities such as *Kenya Revenue Authority v Kenya Breweries Limited* [2019] eKLR, to support the principle that tax liability should follow the jurisdiction where the economic benefits of a service is realised.

13. The Appellant submits that because the supply of service physically took place in Kenya, and the direct benefit accrued to entities in Kenya, the Tribunal misapplied the law to the facts and consequently arrived at a wrong decision. The Appellant maintains that the services are local supplies subject to VAT at the standard rate of 16%.

14. Conversely, on a preliminary point, the Respondent submits that the appeal is incompetent as it invites the Court to re-evaluate findings of act, contrary to the express provisions of section 56(2) of the *Tax Procedures Act*. The Respondent argue that the question of who consumed the services is a factual determination made by the Tribunal based on the evidence adduced, specifically the service agreement. Citing the case of *Martin v Glynwed Distributors Ltd (t/a MBS Fastenings)* ICR 511 and its adoption by the Court of Appeal in *Romageco Kenya Limited v Commissioner of Customs Services*, Civil Appeal No. 37 of 2018, the Respondent argues that this Court must defer to the Tribunal's factual findings unless they are shown to be perverse, which the Appellant has failed to do.

15. The Respondent contends that the services were contractually provided to PVHFEL, the invoices were raised to PVHFEL and the payment was received from PVHFEL. The output of the services – in the form of reports, date and strategic analysis- was delivered to and used by PVHFEL in Hong Kong to inform its global business and sourcing decisions. The Respondent argues that this fall squarely within the statutory use and consumption test set out in section 2 of the *VAT Act*.

16. The Respondent submits that Regulation 13(1)(b) was not merely inconsistent with the *VAT Act* but was *ultra vires* and created a legal absurdity that effectively nullified the parent Act's provision for zero-rating of exported services. The Respondent points to the subsequent amendment of the Regulation via *Legal Notice No. 86 of 2019* as a corrective measure by the Legislature, a fact noted by Parliament's own Committee on Delegated Legislation. The Respondent cited the Supreme Court decision in *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* eKLR and asserted that a subsidiary law cannot be used to defeat the clear provisions of its parent Act.

17. The Respondent argues that the vendors are merely the subject matter of the services, not the recipients or beneficiaries in the legal or economic sense. There exists no contractual nexus, no payment and no delivery of a service to the vendors. The ultimate economic benefit accrues to PVHFEL, which leverages the sourcing intelligence for its international commerce. The Respondent contends that this position is overwhelmingly supported by a consistent line of this Court's decisions establishing the "destination principle" or "benefit accrual" test, including the decisions in *Commissioner of Domestic Taxes v Total Touch Cargo Holland* [2018] eKLR and *Panalpina Airflo Limited v Commissioner of Domestic Taxes* [2019] eKLR.

Analysis & Determination

18. Having keenly read the Memorandum of Appeal, the records and the respective submissions, the issues for determination are:

    i. What is the appropriate standard of review applicable to this appeal from the Tribunal?

    ii. Whether the Tribunal erred in law in applying the definition in the *VAT Act* over that stipulated in Regulations 13(1)(b) of the *VAT Regulations*;

    iii. Whether the Tribunal correctly determined the user and consumer of the services provided by the Respondent;

19. In tax appeals arising from the Tribunal, the jurisdiction of this Court is appellate and confined strictly to points of law as prescribed under section 56(2) of the *Tax Procedures Act*. This Court is restricted from substituting the Tribunal's decision with its own conclusions based purely on its analysis and appreciation of facts.

20. A question of law involves the interpretation of a statute, a constitutional provision or a legal principle. A question of fact, on the other hand, is a determination made by a tribunal based on the evidence presented before it.

21. In *Golden Cara Investments Limited v Commissioner of Domestic Taxes* [2024] KEHC 5570 (KLR), the Court confirmed this limited appellate jurisdiction, noting that the appeal is confined to matters of law and that the court should not substitute the Tribunal's decisions based on its own appreciation of the facts.

22. The central issue herein – whether the services were used or consumed outside Kenya – is predominantly a mixed question of fact and law. However, the determination of the legal parameters governing exported services remains firmly within the purview of this Court.

23. The Appellant's primary argument is that the Tribunal erred by not applying Regulation 13(1)(b) of the 2017 Regulations. This brings into sharp focus the fundamental constitutional principle of the hierarchy of norms in our legal system.

24. Subsidiary legislation, while having the force of law, derives its legitimacy and authority from a parent Act. It is axiomatic that a stream cannot rise higher than its source. This principle is codified in section 31(b) of the *Interpretation and General Provisions Act*, which provides:

> Where an Act confers power on an authority to make subsidiary legislation... no subsidiary legislation shall be inconsistent with the provisions of an Act.

25. This statutory command enunciated by the Supreme Court in *Kidero & 4 others v Waititu & 4 others* [2014] KESC 11 (KLR), where the Court stated:

> " Such a position cannot, in our view, be sustained: for it flies in the face of the time-hallowed principle of "the hierarchy of norms." It is well recognized that an instrument of subsidiary legislation cannot override the provisions of an Act of Parliament."

26. A plain reading of the two provisions in question reveals a direct and irreconcilable conflict. Section 2 of the *VAT Act* establishes a single, clear and effects-based test for an exported service. In stark contrast, the pre-amendment Regulation 13(1)(b) sought to impose additional, disqualifying conditions based on the place of performance and the residence of the payer. The effect of the regulation was to

negate the very provision of the parent Act it was meant to implement. It created a legal absurdity where a service contractually provided to, paid for by, and consumed by a non-resident entity was legislated out of existence if any part of its performance occurred within Kenya. This anomaly was so glaring that, as the Tribunal correctly noted, the Parliamentary Committee on Delegated Legislation acknowledge that the regulation was "effectively eliminating all export of services" and recommended its amendment. The subsequent amendment in 2019 was not a change in the law, but a correction to align the subsidiary legislation with the parent Act's original and consistent intent. Therefore, the Tribunal was not only correct but was duty-bound to find that the regulation was inconsistent with the Act and that the Act must prevail. The Appellant's reliance on the said regulation was an error of law, and the Tribunal correctly identified and rectified it.

27. Having established that the sole statutory test is "use or consumption outside Kenya", it is necessary to articulate how this test has been interpreted and applied by our courts. A consistent line of jurisprudence from this Court has developed the "destination principle" or the "benefit accrual" test to give effect to this provision. This principle holds that for VAT purposes, services are consumed where the economic benefit of the service ultimately accrues, which is typically the location of the customer who contracts for and utilizes the service.

28. The judicial interpretation began to take firm root in the landmark case of *Commissioner of Domestic Taxes v Total Touch Cargo Holland* [2018] KEHC 859 (KLR), in which the Court held that services such as cooling and palletizing flowers, although physically performed in Kenya were consumed in Europe where the benefit of receiving fresh flowers was realised. The Court stated:

> "The determining factor is the location where that service is to be finally used or consumed. Therefore an exported service will be one which is provided for use or consumption outside Kenya."

29. This principle was affirmed and applied in subsequent cases such as *Panalpina Airflo Limited v Commissioner of Domestic Taxes* [2019] KEHC 12289 (KLR), *Commissioner of Domestic Taxes v Coca Cola Central East and West Africa Ltd* [2023] KEHC 1407 (KLR, *Commissioner of Domestic Taxes v WEC Lines (K) Limited* [2022] KEHC 57 (KLR), and *Commissioner of Domestic Taxes v WEC Lines (K) Limited* [2024].

30. More recently, in *Stanbic Bank Kenya Limited v Commissioner of Domestic Taxes* KEHC 13073 (KLR), the Court held that referral services provided by a Kenyan bank to source potential customers for international financial organisations were consumed outside Kenya. The Court stated:

> "I am guided by the above authorities. In this case, I note that the Appellant introduced potential customers to international organisations who would offer investment products to them. It is therefore the international organisations that benefited from the Appellant's services by obtaining potential customers. This means that the referral service was consumed outside of Kenya and falls squarely within the definition of exported services."

31. From this unbroken chain of authorities, the law is settled. The consumer of a service is the entity that contractually procures the service and for whose ultimate economic benefit the service is performed. This analysis requires a court to look at the contractual relationship and the ultimate destination of the service's output and benefit. The Appellant's attempt to conflate the subject of the service and the consumer of the service is a misapprehension of this established legal principle. The vendors are passive subjects of a data-gathering exercise; PVHFEL is the active consumer of the resulting intelligence.

32. Applying these established principles to the facts of this appeal leads to the inexorable conclusion. The Appellant has failed to demonstrate any error of law in the Tribunal's well reasoned and legally sound decision. The appeal is devoid of merit.

33. Consequently, the appeal is dismissed, with costs to the Respondent assessed at Kshs 50,000/=.

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: Nyapara h/b Ms. Kinyua

For the Respondent: Mr. Ruto

Court Assistant: Lucy Mwangi