Taxwise

The Commissioner of Domestic Taxes v Sendy Ltd

Income Tax Appeal No. E137 of 2024

In this edition

Sendy, a digital marketplace connecting transporters and customers, faced a KRA audit assessing VAT on full delivery fees from 2016-2020, while Sendy claimed liability only on its commissions as an intermediary without vehicle ownership.

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Background

Sendy Limited is a private limited company whose principal business activity is operating a digital marketplace that connects independent transporters with customers seeking delivery services. Like many tech-enabled logistics platforms, Sendy does not own vehicles or directly employ drivers. Instead, it earns commission income from facilitating transactions between third-party service providers and end-users. This model most common across ride-hailing, delivery, and freight platforms, has challenged traditional tax frameworks, especially where VAT liability hinges on the definition of “supply” and the identity of the supplier

This case represents a clash between a traditional interpretation of tax law and the business models of the digital platform economy. The dispute centered on whether Sendy Limited, a digital marketplace for delivery services, was liable for Value Added Tax (VAT) on the full value of the delivery fees or only on its commission income.

Following a Kenya Revenue Authority audit for the period 2016-2020, the KRA assessed Sendy Limited for additional VAT, arguing that the total funds passing through its bank accounts from customers represented its revenue from providing "transport services." Sendy objected, contending it was only a platform provider liable for VAT solely on the commission it earned for connecting transporters and customers.

The Journey Through the Courts

At the Tax Appeals Tribunal (TAT). Ruled in favor of Sendy, accepting its characterization as an intermediary. The TAT held that the third-party transporters were the suppliers of the transport service and thus responsible for the associated VAT.

At High Court. The KRA appealed the TAT decision. The High Court overturned the TAT's ruling, holding that based on the "economic reality" of the transaction, Sendy was the principal supplier and liable for VAT on the full customer payment.

Arguments by the Parties

Sendy Limited's Arguments (Raised at the TAT & High Court)

Sendy argued that it was a technology company providing a digital marketplace, not a transport service provider. Its core arguments included its role as a pure intermediary with no direct contract with the end-customer, emphasizing that the transport contract was strictly between the transporter and the customer and that the KRA could not "rewrite the contract" between these parties.

A central pillar of its case was a Binding Private Ruling issued by the KRA on 30 June 2020, which Sendy argued was binding under Section 65(4) of the Tax Procedures Act and created a "legitimate expectation" that transporters should account for their own VAT, and Sendy should account for VAT only on its commissions. Sendy also emphasized its "asset-light" structure, noting it did not own any vehicles to reinforce that it was not in the transport business

Finally, Sendy raised a preliminary objection on jurisdiction, contending that the KRA's appeal was incompetent because it challenged the TAT's findings of fact, whereas the law only permits appeals on "questions of law only."

Kenya Revenue Authority's Arguments (Raised at the TAT & High Court)

The KRA's primary argument, which ultimately prevailed, was based on economic substance over legal form. The revenue authority urged the Court to look beyond contractual labels to the commercial substance, where Sendy exercised decisive control over the entire transaction. The KRA highlighted that Sendy controlled **customer relationships via its app, set the price for the delivery, dispatched the driver using its algorithm, issued the Request for Payment (RFP), and collected the full payment from the customer into its own bank account.**

Relying on persuasive EU jurisprudence the KRA argued that by authorizing the charge and the delivery, Sendy should be deemed the supplier for VAT purposes, with the payment to the driver being a cost of sale, not a remittance.

The KRA also contended that the Request for Payments (RFPs) functioned as tax invoices for the full delivery service, making Sendy liable for VAT on that amount under Section 42 of the VAT Act. In its arguments at the TAT, the KRA had also maintained that Sendy failed to provide sufficient documentation, such as tax invoices from transporters, to discharge its burden of proof and reconcile the variance between its declared turnover and bank receipts.

High Court Determination

The High Court allowed the KRA's appeal, overturning the TAT's decision. Its reasoning directly addressed and countered the TAT's findings. The following issues lend themselves for determination:

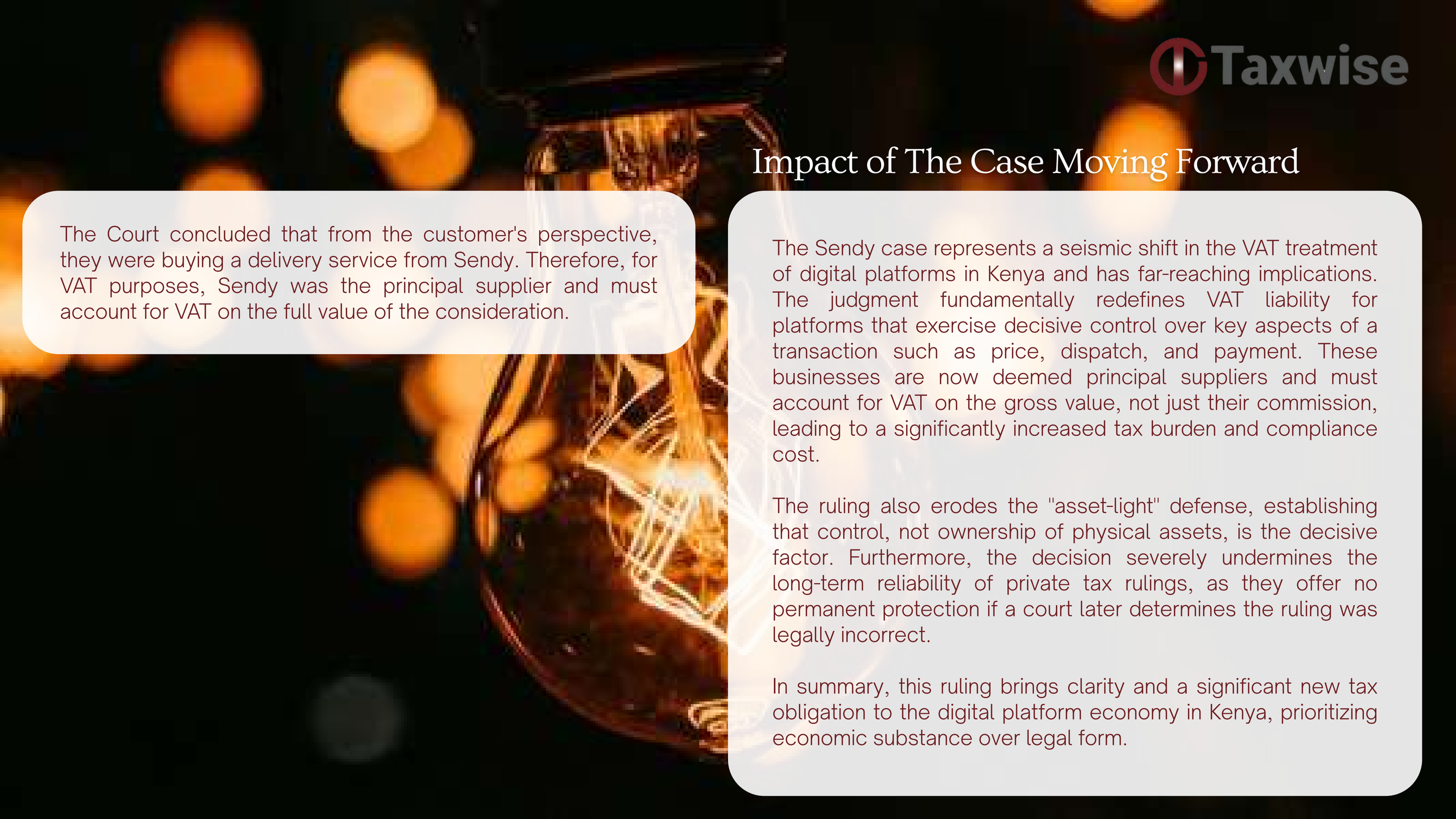
- Whether the appeal is competent before this Court;
- Whether the Tribunal erred in law in finding that the Respondent did not provide transport services and was, therefore, liable to account for VAT on the gross receipts from customers.

On the first issue, The High Court allowed the KRA’s appeal, delivering a strong judgment with several key determinations. On the competence of the appeal, the Court dismissed Sendy’s preliminary objection, holding that characterizing a supply for VAT purposes is a question of law. On the issue of the Binding Private Ruling, the Court acknowledged that the KRA's conduct in disregarding its own ruling was questionable and a breach of legitimate expectation. However, it crucially held that an administrative ruling cannot prevent a court from applying the correct interpretation of the law, as the court's duty to interpret the statute correctly is paramount.

On the second issue, the Court conducted a thorough analysis and sided with the KRA's **"substance over form"** approach, explicitly rejecting the TAT's formalistic view and found that the TAT erred in law by accepting the contractual form without considering the economic reality. The Court held that the TAT's finding that the "transporter charges the customer" was a legal fiction.

The Court heavily relied on the adoption of the "Deemed Supplier" Doctrine, persuasive authority from the Court of Justice of the European Union (CJEU), particularly the **"Fenix International" (OnlyFans) case**. It adopted the principle that a platform is **deemed to be the supplier** if it authorizes the charge to the customer and/or authorizes the delivery of the service and the application of the Control Test: The Court applied this doctrine to Sendy's operations and found a high degree of control, making it analogous to Uber rather than Airbnb:

- Price Control: Sendy sets the price.
- Delivery Authorization: Sendy's algorithm dispatches the driver.
- Billing and Payment: Sendy issues the RFP and collects the full payment.



Impact of The Case Moving Forward

The Court concluded that from the customer's perspective, they were buying a delivery service from Sendy. Therefore, for VAT purposes, Sendy was the principal supplier and must account for VAT on the full value of the consideration.

The Sendy case represents a seismic shift in the VAT treatment of digital platforms in Kenya and has far-reaching implications. The judgment fundamentally redefines VAT liability for platforms that exercise decisive control over key aspects of a transaction such as price, dispatch, and payment. These businesses are now deemed principal suppliers and must account for VAT on the gross value, not just their commission, leading to a significantly increased tax burden and compliance cost.

The ruling also erodes the "asset-light" defense, establishing that control, not ownership of physical assets, is the decisive factor. Furthermore, the decision severely undermines the long-term reliability of private tax rulings, as they offer no permanent protection if a court later determines the ruling was legally incorrect.

In summary, this ruling brings clarity and a significant new tax obligation to the digital platform economy in Kenya, prioritizing economic substance over legal form.

LET’S TALK

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