(Sybrin Kenya Ltd v Commissioner of Domestic Taxes (Civil Appeal E334 of 2024) [2026] KECA 1293 (KLR)

Judgement Alert Issue No. 4 of 2026

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Background

Sybrin Kenya Limited ("Sybrin Kenya") provides specialized software development, hardware support and maintenance services. It was subcontracted by its foreign affiliates, Sybrin Systems (Pty) Ltd in South Africa and Sybrin Limited in Guernsey, to perform specific software-related services that were integrated into proprietary banking solutions subsequently supplied by the foreign affiliates to financial institutions in Kenya.

Following a VAT audit covering the period January 2016 to December 2019, the Commissioner of Domestic Taxes issued a VAT assessment of approximately KES 40.7 million.

The Commissioner argued that although Sybrin Kenya invoiced its foreign affiliates, the services were ultimately enjoyed by Kenyan banks and were therefore consumed in Kenya. Consequently, KRA took the view that the services did not qualify as exported services under section 2 of the VAT Act and therefore were subject to VAT.

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Brief background of the case at the Tax Appeals Tribunal (TAT)

- The primary issue placed before the Tax Appeals Tribunal was whether the software development, maintenance and support services supplied by Sybrin Kenya Ltd to its related non-resident entities qualified as exported services for VAT purposes. The taxpayer asserted that the services were supplied under contracts with, and paid for by, its foreign affiliates, which exercised control over and consumed the services outside Kenya.

- KRA disputed this position, arguing that the services were effectively consumed by Kenyan financial institutions using the software locally and therefore did not qualify for zero-rating. Upon considering the contractual arrangements and the nature of the supplies, the Tribunal found that the foreign affiliates were the recipients of the services and subsequently held that the supplies constituted exported services eligible for zero-rating under the VAT Act.

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Brief background of the case at the High Court

- Aggrieved by the Tribunal's decision, the Commissioner of Domestic Taxes appealed to the High Court, contending that the Tribunal had erred in finding that the services supplied by Sybrin Kenya Ltd constituted exported services for VAT purposes.

- The Commissioner argued that the Tribunal had placed undue emphasis on the contractual recipient of the services while overlooking the fact that the services were ultimately consumed by Kenyan financial institutions.

- The taxpayer, on the other hand, maintained that the Tribunal had correctly identified the non-resident affiliates as the recipients and consumers of the services, given that they contracted for, directed and paid for the services.

- The High Court agreed with the Commissioner, holding that the place of actual consumption was determinative and that the services were consumed in Kenya. It therefore found that the supplies did not qualify as exported services and upheld the VAT assessment.

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Brief background of the case at the Court of Appeal

- The Court of Appeal overturned the High Court's decision and reinstated the Tribunal's judgment.
- The Court held that the proper inquiry was who consumed the services supplied by Sybrin Kenya, rather than who ultimately benefited from the completed software solution.
- Upon examining the intercompany agreements, the Court found that Sybrin Kenya's contractual obligations were owed exclusively to its foreign affiliates, who commissioned and paid for the services as part of fulfilling their own contractual obligations to Kenyan banks. Although the banks ultimately received the completed software solution, they did not receive or consume the specialized services supplied by Sybrin Kenya.
- The Court also relied on the destination principle embodied in the OECD International VAT/GST Guidelines, which govern the VAT treatment of business-to-business (B2B) transactions. Pursuant to this principle, VAT is imposed in the jurisdiction where the contractual customer is established and consumes the services. Given that Sybrin Kenya's customers were located outside Kenya, the Court concluded that the services constituted exported services under section 2 of the VAT Act and were accordingly not subject to VAT in Kenya.

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Why this disision matters

1. Clarifies the VAT treatment of exported B2B services

The judgment confirms that the VAT treatment of cross-border services depends primarily on who contracts for and consumes the taxpayer's services, rather than where the end product is ultimately used. This provides much-needed clarity on the interpretation of "exported services" under the VAT Act.

2. The end-user is not always the VAT consumer

A key aspect of the decision is the Court's clarification that the location of the end-user does not, by itself, determine where a service is consumed for VAT purposes. Although the software was ultimately deployed to Kenyan financial institutions, the Court held that the banks merely consumed the foreign affiliates' finished product, not the specialized services supplied by Sybrin Kenya.
The relevant inquiry is therefore who contracted for, received and consumed the taxpayer's services rather than who ultimately benefited from the final product.

Why this decision matters

3. Provides certainty for multinational business models

The decision offers welcome certainty for multinational groups operating through regional service centers, shared service hubs and subcontracting arrangements. Kenyan entities providing specialized or contributory services to non-resident affiliates may qualify for export treatment even where those services ultimately support products or services supplied to customers in Kenya.

4. Reinforces the destination principle

By expressly relying on the OECD International VAT/GST Guidelines, the Court reaffirmed that internationally traded B2B services should be taxed in the jurisdiction where the contractual customer is located and consumes the service. The judgment therefore aligns Kenya's VAT jurisprudence with internationally accepted VAT principles governing cross-border services.

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5. Contractual documentation remains critical

The Court placed significant weight on the contractual arrangements between the parties in determining the recipient and consumer of the services.

Businesses engaged in cross-border service arrangements should therefore ensure that intercompany agreements, statements of work, invoices and supporting documentation clearly identify the non-resident affiliate as the contractual recipient and consumer of the services. Robust documentation will be critical in substantiating export treatment during a tax audit or dispute.

This version strikes a balance between explaining the facts, the Court's reasoning, and the practical implications in a way that is informative for both tax professionals and business executives.

Conclusion

The decision clarifies that the VAT treatment of exported services depends on the contractual recipient and consumer of the service, rather than the ultimate beneficiary. It also reinforces the importance of robust contractual documentation.

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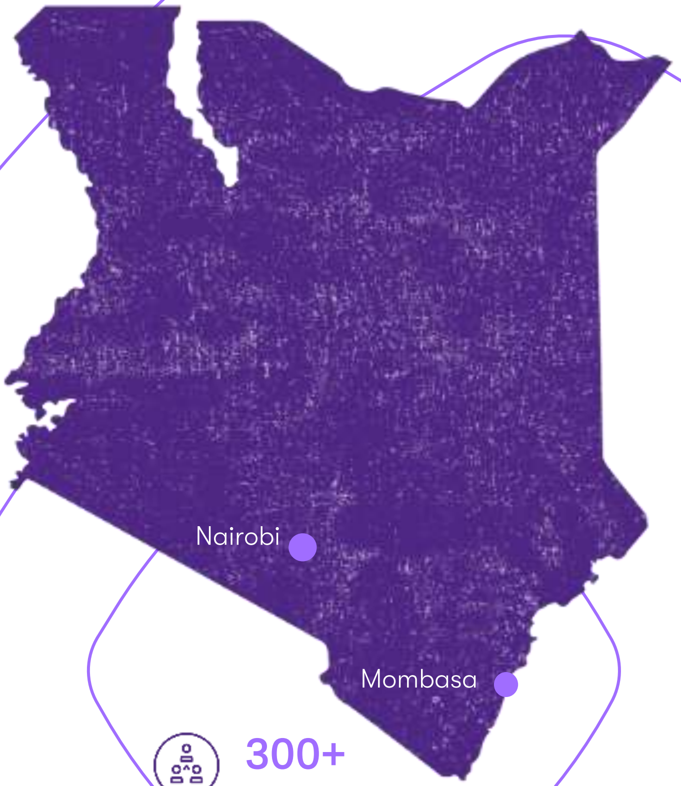

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