REPUBLIC OF KENYA

IN THE TAX APPEALS TRIBUNAL

APPEAL NO. E786 OF 2023

AVIC INTERNATIONAL BEIJING (EA) LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a Kenyan based company that was established in the year 2015. Its principal activity is to import trucks, other machinery and motor vehicle spare parts and sell locally. The Appellant is an approved importer of Completely Knocked Down Kits for the assembly of motor vehicles and an assembler of motor vehicles.

2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 Laws of Kenya (KRA Act). Under Section 5(1) of the Act, KRA is an agency of the Government for the collection and receipt of all revenue. For the performance of its function under Subsection (1), the Authority is mandated under Section 5(2) of the Act to administer and enforce all provisions of the written laws as set out in Parts I and II of the First Schedule to the KRA Act to assess, collect, and account for all revenues under those laws.

3. The Respondent issued the Appellant with a Notice of Intention to Audit dated 30th July 2021 for the period 2016 to 2021 covering Corporation

tax, Value Added Tax (VAT), Pay As You Earn (PAYE) and Withholding Tax (WHT).

4. On 1st November 2022, the Respondent issued its pre-assessment findings for the period January 2016 to December 2020, which the Appellant responded to on 23rd January 2023.

5. The Respondent subsequently raised additional assessments through a letter dated 29th June 2023 assessing the Appellant for Corporation tax, PAYE and WHT amounting to Kshs. 530,528,802.00 inclusive of penalties and interest.

6. The Appellant objected to the Respondent's assessment on 27th July 2023 and the Respondent issued its Objection decision on 25th September 2023 confirming Corporation tax, PAYE and WHT assessments amounting to Kshs. 514,154,336.00 inclusive of penalties and interest.

7. The Appellant, being dissatisfied with the Respondent's Objection decision, filed its Notice of Appeal dated 24th October 2023.

THE APPEAL

8. The Appeal is premised on the Memorandum of Appeal dated 7th November 2023 and filed on 8th November 2023 which raised the following grounds: -

    a) That the Respondent erred in fact and law by using the Transactional Net Margin Method as the most appropriate method to the gross revenues of the Appellant and made a transfer pricing adjustment which resulted in unimaginary and unrealistic additional revenues and assessed Corporation tax on the same.

b) That the Respondent in his Objection decision dated 25th September 2023 erroneously assessed a period beyond five years of audit for Withholding tax and Pay As You Earn, from the year 2017 to 2023.

c) That the Respondent erroneously double-charged Corporation tax on revenues of Kshs. 239,469,918.00 declared in 2019 derived from a comparison of Value Added Tax returns and audited financial statements. That these revenues were actually declared in 2018 for Income tax purposes.

d) That the Respondent erred in fact and law by using the wrong methodology in assessing PAYE on expatriates and seconded personnel. That the Commissioner applied Hays Asia Pay Scale Salary Guide without considering the simplified approach on low value adding individuals.

e) That the Respondent acted capriciously by subjecting the income earned by various seconded personnel to both Withholding Tax and Pay As You Earn which should not be the case as it resulted in double taxation.

f) That the Respondent erred in fact and law by imposing WHT on the same emoluments derived and used to compute Pay As You Earn.

g) That the Respondent erred in fact and law by deeming WHT on primary adjustments which resulted from adopting Transactional Net Margin Method as the most appropriate method.

APPELLANT'S CASE

9. The Appellant's case is premised on the following documents filed before the Tribunal:

   a) The Appellant's Statement of Facts dated 7th November 2023 and filed on 8th November 2023 and the documents attached to it; and

   b) The Appellant's written submissions filed on 20th August 2024.

10. The Appellant stated that the Respondent issued it with a Notice of Intention to Audit dated 30th July 2021 for the period 2016 to 2021 covering Corporation tax, Value Added Tax (VAT), Pay As You Earn (PAYE) and Withholding Tax (WHT).

11. That on 1st November 2022, the Respondent issued its pre-assessment findings for the period January 2016 to December 2020. The Appellant averred that on 23rd January 2023, it provided a substantive response to these findings, together with additional documents.

12. The Appellant further stated that the Respondent subsequently raised additional assessments through a letter dated 29th June 2023 assessing the Appellant for Corporation tax, PAYE and WHT amounting to Kshs. 530,528,802.00 inclusive of penalties and interest.

13. That the Appellant objected to the Respondent's assessment via iTax on 27th July 2023 and the Respondent issued its Objection decision on 25th September 2023 confirming Corporation tax, PAYE and WHT assessments amounting to Kshs. 514,154,336 inclusive of penalties and interest.

14. The Appellant stated that it appealed the decision at the Tribunal *vide* this Appeal.

15. The Appellant analysed its grounds of appeal as follows:

On the Respondent in hits Objection decision erroneously assessing a period seven years from 2017 to the current year 2023.

16. The Appellant stated with reference to the Notice of Intention to Audit dated 30th July 2021, that the period of assessment under review was clearly indicated to be from 2016 to the current period, then being 2021.

17. The Appellant cited Section 31(4) of the Tax Procedures Act to submit that the Respondent has not alleged that the taxpayer has committed fraud or willful evasion of the mentioned taxes for the assessment to be done at any time, to raise an assessment for a period exceeding five years as stated above. That as a result, the total assessment from PAYE amounted to Kshs. 140,034,065.00 whereas for WHT amounted to Kshs. 130,945,168.00.

18. The Appellant averred that its issue pertained to the Respondent's assessment that covered more than 5 years of income 2017 to 2023 instead of 2017 to 2021. That the Respondent's Objection decision dated 25th September 2023 averred to have made adjustments for the assessed period beyond 2021, especially for PAYE and WHT.

On the Most Appropriate Method

19. The Appellant asserted that the controlled transaction under consideration involves the purchase of products from independent manufacturers by Avic Intl Beijing Company Limited (China) as completely knocked-down motor vehicle parts. That Avic Intl Beijing Company Limited (China) later sells these products to the Appellant without any value addition.

20. The Appellant stated that it then assembles these completely knocked-down motor vehicle parts and designs them into finished products and

subsequently markets these finished products to wiling buyers in the market.

21. The Appellant referred to Paragraph 2.2 of the OECD Transfer Pricing Guidelines, citing that the selection of a transfer pricing method always aims at finding the most appropriate method for a particular case. That for this purpose, the selection process should take account of the respective strengths and weaknesses of the OECD recognized methods; the appropriateness of the method considered in view of the nature of the controlled transaction, determined in particular through a functional analysis; the availability of reliable information (in particular on uncontrolled comparables) needed to apply the selected method and/or other methods; and the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate material differences between them.

22. The Appellant further averred that no one method is suitable in every possible situation, nor is it necessary to prove that a particular method is not suitable under the circumstances.

23. That further, Paragraph 2.3 of the OECD Transfer Pricing Policy Guidelines stated the situations that traditional methods are preferred, being the commercial and financial relations between related parties. That inasmuch as the traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method.

24. The Appellant submitted that the Resale Price Method is based on the price at which a product that has been purchased from an associated

enterprise is resold to an independent enterprise. That the Resale Price Method is appropriate in the cases involving the purchases and resale of tangible goods and the buyer/reseller does not add any substantial value to these tangible goods.

25. The Appellant averred that considering that Avic Intl Beijing (China) Company Limited bought the completely knocked down motor vehicle parts and spare-parts from the independent manufacturer and resold them to the Appellant without adding any value whatsoever, then the Appellant would sell into the local market, the above transaction was clear, simplified and the Resale Price Method is considered a more direct and thus the most appropriate method.

26. That in applying the Resale Price Method, the benchmarking search identified a combined interquartile range of between 7.31% and 13.23% with a median of 9.09% for companies performing similar functions as the Appellant, and thus, a mechanism that the Appellant earns gross margins within the interquartile range as stated would be construed as a reasonable application of the arm's length principle.

On whether the Transactional Net Margin Method is unjustified

27. Referring to Paragraph 2.4, the Appellant submitted that the OECD Transfer Pricing Policy guidelines also state that Resale Price Method is the most appropriate method for benchmarking the price of products in this controlled transaction, unless there are extenuating circumstances which may justify the use of Transactional Net Margin Method.

28. The Appellant averred that in this case, the only extenuating circumstance shown by the Respondent on choosing Transactional Net Margin Method over the Resale Price Method in its assessment is with regards to the

challenge in arriving at an arm's length price where the goods are further processed.

29. It was the Appellant's statement that its purchase of products from Avic International Beijing (China) transaction is not particularly complex, and the functions performed by either entity have been well articulated by the Appellant's Transfer Pricing Policy.

30. The Appellant stated that in enabling the above, it provided the invoices between Avic International Beijing (China) and the manufacturers, as well as the invoices between Avic International Beijing (China) and the Appellant.

31. The Appellant presented the following a sample analysis of the product pricing:

Sample Price per Unit Between the independent Manufacturer, Avic International Beijing and Avic International Beijing (EA)							
China	Manufacturer's Price (Chinese Yuan)	Avic China to Kenyan Office Price (USD)	Year	Dollar Exchange Rate	Manufacturer's Price	Avic China Price	Margin
F2000	245,070	33,050	2018	0.14	34,310	33,050	1,260
F2000	245,572	33,051	2018	0.14	34,380	33,051	1,329
M3000	224,298	34,091	2018	0.14	31,402	34,091	(2,689)
F2000	250,500	37,182	2019	0.14	35,070	37,182	(2,112)
F2000	247,510	37,601	2019	0.14	34,651	37,601	(2,950)
F2000	251,803	35,506	2019	0.14	35,252	35,506	(254)

On the complexity of applying Transactional Net Margin Method

32. The Appellant argued that the Respondent opting to use the Transactional Net Margin Method implies a greater risk of error in the benchmarking.

33. While referring to Chapter III of the OECD Transfer Pricing Policy guidelines of 2017, the Appellant submitted that the most appropriate method for a particular controlled transaction will be the one that produces the most reliable results, with the minimal risk of error – taking into consideration all the relevant factors, including the availability of comparable uncontrolled transactions, the complexity of the transaction, and functions performed by the parties to a transaction.

34. That Annex I to Chapter II of the OECD Transfer Pricing Policy Guidelines of 2017 recognizes that Transactional Net Margin Method is less sensitive to the characteristics of the product and the differences in functions which are reflected in the operating expenses unlike Resale Price Method. That there is a higher risk of error in adopting Transactional Net Margin Method besides recognizing the marketing function and other materials that are acquired by the Appellant locally in the production process. That this can potentially introduce errors into the Transactional Net Margin Method analysis and potentially lead to an inaccurate arm's length price.

35. The Appellant averred that the Respondent draws its basis on the difficulties in applying the Resale Price Method in the case where the goods are further processed. That the further processing of goods by the Appellant is relatively minor and does not significantly alter the identity or the value of the product. That for the case of spare parts, they are no modifications whatsoever applied. Further, that paragraph 2.38 of the OECD Guidelines acknowledges the need for adjustment when applying the Resale Price Method in the case of substantial activity in addition to the resale activity itself.

36. The Appellant averred that upon applying the Transactional Net Margin Method to benchmark the transaction above, the Respondent arrived at

an interquartile range of between 16.58% and 5.17% with a median of 10.95%. That as a result, the Respondent made a transfer pricing adjustment resulting in additional revenue of Kshs. 424,914,851 and assessed Corporation tax amounting to Kshs. 173,388,200.

37. The Appellant concluded that the Respondent's decision to use the Transactional Net Margin Method over Resale Price Method is not consistent with the guidance in the OECD Transfer Pricing Guidelines.

38. The Appellant further argued that the specific circumstances of each transaction should be carefully considered when selecting an arm's length pricing method. That for the above reasons, Resale Price Method is still a strong contender as the preferred method given its simplicity, market-based approach and its ability to adjust for specific processing activities as documented in the Appellant's Transfer Pricing Policy unlike the Transactional Net Margin Method as adopted by the Commissioner to benchmark the sale of products by the Appellant.

39. The Appellant reiterated that it sources for supplies from Avic International Beijing China Limited which supplies it the Completely Knocked Down components on an as-is basis. That the Appellant then, on receipt of the components does its assembly locally in the Kenyan market. That therefore, the Resale Price Method would have been the most appropriate method for benchmarking purposes.

Under-declared sales of Kshs. 239,469,918.00

40. The Appellant stated that the Respondent made a comparison between VAT sales recorded for the year 2019 against sales declared in the income tax return for the same year. That from this comparison, the Respondent purported that the Appellant under-declared sales of Kshs.

239,469,918.00, and consequently subjected the variance to Corporation tax which resulted in additional tax liabilities for the year 2019.

41. The Appellant averred that the Respondent erred in its computation to aver that there was an under-declaration in the year 2019. That additionally, the Respondent used VAT additional assessments for the period August 2018 which was objected to and an Objection decision was reached on 31st March 2023 (sic).

42. The Appellant further averred that it has made numerous attempts with the Respondent to align the i-tax ledger to reflect the correct tax position but that its efforts have failed. The Appellant stated that it has attached the Objection decision herein for the Tribunal's review.

43. The Appellant stated that the actual sales for the year 2019 are Kshs. 662,477,096.00. That while the total VAT returns for 2019 amounts to Kshs. 901,947,014.00, the variance of Kshs. 186,471,225.22 is a result of invoices of 2018 that were declared late in the year 2019 for VAT purposes; that for Corporation tax purposes, these were declared as part of the income disclosed in the year 2018. That Kshs. 32,833,770.35 which was accounted for and recognised in year 2018 in the audited financial statements, was revenue from East Asia that was erroneously declared twice in the monthly VAT returns of August 2018 and March 2019. That the remaining variance amounts of Kshs. 20,164,922.37 which were journal entries not passed by the Appellant's auditors.

44. The Appellant summarised its reconciliation as in the table below:

Description	2018	2019
Total sales as per VAT returns	656,505,267.67	901,947,014.00
Total sales as per AFS	842,976,095.00	662,477,096.00

Variance	(186,471,225.22) *(sic)*	239,469,918.00
Less: Additional VAT Assessments		(186,471,225.22)
Variance		52,998,692.78
Less; Double claimed invoices		(32,833,770.35)
Variance		20,164,922.43

45. The Appellant further stated that its VAT analysis of the same periods is as per the table below:

	2018			2019		
Month	**General rated**	**Exempt**	**Total**	**General rated**	**Exempt**	**Total**
January	10,794,322	10,794,322 *(sic)*	22,100,672	69,770,660	0	69,770,660
February	5,560,704	0	5,560,704	0	0	0
March	16,407,194	7,000,000	23,407,194	112,044,929	0	112,044,929
April	4,978,547	0	4,978,547	194,141,850	0	194,141,850
May	46,315,258	0	46,315,258	72,820,670	10,000,000	82,820,670
June	25,204,035	8,500,000	33,704,035	901,035	24,700,000	25,601,035
July	0	30,741,953	30,741,953	82,898,331	0	82,898,331
August	88,029,079	16,715,415	104,744,494	71,504,310	0	71,504,310
September	88,333,691	15,244,296	103,577,987	27,758,621	20,000,000	47,758,621
October	91,952,702	14,425,388	106,378,090	38,096,602	5,000,000	43,096,602
November	132,155,515	0	132,155,515	128,666,298	21,200,000	149,866,298
December	42,840,818	0	42,840,818	22,443,707	0	22,443,707
Total	552,571,865	103,933,402	656,505,267	821,047,014	80,900,000	901,947,014

46. That based on the above analysis, there was no under-declaration in the year 2019 hence the Commissioners assessment of undeclared sales of Kshs. 239,469,918.00 should be vacated.

Receipt of administrative support by the Appellant from Avic International Beijing (China)

47. The Appellant stated that the Respondent assessed PAYE on expatriates and seconded employees for the periods from August 2017 to August 2023 and demanded taxes of Kshs. 107,935,290.00 inclusive of penalties and interest.

48. The Appellant averred that the Respondent claimed that the emoluments payable to the said personnel are not comparable hence benchmarked for comparable pay scale using Hays Asia salary guide.

On whether the Commissioner erred in law by imposing tax on nominee directors who did not render any service or earn any Income in Kenya.

49. The Appellant averred that the Respondent charged PAYE totalling to Kshs. 59,339,187 on its nominee directors, Wang Guangjun and Zhang Yiqiong, who the Appellant claimed are appointed for compliance since Avic is a state corporation. The Appellant asserted that these two individuals' roles are passive in nature, and that they have not rendered any service to the Appellant nor have they earned any income in Kenya.

50. The Appellant referred to Section 5(1)(b) of the Income Tax Act and submitted that the provision deems income of a non-resident person in respect of any employment with or services rendered to an employer who is resident in Kenya or the permanent establishment in Kenya of an employer who is not so resident to be income earned in Kenya.

51. The Appellant decried that if the Respondent's action of charging tax on these two nominee directors is allowed, it will be prejudicial to the Appellant. That based on these findings, the assessment of Kshs. 59,339,187.00 should be set aside.

On whether the Commissioner erred in proposing unrealistic salary adjustments and assessing PAYE on expatriates.

Use of Hays Asia Salary Guide

52. The Appellant averred that the Respondent's reliance on the Hays Asia Salary Guide as comparable is flawed and does not adequately reflect the specific industry. That it is drawn or based on manufacturing, engineering capacity in the automotive industry. That the Appellant on the other hand is in the business of importing trucks as Completely Knocked Down units, assembling and selling locally.

53. The Appellant posited that the question that this Tribunal should ask itself is whether the automotive industry and motor assembly are the same. That in the Appellant's opinion, the automotive industry and the motor assembly industry are closely related but they are not the same thing.

54. That the automotive industry is broad and encompasses all businesses in design, development, manufacturing, marketing, selling, repairing and modification of motor vehicles ranging from the large multinational corporations to specialty business.

55. That on the other hand, the motor assembly industry is more specific to companies that actually assemble motor vehicles. That additionally, the Respondent did not take into consideration industry performance evaluations data of the staff before concluding on Hays Asia for benchmarking.

56. The Appellant further averred that the data also does not account for the Appellant's size and the location, given that the Appellant, being the company bearing the costs thereof, is established in Kenya.

57. That as per the OECD guidelines, to apply the Comparable Uncontrolled Price (CUP) method on a transaction, certain factors have to be comparable between the two transactions. That the main comparable factors when using the CUP method is are nature and quantity of the product, geological market conditions, contractual terms, sales volume, time, market level, and functions performed and risks assumed.

58. The Appellant further averred that when applying CUP price method, it is important that there are no material differences between the compared transactions and the enterprises undertaking those transactions, which could affect the price in an open market. That however, the size of the company and the market conditions in the country pose as a material difference that need to be eliminated through reasonable and realistic adjustments. The Appellant added that its overall compensation philosophy is performance based.

Financial Constraints

59. The Appellant stated that as per its audited financial statements, it is evident that the Appellant is operating in a challenging financial environment.

60. The Appellant further stated that with its current salary expense it had a net profit of Kshs. 30,378,894.00 in the year 2017 and a net loss of Kshs. 78,129,534.00 and Kshs. 18,000,677.00 in the years 2018 and 2019 respectively.

61. That with the Respondent's proposed salary for the 5 expatriates and the 11 seconded personnel, the Appellant's financial performance would be a net loss of Kshs. 127,727,504.00 for the year 2018, Kshs. 95,217,976.00 for the year 2019 and Kshs. 98,590,090.00 for the year 2020.

62. That further, the proposed salary adjustments would be an undue burden to the Appellant and further jeopardize its financial stability. That as such, the Appellant is not in a position to afford to match the Hays Asia Salary recommendations without compromising its ability to meet its obligations to its creditors and even other employees.

63. The Appellant further stated that it is committed to paying its employees fairly, but it also has a responsibility to ensure its own financial sustainability and the associated going concern risks.

Low Value-Adding Functions

64. The Appellant affirmed that the roles of the expatriates are supportive in nature which fall under the scope of low value-added services between connected persons in line with Paragraph 7.49 of the OECD Transfer Pricing Guidelines, thus, no further benchmarking analysis is needed since there is a simplified approach recommended by OECD and U.N practical manual for developing countries.

65. The Appellant submitted that Paragraph 7.45 of the OECD 2022 T.P guidelines defines low value intragroup services to mean the following:

a) Are supportive in nature.

b) Are not part of the core business of the MNE group.

c) Do not require use of unique and valuable intangibles and do not lead to creation of unique or valuable intangibles.

d) Do not involve the assumption or control of substantial or significant risk by the service provider.

66. That further, the OECD Guidelines lists examples of services that qualify as low value added intra group services and those that do not qualify. That Paragraph 7.49 provides examples of services that would likely meet the definition of low value-adding services provided in paragraph 7.45. That they include:

a) Accounting and auditing, for example gathering and reviewing information for use in financial statements, maintenance of accounting records, preparation of financial statements, preparation or assistance in operational and financial audits, verifying authenticity and reliability of accounting records, and assistance in the preparation of budgets through compilation of data and information gathering.

b) Processing and management of accounts receivable and accounts payable, for example compilation of customer or client billing information, and credit control checking and processing.

c) Information technology services where they are not part of the principal activity of the group, for example installing, maintaining and updating IT systems used in the business; information system support (which may include the information system used in connection with accounting, production, client relations, human resources and payroll, and email systems); training on the use or application of information systems as well as on the associated equipment employed to collect, process and present information; developing IT guidelines, providing telecommunications services, organizing an IT helpdesk, implementing and maintaining of IT security systems; supporting, maintaining and supervising of IT networks (local area network, wide area network, internet).

d) General services of an administrative or clerical nature.

e) Activities with regard to tax obligations, for example information gathering and preparation of tax returns (income tax, sales tax, VAT, property tax, customs and excise), making tax payments, responding to tax administrations' audits, and giving advice on tax matters.

67. The Appellant presented the following overview of the contracts of expatriates and their functions to demonstrate that they fall under the scope of low value adding intra group services as their core functions are administrative in nature: -

a) Hao Fuping. That his duties in the position of finance administration, in reference to his work contract included:

i. Driving financial planning of the Appellant by analyzing its performance and risks.

ii. Set up and oversee company's finance IT system.

iii. Oversee all audit and internal control operations.

iv. Prepare reports on financial performance.

v. Develop corporate funding strategy and manage relationships with partners and investors.

That from the work duties above, it is clear that the major activities fall under general administrative service activities whose main purpose is to support the Appellant's operation to survive in the foreseeable future.

That in addition, the said person had a contract with defined salary agreement and as per iTax records, relevant taxes were paid. That based on this, the Respondent's assessments on this person should be vacated in totality.

b) Chen Zhe. That his main responsibilities in his position of general administration included to:

i. Maintain and increase revenue of the company's products.

ii. Establish and maintain customers base.

iii. Strategically propel the Appellant to achieve its vision and mission.

That making reference to paragraph 7.45 of the OECD 2022 guidelines, the activities of this personnel qualify for low value.

That in addition, the said person had a contract with defined salary agreement and as per iTax records, relevant taxes were paid. That based on this, the Respondent's assessments on this person should be vacated in totality.

c) Yang Zhaoxin. His position was that of general accountant. That his responsibilities included:

i. Documentation of financial transactions.

ii. Prepare and record vouchers into the Kingdee accounting system.

iii. Prepare payments by verifying documentation and requesting disbursements.

iv. Compute taxes owed and prepare tax returns ensuring compliance with tax requirements.

That the personnel qualifies as low value since his duties fall under the scope of accounting, auditing and activities in regards to tax obligations.

That in addition, the said person had a contract with defined salary agreement and as per iTax records, relevant taxes were paid. That based on this, the Respondent's assessments on this personnel should be vacated in totality.

d) Wu Lin Mao. That his position was that of after sales administration.

e) Zhang Hongmei. That his responsibilities in his position of general accountant included:

i. Documentation of financial transactions.

ii. Prepare and record vouchers into the Kingdee accounting system.

iii. Prepare payments by verifying documentation and requesting disbursements, compute taxes owed and prepare tax returns ensuring compliance with tax requirements.

That this personnel qualifies as low value since his duties fall under the scope of accounting, auditing and activities in regards to tax obligations.

Taxation of Individual Income

68. The Appellant cited Section 5(1) of the Income Tax Act and submitted that the provision deems income earned by a person who is, or was at the time of employment or when the services were rendered, a resident person in respect of any employment or services rendered by him in Kenya or outside Kenya, or a non-resident person in respect of any employment

with or services rendered to an employer who is resident in Kenya or the permanent establishment in Kenya of an employer who is not so resident, to have accrued in or to have been derived from Kenya.

69. The Appellant averred that the Tribunal should ask itself whether, if one has a contract of employment stipulating terms of employment including emoluments to be paid, the Respondent can adjust contracts and increase emoluments payable. That in the Appellant's view, this is impractical as the additional assessments levied are assumed income but it has not been earned. That additionally, PAYE for the above employees was accounted for.

70. The Appellant asserted that it was its understanding that income is only taxable if it has actually been received or accrued to the taxpayer. That in this case, the seconded staff members have not received or accrued the salary adjustments that the Respondent is proposing to tax. That therefore, the Respondent's position is unreasonable as it will place an undue burden to account for tax on behalf of individuals on money that has not been earned yet or accrued to them which could have a significant impact on its cash flow performance. That as a result, the additional assessment is erroneous and should be vacated.

71. The Appellant stated that it had attached to its appeal the employment contracts for Yang Zhaoxin, Wu Lin Mao, Hao Fuping, Chen Zhe, and Zhang Hongmei in support of its case.

On whether the Commissioner erred in fact and law in charging tax on seconded individuals

72. The Appellant stated that the Respondent erred by stating that the Appellant incurs payroll costs which led to additional assessments of the

same for the years 2018 to 2023. That the names of the staff are as follows:

Name	Key Tasks
Chu Conghai	Technician Seconded from Factory
Chen Shengwen	ICT officer Seconded from IT company
Li Xuedong	ICT officer Seconded from IT company
Zhao Long	Business development survey officer - Permit Application expenses refunded
Chai Lei	Engineer seconded from factory to oversee Trucks assembly
Yue Zhenjang	Engineer seconded from factory to oversee Trucks Body Fabrication
Zhao Xinlong	Engineer seconded from factory to oversee Trucks assembly
Zhang Qi	Technician Seconded from factory
Zheng Chongyi	SPECIAL PASS for visiting and market survey
Liu Hongsheng	Engineer seconded from factory to oversee Trucks assembly
Qiang Jianpeng	Engineer seconded from factory to oversee Trucks assembly
Liu Jian	Logistics Officer seconded from Avic Headquarter
Sun Hu	SPECIAL PASS for visiting and market survey

73. The Appellant referred to its Transfer Pricing Policy document which it averred that it had shared with the Respondent. That the policy states that Avic International Beijing deploys some of its staff to the Appellant to take charge of administrative and financial roles and the parent company was responsible for payroll costs associated with the deployed staff.

74. The Appellant stated that its parent company, that is, Avic International Beijing is a trading company which identifies opportunities in different jurisdictions and does investment, and it does not have any staff specialized in assembly and fabrication.

75. The Appellant also referred the Tribunal to Minutes Part II, "Discussion on new business model" which states that the technicians were to be deployed to assist in finishing assembly and installation.

76. That in addition to that, Shaanxi Heavy Duty (Manufacturer) was responsible for the wages of the technicians dispatched to Kenya, but the Appellant needed to ensure the safety of the technicians and provide accommodation for them. That while Shaanxi Automobile Group can flexibly dispatch technicians according to its own conditions without affecting the assembly work, Shaanxi Automobile has overseas technicians whose main purpose is to support partners selling the SHACMAN brand.

77. That based on the above, the Appellant had no obligation to deduct or remit PAYE to the Respondent. That this is because the technicians are employed by Shaanxi Automobile Group and this is an after sales service and the emoluments were directly paid to them. That this is evident from the audited financial statements as no expenses were claimed in computing the taxable income subject to taxation.

78. That based on the above transaction, there existed no employer-employee relationship, as such, the Appellant had no obligation to deduct and remit PAYE.

79. That Section 2 the Income Tax Act defines an employer to include any resident person responsible for the payment of, or account of any emoluments to an employee, and any agent, manager or other representative so responsible in Kenya on behalf of any nonresident employer.

80. That further, Section 2 of the Employment Act provides that employer means any person, public body, firm, corporation or company who or

which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.

81. The Appellant placed reliance on the meaning of contract of service to further establish whether there is an employer-employee relationship. That a contract of service means an agreement, whether oral or in writing, whether expressed or implied, to employ or to serve as an employee for any period of time, and includes a contract of apprenticeship or indentured learnership under which the employer has the power of selection and dismissal of the employee, pays his wages or salary and exercises general or specific control over the work done by him.

82. That there was no contract of service between the Appellant and the technicians; instead what existed was seconded employees who assisted in assembly and installation. That to further buttress this, the contract between technicians was entered by the manufacturer (Shaanxi Heavy Duty) and emoluments paid to them was not determined by the Appellant and were paid directly to the technicians. That at this point, matters were beyond the Appellant to account for tax. That it will be unattainable for the Respondent to levy tax on the Appellant.

83. That even if the Respondent could have charged tax on seconded employees, benchmarking using Hays Asia cannot be relied on based on the reasons stated above.

84. That the time period of the assessment by the Respondent is beyond the 5 years that is acceptable within the law, except in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer.

85. The Appellant further averred that the Respondent has used assumptions to claim that the seconded employees are in the country to date and are still rendering employment services hence assessed tax from the years they came into the Country to August 2023. The Appellant asserted that these individuals were present in the Country for a maximum of three months at most.

86. The Appellant stated that it encountered challenges in ascertaining the correct timelines that these individuals were present, as these individuals only had a contract with their manufacturer and not the Appellant, and the work permits which could act as the direct supporting document for the same were inaccessible by the Appellant as they were in the possession of these individuals. That the Respondent is a Governmental agency hence could have instead collaborated with the Immigration Department to ascertain when they left in the Country. That additionally no work permit expenses have been claimed in the years 2020 onwards.

87. It was the Appellant's assertion that the said personnel left the Country in 2019 and their stay in the country was not constant for the whole year. That as explained in the minutes that the Appellant attached, the manufacturer had the control rights over them hence the manufacturer could withdraw them any time and replace them with other personnel.

88. The Appellant emphasised that from the year 2020, it changed its business model which transferred this function to a third party hence there is no way the Respondent can assess taxes from the year 2020 onwards. That it will be unfair to assess tax on ghost workers.

89. That as a result, the Respondent's additional assessments on the seconded personnel was unfair and discriminatory and should be vacated in totality.

On the Withholding Tax

90. The Appellant stated that the Respondent has contradicted itself by averring that the services provided by the seconded employees are professional and managerial in nature. That on one hand, the Responded averred that they are employees and on the other hand stated that they are consultants.

91. That the Respondent used the Hays Asia Salary Guide to adjust for the amount accrued to these individuals.

92. The Appellant posed that the Tribunal needs to answer whether one can be an employee and a consultant at the same time. The Appellant in response to its own question, stated that it cannot be possible.

93. The Appellant stated that the Respondent purports that the Appellant should pay a service fee to its parent company for deploying some of its staff.

94. The Appellant argued that as it explained under seconded employees above, the seconded technicians are overseas employee technicians of Shaanxi Automobile Group. That there are no service fees that were recharged nor payable by the Appellant to its parent company.

95. The Appellant averred that the Respondent has used the emoluments benchmarked for PAYE to calculate WHT. That this is a scientific method with no rationale in any tax law. That even if WHT could apply, it can only be to extend the service fee which could be benchmarked on companies performing similar functions, which the Respondent did not do. That regardless of this, the Appellant emphasized that there is no WHT due or payable.

96. The Appellant submitted that Section 2 of the Income Tax Act defines management or professional fee to mean any payment made to any person, other than a payment made to an employee by his employer, as consideration for any managerial, technical, agency, contractual, professional or consultancy services. That based on the plain and textual reading of this section, it is clear that employment income earned cannot be further subjected to WHT.

97. The Appellant relied on the Court of Appeal case of **KRA vs the Republic (ex parte Fintel Ltd)**, where the learned Judges ruled that WHT is payable on the earlier of accrual or on payment. That however, in these circumstances there are no accrued fees nor any payment made.

98. That under normal circumstances, there is no possibility of withholding taxes whatsoever for companies performing similar functions. That for example, Company A is a manufacturer of spare parts in the United Kingdom, company B promotes and sells company A spare parts to the local market in Kenya. That company B has its own staff but needs some specialized staff to streamline its operations. That as such, if company A decides to deploy some of its employees to B and agrees to cover payroll costs. That based on this illustration, there is no way to charge service fees to company A. That these are the circumstances in this case.

99. The Appellant prayed to this Tribunal that the additional WHT of Kshs. 45,126, 894 is erroneous and should be vacated in totality.

On Secondary Transactions – Deemed Dividends

100. The Appellant stated that the Respondent erred in selecting Transactional Net Margin Method as the most appropriate method which resulted in a transfer pricing adjustment from the additional revenues.

101. The Appellant argued that the most appropriate method has to be determined for the primary transaction and as a result, the adjustment is erroneous and the assessment on the secondary transaction should be vacated.

102. The Appellant, additionally, preferred the Tribunal to consider the following circumstances:

    a) Will a company distribute dividends if it has accumulated losses of more than 75 million?

    b) Will a company distribute dividends if it has overdue payables over 950 million?

    c) How will a company distribute dividends when additional salaries expense of Kshs. 432,420,141.00 for expatriates and seconded employees have not been factored?

103. The Appellant submitted that the Finance Act of 2018 expanded the scope of WHT to include transfer pricing adjustments that result in additional income/reduced losses which would be deemed to be dividends. The Appellant averred that the effective date of this was 1st January 2019. That this implies that the deemed dividends for the year 2018 are unjustified. That in fact the Appellant has seen reduced sales and this cannot be the distribution of dividends.

104. The Appellant prayed that the Tribunal sets aside WHT on deemed dividends of Kshs 67,492,432.00.

On the Preliminary Objection

105. The Appellant, in its written submissions, replied to the preliminary objection filed by the Respondent, where the Respondent contended that it was not served with the Notice of Appeal, hence the present Appeal should be struck out.

106. The Appellant acknowledged that it is indeed true that there was a technical error in appealing, in that the Notice of Appeal was only received by the Secretariat of the Tribunal but was not served on the Respondent. That this mistake was not intentional and did not in any way prejudice the present Appeal.

107. The Appellant prayed that the Tribunal allows the Appeal as it is arguable and has chance of succeeding. That this would avert the Appellant from suffering irreparable loss, and form a fair and good precedent ruling that may serve many more taxpayers in the future.

Appellant's prayers

108. The Appellant prayed for the following Orders:-

a) That this Appeal be allowed and the Respondent's decision dated 25th September 2023 be set aside.

b) That the costs of the Appeal be in the cause.

RESPONDENT'S CASE

109. The Respondent's case is premised on the following documents:

a) The Respondent's Preliminary Objection dated and filed on 5th December 2023;

b) The Respondent's Statement of Facts dated and filed on 5th December 2024; and

c) The Respondent's written submissions dated and filed on 31st July 2024.

Preliminary Objection

110. The Respondent raised a Preliminary Objection on a point of law on grounds that the Appellant's Memorandum of Appeal and Statement of Facts, herein are invalid, null and void *ab initio*, no Notice of Appeal having been served upon the Respondent as required under Section 12 of the Tax Appeals Tribunal Act.

111. The Respondent stated that it sought that the Appeal be struck out, with costs in the first instance.

112. The Respondent referred to Section 12 of the Tax Appeals Tribunal Act which provides that a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal, provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.

113. The Respondent submitted that the Appeal herein was not filed subject to any prior written notice to the Commissioner as required under Section 12 of the Tax Appeals Tribunal Act.

114. The Respondent urged the Tribunal to re-affirm its findings in a similar situation in **TAT 299 of 2021-Andrew Mukite Musangi-Vs-Commissioner of Domestic Taxes** where the Tribunal dismissed the Appeal on grounds that

statutory timelines which give rise to substantive rights could not be extended by the Tribunal *suo moto*.

115. The Respondent further submitted that the decision of the High Court in **HCITA No. E163 OF 2021-Andrew Mukite Musangi-Vs-Commissioner of Domestic Taxes** where the Court rejected the appeal is now binding upon the Tribunal and that the instant Appeal must suffer the same fate as the said case. That the Court held as follows: -

> *"Rules of Procedure are put in place to ensure proper adjudication of disputes."*

116. The Respondent stated that it conducted an audit on the Appellant's operations for the period between 2017 to 2023 and issued an assessment letter dated 29th June 2023 covering Corporation tax, Pay As You Earn (PAYE) and Withholding Tax (WHT) amounting to Kshs. 530,528,802 inclusive of interest and penalties.

117. That the Appellant objected to the assessments *vide* a notice dated 28th July 2023, and the Respondent issued an Objection decision on 25th September 2023 which the Appellant appealed at the Tribunal.

On the allegation that the Respondent erred in fact and law by using Transactional Net Margin Method (TNMM) as the most appropriate method (MAM) to the gross revenues of the Appellant and made a Transfer Pricing Policy adjustment which resulted in unimaginary and realistic additional revenues and assessed Corporation tax on the same.

118. The Respondent stated that it opted to use the Transactional Net Margin Method (TNMM) due to the following reasons.

119. It was the Respondent's statement that the Resale Price Method may become less reliable when there are differences between the controlled and uncontrolled transactions and the parties to the transactions, and those differences have a material effect on the attribute being used to measure arm's length conditions, in this case the resale price margin realised.

120. The Respondent averred that the Appellant deals with heavy duty vehicles, and in the bench-marking study conducted by the Appellant, the comparable companies listed deal with light motor vehicles such as Renault, Volkswagen, Toyota, Hyundai, Nissan, and Mazda, among others. That the Appellant is involved in the assembly, fabrication and distribution of heavy commercial vehicles, construction machinery and associated spare parts. That therefore, the product and functions comparability factor was not satisfied in the study.

121. The Respondent also averred that the Appellant was requested to provide agreements between AIBCL and third parties. That the documents were provided but were worded in Mandarin without a translation to English language and therefore the review could not verify the contradiction argued in the Objection application. That the documents requested and which the Appellant failed to provide were essential to help establish the contradiction between the agreements and the TP policy.

122. The Respondent added that despite the above and as observed by the assessment, Shaanxi's incoterms are Free on Board (FOB), including, tax to at the Chinese port, inspection fees, transport fees to port, loading and unloading fees and insurance fees to port; whilst, AIBCL incoterms are Cost-Freight and Insurance (CIF).

123. The Respondent stated that the Appellant was also requested to provide the full set of financial information for AIBCL. That the OECD TPG specifies that in selecting a foreign company as the tested party for having a less complex functional analysis, a full set of financial information on such party should be availed. That the financial information on AIBCL was not provided hence the test on the sufficiency of information selecting the foreign tested party failed as AIBCL's financial information was not availed.

124. The Respondent asserted that it is more difficult to use the Resale Price Method to arrive at an arm's length price where, before resale, the goods are further processed or incorporated into a more complicated product so that their identity is lost or transformed.

125. The Respondent stated that the Appellant offers design and fabrication of trailers for the assembled trucks at its factory and acts as the business hub for after-market servicing of heavy and light trucks. That this transforms the product sold in the market to differ from those of other markets.

126. The Respondent further stated that the Appellant's benchmarking study failed to incorporate specific economic activities (NACE Codes) to capture comparable companies selling/performing similar products/functions to those sold/conducted by the Appellant. That due to the deficiencies noted above in the Appellant's benchmarking study, which had not been addressed, and the benchmarking the analysis of the functions performed by the Appellant, the assets it utilizes and the risks it assumes (FAR analysis) under controlled transactions, there is need to use a method not affected by functional differences between the controlled and uncontrolled transactions.

127. It was the Respondent's statement that based on the accurate delineation of the transactions through the FAR analysis carried out by the assessing team, Transactional Net Margin Method (TNMM) was selected as the most appropriate method since the Appellant makes valuable contribution in the whole value chain.

On the allegation that the Respondent in its Objection decision dated 25th September 2023 erroneously assessed a period beyond five years of audit for withholding tax and Pay As You Earn (PAYE) from the year 2017 to 2023.

128. The Respondent averred that the Appellant's year-end is December 31st. That the 2017 income tax return was filed on 30th June 2018 and the assessment was raised on 29th June 2023. That therefore, the assessment is within the five years allowed.

129. The Respondent further averred that the assessments for WHT and PAYE are within the five years allowed as the assessments are for 2019.

130. In response to the Appellant's argument that the Respondent assessed more years, that is, 2022 and 2023, the Respondent stated that it noted that the anomaly that necessitated the assessment in the years 2017 to 2021 persisted in the years 2022 to 2023 and therefore the raised the additional assessment.

On the allegation that the Respondent erroneously double charged Corporation tax on revenues of Kshs. 239,469,918 declared in 2019 derived from a comparison of Value Added Tax (VAT) Returns and Audited Financial Statements.

131. In response to the Appellant's statement that the assessment had been addressed in the previous audit and the Objection decision on the same issued, the Respondent averred that in the previous audit the assessment was on VAT and not income tax. That the Appellant did not support its objection sufficiently to demonstrate that the income assessed in the assessment was the income that had been declared in 2018.

On the allegation that the Respondent erred in law by using the wrong methodology in assessing PAYE on expatriates and seconded personnel. That the Respondent applied Hays Asia Pay Scale Salary Guide without considering the simplified approach on low value adding individuals.

132. The Respondent averred that the income earned by the expatriates and seconded employees is income derived from Kenya and therefore should be subjected to PAYE.

133. The Respondent stated that it established that the roles of the expatriates and seconded employees are not low-value adding services but an integral part of the value chain as evidenced by the FAR analysis carried out. That the services provided have an impact on the distribution chain.

On the allegation that the Respondent erred in fact and law by imposing WHT on the same emoluments derived and used to compute for PAYE.

134. The Respondent reiterated the Appellant's submission that the staff are sourced by AIBCL. The Respondent stated that for this purpose there should be some management fees and this is what the Commissioner has subjected to WHT.

135. The Respondent asserted that the management fee is what it subjected to WHT at the non-resident the rate applied of 20%, and the emoluments to the expatriates is what is subjected to the PAYE.

On the allegation that the Respondent erred in fact and law by deeming WHT on the primary adjustment which resulted from adopting TNMM as the most appropriate method.

136. The Respondent asserted that it has explained the use of TNMM as the most appropriate method for the transfer pricing adjustment and therefore the deemed dividends is justifiable.

137. The Respondent referred to Section 7(1)(b)(v) of the Income Tax Act which deems as dividends distributed by a company where the amounts represent additional taxable income with the related person as a result of the adjustment. The Respondent stated that the provision came to effect on 1st July 2018 and therefore the WHT on the deemed dividends is due and payable.

138. The Respondent submitted that it relied on the following provisions of the law in support of its case:

a) Section 12 of the Tax Appeals Tribunal Act.

b) Section 51 of the Tax Procedures Act, 2015.

c) Section 5, 10, 17, 35, of the Income Tax Act.

d) Section 5 of the VAT Act 2013.

e) Section 31 of the Tax Procedures Act

f) OECD Transfer Pricing Guidelines

139. The Respondent submitted that the Preliminary Objection should dispose of this Appeal, however, that on strictly without prejudice basis to the preceding issue, with reference to Section 56(1) of the Tax Procedures Act, the Appellant failed to discharge its burden of proof, by availing documents in support of its Objection and Appeal.

140. That this was reiterated in Pearson Vs. Belcher CH.M Inspector of Taxes Tax Cases Volume 38 referred to by Justice D.S. Majanja in **PZ Cussons East Africa Limited Vs. Kenya Revenue Authority (2013) eKLR** that: -

> *"There is an additional assessment made by the Commissioner upon Appellant; it is perfectly settled by cases such as Norman vs. Galder 267C 293 that the onus is upon the Appellant to show that the assessment made upon him is excessive and incorrect and of course he has completely failed to do. That is sufficient to dispose of the appeal, which I accordingly dismiss with costs."*

Respondent's prayers

141. The Respondent prayed that the Tribunal:

a) Strikes out and/or dismisses the Appeal with costs.

b) Upholds the Objection decision dated 25th September 2023.

ISSUES FOR DETERMINATION

142. The Tribunal has considered the facts of the matter and the submissions made by the parties, and considers the issues for determination as follows:

a) **Whether the Appeal should be struck out.**

b) **Whether the Respondent's assessments were time-barred.**

c) Whether the Respondent erred in assessing Pay As You Earn (PAYE).

d) Whether the Respondent erred in assessing Corporation tax.

e) Whether the Respondent erred in assessing Withholding tax (WHT).

ANALYSIS AND FINDINGS

143. The Tribunal has analysed the issues that call for its determination as hereunder, having reviewed all the pleadings, information and documents adduced by the Appellant and the Respondent concerning the impugned objection decision.

a) Whether the Appeal should be struck out.

144. The Respondent submitted that from the record, this Appeal is premised on a Notice of Appeal dated and filed at the Tribunal on 24th October 2023. That the same was never served upon the Respondent.

145. The Respondent referred to Section 12 of the Tax Appeals Tribunal Act and urged the Tribunal to dismiss the Appeal on grounds that statutory timelines which give rise to substantive rights could not be extended by the Tribunal *suo moto*.

146. The Appellant, in its written submissions, replied to the Respondent's Preliminary Objection, where the Respondent contended that it was not served with the Notice of Appeal. The Appellant acknowledged that it is indeed true that there was a technical error in appealing, in that the Notice of Appeal was only received by the Secretariat of the Tribunal but was not served on the Respondent. That this mistake was not intentional and did not in any way prejudice the present Appeal.

147. The Tribunal considered the uncontended facts of the matter and refers to the Sections 12 and 13 of the Tax Appeals Tribunal Act which provide as follows:

"12. Appeals to the Tribunal

A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal,

Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.

13. Proceedure of appeal

(1) A notice of appeal to the Tribunal shall—

(a) be in writing or through electronic means;

(b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner.

(2) The appellant shall, within fourteen days from the date of filing the notice of appeal, submit enough copies, as may be advised by the Tribunal, of—

(a) a memorandum of appeal;

(b) statements of facts; and

(c) the appealable decision; and

(d) such other documents as may be necessary to enable the Tribunal to make a decision on the appeal.

(3) …

(4) …

(5) An appellant shall serve a copy of the appeal on the Commissioner within two days after giving notice of appeal to the Tribunal."

148. The Tribunal's reading of Section 12 of the Tax Appeals Tribunal Act is that failure to give notice in writing to the Commissioner by a person appealing the Commissioner's decision does not result to the invalidity of an appeal.

149. Section 13(1) of the Tax Appeals Tribunal Act provides for filing a notice of appeal to the Tribunal, which initiates the Tribunal's jurisdiction to hear and determine appeals filed against decisions made by the Commissioner. The same provision specifies the time for filing the notice of appeal to the Tribunal.

150. Section 13(2) of the Tax Appeals Tribunal Act then lists the appeal documents that the Appellant is required to submit to the Tribunal to enable the Tribunal appreciate the nature of the appeal before it. These documents include a memorandum of appeal, statements of facts, the appealable decision and other necessary documents.

151. Section 13(5) of the Tax Appeals Tribunal Act specifies that an Appellant shall serve a copy of the appeal on the Commissioner within two days after filing a notice of appeal to the Tribunal.

152. The Tribunal is of the considered view that failure of an Appellant to serve the notice to the Commissioner referred to in Section 12 of the Tax

Appeals Tribunal Act does not expressly invalidate an appeal. The Section is silent as to the consequences or legal effect of the default in the service of the notice of appeal upon the Respondent subsequent to it having been timeously filed before the Tribunal.

153. Further, Section 15 of the Tax Appeals Tribunal Act, prompts the Commissioner to respond to the documents listed in Section 13(2) of the Tax Appeal Tribunal Act served upon it by the Appellant. Section 15 of the Tax Appeals Tribunal Act provides as follows: -

> *"(1) The Commissioner shall, within thirty days after being served with a copy of an appeal to the Tribunal, submit to the Tribunal enough copies as may be advised by the Tribunal, of—*
>
> *(a) a statement of facts including the reasons for the tax decision; and*
>
> *(b) any other document which may be necessary for review of the decision by the Tribunal."*

154. The Tribunal notes that the Appellant received the Commissioner's Objection decision on 25th September 2023, and filed its Notice of Appeal to the Tribunal on 24th October 2023. The Appellant submitted to the Tribunal its Memorandum of Appeal, Statement of Facts, the appealable decision and documents on 8th November 2023, and the Respondent filed its response to the Appeal on 5th December 2023 by filing its Statement of Facts.

155. Moreover, the Tribunal observed that the Respondent having responded to the Appeal, the Respondent neither suffered prejudice nor was it caused any hardship by the Appellant's failure to serve it with a Notice of Appeal.

156. Based on the foregoing, the Tribunal finds that this Appeal is validly before it as the Appeal satisfies the requirements under Section 13 of the Tax Appeals Tribunal Act, and should therefore not struck out.

b) Whether the Respondent's assessments were time-barred.

157. The Respondent stated that it relied on Section 31 of the Tax Procedures Act as an authority in issuing the Corporation tax, PAYE and Withholding tax assessments.

158. The Appellant averred that its issue pertained to the Respondent's assessment that covered more than 5 years of income 2017 to 2023 instead of 2017 to 2021.

159. Before delving into the merits of the Respondent's assessments and the Appellant's arguments against them, the Tribunal sought to establish whether the Respondent issued the assessments within the time allowed under Section 31(4) of the Tax Procedures Act.

160. Section 31 of the Tax Procedures Act provides as follows regarding the issuance of assessments by the Respondent: -

"(4) The Commissioner may amend an assessment—

(a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or

(b) in any other case, within five years of—

(i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; *or*

(ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment." ***Emphasis added***

161. According to Section 31(4)(a) of the Tax Procedures Act, the Respondent may only issue an assessment beyond the five years where it proves gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer. It is thus clear that an assessment issued under Section 31 of the Tax Procedures Act beyond the five-year limit is unlawful unless the Respondent can prove gross or wilful neglect, evasion, or fraud by or on behalf of a taxpayer.

162. The Tribunal has examined the Appellant's pleadings and notes that the issues under Section 31(4)(a) of the Tax Procedures Act regarding gross or wilful neglect, evasion or fraud on the part of the Appellant were neither pleaded nor proved by the Respondent.

163. The Tribunal reiterates its holding in a similar matter **TAT Appeal No. 411 of 2021, City Gas East Africa v Commissioner of Investigations and Enforcement** where the Tribunal held that the Respondent erred in assessing the Appellant for a period beyond five years when there was no evidence of wilful neglect or fraud.

164. On 29th June 2023, the Respondent issued the Appellant with Corporation tax assessments for the years of income 2017 to 2021, PAYE assessments for the periods of 2018, 2019, 2020, 2021, 2022 and 2023 and WHT assessments for the periods of 2018, 2019, 2020, 2021 and 2022 in its notice of assessment.

165. The Respondent's assessment was dated 29th June 2023, meaning that the earliest periods that the Respondent could assess additional Corporation tax were from the year 2017, and for PAYE and WHT were for the tax periods starting from July 2018.

166. Consequently, the Tribunal finds that the Respondent's assessment of PAYE and WHT for the tax periods before July 2018 was illegal and the same was not justified.

c) Whether the Respondent erred in assessing Pay As You Earn (PAYE).

167. The Respondent assessed PAYE amounting to principal tax of Kshs. 107,935,290.00 plus interest and penalties on the income that it claimed to have been earned by expatriates and seconded employees. The Respondent averred that the income earned by the expatriates and seconded employees is income derived from Kenya and therefore should be subjected to PAYE.

168. The Respondent stated that it established that the roles of the expatriates and seconded employees are not low-value adding services but an integral part of the value chain as evidenced by the FAR analysis carried out. That the services provided have an impact on the distribution chain, therefore, the Respondent benchmarked for comparable pay scale using Hays Asia Salary Guide as the emoluments payable to the said personnel were not comparable to the services.

169. The Appellant disputed the PAYE assessment and made the following arguments in support of its position:

    a) That its nominee directors, Wang Guangjun and Zhang Yiqiong are appointed for compliance since Avic is a state corporation. That the two individuals' roles are passive in nature, and that they have not rendered any service to the Appellant nor have they earned any income in Kenya.

b) That the Respondent's reliance on the Hays Asia Salary Guide as comparable is flawed and does not adequately reflect the specific industry. That the roles of the expatriates are supportive in nature which fall under the scope of low value-added services between connected persons in line with paragraph 7.49 of the OECD Transfer Pricing Guidelines, thus, no further benchmarking analysis is needed since there is a simplified approach recommended by OECD and U.N practical manual for developing countries.

c) That the seconded staff members have not received or accrued the salary adjustments that the Respondent is proposing to tax.

d) That according to the Appellant's Transfer Pricing Policy Avic International Beijing deploys some of its staff to the Appellant to take charge of administrative and financial roles and the parent company was responsible for payroll costs associated with the deployed staff.

e) That the Appellant's parent company, that is, Avic International Beijing, is a trading company which identifies opportunities in different jurisdictions and does investment and it does not have any staff specialized in assembly and fabrication.

f) That there was no contract of service between the Appellant and the assembly and installation technicians because the technicians are employed by Shaanxi Heavy Duty Automobile Import & Export Co. Ltd (Shaanxi Automobile Group/Shaanxi), the manufacturer, and seconded to the Appellant, and their emoluments were directly paid to them and not determined by the Appellant.

g) That Shaanxi was responsible for the wages of its overseas technicians dispatched to Kenya whose main purpose is to support partners selling

the SHACMAN brand. That there existed no employer-employee relationship, as such, the Appellant had no obligation to deduct and remit PAYE.

h) That no expenses for the seconded employees were claimed in computing the taxable income as evident from the audited financial statements.

170. The Tribunal perused all the documents presented by the Appellant in its Appeal in support of its arguments and established the following:

a) The Appellant presented the employment contracts for its expatriate employees, that is, Hao Fuping, Chen Zhe, Yang Zhaoxin, Wu Lin Mao and Zhang Hongmei which showed their respective remuneration.

b) The Appellant presented its 2018 audited accounts which lists Wang Guangjun, Zhang Yiqiong, Hao Fuping and Chen Zhe as its directors in the corporate information page.

c) The Appellant furnished the Tribunal with a schedule which the Respondent used to present the adjusted gross salaries of the expatriates and seconded employees. This schedule demarked the staff that were nominee directors of the Appellant, expatriate employees of the Appellant, staff seconded by the Appellant's non-resident related party and technicians seconded by Shaanxi. The Tribunal notes that the Respondent did not contend the Appellant's descriptions of the staff in the schedule.

d) The Appellant described Wang Guangjun and Zhang Yiqiong in the schedule and pleadings as its nominee directors. The Appellant alleged that the individuals were appointed for compliance since Avic is a state

corporation. That the two individuals' roles are passive in nature, and that they have not rendered any service to the Appellant nor have they earned any income in Kenya.

e) The Appellant presented signed board minutes of the manufacturer of the Appellant's Completely Knocked Down (CKD) imports, Shaanxi Heavy Duty Automobile Import & Export Co. Ltd (Shaanxi Automobile Group/Shaanxi) dated 14th November 2017, wherein the meeting resolved that Shaanxi would send its oversea technicians to finish the assembly and installation of the Appellant's vehicles from CKD imports in Kenya.

f) That Shaanxi, according to the board minutes, resolved in the meeting to pay in full the wages of the Shaanxi technicians dispatched to Kenya, and that the Appellant needed to ensure the safety of the technicians and provide them with accommodation.

171. The Tribunal refers to Section 3(2)(a)(ii) of the Income Tax Act which provides that gains or profits from employment or services rendered comprise income upon which tax is chargeable under the Act, subject to the Act. Section 5(1) of the Income Tax Act details the gains or profits from employment or services rendered by residents and non-residents that is deemed to have accrued in or to have been derived from Kenya as follows: -

"For the purposes of Section 3(2)(a)(ii), an amount paid to -

(a) a person who is, or was at the time of the employment or when the services were rendered, a resident person in respect of any employment or services rendered by him in Kenya or outside Kenya;

or

(b) a non-resident person in respect of any employment with or services rendered to an employer who is resident in Kenya or the permanent establishment in Kenya of an employer who is not so resident,

shall be deemed to have accrued in or to have been derived from Kenya."

172. The basis for the deduction of and accounting for income tax PAYE is found in Section 37(1) of the Income Tax Act which provides as follows: -

"An employer paying emoluments to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed."

173. The Tribunal places reliance on the holding in **Tax Appeal No. E003 of 2020 China Road and Bridge Corporation v Commissioner of Domestic Taxes,** where the Court summarised the onus of PAYE deductions as follows: -

"38. Turning to the matter at hand, the basis of PAYE is Section 37(1) of the ITA. The clear language of this provision refers to, "An employer paying emoluments to an employee" It would therefore be improper to imply or read into this provision any other relationship other than an employer or employee. To do so violates the clear words of the statute. It also violates the principles of interpretation of tax statutes.

39. The Tribunal therefore fell into error by holding that section 37 of the ITA applies to a situation where, absent an employer-employee relationship, the person paying for services rendered is subject to PAYE. Further, it also erred by holding that, "it would be prejudicial to the

taxing authority to limit the ambit of Section 37(1) of the Income Tax Act to scenarios where only an employer-employee relationship exists." In so doing, the Tribunal expanded the scope of statutory provisions beyond the words of the statute.

40. I therefore find and hold that section 37 of the ITA bespeaks an employer-employee relationship. Since CRBC was not an employer, it was not under a statutory obligation to deduct and remit any tax in accordance with section 37(1) of the ITA."

174. The meaning of the term "employer" is provided in Section 2(1) of the Income Tax Act as follows: -

""employer" includes any resident person responsible for the payment of, or on account of, any emoluments to any employee, and any agent, manager or other representative so responsible in Kenya on behalf of any non-resident employer;"

175. The documents presented by the Appellant have sufficiently demonstrated that the staff identified by the Respondent comprised:

a) Hao Fuping, Chen Zhe, Yang Zhaoxin, Wu Lin Mao and Zhang Hongmei who were the Appellant's expatriate employees, based on the employment contracts furnished in the record of Appeal;

b) Wang Guangjun, Zhang Yiqiong Zhang Long, and Lian Jian were seconded employees from AIBCL, the Appellant's related party based on the schedule, audited accounts and transfer pricing policy provided by the Appellant; and

c) Chu Conghai, Chen Shengwen, Li Xuedong, Chai Lei, Yue Zhenjiang, Zhao Xinlong, Zhang Qi, Liu Honsheng and Qiang Jianpeng were

seconded employees from Shaanxi Heavy Duty Automobile Import & Export Co. Ltd (Shaanxi), the non-resident manufacturer of CKD products that is not related to the Appellant, based on the schedule and minutes provided by the Appellant.

176. In reference to Section 37(1) of the Income Tax Act, case law cited and evidence adduced by the Appellant, the Tribunal finds that the Appellant was under a statutory obligation to deduct, account for and remit PAYE for its expatriate employees, that is, Hao Fuping, Chen Zhe, Yang Zhaoxin, Wu Lin Mao and Zhang Hongmei.

177. The Tribunal notes that the Respondent acknowledged in its pleadings that there were expatriates and seconded employees working in the Appellant's business. The Tribunal finds that the Respondent's distinction of these staff shows that the Respondent recognised that the category of staff that were seconded employees were not the Appellant's employees.

178. Having established that the seconded staff were not the Appellant's employees, the Tribunal, thus, finds that the Respondent erred in finding that Section 37(1) of the Income Tax Act applies to a situation where, absent an employer-employee relationship, the Appellant was liable to deduct, account for and remit PAYE for employees seconded from its non-resident related party, that is AIBCL, and employees seconded from its non-resident manufacturer of CKD products, Shaanxi, that is not related to the Appellant. In so doing, the Respondent expanded the scope of statutory provisions beyond the words of the statute.

179. Having determined that PAYE was applicable to the Appellant's expatriate employees, that is, Hao Fuping, Chen Zhe, Yang Zhaoxin, Wu Lin Mao and Zhang Hongmei, the Tribunal proceeded to determine whether the

Respondent acted within the law in enhancing the employment income amounts subject to PAYE for these employees.

180. The gains or profits from employment that are subject to income tax are listed in Section 5(2) of the Income Tax Act as follows: -

"(2) For the purposes of section 3(2)(a)(ii) "gains or profits" includes–

(a) any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance ***received in respect of employment or services rendered****, and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income:"*

181. The Tribunal notes that the Respondent claimed to have benchmarked for comparable pay-scale using Hays Asia Salary Guide for the years 2018 to 2022 and issued the additional PAYE assessment for the period June 2018 to May 2023. The Respondent cited its basis of assessment in its notice of assessment dated 29th June 2023 as below:

"Our review of the payroll workings of the expatriates employed by the AIBECL indicate that their emoluments were not commensurate to industry emoluments payable to employees with same skills sets and playing similar roles."

182. The clear reading of Section 5(2)(a) of the Income Tax Act is that income tax is applicable to any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling,

entertainment or other allowance received in respect of employment or services rendered.

183. The Appellant presented to the Tribunal, the employment contracts for its expatriate employees that explicitly delineated their remuneration for their employment with the Appellant. The Respondent in its notice of assessment also referred to the Appellant's payroll workings, which after its review of the same, the Respondent still elected to enhance the employment income amounts for the expatriates and assess additional PAYE.

184. Based on the evidence on record, the Tribunal finds that the Appellant discharged its burden of proof under Section 56(1) of the Tax Procedures Act and Section 30 of the Tax Appeals Tribunal Act in establishing that the expatriate employees' remuneration was as indicated in their employment contracts.

185. The Respondent on the other hand, failed to dismantle the Appellant's evidence by referring to any applicable law to support its assertion that the employment income enhancements it undertook for the Appellant's expatriate employees was justified. The Respondent further failed to prove that the Appellant's expatriate employees received sums exceeding the amounts specified in their employment contracts.

186. In **Hickman Motors Ltd. v. Canada, [1997] 2 S.C.R. 336** the Court stated as follows with regard to the expected response by the Respondent where a taxpayer shows a *prima facie* case: -

> *"The taxpayer's initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least prima facie case... Where the Minister's assumptions have been "demolished by the*

appellant, "the onus .... shifts to the Minister to rebut the prima facie case" made out by the appellant and to prove the assumptions ... The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions; ...Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed; and even if the evidence contained "gaps in logic, chronology, and substance", the taxpayer's appeal will be allowed if the Minister fails to present any evidence as to the source of income."

187. The Tribunal further finds that the Commissioner's use of best judgement to arrive at an assessment does not exist in a vacuum and should be reasoned with reliable information. The Tribunal is guided by the Court's finding on the application of 'best judgement' in **Saima Khalid vs The Commissioner for Her Majesty's Revenue & Custom s Appeal No. TC/2017/02292**, where the Court observed that: -

"29. The requirements for a decision to be to the best of HMRC's judgement were set out in the High Court case of ***Van Boeckel v C & E Commissioners*** *where Woolf J, as he then was, said:*

"...The very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them ... What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on commissioners will fairly consider all material placed before them and, on that material, come to a decision which is reasonable and not arbitrary as to the amount of tax which is due..."

188. Based on the foregoing, the Tribunal finds that the Respondent's enhancement of the employment income amounts of the Appellant's expatriate employees and the PAYE assessment thereon was arbitrary and not justified by law. However, the Tribunal finds that the Respondent was justified in assessing PAYE for the Appellant's expatriate employees for the periods starting from July 2018 on the remuneration amounts specified in the expatriate employees' employment contracts.

d) Whether the Respondent erred in assessing Corporation tax

Undeclared income of Kshs. 239,469,918 – Turnover variance

189. The Respondent assessed Corporation tax on undeclared revenue amounting to Kshs. 239,469,918.00 for the year 2019, that the Respondent derived from a comparison of the sales declared in the audited accounts and the sales declared in the Value Added Tax (VAT) returns.

190. The Appellant averred that the Respondent erred in its computation to aver that there was an under-declaration in the year 2019. That additionally, the Respondent used VAT additional assessments for the period August 2018 which was objected to and an Objection decision was reached on 31st March 2023 (sic).

191. The Appellant stated that the actual sales for the year 2019 are Kshs. 662,477,096.00. That while the total VAT returns for 2019 amounts to Kshs. 901,947,014.00, the variance of Kshs. 186,471,225.22 is as a result of invoices of 2018 that were declared late in the year 2019 for VAT purposes; that for Corporation tax purposes, these were declared as part of the income disclosed in the year 2018. That Kshs. 32,833,770.35 which was accounted for and recognised in year 2018 in the audited financial

statements, was revenue from East Asia that was erroneously declared twice in the monthly VAT returns of August 2018 and March 2019. That the remaining variance amounts of Kshs. 20,164,922.37 were journal entries not passed by the Appellant's auditors.

192. In response to the Appellant's statement that the assessment had been addressed in the previous audit and the Objection decision on the same issued, the Respondent averred that in the previous audit the assessment was on VAT and not income tax. That the Appellant did not support its Objection sufficiently to demonstrate that the income assessed in the assessment was the income that had been declared in 2018.

193. The Appellant's evidence in support of its case was the following:

a) Its audited accounts for the year 2018.

b) Its reconciliation of the variance analysis between sales as per the VAT returns and sales as per its audited accounts for the years 2018 and 2019.

c) Its schedule of its sales declarations as per its VAT returns for the years 2018 and 2019.

d) The Respondent's Objection decision dated 31st March 2022.

194. The Tribunal reviewed the evidence adduced above in totality to establish if the Respondent was justified in charging Corporation tax on the established variance of Kshs. 239,469,918.00 between the sales as per VAT returns and audited accounts for the year 2019.

195. From the review of the Respondent's Objection decision dated 31st March 2022, the Tribunal observes that the Respondent made a finding in

Paragraph 1 of Part A of that Objection decision of 31st March 2022 that the Appellant had explained to the Respondent's satisfaction that Kshs. 182,261,528.81 of the Appellant's 2018 sales were declared in the Appellant's April 2019 and May 2019 VAT returns.

196. The Respondent reiterated this finding in Paragraph 1 of Part B of that Objection decision. To this extent, the Tribunal finds that the Respondent erred in reneging its previous decision on the same sales without proper justification, and finds that the Appellant discharged its burden of proving that the Respondent's charge of additional income tax of Kshs. 182,261,528.81 was incorrect.

197. The Tribunal notes that the Appellant did not provide any evidence in support of Kshs. 4,209,696.41 of the computed variance which it claimed to relate to sales for 2018 declared late in the year 2019.

198. The Tribunal further notes that, while the Appellant alleged that Kshs. 32,833,770.35 of the computed variance was revenue from East Asia that was accounted for and recognised in year 2018 in the audited financial statements but erroneously declared twice in the monthly VAT returns of August 2018 and March 2019, the Appellant did not provide the invoices for this transaction and the VAT returns for August 2018 and March 2019 to enable the Tribunal to verify this assertion.

199. The Tribunal reviewed the record of appeal and further notes that besides the Appellant's averment that the remaining variance amounts of Kshs. 20,164,922.37 were journal entries not passed by the Appellant's auditors, the Appellant did not present any documentation to prove that the amounts did not comprise undeclared revenue.

200. Despite the law under Section 56(1) of the Tax Procedures Act and Section 30 of the Tax Appeals Tribunal Act expressly placing a burden on the Appellant to prove its case, the Appellant did not adduce any relevant source documents that it is required to keep under Section 54A(1) of the Income Tax Act and Section 23(1) of the Tax Procedures Act to support its arguments on the issue of the Appellant's 2018 sales allegedly declared in the Appellant's 2019 VAT returns, sales invoices allegedly declared twice in the VAT returns of August 2018 and March 2019, and journal entries allegedly not passed by the Appellant's auditors.

201. Consequently, the Tribunal finds that the Respondent was justified in determining that the unsupported explanation of variances amounting to Kshs. 57,208,389.13 was undeclared revenue for the year 2019.

Transfer pricing adjustment – Use of TNMM as most appropriate method

202. The Respondent selected the Transactional Net Margin Method (TNMM) as the most appropriate method to determine the arm's length remuneration for the controlled transaction of purchase of products by the Appellant from AIBCL. The Respondent's application of TNMM resulted in a transfer pricing adjustment of Kshs. 424, 915,851.00 of additional revenue in the years of income 2017 to 2021.

203. The Respondent stated that it noted deficiencies in the Appellant's benchmarking study which prompted it to conduct an independent functional analysis from which it established that the Appellant is a fully-fledged manufacturer and that AIBCL is a procurement service provider. That it selected TNMM as the most appropriate method, selected the Appellant as the tested party due to availability of information on the Appellant, and selected the Net Profit Margin at Earnings Before Interest and Tax (EBIT) as the profit level indicator.

204. The Respondent further stated that it conducted a benchmarking analysis having selected companies performing the function of assembly, fabrication and distribution of heavy commercial vehicles and re-sellers of associated spare parts, and that assumed similar risks as comparable companies to the Appellant.

205. The Respondent averred that the benchmarking analysis yielded EBITs that ranged from 5.17% to 16.58%, with a median of 10.95%. That the Appellant's EBIT for the period 2017 to 2020 ranged from -9.5% to 4.47%. That the Respondent applied the median EBIT to be the arm's length return to adjust the Appellant's EBIT for 2017 to 2021 that were below the Respondent's computed arm's length return.

206. The Respondent stated that it cited the following deficiencies in the Appellant's benchmarking analysis:

a) That the Resale Price Method may become less reliable when there are differences between the controlled and uncontrolled transactions. The Respondent averred that AIBCL deals with heavy duty vehicles, and in the benchmarking study conducted by the Appellant, the comparable companies listed deal with light motor vehicles such as Renault, Volkswagen, Toyota, Hyundai, Nissan, and Mazda, among others. That AIBEL is involved in the assembly, fabrication and distribution of heavy commercial vehicles, construction machinery and associated spare parts. That therefore, the product and functions comparability factor was not satisfied in the study.

b) That the Appellant was requested to provide agreements between AIBCL and third parties. That the documents were provided but were worded in Mandarin without a translation to English language and

therefore the review could not verify the contradiction argued in the objection application, yet the documents were essential to help establish the contradiction between the agreements and the TP policy.

c) The Respondent added that, Shaanxi's incoterms are Free on Board (FOB), including; tax at the Chinese port, inspection fees, transport fees to port, loading and unloading fees and insurance fees to port; whilst, AIBCL incoterms are Cost-Freight and Insurance (CIF).

d) The Respondent stated that the Appellant was also requested to provide the full set of financial information for AIBCL but that the financial information was not availed.

e) The Respondent asserted that it is more difficult to use the Resale Price Method to arrive at an arm's length price where, before resale, the goods are further processed or incorporated into a more complicated product so that their identity is lost or transformed. The Respondent stated that the Appellant offers design and fabrication of trailers for the assembled trucks at its factory and acts as the business hub for after-market servicing of heavy and light trucks. That this transforms the product sold in the market to differ from those of other markets.

f) That the Appellant's benchmarking study failed to incorporate specific economic activities (NACE Codes) to capture comparable companies selling/performing similar products/functions to those sold/conducted by the Appellant.

207. The Appellant asserted that the Resale Price Method is most appropriate method for determining the arm's length remuneration for the controlled transaction.

208. The Appellant stated that the controlled transaction involves the purchase of products from independent manufacturers by Avic Intl Beijing Company Limited (China) (AIBCL) as completely knocked-down motor vehicle parts. That AIBCL later sells these products to the Appellant without any value addition. The Appellant stated that it then assembles these completely knocked-down motor vehicle parts and designs them into finished products and subsequently markets the finished products to wiling buyers in the market.

209. The Appellant in sub-section 6.4 of its transfer pricing policy stated that it is in the business of operating spare parts and components for motor assembly for light trucks, heavy trucks and other machineries. That it performs the following functions in relation to purchase of products: request for product, receipt and quality control of the shipped products, assembling the product and payment for the supplies. That the Appellant sells the assembled CKD or spare parts at a margin.

210. Sub-section 6.4 of the Appellant's Transfer Pricing Policy states that AIBCL performs the following functions in this controlled transaction, that is, preparation of quotation, sourcing for the supplies and shipping of the supplies.

211. The Appellant in sub-sub-section 9.1.6 of its Transfer Pricing Policy identified itself as the tested party for purposes of applying the Resale Price Method. The Appellant claimed that it selected itself as the tested party because it is the party with the least complex functions and that it does not own intangible assets.

212. The Appellant in its Transfer Pricing Policy used the Gross Margin as the profit level indicator for purposes of conducting the benchmarking

analysis. It stated in its Transfer Pricing Policy that it obtained financial statements for the years 2017 to 2019 for comparable companies to it and obtained the three-year average to benchmark for the arm's length gross margin. The Appellant further stated that it selected the inter-quartile range as the arm's length range.

213. The Appellant averred that it sourced companies comparable to it in terms of similar functions and risks on the OneSource Database and narrowed down to 27 comparable companies and established 7.31% as the lower quartile gross margin, 9.90% as the median gross margin and 13.23% as the upper quartile gross margin. That based on these results, the Appellant established that where it earns a gross argin within this interquartile range for purchase of products from AIBCL it can be construed as arm's length.

214. The Tribunal considered the Parties' arguments and sought to determine what is the most appropriate method of determining the arm's length remuneration in the controlled transaction of the Appellant's purchase of products from AIBCL in accordance with Section 18(3) of the Income Tax Act and the Income Tax (Transfer Pricing) Rules, 2006 L.N. 67/2006, and as guided by the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

215. Section 18(3) of the Income Tax Act cited above provides that transactions between a non-resident person and resident persons or its permanent establishment should be at arm's length as follows.

216. The Appellant applied Resale Price Method and determined that its presentation of the remuneration for the controlled transaction is within the arm's length range. The Respondent on the other hand disputed the Appellant's position, and applied the Transactional Net Margin Method in

determining what it considered to be the arm's length remuneration for the controlled transaction.

217. The Tribunal notes comparability analysis is critical in the application of the arm's length principle to a controlled transaction. Performing a comparability analysis leads to the identification of reliable comparables to enable an outcome that is arm's length. Paragraph 1.36 of the OECD Transfer Pricing (TP) Guidelines outlines the economically relevant characteristics or comparability factors that need to be identified in the commercial or financial relations between the associated enterprises in order to accurately delineate the actual transaction as follows:

a) The contractual terms of the transaction.

b) The functions performed by each of the parties to the transaction, taking into account assets used and risks assumed, including how those functions relate to the wider generation of value by the MNE group to which the parties belong, the circumstances surrounding the transaction, and industry practices.

c) The characteristics of property transferred or services provided.

d) The economic circumstances of the parties and of the market in which the parties operate.

e) The business strategies pursued by the parties.

218. Both the Appellant and the Respondent conducted a functional analysis of the parties in the controlled transaction. The Tribunal notes that the results of the Parties' functional analysis both characterized the Appellant as a fully-fledged manufacturer and that AIBCL is a procurement service provider.

219. The Appellant's selected the Resale Price Method as the most appropriate transfer pricing method and selected itself as the tested party. Rule 7(b) of the Income Tax (Transfer Pricing) Rules, describe the Resale Price Method as follows: -

"the resale price method, in which the transfer price of the produce is compared with the resale price at which the product is sold to an independent enterprise:

Provided that in the application of this method the resale price shall be reduced by the resale price margin (the profit margin indicated by the reseller)"

220. In the controlled transaction under review, the Appellant purchases completely knocked-down motor vehicle parts from Avic International Beijing Company Limited (China) (AIBCL) then assembles these completely knocked-down motor vehicle parts and designs them into finished products and subsequently markets these finished products to wiling buyers in the market.

221. The Appellant stated Avic Intl Beijing Company Limited (China) (AIBCL) purchases products from independent manufacturers as completely knocked-down motor vehicle parts and later sells these products to the Appellant without any value addition.

222. The Tribunal refers to Paragraph 2.34 of the OECD TP Guidelines which provides that the Resale Price Method may become less reliable as a result of differences between the controlled and uncontrolled transactions and parties to the transactions which materially affect the gross margin. Paragraph 2.34 provides as follows: -

"*2.34. The resale price method also depends on comparability of functions performed (taking into account assets used and risks assumed). It may become less reliable when there are differences between the controlled and uncontrolled transactions and the parties to the transactions, and those differences have a material effect on the attribute being used to measure arm's length conditions, in this case the resale price margin realised. Where there are material differences that affect the gross margins earned in the controlled and uncontrolled transactions (e.g. in the nature of the functions performed by the parties to the transactions), adjustments should be made to account for such differences. The extent and reliability of those adjustments will affect the relative reliability of the analysis under the resale price method in any particular case.*

223. The Tribunal notes that the criteria for selection of comparables that the Appellant applied in its benchmarking analysis did not include assembly, design and fabrication of motor vehicles which is a significant function undertaken by the Appellant. The Tribunal observes that the Appellant, having selected itself as the tested party, significantly impacted the selected comparables by omitting this criterion in the search for comparables.

224. The Tribunal further refers to Paragraph 2.35 of the OECD TP Guidelines which highlights the complexity of applying the Resale Price Method where before resale, the reseller substantially adds value to the product, as follows: -

"2.35. An appropriate resale price margin is easiest to determine where the reseller does not add substantially to the value of the product. In contrast, it may be more difficult to use the resale price method to arrive at an arm's length price where, before resale, the goods are

further processed or incorporated into a more complicated product so that their identity is lost or transformed (e.g. where components are joined together in finished or semi-finished goods)…"

225. In the Appellant's response dated 23rd January 2023 to the Respondent's pre-assessments, the Appellant stated that there was an oversight in its benchmarking study. The Appellant stated: -

"Avic Intl Beijing (China) Company Limited has the least complex functions in the purchase of products transaction thus the rightful tested party. However, there was an oversight in the TP study conducted by the company selecting Avic Intl Beijing (EA) Company Limited as the tested party. Avic Intl Beijing (EA) Company Limited owns intangible which are important in the sale of products transaction thus more complex. Avic Intl Beijing (EA) Company Limited owns the marketing intangibles in terms of design, fabrication and customer retention."

226. While the Appellant recognised that it made a mistake in the selection of the tested party in the application of the Resale Price Method, the Appellant did not submit a corrected benchmarking study to the Respondent or the Tribunal for consideration. Consequently, the Tribunal concludes that the Appellant failed to adequately present its argument that its benchmarking analysis was correct, despite the fact that it acknowledged its error.

227. Based on the pleadings and evidence of the Appellant, it is clear that the Appellant further processes the completely knocked down kits that it purchases from AIBCL, which alters the imported CKD kits to assembled vehicles. The Appellant further state, as cited above, that it owns marketing intangibles in terms of design, fabrication and customer

retention. Considering that the Appellant selected itself as the tested party in the application of the Resale Price Method for the controlled transaction of purchase of product from AIBCL, the Tribunal finds that the application of the Resale Price Method to arrive at an arm's length remuneration would lead to unreliable results.

228. Based on the foregoing, the Tribunal finds that the Appellant erred in selection of the Resale Price Method as the most appropriate transfer pricing method.

229. The Tribunal thus, concurs with the Respondent's selection of the Transactional Net Margin Method as the most appropriate transfer pricing method in the controlled transaction of purchase of products, the Respondent's selection of the Appellant as the tested party due to availability of the Appellant's financial information and the benchmarking analysis it conducted to arrive at the arm's length remuneration which the Appellant failed to rebut with evidence.

230. As per the foregoing, the Tribunal finds that the Appellant did not discharge its burden of proof as it failed to demonstrate that the Respondent's transfer pricing adjustment was excessive or incorrect as it is mandated by Section 56(1) of the Tax Procedures Act and Section 30 of the Tax Appeals Tribunal Act.

231. Consequently, the Tribunal finds that the Respondent was justified in making the transfer pricing adjustment amounting to Kshs. 424,914,851.00 for the years of income 2017 to 2021 and was justified in assessing Corporation tax on the same.

e) Whether the Respondent erred in assessing Withholding Tax (WHT)

Management Fees

232. The Respondent reiterated the Appellant's submission that staff are sourced by AIBCL. The Respondent stated that for this purpose there should be some management fees.

233. The Respondent asserted that the management fee is what it has subjected to WHT at the non-resident the rate of 20%, and the emoluments to the expatriates is what it subjected to the PAYE.

234. The Appellant stated that the Respondent has contradicted itself by averring that the services provided by the seconded employees are professional and managerial in nature. That on one hand, the Respondent averred that they are employees and on the other hand stated they are consultants. The Appellant stated that the Respondent has used the emoluments benchmarked for PAYE to calculate WHT.

235. The Appellant stated that the Respondent purports that the Appellant should pay a service fee to its parent company for deploying some of its staff. The Appellant argued that the seconded technicians are overseas employee technicians of Shaanxi Automobile Group, and that there are no service fees that were recharged nor payable by the Appellant to its parent company. The Appellant also argued that WHT can only be to extend the service fee which could be benchmarked on companies performing similar functions, which the Respondent did not do.

236. The Tribunal examined the schedule that the Respondent used to calculate the WHT on management fees, which according to the Respondent, were payable to Avic International Beijing Co. Limited (AIBCL) and established that the Respondent applied a WHT rate of 20% to the salaries that it enhanced based on salaries it had benchmarked on the Hays Salaries Scale

for the following staff: Chen Zhe, Chu Conghai, Chen Shengwen, Li Xuedong, Zhang Long, Chai Lei, Yue Zhenjiang, Zhao Xinlong, Zhang Qi, Liu Honsheng, Qiang Jianpeng and Lian Jian covering the years 2019, 2020, 2021 and 2022.

237. The Tribunal refers to the Appellant's Transfer Pricing Policy wherein the Appellant lists 'receipt of administrative support from Avic International Beijing Co. Limited (China) (AIBCL) as one of its controlled transactions. In sub-section 6.3 of its Transfer Pricing Policy, the Appellant states that it receives support from AIBCL in the execution of the business administrative function through personnel who are deployed to oversee both the Appellant's administrative operations and financial operations.

238. The Appellant's functional analysis as per the Transfer Pricing Policy describes the functions of AIBCL as deploying some of its staff to the Appellant to support administrative roles, oversee and take charge of the financial management of the Appellant. The Appellant's functions were receipt of the administrative support and to ensure that the staff posted has accommodation and is able to integrate and work with other team members.

239. The Appellant in sub-section 6.3 of its Transfer Pricing Policy states that AIBCL incurs payroll costs associated with the deployed staff and does not recharge the Appellant the costs for the administrative support.

240. In sub-sub-section 10.2.5 of the Appellant's Transfer Pricing Policy, the Appellant selected the Transactional Net Margin Method (TNMM) as the most appropriate method for determining the arm's length remuneration for the provision of administrative support services by AIBCL, identified AIBCL as the tested party for the controlled transaction, selected the Net

Cost Plus mark-up as the profit level indicator and stated that it shall apply time as the cost allocation key for the administrative support services received.

241. The Appellant further categorised the administrative support services received from AIBCL as low value adding intra-group services in accordance with the OECD TP Guidelines, and stated that administrative support services received from AIBCL are to be charged as the total costs incurred in the provision of the business services plus a mark-up of 5%.

242. The Tribunal refers to its PAYE analysis above, where it established that Chen Zhe was an expatriate who was an employee of the Appellant as supported by the employment contract attached to this Appeal. The Tribunal thus finds that the Appellant sufficiently discharged the burden of proof by demonstrating that Chen Zhe was the Appellant's employee and not an employee seconded by AIBCL, therefore, management fees is not applicable to the costs for this staff as the costs were not in respect of a related party transaction.

243. In the PAYE analysis, the Tribunal also determined from the evidence adduced by the Appellant that Chu Conghai, Chen Shengwen, Li Xuedong, Chai Lei, Yue Zhenjiang, Zhao Xinlong, Zhang Qi, Liu Honsheng and Qiang Jianpeng were staff that were seconded from Shaanxi Heavy Duty Automobile Import & Export Co. Ltd (Shaanxi), a non-resident company that is not related to the Appellant. For this reason, the Tribunal finds that Respondent's transfer pricing adjustment for management fees is not applicable to the transactions involving these staff as they did not pertain to a related party transaction.

244. The Tribunal observes that the only staff on the Respondent's schedule on which management fees could be determined, if applicable, are, Zhang Long, who was listed as a Business Development Survey Officer who the Appellant failed to specify if the staff was seconded by Shaanxi Heavy Duty Automobile Import & Export Co. Ltd (Shaanxi), and Lian Jian, who was listed as a Logistics Officer seconded from Avic Headquarter.

245. The Tribunal finds that Zhang Long and Lian Jian were seconded employees from the Appellant's related party, AIBCL, as no evidence supporting the contrary was adduced by the Appellant. Based on this information, it is clear that the Appellant received management services from AIBCL.

246. The Tribunal notes, from the evidence adduced by both parties, that the Respondent imputed management fees for the years 2019, 2020, 2021 and 2022 amounting to Kshs. 23,683,354 for Zhang Long and Kshs. 23,683,354 for Lian Jian in respect of the related party transaction between the Appellant and AIBCL, yet the Appellant confirmed that AIBCL did not charge it any management fees for services provided to the Appellant.

247. The necessity for transfer pricing adjustments is outlined in Section 18(3) of the Income Tax Act which provides that: -

> *"Where a non-resident person carries on business with a related resident person or through its permanent establishment and the course of that business is such that it produces to the resident person or through its permanent establishment either no profits or less than the ordinary profits which might be expected to accrue from that business if there had been no such relationship, then the gains or profits of that resident*

person or through its permanent establishment or from that business shall be deemed to be the amount that might have been expected to accrue if the course of that business had been conducted by independent persons dealing at arm's length."

248. Section 18(8) of the Income Tax Act further provides for the Income Tax (Transfer Pricing) Rules as follows: -

"(8) The Cabinet Secretary may, by rules published in the Gazette–

(a) issue guidelines for the determination of the arm's length value of a transaction for purposes of this section; or

(b) specify such requirements as he may consider necessary for the better carrying out of the provisions of this section."

249. The Tribunal's interpretation of Section 18(3) of the Income Tax Act is that it only allows for transfer pricing adjustments, such as the one that the Respondent made by imputing management fees, where in case of a resident person, a transaction between a non-resident person and a related resident person results in either no profits or less than ordinary profit, relative to the expected outcome if the transaction was between independent persons.

250. Although there was a related party transaction between the Appellant and AIBCL, the Appellant was not charged any management fees by AIBCL, and correspondingly, did not deduct any management fees as an expense. Consequently, there was no impact on its taxable profits. Specifically, the Tribunal finds that the Appellant's approach to the related party transaction was such that the transaction did not lead to any losses or reduced profits.

251. The Tribunal agrees with the holding in **Equity Group Holdings Limited v Commissioner of Domestic Taxes (Civil Appeal E069 & E025 of 2020) [2021] KEHC 25 (KLR) (Commercial and Tax) (23 August 2021) (Judgment)** where Mativo J. held in paragraph 11 regarding interpretation of tax statutes that: -

> *"11. In construing fiscal statutes and in determining the liability of a subject to tax one had to have regard to the strict letter of the law. If the revenue satisfied the court that the case fell strictly within the provisions of the law, the subject could be taxed. If, on the other hand, the case was not covered within the four corners of the provisions of the taxing statute, no tax could be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."*

252. The Tribunal has adopted the ordinary meaning of the words used in Section 18(3) of the Income Tax Act. This is because as regards tax law the issue of intention or intendment does not arise. Accordingly, based on the facts of the matter, evidence adduced, the applicable tax laws, and case law cited above, the Tribunal finds that the Respondent was not justified in law in imputing management fees for this related party transaction as the transfer pricing adjustment contradicts Section 18(3) of the Income Tax Act.

253. Based on the foregoing, the Tribunal finds that the Respondent erred in charging WHT on the imputed management fees for the years 2019, 2020, 2021 and 2022.

Interest Expense on Related Party Loan

254. The Respondent assessed WHT of a principal tax of Kshs. 1,610,804.00 plus interest and penalties on accrued interest on intra-group loans for the period of 2020 to 2022. The Appellant appealed against this decision in the instant Appeal.

255. The Tribunal observes that the Appellant did not address in its pleadings the issue of the additional WHT assessment on accrued interest. Additionally, the Appellant did not provide any evidence in support of its dispute against the assessment as it is required to under Section 56(1) of the Tax Procedures Act and Section 30 of the Tax Appeals Tribunal Act.

256. In the circumstance, the Tribunal finds that the Respondent was justified in assessing WHT on the accrued interest for the period of 2020 to 2022.

Deemed Dividend Distribution

257. The Respondent assessed WHT of a principal tax of Kshs. 48,902,615.00 plus interest and penalties on deemed dividend distribution arising from the transfer pricing adjustment established by the Respondent for the years 2018, 2019, 2020 and 2021 which was as a result of the Respondent applying TNMM as the most appropriate method for determining the arm's length remuneration for the controlled transaction of purchase of products. The Respondent referred to Section 7(1)(b)(v) of the Income Tax Act and submitted that the provision came to effect on 1st July 2018.

258. In disputing the assessment, the Appellant stated that the Respondent erred in selecting Transactional Net Margin Method as the most appropriate method which resulted in a transfer pricing adjustment.

259. The Appellant, additionally, preferred the Tribunal to consider the following circumstances:

a) Will a company distribute dividends if it has accumulated losses of more than 75 million?

b) Will a company distribute dividends if it has overdue payables over 950 million?

c) How will a company distribute dividends when additional salaries expense of Kshs. 432,420,141 for expatriates and seconded employees have not been factored?

260. The Appellant submitted that the Finance Act of 2018, expanded the scope of WHT to include transfer pricing adjustments that result in additional income/reduced losses which would be deemed to be dividends. The Appellant averred that the effective date of this was 1st January 2019. That this implies the deemed dividends for the year 2018 are unjustified. That the Appellant has seen reduced sales and this cannot be the distribution of dividends.

261. The Tribunal notes that income from dividends is chargeable to income tax under Section 3(1) and 3(2)(b) of the Income Tax Act. The Tribunal refers to Section 7(1)(b) of the Income Tax Act which provides that additional taxable income from audit adjustments are deemed to be dividend distributions, as follows: -

"7. (1) For the purposes of Section 3(2)(b)–

(a) a dividend paid by a resident company shall be deemed to be income of the year of income in which it was payable;

(b) an amount shall be deemed to be a dividend distributed by a company to a shareholder where–

(i) any cash or asset is distributed or transferred by that company to or for the benefit of that shareholder or any person related to that shareholder;

(ii) the shareholder or any person related to that shareholder is discharged from any obligation measurable in money which is owed to that company by that shareholder or related person;

(iii) the amount is used by that company in any other manner for the benefit of the shareholder or any person related to that shareholder;

(iv) any debt owed by the shareholder or any person related to that shareholder to any third party is paid or settled by that company;

(v) the amount represents additional taxable income or reduced assessed loss of that company by virtue of any transaction with the shareholder or related person to such shareholder, resulting from an adjustment."

262. The Respondent assessed the Appellant WHT pursuant to Section 7(1)(b)(v) of the Income Tax Act. The Tribunal asserts that the provision was introduced by Section 3 of the Finance Act 2018 and that the provision came into operation on 1st July 2018 and not 1st January 2019 as alleged by the Appellant. Section 1 of the Finance Act 2018 provides as follows: -

"1. This Act may be cited as the Finance Act, 2018, and shall come into operation, or be deemed to have come into operation, as follows–

(a) Sections 48, 49, 50, 54, 56, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, and 78, on the 1st October, 2018;

(b) Sections 4, 6, 7, 11(a), and 11(c) on the 1st January, 2019;

(c)all other Sections on the 1st July, 2018."

263. The Tribunal further notes that Section 7(1)(b)(v) of the Income Tax Act does not afford any exceptions to the deeming of dividend distributions, such as those requested by the Appellant for the Tribunal's consideration. Consequently, the Tribunal, cognizant that it does not have legislative authority, is unable to exclude from taxation what is explicitly defined in statute as taxable income.

264. Based on the foregoing, the Tribunal finds that WHT was applicable to the deemed dividend distribution from the transfer pricing adjustment that the Respondent made.

265. Notwithstanding that WHT is applicable to the deemed dividend distribution, as established by the Tribunal above, the Respondent's assessment of WHT for the tax periods before July 2018 was illegal and the same was not justified.

266. Further, following the deletion of Section 35(6) of the Income Tax Act by Section 9 of the Finance Act of 2016 effective from 9th June 2016, the Respondent lacks the powers to collect and recover the WHT principal, penalties and interest from the Appellant from 9th June 2016 to 6th November 2019.

267. Section 35(6) of the Income Tax Act read as below before its deletion: -

"35 (6) Where a person who is required under this section and in accordance with the rules made under section 130, to deduct tax—

(a) fails to make the deduction or fails to deduct the whole amount of the tax which he should have deducted; or

(b) fails to remit the amount of a deduction to the Commissioner on or before the twentieth day following the month in which the deduction was made or ought to have been made,

the Commissioner may impose such penalty as may, from time to time, be prescribed under the rules, and the provisions of this Act relating to the collection and recovery of tax and the payment of interest thereon, shall apply to the collection and recovery of that amount of tax and penalty as if they were tax due and payable by that person and the due date for the payment of which was the date on which the amount of tax should have been remitted to the Commissioner."

268. To buttress its finding on the Respondent's powers of collection and recovery of WHT not deducted by the Appellant for periods between 9th June 2016 and 6th November 2019, the Tribunal relies on **TAT 304 of 2019 Pevans East Africa Limited v Commissioner of Domestic Taxes [2019]** where the Tribunal held that: -

"79. The Tribunal is alive to the fact that the Finance Act 2016 amended Section 35 of the ITA by deleting subsection 35 (6). The import of this amendment was that where a person has failed to withhold tax as prescribed, the Commissioner cannot demand the tax not withheld from the person who should have withheld. Consequently, the Respondent cannot demand tax from the Appellant as if it was tax due from it. It is also appreciated that when parliament intended withholding tax to be

recovered from the withholding tax agent as if it was tax due, the legislation clearly stated so."

269. The High Court upheld the Tribunal's decision on the collectability of WHT not deducted and remitted in the case of **Commissioner of Domestic Taxes v Pevans East Africa Limited & 6 others (Tax Appeal E003 of 2019) [2022] KEHC 10392 (KLR)** where the Court held that: -

"42. I am in agreement with the Tribunal that prior to 2016, section 35(6) of the ITA provided that the commissioner could claim taxes from a payer who fails to make a deduction as though the taxes were due from them. However, the amendment introduced by the Finance Act, 2016 deleted the said section 35(6) of the ITA meaning that the Commissioner could no longer demand taxes not withheld from the person who should have withheld the same and that this position remained until the enactment of the Finance Act, 2019 came into force on November 7, 2019 when the previously deleted provisions of section 35(6) of the ITA were now reintroduced and reproduced as a new section 39A under the TPA.

43. Consequently, I therefore find and hold that during the subject years of 2018 and 2019, the Commissioner could not collect the WHT that ought to have been deducted by the Respondents from the punters and that all the Commissioner could do was seek the same from the punters directly."

270. In view of the aforesaid analysis, the Tribunal finds that the Respondent has no legal basis for collecting and recovering the WHT which the Appellant failed to deduct from the deemed dividend distribution for the

periods before 7th November 2019, and the resultant penalties and interest, as tax due and payable by the Appellant.

271. The Tribunal further finds that the Respondent was justified in assessing and demanding WHT on the deemed dividend distribution for periods commencing on 7th November 2019.

FINAL DECISION

272. The upshot of the foregoing analysis is that the Tribunal finds that the Appeal is partially merited and accordingly proceeds to make the following Orders:

a) The Appeal be and is hereby partially allowed.

b) The Respondent's Objection decision dated 25th September 2023 be and is hereby varied in the following terms:

i. The Pay as You Earn (PAYE) assessments on the employment income of Appellant's expatriate employees for periods before July 2018 be and are hereby set aside.

ii. The Pay as You Earn (PAYE) assessments for seconded employees be and are hereby set aside.

iii. The Pay as You Earn (PAYE) assessments for the employment income of Appellant's expatriate employees be recomputed using the remuneration as per their respective employment contracts for periods starting from July 2018.

iv. The undeclared revenue from established turnover variances for the year 2019 on which the Respondent assessed Corporation tax to be

revised to the total of the unsupported variances as broken down below:

i. Kshs. 4,209,696.41 allegedly relating to sales for 2018 declared in 2019 VAT returns;

ii. Kshs. 32,833,770.35 being the alleged revenue from East Asia declared both in the August 2018 and March 2019 VAT returns; and

iii. Kshs. 20,164,922.37 being the alleged journal entries.

v. The Withholding Tax (WHT) assessments on management fees be and are hereby set aside.

vi. The Withholding Tax (WHT) assessments on accrued interest expense be and are hereby upheld.

vii. The Withholding Tax (WHT) assessments on deemed dividend distribution for periods before 7th November 2019 be and are hereby set aside.

viii. The Withholding Tax (WHT) assessments on deemed dividend distribution for periods starting from 7th November 2019 be and are hereby upheld.

ix. The Respondent is hereby directed to recompute the tax assessments based on the Tribunal's findings under Orders b) (i), (ii), (iii), (iv), (v), (vi), (vii), and (viii) above within Thirty (30) days from the date of delivery of this Judgment.

c) Each party to bear its own costs.

273. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of November, 2024.

ERIC NYONGESA WAFULA

CHAIRMAN

GLORIA A. OGAGA

MEMBER

DR. RODNEY O. OLUOCH

MEMBER

ABRAHAM K. KIPROTICH

MEMBER