REVENUE APPEALS TRIBUNAL
ESWATINI

IN THE REVENUE APPEALS TRIBUNAL ESWATINI

JUDGMENT

CASE NO: RATE/IT012/23

In the appeal between:

RATE/IT012/23 **APPELLANT**

And

ESWATINI REVENUE SERVICES- **RESPONDENT**

THE COMMISSIONER GENERAL

Neutral Citation:	*RATE/IT012/23 v Eswatini Revenue Services, The Commissioner for Eswatini Revenue Services (012/23) (2023) RATE 012* (March 2023*)*
Coram:	Mr Muso Simelane (President) Ms Fikile Dlamini, Ms Khethiwe Dlamini, Ms Ntombenhle Shongwe, Mr Sandile Dlamini and Mr John Henwood (Members)
Heard:	15 February 2024
Delivered:	This judgment is to be handed down electronically by circulation to the parties, legal representative by email and uploaded on email platform. The date for hand-down is deemed to be 26 July 2024

Summary: *Tax Issue: Tax evasion, postponement, or reduction of payment – Section 65 ITO – anti- avoidance - arm's length transaction – Transfer pricing – OECD Transfer Pricing Guidelines*

The Appellant sought to claim as an allowable deduction "management fees" that it claims to offer its subsidiary based in Eswatini, making this an intercompany charge or expense. The Appellant submits that as part of managing operations, RATE/IT012/23 South Africa provides a basket of activities which are predominantly management and technical services to its subsidiaries. The two main reasons advanced for provision of the services centrally (from headquarters) are to ensure clients situated in different jurisdiction have the same experience regardless of jurisdiction and that the subsidiaries benefit from economies of scale within the procurement value chain, as well as protecting the brand.

The Respondent disallowed several of these expenses and the disallowance resulted in an additional tax liability of E 7 604 011.22 (Seven Million Six hundred and Four Eleven Emalangeni and Twenty-Two cents). The Respondent disallowed the expenses on the basis that 1) *lack of evidence that expenses were actually incurred*, 2) *services were duplicative*, 3) *expenses fell within Shareholder activity categories* and 4) *improper allocation keys were changed, and the proper ones were utilised.*

JUDGMENT

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1) The Appellant is RATE/IT012/23 (Pty) Ltd trading as RATE/IT012/23 Eswatini, a wholly owned subsidiary of Africa RATE/IT012/23 Limited (Pty) Ltd, a multi- national company listed on the Johannesburg Stock Exchange ("JSE"). Africa RATE/IT012/23 Limited, is a company duly registered in accordance with the Laws of the Kingdom of Eswatini having its principal place of business at King Sobhuza II Avenue, Industrial site, Matsapha, Eswatini. Africa RATE/IT012/23 also has subsidiaries in Botswana, Lesotho, Malawi, Mozambique, Namibia and Zambia.

2) The Respondent is described as Eswatini Revenue Service, a semi-autonomous revenue administration agency on behalf of the state, established through the Revenue Authority Act No. 1 of 2008. This organisation operates within the broad framework of government but outside of the civil service. The Commissioner General cited herein in his official capacity as the Chief Executive Officer of Eswatini Revenue Service, a legal body charged

with the responsibility of revenue collection on behalf of the Government of Eswatini. The Respondents' primary mandate is the assessment and collection of all revenue on behalf of the Government.

3) A brief history of the matter is set in the paragraphs that follow; The Appellant seeks to appeal the decision of the Commissioner- General to disallow certain costs which it claimed as allowable deductions. These costs related to services that are alleged to have been offered and invoiced by Africa RATE/IT012/23 Limited (parent company) to RATE/IT012/23 (wholly owned subsidiary). The Appellant submits that the costs are legitimately claimed and were offered and invoiced on arm's length terms to the Appellant by its parent company, and this is consistent with the Organisation for Economic, Corporation and Development (OECD) transfer pricing guidelines.

4) To this end the Appellant refutes the Respondents' classification of the various costs under three main classifications, being 1) Shareholder activities, 2) wrong allocation keys and 3) Management fees (disallowed) as being incorrect and argues that these are in fact management fees that were legitimately offered, invoiced, and paid.

5) The Respondent, in disallowing the expenses raised a tax adjustment to the amount of E 7 601 011.22 (Seven Million, Six Hundred and One Thousand, Eleven Emalangeni and Twenty-two cents) which were largely due to reversal of the management fees payments. The Respondent advanced the four main grounds that the fees were; 1) devoid of evidence that they were actually incurred 2) that some were duplicative in their nature and 3) some fell within the shareholders activity category and lastly that the Appellant 4) used improper allocation keys for some of the fees which the Respondent corrected.

6) The Appellant submits that the mere fact that there is no service level agreement on which the services are based (evidence), should not lead to the automatic conclusion that the said services were not rendered.

7) To that end the Appellant asserts that the Respondents' decision to disallow the deductions of these costs on the ground that they meet the requirements of Section 65 of the ITO, being mainly that "when carried out which has the effect of avoiding or postponing liability for any tax, duty or levy or income", is not correct and asserts on the contrary that the

deductions are entirely legitimate as costs incurred by the Appellant on account of services rendered to it by its parent company.

8) Upon the objection to the decision to disallow the costs as explained above to the Respondent, the Respondent maintained that it finds no evidence that these costs were incurred legitimately as submitted by the Appellant, it is from this response from the Respondent that the Appellant approaches the Tribunal to have the Respondents' decision set aside.

9) The Respondent in the main, submits that the Appellant's adjustment as raised, was on account of four main grounds as identified in the course of conducting an international transaction audit on the Appellant, which four main grounds were that, that the management fees as claimed by the Appellant as an allowable deduction were;

    9.1 void of evidence that they were actually incurred,
    9.2 that some were duplicative in their nature,
    9.3 some fell within the shareholders activity category; and
    9.4 that the Appellant used improper allocation keys for some of the fees
    9.5 which the Respondent corrected.

10) The Respondent submits that in order for expenses or losses to be deductible under Section 14 (1) of the Income Tax Order of 1975 ("the Income Tax Order") they ought to be incurred in the production of income and thus must have a connection to the production of income. The Respondent submits that it was unable to (in the period under review) to establish or prove a nexus between the expenses and the production of income.

11) The Respondent averred further that in light of the circumstances the transactions that gave rise to the adjustment being raised, having not been proven to have been incurred in the production of income when claimed to have the effect of avoiding, or postponing the Appellants' tax liability as envisaged by Section 65 of the Income Tax Order of 1971.

12) The Respondent in emphasis of its position stated that having regard to the manner in which the transaction between the Appellant and its parent company, which was entered into and carried out, created rights and responsibilities between them that would not normally be created between persons dealing at arms-length under a transaction of the

nature in question herein. Additionally, that it would in fact be abnormal for the Appellant to be willing to pay for such activities if the Appellant was not part of the parent company's group of companies.

13) To the above end, it is the Respondents assertion that it is led to the conclusion that the sole or main purpose of the transaction was to evade or postpone the Appellants' liability to pay the tax due.

14) For the above reason, the Respondent submits that Section 65 of the Income Tax Order finds application in this case and accordingly prays for the appeal to be dismissed.

15) Discontented with the Respondent 'determination, the Appellant lodged its appeal under section 15 (1) of the Revenue Appeals Tribunal Act 13 of 2019, which appeal was lodged before the Tribunal on the 31st of March 2023.

16) Mr Rob Web, Ms Disebo Makhetha and Callous Shikwambana appeared on behalf of the Appellant and Mr Bongisipho Dlamini, Ms Bongekile Nsingwane and Ms Ngibongiseni Mbaijana appeared on behalf of the Respondent

17) The Appellant has raised the following grounds of appeal and submitted as follows:

17.1 The Appellant raised the Appeal on the following *grounds*:

17.1.1 Section 65 of the ITO does not find application in the findings raised as it is limited to an arms-length analysis of the transactions based on wholistic comprehension of the OECD Guidelines on which the assessment is based.

17.1.2 The cost relating to customer service centre sales, customer master service collection sales process, inventory scheduling and commercial Corne Coetzee are legitimate costs and the Respondents' position that these are shareholders activities is incorrect.

17.1.3 The revenue-based allocation key is objective and is in line with the Appellants' business and as such should be accepted as the selected

allocation key for IT, human resource costs and legal and secretariat costs.

17.1.4 For costs relating to corporate communication, business unit management and Corne Coetzee, we furnish an adequate explanation on the basis of the allocation of the cost the absence of a service level to a conclusion that no services were rendered.

17.2 The main issues for determination in this appeal before the Tribunal are three and the Tribunal breaks them down as follows:

17.2.1 Whether the expense / cost of inter-corporate "management fees" in the context of a multinational company may be deductible as an expense.

17.2.2 Whether the transaction in question under which the management fees were charged is an avoidance arrangement or transaction for purposes of Section 65 of the Income Tax Order.

17.2.3 Whether the transaction meets the requirements for an arms-length analysis for multi-national companies as guided by international transfer pricing guidelines such as the OECD transfer pricing guidelines.

18) Appellant's submission

The Appellant in the above application advanced the following main arguments as its case:

18.1 That its entity is in its nature a multi-national entity, by virtue of which there are complex and multi-level shared services between the companies within the company group. In the case of Eswatini, for instance it was the Appellants' submission that there are certain activities that are in the majority done and processed from the South African Headquarters. For this reason, there should be a mechanism for a fair and reasonable allocation of the shared costs to make sure these services are delivered successfully.

18.2 The Appellant submitted before the Tribunal that there is in fact no bill charged for such services as is possible with other professional services e.g. accounting services. For this reason, fees are charged to the Appellant (the Eswatini entity which is a wholly owned subsidiary of the Appellant) as management fees and are charged through the indirect charging method found in the OECD transfer pricing guidelines.

18.3 The Appellant submitted to the Tribunal that the findings of the Respondent, in particular that the fees as charged to the Appellants' Eswatini entity fall within the ambit of a transaction that "has been carried out with the intent to avoid or postpone tax liability" in terms of Section 65 of the Income Tax Order ("ITO") as the Respondent contends are incorrect. The Appellant on the contrary submitted that in fact the sole or main purpose to structure the transaction this way is to attain optimal efficiently to run the group of companies to a high standard that makes them a global leader. Therefore, based on the entire reasoning of the Respondents' case being Section 65, the case should fail.

18.4 At a more refined level the Respondent stated that they had utilized the OECD transfer pricing guidelines to prove that they do not qualify to be considered legitimately taxable deductions as intracompany fees. Further that the Respondent had stated that the transactions lacked substance and under the guidelines they were categorized as duplicative, shareholder fees and bearing incorrect allocation keys. The Appellant on the contrary argued that these transactions did not in fact fit under these categorizations because they served a different purpose to that which the Respondent had identified, and thus were justifiably deductible. Further, that in charging the Eswatini subsidiary the parent company utilized a justifiable charging method under the OECD which is the indirect charge method.

18.5 The Appellant further argued significant portion of the Respondents' assessment in which it added back an amount of E 7 601 011, 22 (Seven Million Six Hundred and One Thousand, Eleven Emalangeni and Twenty-two cents) that E 3 400 00, 00 (Three Million Four Hundred Thousand Emalangeni) in actual fact had nothing to do with the arguments above and was just a 10% markup fee for products sold to RATE/IT012/23 by its parent company RATE/IT012/23 South Africa.

18.6 The Appellant in finality, argued that in considering whether that conduct of the Appellant falls within the scope of section 65 of the ITO, it is important to pay due attention to the words "and" and "sole or main purpose". Further, that the deliberation of whether the sole or main purpose of the Appellants' conduct must by necessary implication consider that in the charging of the management fees in question the Appellant paid over to the Respondent its withholding taxes on those management fees, which would not be the conduct of someone intending to evade tax. For this reason, it was the Appellant's view that the Respondent's case should be dismissed.

19) The Respondent's submission

19.1 The Respondent submitted as a point of departure that in the case of the Appellant, it is appreciated that the Appellant is a full spectrum business that delivers its product service offering through sharing certain functions from a central point to ensure uniformity as the Appellant had argued. However, the Respondent in dealing with this matter had sight of the Appellant's transfer pricing documents and it made no mention of the management fees in question and instead was only limited to purchasing and distribution of specific products sold by the Appellant.

19.2 The Respondent proceeded to address the Appellants' argument that the Respondent ought not to have relied on the OECD transfer pricing guidelines in this matter as it was in fact a signatory to the UN Model. To this the Respondent argued that the OECD guidelines are simply a guidance document and not a binding document applicable only to its signatories, there was therefore no reason for the Respondent to obtain guidance from it in particular in that area of the application of the arms-length principle.

19.3 In amplification, the Respondent referred to the case of ***Unilever Kenya Limited v the Commissioner of Income Tax***[1] where the court endorsed the use of OECD transfer pricing guidelines in the absence of detailed guidance. The court in this case

[1] October 2005, High Court of Kenya, Case no. 753 of 2003

made the point that with modern business changing and evolving it would be highly short sighted of any court to disregard reference to international guiding principles.

19.4 The Respondent in response to the Appellant's argument that in *casu*, section 65 of the Income Tax Order does not apply, stated that the primary consideration in this regard is whether in scrutinising a particular transaction, the Commissioner General having regard to the circumstances under which the transaction, forms the perception that scheme or operation was carried out in an abnormal manner and created abnormal rights or obligations as its "effect".

19.5 Relying on the case ***Commissioner of Taxes v F,***[2] the Respondent emphasized that, between the requirement of the "opinion" of the Commissioner-General and "effect" of the transaction being abnormal, it is clear that the intention of the Legislature "to cast the net in such a way as to block every avenue of escape" for a tax avoidance transaction. It was on the basis that the Respondent contended that Section 65 was fully applicable in the present case.

19.6 The Respondent in substantiating the results of its assessment in which it added back E 7 601 011, 22 (Seven Million Six Hundred and One Thousand, Eleven Emalangeni and Twenty-two cents), explained to the Tribunal the nature of duplicative services, shareholder services and the idea of allocation keys and explained that under each one the listed items were scrutinised and found to be fitting in those descriptions and they could not be classified as deductible intra-company services.

19.7 The Respondent emphasized that this scrutiny entailed an extensive field audit in which the Respondent attended both the premises of the Appellant itself and the companies sites in one of its key customers which it supplies as a means to verify if in fact the way in which the Appellant justified these services was indeed true and the outcome was in fact that the Respondent's assertion was true as the evidence of the justification was not found and further to that all documents requested and provided did not serve as evidentiary value as to the substance of the transaction.

[2] 1976 (1) RLR 106 (AD)

Save for the case of audit fees, which were accepted as legitimately deductible, and the due adjustment was made.

19.8 It was the Respondents' prayer that the Tribunal dismiss the Appellant's appeal as it had failed to make out a case for the relief it sought and further that the relief it sought was an extra-ordinary remedy in law, made without identifying the elements of the allegations it had made.

20) Tribunal's Analysis

20.1 As a point of departure, the Tribunal wishes to pronounce itself on its alignment with the views expressed by Visram J and by extension the Kenyan position, in the case of ***Unilever Kenya Ltd v Commissioner of Income Tax [2005] eKLR*** [3]where he states in respect of the OECD guidelines that;

> *"They are simply "guidelines", guiding the world of business, that is business enterprises and taxing authorities of those countries in arriving at proper transfer pricing principles for the purposes of the computation of income tax. I am therefore unable to accept the argument that in view of the alleged clear wording of section 18 (3) of the Act, no guidelines are necessary (here in Kenya). That is rather simplistic and devoid of logic. We live in what is now referred to as a "global village". We cannot overlook or sideline what has come out of the wisdom of taxpayers and tax collectors in other countries. And especially because of the absence of any such guidelines in Kenya. We must be prepared to innovate, and apply creative solutions based on lessons and best practices available to us. That is how our law will develop, and our jurisprudence will be enhanced. That is how we shall encourage business to thrive in our country".*

20.2 For the above reason the Tribunal is fully accepting of the Appellant and Respondent's reliance on the Organisation for Economic Cooperation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("**OECD Guidelines**"), and in the same breath the Tribunal shall be guided by the guidelines in this judgment.

[3] [2005] eKLR

20.3 Having gone through the submissions above, the Tribunal has closely looked at the dispute itself in the matter. Before dealing with the issues in dispute, we find it pertinent to preface our judgment with the background or submission made, that gave rise to the present legal wrangle where the taxpayer being the Appellant herein, contends that the disallowed costs, including those related to customer service, debt collection, and various management functions, are legitimate business expenses that should be deductible under these provisions.

20.4 The submission or presentation of the above appeal bring out three (3) issues for determination by the Tribunal, being the following.

20.4.1.1 Whether the expense / cost of inter-corporate "management fees" in the context of a multinational company <u>may be deductible as an expense</u>.

20.4.1.2 Whether the transaction <u>meets the requirements for an arms-length principle</u>.

20.4.1.3 Whether the transaction in question under which the management fees were charged <u>is an avoidance arrangement or transaction for purposes of Section 65 of the Income Tax Order</u>.

which the Tribunal proposes to deal with in this judgment categorically per issue as follows;

20.5 ***As to whether the Appellant cost of inter-corporate "management fees" in the context of Appellants' multinational company may be deductible as an expense.***

20.5.1 Central to the appeal is the deductibility of various costs under Section 14 of the Income Tax Order. Specifically, Section 14(1)(a) allows deductions for expenditures incurred in the production of income and considering that this is an expense by a Eswatini taxpayer outside

Eswatini and Section 14 (1) (a), is also specifically prescriptive in that regard, where states that:

> "***including <u>such expenses incurred outside Swaziland in the production of the taxable income as the Commissioner may allow</u>***".

20.5.2 This being a case that entails multinational operation (South Africa and Eswatini) and as such brings in the dimension on international taxation and compels this Tribunal to consider the Double Taxation Agreement ("**DTA**") between Eswatini and South Africa as part of the applicable law in the determination of this case. To this end Article 7 of the DTA, dealing with business profits is relevant in determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment. Article 7 (3) specifically reads;

> "*In determining the profits of a permanent establishment,* ***<u>there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment</u>****, including executive and general administrative expenses so incurred, whether in the Contracting State in which the permanent establishment is situated or elsewhere*."

20.5.3 This provision supports the taxpayer's position that legitimate business expenses should be deductible.

20.5.4 However, both the Eswatini Legislation and the DTA give little to no direction as to the key consideration in the deductibility of internationally incurred expenses. It is only the OECD guidelines that give guidance on the above matter which both parties have ably referenced and relied on.

20.5.5 Pertinent to this case is Part VI of the OECD guidelines, which specially regulates "Special considerations for <u>intra-group services</u>". Which is the expense at issue in this present case. The OECD guidelines mention that there are two main or key consideration in assessing the deductibility of

intra-group expenses. In this regard Part B of Chapter VI (Article 7.5) states the following:

> *"Main issues*
>
> *7.5. There are two issues in the analysis of transfer pricing for intragroup services. One issue is **whether intra-group services have in fact been provided.** The other issue is what the intra-group charge for such services for tax purposes should be in accordance with the arm's length principle. Each of these issues is discussed below by the Tribunal."*

20.5.6 The above suggest that the determination of the deductibility of an intracompany expense should be guided by two main issues being;

20.5.6.1 **whether intra-group services have in fact been provided**.

20.5.6.2 such services for tax purposes should be **in accordance with the arm's length principle**

20.5.7 This judgment proposes for the determination of the deductibility of the expenses in contention to deal only with point 18.3.6 being the consideration of whether or not the intra-group services have actually been rendered, as the issue of the arms-length nature of the transaction is dealt with separately as an issue for consideration in this matter.

whether intra-group services have in fact been provided?

20.5.8 Provision B.1. of the OECD guidelines discusses the issue determining whether intra group services have been rendered. It sates the following as consideration of whether an intra group service has been rendered;

20.5.8.1 The benefit test i.e. the service provides an economic/commercial value

20.5.8.2 Should not be a shareholder activity

20.5.8.3 Should not be a duplicated service

20.5.8.4 Should not provide an incidental benefit

20.5.8.5 Should relate to a centralised service(s)

20.5.8.6 The form of remuneration provided for the service

20.5.9 In this judgment the Tribunal will consider only the consideration raised by the parties themselves in this determination which considerations are a) the benefit test, b) Duplicative services and c) Shareholder activities. It should be noted however that as far as the economic benefit consideration is concerned, it is an overriding consideration which will apply to all the other consideration and all types of management fees.

Duplicative services

20.5.10 In relation to Duplicative services, the Respondent in computing the Appellants tax liability had disallowed the expenses of **a**) Customer Service Centre SA sales, **b**) Customer Master, **c**) Debt Collection **d**) Sales Process, **e**) Procurement and **f**) Inventory scheduling, on the basis that they are duplicative services. The Appellant argued these services are not duplicative as they involve sophisticated infrastructure and processes not undertaken locally. They include opening new customer accounts, managing product prices, and debt collection.

20.5.11 The Respondent in contention maintained that the Appellant didn't provide sufficient new evidence to warrant changing their initial assessment. The said initial assessment entailed the Respondent arguing that certain of these functions e.g. services **a**), **b**), **c**) and **d**) above are performed in Eswatini and as such same should not be recharged to the Eswatini subsidiary. Further that there was no Service Level Agreement (“**SLA**”) detailing the services and proof supporting that the services were rendered. Lastly that all monthly invoices provided did not detail the services received or enjoyed by the Eswatini subsidiary.

20.5.12 The Tribunal when considering the arguments advanced by both parties considered the guidance that the OECD guidelines provide on duplicative services. The guidelines are clear that duplicative services are not to be allowed. The guidelines state that in general, no intra-group service should be found for activities undertaken by one group member, that merely duplicate a service that another group member is performing for itself.

20.5.13 The successive question would then be how to identify a duplicative service. The guidelines in this respect provide this noteworthy guidance;

> *"Any consideration of possible duplication of services needs to identify the nature of the services in detail, and the reason why the company appears to be duplicating costs contrary to efficient practices. The fact that a company performs, for example, marketing services in-house and also is charged for marketing services from a group company does not of itself determine duplication, since marketing is a broad term covering many levels of activity."*

Further that:

> *"**Examination of information provided by the taxpayer may determine that the intra-group services are different, additional, or complementary to the activities performed in-house.** The benefits test would then apply to those non-duplicative elements of the intra-group services. Some regulated sectors require control functions to be performed locally as well as on a consolidated basis by the parent; such requirements should not lead to disallowance on grounds of duplication."*

20.5.14 In this regard the determination is as to whether the costs listed as duplicative on examination of the information provided by the Appellant showed that the services were different, additional or complementary. In the main the Appellant denies that the services are duplicative and justifies the services alleged to be duplication as in fact necessary to the

Eswatini subsidiary. In respect of services **a**) to **d**) above the Appellant argued that the services are imperative for maintaining and obtaining new clients and the services other levels of the said activities and therefore not duplicative. In respect to service **e**) above, the Appellant submits that the service involves providing global and regional supplier details, negotiating discounts and facilitating training. In respect of service **f**) above the Appellant argued that these activities are integrated with the Appellants' parent company operations for efficiency and include inventory compliance processes, in particular that the ultimate aim is to streamline and supply bulk products to all customers including the Appellants Eswatini subsidiary as efficiently as possible.

20.5.15 It is the Tribunals considered view on the reading of article 7.11. of the OECD guidelines that the determining factors as to whether a service is duplicative (even if the service is *prima facie* duplicative), is whether the services are different, additional, or complementary to the activities performed in-house. In following the submissions made by the Appellant it is clear to the Tribunal that the services may indeed be complementary to the Appellant's Eswatini subsidiary and in that respect possibly justified.

20.5.16 However, as guided by the OECD that to rule out mere possibility and confirm the non-duplicative nature of a service it is imperative that the benefit test be applied. Article 7.11. of the guidelines clearly states that the benefits test would then apply to those non-duplicative elements of the intra-group services.

20.5.17 For this reason, the Tribunals' assessment of whether the above services are duplicative or not must as a matter of necessity involve the consideration of the benefit test. The benefit as outlined by article 7.6. of the OECD guidelines entails the question whether an intra-group service has been rendered when an activity is performed for one or more group members by another group member should depend on whether the activity provides a respective group member with economic or commercial value to enhance or maintain its business position. The

guidelines further clearly express that to arrive at the determination whether the group member receiving the intra-group service has benefited (economically or commercially) from the service will depend on the evidence presented to prove this benefit.

20.5.18 Article 7.6. of the OECD guidelines states that:

> *"It is essential, however, that reliable documentation is provided to the tax administrations to verify that the costs have been incurred by the service provider."*

20.5.19 It follows therefore that in determining the non-duplicative nature of a service the Appellant both show that the services are either different, additional or complementary and prove the economic benefit of the service through evidence being reliable documentation. It is Tribunal's view that this is well aligned with the discharging of the burden of proof of ITO as outlines in section 53. To that end it was wholly incumbent on the Appellant that further to explaining the complementary nature of the alleged duplicative service that it provides clear documentary evidence of the service.

20.5.20 The Tribunal finds the Appellant to have failed despite several opportunities and requests to provide documentary proof or sufficient evidence to prove the services to be non-duplicative in particular by failing to prove the economic benefit as required by article 7.11. and detailed by article 7.6 of the OECD guidelines.

20.5.21 Aside of the guidelines themselves it is held in international tax jurisprudence and judicial precedent that indeed it is an established principle that in dealing with issues of intra-group services the burden of proving the expense remains with the taxpayer and there must be evidence of the actual provision of the service and its benefit. In both the cases of ***Zimbabwe vs IAB Company*** [4]and ***Italy vs Gru Comedil s.r.l.***[5]

[4] Judgment No. HH 32-22 ITC 17/17)
[5] (Case No 6584/2024)

both of which deal with similar issues of intra-group service costs are particularly relevant and in summation ruled as follows*:*

20.5.21.1 While taxpayers have the right to structure their businesses as they see fit, the burden of proving the deductibility of expenses remains with the taxpayer.

20.5.21.2 For intra-group service costs to be deductible, the subsidiary must derive an actual utility from the remunerated service, and this utility must be objectively determinable and adequately documented.

20.5.21.3 A '*benefit test*' is required to verify whether the activity confers an advantage on the enterprise aimed at improving its economic or commercial position.

20.5.21.4 The mere existence of a service level agreement is not sufficient to justify the deduction of management fees. There must be evidence of actual service provision and benefit.

20.5.21.5 Invoices for management services should ideally itemise the services rendered to support the deduction claimed.

20.5.21.6 The assessment of whether a benefit exists should consider the company's organisational structure and its ability to perform the services on its own.

20.5.21.7 A comprehensive evaluation of evidence, including cost-sharing agreements, invoices, statements of account, and allocation criteria, is necessary to determine the deductibility of intra- group service costs.

20.5.22 In light of these principles, the following deductions are made:

20.5.22.1 ***Burden of Proof***

Both cases affirm that the burden of proving the deductibility of expenses lies with the taxpayer. This principle aligns with Section 53 of the Eswatini Income Tax Order. It was therefore incumbent upon the Appellant to therefore provide sufficient evidence to support its claimed deductions for management fees and other charges paid to its parent company.

20.5.22.2 ***Actual Utility and Benefit Test***

The ***Italy vs Gru Comedil***[6] case emphasises the need for a 'benefit test' to verify if the services provide an actual advantage to the recipient company. This principle is crucial in addressing the Respondent's objection regarding the lack of evidence of service provision or economic benefit. It was therefore necessary for the Appellant to demonstrate that each category of service charged by its parent company confers a tangible advantage to its operations. The OECD Guidelines (particularly paragraph 7.6) as mentioned above also stress the importance of demonstrating that intra-group services provide actual economic or commercial value to the recipient.

20.5.22.3 ***Objective Determinability and Documentation:***

Both cases stress the importance of adequate documentation. This principle is particularly relevant to the Appellant's appeal, as the Respondent has cited lack of evidence as a primary reason for disallowing the deductions. The Appellant had to provide comprehensive documentation that objectively demonstrates the nature and value of the services received.

20.5.22.4 ***Insufficiency of Service Level Agreements:***

The ***Zimbabwe vs IAB Company***[7] case goes on to further highlight that the mere existence of a service level agreement

[6] (Case No 6584/2024)

[7]

is not sufficient to justify deductions. This principle supports the Respondent's position that more substantial evidence is required beyond contractual arrangements.

20.5.22.5 ***Itemised Invoices:***

The Zimbabwe case suggests that invoices should ideally itemise the services rendered. This principle relates to the Respondent's objection regarding the lack of detailed evidence. The Appellant should have strived to provide itemised invoices or equivalent detailed documentation of services received.

20.5.22.6 ***Organisational Structure Consideration:***

The ***Italy vs Gru Comedil***[8] case indicates that the assessment should consider the company's organisational structure and its ability to perform the services independently. This principle is relevant to Appellant's argument that it benefits from group synergies and centralised functions provided by its parent company. It was therefore imperative for the Appellant to show why the services could not be independently performed by the Appellants as a subsidiary and required the parent company's intervention as part of the benefit test.

20.5.22.7 ***Comprehensive Evaluation of Evidence:***

The Italy case emphasises the need for a holistic evaluation of all available evidence. This principle supports the submission advanced by the Appellant for a more thorough consideration of the evidence it has provided and may provide in the future, it is only unfortunate they were unable to provide this sufficient evidence to evaluate.

[8] (Case No 6584/2024)

20.5.23 In the above regard, it is the Tribunals considered view that central to the enquiry of whether a service is duplicative, is the concept of "utility" meaning the actual use value of the services. *In casu* this denotes that the Appellants subsidiary must derive an actual utility from the remunerated service and this utility must as a matter of necessity be objectively determinable and adequately documented.

20.5.24 It is therefore most essential that this utility is proven thoroughly. The Tribunal cannot be expected to simply accept a bare explanation of utility not supported by clear evidentiary proof, to do this would be entirely remiss of the Tribunal and would open the gate to all kinds of tax avoidance arrangements which simply can be explained away. Therefore, the essential nature of proof cannot be discounted.

Shareholder activities

20.5.25 The Tribunal proceeds to the shareholder activities, the Respondent in computing the Appellants tax liability had disallowed the expenses of **a**) Customer Service Centre SA sales, **b**) Customer Master, **c**) Debt Collection **d**) Sales Process, **e**) Inventory scheduling and **f**) Commercial Corne Coetzee, on the basis that they are shareholder activities. The Appellant argued these services are not shareholder activities as they do not fall within any of the categories that the OECD lists as shareholder activities.

20.5.26 The Respondent in contention submitted that these activities; while not befitting the exact example in the OECD guidelines, they still qualify as shareholder activities because they are performed solely due to the Appellant's parents company ownership interest as subsidiary. The Respondent in its papers submitted that the qualification of these services being shareholder activities is that they are activities which the Appellants parent company (a member of the company group) performs for the Appellant as a subsidiary (another member of the group) solely because of its ownership interest in the other group member.

20.5.27 In further detail the Respondent explained that in respect of services **a**) – **d**) which are; **a**) Customer Service Centre SA sales, **b**) Customer Master, **c**) Debt Collection **d**) Sales Process, in accordance with the evidence gathered in the course of the audit conducted by the Respondent it was gathered that these functions or services are done by the Appellant's parent company merely to monitor its own investment interest in the Appellant as a subsidiary. This was stated in paragraph 30.3 of the audit outcome letter of the audit engaged by the Respondents Audit division. Similarly in respect of service **e**) Inventory scheduling, the audit finding as per para 30.11 of the audit outcome) this function was done by the Appellant as a subsidiary and the Appellant's parent company involvement in this service was for the purpose of the reporting and monitoring shareholder interests (i.e. the Head office). Lastly in respect of service **f**) Commercial Corne Coetzee the audit revealed that (as per para 30.13) it was noted that Corne Coetzee was a company director of the Appellant's parent company and would convene meetings with Appellants country director as a subsidiary, and constant meetings were observed as being for purposes of Corne Coetzee reporting and investment interest by the Appellants parent company.

20.5.28 Noteworthy in this regard is that at no point does the Appellant dispute the audit findings per finding and only made the blanket statement at the hearing of the matter Corne Coetzee is related to managing, maintaining the business units to achieve a uniform approach and improving the customer experience. It is the Tribunal's considered view that, the Respondent's evidentiary findings per its audit remained uncontroverted.

20.5.29 The Tribunals analysis of shareholder activities was guided by the OECD guidelines which describe shareholder activities in article 7.9 as;

> *"Such an activity would be one that **<u>a group member (usually the parent company or a regional holding company) performs solely because of its ownership interest in one or more other group members</u>**, i.e. in its capacity as shareholder."*

20.5.30 Further to which, OECD guidelines go on to express the manner in which typical shareholder activities are determined. It guides that the two critical elements to consider when assessing shareholder activities is firstly, whether an independent company be willing to pay for the service or perform the same service for itself, and secondly whether the service is being performed solely because of the person performing that service has an ownership interest in the company for which the service is being rendered.

> *"Whether these activities fall within the definition of shareholder activities as defined in these Guidelines would be determined according to whether under comparable facts and circumstances the activity* ***is one that an independent enterprise would have been willing to pay for or to perform for itself****."*

Further that;

> *"Where activities such as those described above are performed by a group company* ***other than solely because of an ownership interest in other group members****, then that group company is not performing shareholder activities but should be regarded as providing a service to the parent or holding company to which the guidance in this chapter applies."*

20.5.31 On the reading of the guidance by the OECD Guidelines, the Tribunal has come to the consideration that a distinguishing factor that identifies a shareholder activity is that the activity should be in "pursuit" of the ownership interest. This means that the activity must have the overall aim to further that interest. Such furtherance could be the protection of that interest, developments of that interest etc. The ultimate outcome therefore of the service must be one that benefits that interest.

20.5.32 In light of this consideration, the Tribunal's determination sought to identify whether the alleged shareholder was rendered purely on an operational basis or had the underlying aim to serve the ownership

interest of the Appellant's parents' company. The Tribunal has noted that, on all submissions made during the hearing, the only submissions supported by evidence is that of the Respondent through audit findings, which evidence remained uncontroverted.

20.5.33 The Appellants' attention is drawn in this regard to the fact that on this evidence being presented it become incumbent upon them to rebut this report by advancing clear evidence as to why the audit was not credible. Yet even at the hearing of this matter the Appellant did not come to clearly dispute the Respondents audit findings. The Tribunal finds no reason to dispute the credibility of the audit report, which clearly submits that the extent of the Appellant's parents' company's involvement in the listed activities (under shareholder activities) is only to the effect of monitoring and reporting on the Appellant's parent company's investment interests. It is to be taken that this is to ensure that the Appellant's parents company's investment is well protected and that it obtains its return on investment.

20.5.34 The Tribunal therefore sees no reason to dispel the Respondents' finding that the services under shareholder activities are indeed as such. Particularly in the absence of any evidence qualifying them as non-shareholder activities.

20.5.35 It is the Tribunals consideration that the correct approach to the present case was to distinguish between those services that directly contribute to the Appellants' operations and those purely related to the Appellants' parent company's investments interests, with the view to allow the latter and disallow the former. However, in the absence of concrete evidence of the operational nature of these services the Tribunal has no reason to disagree with the Respondents' findings.

The benefit test

20.5.36 To round up the first main consideration under article 7.5. which is whether the service has in fact been provided, is the consideration of

the benefit test which is discussed under article 7.5. (B.1.1) of the OECD Guidelines. Briefly, the benefit test answers the question whether a service provided confers an economic or commercial benefit to the receiving company in the company group. This serves to satisfy that in intra-company service has indeed been rendered for which the company receiving the service may seek a deduction.

20.5.37 The OECD guidelines guide that;

> *"the question whether an intra-group service has been rendered when an activity is performed for one or more group members by another group member should depend on whether the activity provides a respective group member with economic or commercial value to enhance or maintain its business position."*

Further that;

> *"This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity in-house for itself. If the activity is not one for which the independent enterprise would have been willing to pay or perform for itself, the activity ordinarily should not be considered as an intra-group service under the arm's length principle."*

20.5.38 As a Tribunal, we are of the considered view that the benefit test as outlined in the OECD guidelines presupposes that the Appellant was obligated to prove the economic value it gained from the management services for which fees were charged. The proof if given would have been assistive in ascertaining whether an independent enterprise in comparable circumstances would have been willing to pay for the activity. Or if performed the independent enterprise or would have performed the activity in-house for itself.

20.5.39 However, the Appellant when called upon to adduce proof would simply explain the nature of the activity it provides and not the actual

economic benefit it derives from the service. This can be seen from paragraph 3.4. their objection letter dated 17 November 2021, and paragraph 3.3 of their Notice of Appeal letter dated 31 March 2023, where they simply explain the types or the nature of the services and do not address at length the economic benefits they confer. The Appellants' closest attempt to detailing the benefit that the services provide can be found in paragraph 6.2 of the objection letter and paragraph 5(b) of their Appeal letter, where they state that;

> *"...note that the profits made by the subsidiary prior to management fees, was approximately SZL28,5 million (which represents a margin on sales of 29%.* ***This margin is inordinately high, and certainly would not have been achieved by the subsidiary on its own if it was a standalone, business operating independently****. more specifically, this margin does not consider all the processes performed and costs incurred by the head office in South Africa that gave rise to RATE/IT012/23 achieving the sales value and profits that it actually achieved."*

20.5.40 In the Tribunals' view, this allude a benefit being derived, however the failure for purposes of the benefit test is that the Appellant does not show in detail how the services contributed as a matter of fact to the inordinately high margin it suggests. This way if fails to meet the benefit test required in determining whether the services were actually rendered for the purposes of the OECD guidelines.

20.5.41 It is therefore the Tribunals' conclusive view in this regard that the Appellant has failed to prove that the management fees charged are charged for services actually rendered in terms of article 7.5 of the OECD guidelines. It proved to indeed be a challenge to establish from the documents submitted to the Tribunal whether these expenses in fact occurred, the Tribunal finds that the Appellants papers and oral submissions both only served to justify in writing why it claimed the expenses and why the services are legitimate as opposed to producing hard evidence of the delivery of the service.

20.5.42 Lastly the Tribunals' view was further aided by the considerations advanced under the UN Practice Manual on Transfer Pricing for Developing Countries (2017) ("**UN Practical Manual**") which places emphasis on the fact that regardless of international transfer pricing rules being correctly applied it is domestic law and its view on the expense and the deductibility thereof that prevails. The manual provides the following detail as to the deductibility of arm's length payments;

Firstly that;

> *It should be noted that the requirement that chargeable services be paid for on an arm's length basis is distinct from the question whether such arm's length payments are deductible under the domestic law of the associated enterprise receiving the service. Transfer pricing rules require the payment of arm's length transfer prices for chargeable services.*

However, it is;

> *Principles of domestic law are then applied to determine if such payments may be deducted by the associated enterprise making the payment in determining its taxable income.*

Therefore;

> *In some countries, although an expense may satisfy the arm's length principle, the deduction may be denied, in full or in part, by domestic rules restricting deductions.*

20.5.43 This view the Tribunal finds to be in direct alignment with Section 14 (1) of the ITO where it states that include such expenses incurred outside Swaziland in the production of the taxable income as the Commissioner may allow. This connotes the Respondents discretion to both allow or disallow expenses incurred outside Eswatini as is the case *in casu.* The Tribunal finds that based on the above analysis, the Respondent has appropriately exercised this discretion as the Tribunal

supports the view that in the overall the Appellant has failed to prove these expenses occurring outside Eswatini were incurred in the production of income.

20.6 ***As to whether the transaction or the intra-company services fees meet the requirements for an arms-length analysis for multi-national***

20.6.1 Both parties argue from opposing ends as to the management fees being charged on an arms-length basis. The Appellants' parent company argue in this regard that all management fees charged to its Eswatini subsidiary were charged according to the arms-length principle. While the Respondent argues in the main that the lack of evidence of the services having been rendered (owing to lack of evidence) simply makes it impossible to establish if indeed that charge was made in accordance with the arms-length principle.

20.6.2 It will be recalled that in respect of the special considerations for intra-group services, the OECD guidelines specifically set out that the two main considerations to be made; one issue *is whether intra-group services have in fact been provided*. The other issue is what the intra-group charge for such services for tax purposes *should be in accordance with the arm's length principle*.

20.6.3 It is therefore stated that upon determination of "whether an intra-group has in fact been provided" the subsequent enquiry becomes whether or not the service was charged in accordance with the arms-length basis. The article 7.19 of the guidelines states that what the arms-length principle looks like in specific relation to intra-group services is;

> *"This means that the charge for intra-group services should be that which would have been made and accepted between independent enterprises in comparable circumstances."*

Consequently,

> *“such transactions should not be treated differently for tax purposes from comparable transactions between independent enterprises, simply because the transactions are between enterprises that happen to be associated.”*

20.6.4 The OECD guidelines advise that for purposes in respect of intra-group services as there need to be an “arrangement” that the group’s members put in place to charge each other for services they offer to each other. In this regard the OECD guidelines state the following:

> *“B.2.2. Identifying actual arrangements for charging for intra-group services*
>
> *7.20. To identify the amount, if any, that has actually been charged for services,* ***a tax administration will need to identify what arrangements, if any, have actually been put in place between the associated enterprises to facilitate charges*** *being made for the provision of services between them.”*

20.6.5 The above being sufficiently clear and needing no further elucidation, one moves to consider the elements considered in identifying an appropriate arms-length for intra group services. The OECD guidelines advises that two main methods may apply in this regard, the first being Direct Charge methods and the second being Indirect Charge Methods.

20.6.6 The Appellant in advancing its case has stated that it had utilized the indirect charge method it charges for its management fees. In particular that the fees it charged represented a percentage of the profits attained by the Appellant’s Eswatini subsidiary. This they sated is a “revenue-based allocation key”.

20.6.7 It is understood this type of charging arrangement falls within the scope of the indirect charge methods at discussed in article 7.23. Of the OECD Guidelines. The guidelines state that indirect charge method entails multi-national enterprises finding alternative of utilizing cost allocation and approximation methods which often necessitate some degree of estimation or approximation as a basis for calculating an arms-length charge.

20.6.8 The Appellant justified the selection of this allocation key by stating firstly that a taxpayer should be allowed to choose the easier allocation key over more sophisticated ones that is difficult to implement and manage. Further that, when choosing an allocation key, a balance needs to be struck between theoretical sophistication of the key. The Appellant argued that different allocation keys do not necessarily require different allocation keys, instead a single allocation key may also be appropriate to allocate the cost associated with various services.

20.6.9 Lastly, the Appellant alleged that in this regard, the benefit of the doubt should lie with the taxpayer (meaning the taxpayer does not need to prove the allocation keys appropriateness). Instead, the taxpayer should merely explain the reason behind choosing a particular allocation key. To this end the Appellant submitted that the revenue-based allocation key is objective and in line with their business, as such should be accepted as the selected allocation for such services.

20.6.10 In advancing its case at the hearing of the matter the Appellant made the following example as to the appropriateness of the key for their organisation

> *"Callous is a Tax Manager that provides services to South Africa and numerous geographies across the continent. He is spending time on RATE/IT012/23's Business today and that will come through as a management fee. Now those of us who were auditors know about time sheets we do them every day, but people in the commercial world don't keep time sheets. It just becomes what is a fair and reasonable way to allocate our shared costs. Revenue is one of many keys that you can use."*

20.6.11 The Respondent categorically contended this method stating in the case of the Appellant it could not be established that the eventual charge was in accordance with the arms-length principle as alleged by the Appellant. Indeed, the Respondent went on to disallow certain of the expenses in the management fee for the very reason of the allocation key being inappropriate. These were **a**) Information Technology, **b**) Finance SA General Accounting, Accounts payable, Tax, Treasury and financial Management) and **c**) Legal and Secretariat costs. The Respondent rejected the revenue-based allocation key as being appropriate to allocate the appropriate cost charged for these services in relation to its Eswatini subsidiary.

20.6.12 The Respondent in more detail stated that, in respect of the IT fees, best practice is for instance to charge based on the usage, in terms of the Legal and Secretariat fees the appropriate allocation would have been the actual cost of the service as decided by the head office as this is quantifiable. Lastly that in respect of Finance fees, that there was no proof of the service under this allocation fee being rendered.

20.6.13 To better weight the arguments of the two parties in dispute it is worth considering the guidance of the OECD guidelines as to the best way in which to develop cost allocations are for intra-group services. A first consideration would be one raised by the Appellant itself, which is found in article 7.23 of the OECD guidelines and states the following:

> *"While every attempt should be made to charge fairly for the service provided, any charging has to be supported by an* ***identifiable and reasonably foreseeable benefit****. Any indirect charge method* ***should be sensitive to the commercial features of the individual case*** *(e.g. the allocation key makes sense under the circumstances),* ***contain safeguards against manipulation*** *and* ***follow sound accounting principles****, and be capable of producing charges or* ***allocations of costs that are commensurate with the actual or reasonably expected benefits*** *to the recipient of the service"*

20.6.14 Further on article 7.25 of the OECD guidelines advises that;

> *"The allocation should be* ***based on an appropriate measure of the usage of the service that is also easy to verify****, for example turnover, staff employed, or an activity-based key such as orders processed.* ***Whether the allocation method is appropriate may depend on the nature and usage of the service****. For example, the usage or provision of payroll services may be more related to the number of staff than to turnover, while the allocation of the stand-by costs of priority computer back-up could be allocated in proportion to relative expenditure on computer equipment by the group members."*

And that;

20.6.15 Two critical issues emerge on the consideration of the OECD guidance, the first being that an allocated cost must relate to a **realizable (or foreseeable) benefit** and the cost allocation must be able of some level of verification that enables the revenue administration (should the need arise) be draw the correlation between the value of the service and the cost so as to establish that the cost is indeed commensurate with the said benefit. The guideline further points the need for the person claiming a deduction for this cost to be able to demonstrate that services have been provided.

20.6.16 In this regard the Tribunal having scrutinized the OECD guidelines and considered the submissions made by both parties, is inclined to align with the Respondents submission that in absence of an SLA or any other documentary proof for that matter the allocation key becomes questionable. In the sense that without any information given as to the nature of the chosen allocation key the tax administration is unable to establish that the allocation is based on an appropriate measure of the usage of the service that verifiable. The difficulty this pose is that neither the Respondent nor the Tribunal is placed in a position where they can determine if the allocation key is:

20.6.16.1 In respect of an identifiable and reasonably foreseeable benefit.

20.6.16.2 Is sensitive to the commercial features of the individual case e.g. the allocation key makes sense under the circumstances)

20.6.16.3 Contain safeguards against manipulation

20.6.16.4 Follows sound accounting principles, and

20.6.16.5 Is capable of producing charges or allocations of costs that are commensurate with the actual or reasonably expected benefits.

20.6.17 Which the OECD guidelines advise should be elements that are present. While it is unfortunate that the Appellant does not indicate the authority from which it bases the assertion that:

"the benefit of the doubt should lie with the taxpayer meaning that the taxpayer does not need to prove the allocation keys appropriateness. Instead, the taxpayer should merely explain the reasoning behind choosing a particular allocation key."

20.6.18 This reasoning in the Tribunals defies logic and is in stark contradiction with the OECD guidelines, for this reason the Appellants submissions as to the allocation key finds no application and fails.

The Tribunal goes on now to consider the allegation of the transaction satisfying the claim by the Respondent it is an avoidance scheme or arrangement for purposes of the Eswatini Income Tax Order;

20.7 ***As to whether the transaction in question under which the management fees were charged is an avoidance arrangement or transaction for purposes of Section 65 of the Income Tax Order***

20.7.1 As an overall determination the Respondent case is in terms of the Eswatini ITO in particular Section 14 of the deductibility of expenses in the production of income, on which it denied the deduction of management fees as claimed by the Appellant, and further Section 65 of the ITO, in which it alleges that the transaction in which the Appellant's parent and subsidiary companies charge each other management fees, meets the requirements for a Section 65 arrangement.

20.7.2 Elucidated this is a tax avoidance transaction. Section 65 is the anti-avoidance provision embedded in the ITO and reads;

*"**Transactions, operations or schemes for purposes of avoiding or postponing liability for or reducing amounts of taxes on income.***

65. (1) If any transaction, operation or scheme (whether entered into or carried out before or after the commencement of this Order, including a transaction, operation or scheme involving the alienation of property) ***has been entered into or carried out which has the effect of avoiding or postponing liability for any tax, duty or levy or income*** *(including any such*

tax, duty or levy imposed by any previous law), or of reducing the amount thereof, and which, in the opinion of the 116

Commissioner, having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out –

*(a) was entered into or **carried out by means or in a manner which would not normally be employed** in the entering into or carrying out of a transaction, operation or scheme of the nature of the transactions, operation or scheme in question; or*

*(b) **has created rights or obligations which would not normally be created between persons dealing at arm's length** under any transaction, operation or scheme of the nature of the transaction, operation or scheme in quest"*

20.7.3 The Tribunal takes the view in the above regard that in the current discussion and specifically in relation to Section 65 (1) (b), this judgment in dealing with the second issue for determination, being the arms-length analysis, has dealt with this issue at length and to address here again would be tautological.

20.7.4 Suffice it to say therefore that the Appellant having failed to adduce evidence that the manner in which the management fees charged between its parent and subsidiary company is accordance with the arms-length principle under an enquiry guided by the OECD guidelines, by extension should fail in the domestic legislation as the arms-length principle is universal. For this reason, the Tribunal will import that determination as made above and take it that indeed the transaction in question has satisfied the requirements of Section 65 (1)(b) of the ITO.

20.7.5 This leaves the Tribunal with the determination only of Sectio 65 (1) (a) of the enquiry as to the avoidant nature of this transaction. Noteworthy in this regard is, unlike most jurisdictions of the world Eswatini has not developed a comprehensive General Anti-Avoidance Rule ("**GAAR**") which is a rule developed to better decode and guide a countries anti-

avoidance enquiry. Further, there is barely any jurisprudential guidance in this regard for Eswatini.

20.7.6 For this reason, the Tribunal will align itself with the views of Visram J, in the ***Unilever Kenya Ltd*** case where he stated that;

> *"We must be prepared to innovate, and to apply creative solutions based on **lessons** and **best practice** available to us. That is indeed how we will develop, and our jurisprudence will be enhanced. And that is how we shall encourage business to strive in our country. Therefore, I cannot ignore time tested experiences and the best practices of others… "*

20.7.7 It must recall that the Tribunal will limit its enquiry to the satisfaction of the requirements of Section 65(1)(a) to establish whether the transaction was entered into or carried out by means or in a **manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transactions, operation or scheme in question**.

20.7.8 The Tribunal had the occasion to consider international approaches to the consideration of the above requirements and noted that other country legislations have the requirement of a "transaction whose main or sole purpose is to obtain a tax benefit" rather than one executed in an abnormal manner as in the Eswatini case. However, the South African GAAR which is enacted in pursuance of Section 103 of the South African Income Tax 58 of 1962 ("the **South African Income Tax Act**") was guiding in this regard. Section 103 (1)(i) reads as Section 65 (1) does and similarly the requirement of its Section 80A(a) to (c) of the GAAR.

20.7.9 The South African considers this requirement through a two-stage enquiry which considers Firstly, the element of the "means or manner not employed" and secondly the "rights or obligations not normally created by similar transaction".

In respect of means or manner not employed (s 80A(a)(i))

20.7.10 Stinglingh *et al* in Silke on South African Income Tax (2022) state that this element concerns itself more with the methods the business employs in arriving at a certain transaction as opposed to its purpose. It is suggested that the test does not require that an arrangement have a business purpose but rather that the method or manner in which it is entered into should be normal in a business context.

20.7.11 This it is stated entails engaging a comparison the way in which the taxpayer's transaction in question is carried out against how the way in which other transactions would normally be carried out. It is considered that this requirement would be met if the means or manner in which the transaction is carried out or entered into would not normally be employed for bona fide business purposes (in the transaction is in the context of business) or any other purpose (if not in the context of a business) other than to obtain a tax benefit. Simply put the key question in this regard is whether the means employed are in pursuit of a tax benefit or not.

In respect of rights or obligations not normally created (s 80A(c)(i))

20.7.12 In respect of this question to be considered is that of rights and obligations not normally created existing in a particular transaction. Though for purposes of the GAAR limited commentary exists on what would constitute creating "rights and obligations not normally created" between parties in an arms-length transaction. The case of ***Commissioner of Taxes vs Ferera***,[9] it was stated that;

> *"In interpreting the (anti avoidance) section the Court would bear this in mind and examine the mischief which the section attempted to prevent. It was designed to prevent the creation of abnormal or unnatural situations to the detriment of the fiscus (emphasis).*

[9] 1976 (1) PH T13 (HCR)

20.7.13 Further the case of Income ***Tax Case No 1699 63 SATC 175***[10], the court gave direction on the key consideration of the scrutiny of an abnormal transaction for purposes of section 103 of the Income Tax Act, by stating that a transaction as undertaken by a taxpayer would be abnormal when viewed in terms of a *genus of similar transactions*.

20.7.14 Thus, coupled with the reasoning in the Ferera case it is to be deducted that the transaction when viewed for abnormality should present with features that are unnatural for persons within a relation of that nature or a similar relation to conclude. Further that beyond being unnatural the transaction should be detrimental to the fiscus.

20.7.15 Having regard to the above, and as considered against the genus of similar possible transactions, the questionability that casts doubt in the naturality of the transaction doesn't lie so much in the description or nature of the services themselves but lies more in the fact that these are services provided and create a legal obligation for payment, in the commercial or business sense it should be natural that clear documentation that accounts for the service and the obligation to pay for it would exist. This if not captured in extensive contractual form would at least appear in bill of payment be it an invoice, claim etc, which would clearly show the required service and its corresponding cost and required payment.

20.7.16 More confusing to the Tribunal was that at the hearing of the matter when the opportunity to lead *viva voce* evidence as to the detail of the nature of the disallowed expenses, the benefit of the services and how the legal obligation to pay for them within a related party setting arises, further better justify the cost or charging method as opposed to mentioning it. Yet the Appellant spent a great deal of time explaining their procurement process and why it is s service processed through their head office as a justification for its "highly integrated service". While merely brushing over the certain of the other services that were

[10] SATC 175,

disallowed. Further when questioned as to whether a service level agreement was in place to guide the offer, delivery and payment of these services, the response was that this would typically occur at a high level not at the level of subsidiary companies.

20.7.17 It is the Tribunals understanding that indeed in matters where dealings at arms-length become the subject of enquiry the level of detail as to the evidence of the arms-length nature of related party dealings must be so clear as to leave minimal doubt to the enquirer as to the legitimacy of those dealings at arms-length. It is the Tribunals finding that the position of the Appellant as advanced by it both in its papers and the evidence it led at trial, cast a shadow of doubt as to the legitimacy of the transaction on an arms-length basis. To expect the Tribunal to understand this position would be to expect it to endorse a transaction that clearly falls short of the arms-length principle and set an extremely dangerous precedent for transaction that are brought under the microscope for non-arms-length dealings for taxation purposes, to the express detriment of the Eswatini economy and by extension its economy.

20.7.18 The Tribunal will therefore not endorse an Appellant not upholding the standard of proof required should parties choose to deal at arms-length. At the very least and by way of exemplification the Tribunal would expect for the purposes of an arms-length enquiry evidentiary documentation that will show the nature of the service, its value, the mode of delivery of the service, and the cost of the service on an itemised basis. While there would be no reason to motivate the arms-length nature of the service cost, this evidentiary documentation would suffice to guide the enquiry and that is the aim of the keeping of the proper evidence should the parties elect to deal at arms-length. Without this the Tribunal is left at a loss to find for the Appellant and as such the Appellant's case fails.

Ancillary matters: withholding taxes and sales markup

20.7.19 The Appellant made mention at the hearing of the matter of having paid withholding taxes in respect of the management fees as charged in line with Section 5A of the ITO. In this regard the Tribunal expects that it should follow that the expense of management fees, having been disallowed (as claimed pursuant to Section 14 of the ITO) entitles the Appellant to a full refund of any withholding taxes that were paid in respect of the said management fees. Further in making this refund the Respondent is expected to have regard to Regulation 20 (1) and (2) of the Revenue Appeals Tribunal Regulations of 2022 ("**the Regulations**"). The above being said this is merely the opinion of the Tribunal and in the view of the Tribunal warrants no ruling nor finding as this matter was neither advanced as a ground for appeal by the Appellant in lodging its appeal nor was it advanced nor deliberated extensively at the hearing.

20.7.20 The Tribunal is of the considered view that in the absence of detailed information or evidence and the benefit of the reasoning of the parties arguing for and against a particular issue, may not make a decision. As the Tribunal is bound by what is argued before it. In this regard the Tribunal echoes the words of Visram J in the ***Unilever Kenya*** case, when he stated:

> *"Unfortunately, I do not have the benefit of the reasoning by the local Committee and I am **bound therefore to consider this Appeal in terms of the arguments advanced before me**."* *(Tribunals emphasis)*

20.7.21 In respect to markup on sales, the Appellant raised at the hearing of the matter that the Respondent disallowed 10% markup on cost of sales which is not related to the management fee charge. This must be stated that it was the first time the Tribunal became aware of this issue, in both the Appellant's appeal papers filed with the Tribunal as well the Respondents' corresponding response, the issue is not addressed. As such it does not appear in both the Appellants grounds of Appeal and the Respondents' reasons for its decision in its Response. Given the

scanty manner in which it was swept over at hearing the Tribunal finds itself indisposed to deal with the matter extensively.

20.7.22 Therefore, in light of the arguments advanced before it in respect of the markup on goods sold, the Appellant argued that the Respondent disallowed 10% of the markup and the cost of sales, further arguing that this is the biggest single add back item that actually relates to the markup on the goods sold to Swaziland. In particular the **E 3 500 000,00** (*Three Million Five Hundred Thousand Emalangeni*) of the total add back amount was this markup. The Respondent on the other hand does not deal with the issue at all at the hearing.

20.7.23 In the above respect, the Tribunal finds itself indisposed to deal in and rule on this issue for several reasons. The first being that this matter only appears at the point of the hearing of the matter, and even at the hearing it was not addressed sufficiently. The argument at the hearing being that half of the entire add back amount relates to this issue, it would be expected that the matter being of such magnitude would attract extensive deliberation by the Appellant in its papers from the very beginning.

20.7.24 Secondly, the issue as to the markup is on actual goods sold. It stands to reason that those goods being physically attainable items, their sale would not be completed without traceable documentation, part of the documentation of which would relate to quantities, prices and conditions of sale. If indeed the computation of the add-back amount constitutes 50% of that add back amount this would be easily ascertainable fact. The Respondent would have been placed to make the computation of the markup based on the quantities sold having verified the unit prices and added the 10% markup, the Appellant alleges.

20.7.25 Lastly, if it indeed were the true position that the amount was related to a markup on goods sold, this would give rise to an actual transfer pricing enquiry this being a sale between related parties. For that reason it would follow that in the broader context of this matter the Appellant

would have deliberated at length or at least conclusively with mostly the arms-length nature of the markup, to ensure that it is removed from the total add back amount as computed by the Respondent and the Appellant should have further made a prayer to that effect in their Appeal, that is the reversal of the amount based on it being a legitimate arms-length price.

20.7.26 It is therefore of question to the Tribunal as to why, if indeed the markup form as much as half of the add back amount as it was not dealt with extensively from the beginning of the matter and why it was not addressed sufficiently in its papers along the parameters indicated above. Similarly to the stance taken on the issue of withholding taxes the Tribunal is led to dismiss this argument.

21) ORDER

In light of the foregoing the Tribunal therefore issues the following orders:

1. The Appellant's Appeal is hereby dismissed.
2. Each party to pay its own costs.

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MR MBUSO SIMELANE
PRESIDENT OF THE TRIBUNAL

I Agree.

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MS FIKILE DLAMINI
MEMBER OF THE TRIBUNAL

I Agree.

____

MR JOHN HENWOOD

MEMBER OF THE TRIBUNAL

I Agree.

____

MS NTOMBENHLE SHONGWE

MEMBER OF THE TRIBUNAL

I Agree.

____

MS KHETHIWE DLAMINI

MEMBER OF THE TRIBUNAL

I Agree.

____

MR SANDILE DLAMINI

MEMBER OF THE TRIBUNAL

Appearance

For Appellant:

1. Mr Rob Webb
2. Mr Callous Shikwambana
3. Ms Disebo Makhetha
4. Mr Paula Heaveney
5. Mr Paula Hoseni
6. Mr Bonginkhosi Shongwe
7. Mr Sibusiso Ndlangamandla

For Respondent:

1. Ms Bongekile Nsingwane
2. Mr Bongsipho Dlamini
3. Ms Ngibongiseni Mbaijana
4. Ms Diana Mzizi
5. Ms Mxolisi Madonsela