IN THE REVENUE APPEALS TRIBUNAL ESWATINI

JUDGMENT

CASE NO: RATE/IT/-017/2023

In the appeal between:

RATE/IT/-017/2023 **APPELLANT**

And

ESWATINI REVENUE SERVICES- **RESPONDENT**

THE COMMISSIONER GENERAL

Neutral Citation: *RATE v Eswatini Revenue Services (017/23) (2023) RATE 017* **(October 2023*)***

Coram: Mr Mbuso Simelane (President) Ms Fikile Dlamini, Ms Khethiwe Dlamini, Ms Ntombenhle Shongwe and Mr Sandile Dlamini (Members)

Heard: 7 July 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 12 September 2024

Summary: Tax *Issue: Source of Income from non-resident service provision- Withholding taxes on services rendered digitally without the service provider physical presence in Eswatini - Appellant contending that such services cannot attract both withholding tax and VAT reverse charge at the same time - Appellant further contending that where services are considered as imported into Eswatini only VAT reverse charge is leviable and no withholding tax due since the source of such services income is outside Eswatini. Respondent arguing that income on services was sourced in Eswatini.*

The Appellant issues credit, debit, and prepaid cards to its customers as part of its business - owns and rents MACHINES in Eswatini where its customers can use these cards for a range of financial services- Desk audit on Appellant's withholding tax obligations in respect of payments to Payment Network 1 and Payment Network 2 services for the 2019 to 2021 years of assessment - Value Added Tax (VAT) reverse charge obligations- the Respondent guidance letter- The Appellant's agreements with Payment Network 1 and Payment Network 2 were Eswatini source service contracts as defined in Section 59A of the Income Tax Order 1975 as amended ("hereinafter, the Order").

Respondent confirmed the definition of Eswatini source service contract requires an agreement which gives rise to Eswatini sourced income- source as the basis for levying of withholding tax in terms of the cited provision- Respondent guided by ***CIR v Lever Brothers Unilever***[1] *- Establishment of principle to determine source- the taxation of payments made for non-resident services established in legislation through section 59A of the Income Tax Order (hereinafter referred to as ITO)- withholding tax liability-The Respondent levied a VAT Reverse charge on the payments made to Payment Network 1 and Payment Network 2 on the basis that such services were imported- issued assessments in respect of both withholding taxes- VAT reverse charge- additional taxes amounting to E 37 175 595.07*

The Appellant conceded withholding tax (hereinafter referred to as WHT) on rental payments and VAT reverse charge (hereinafter referred to as VATRC) - payable and settled the amounts in respect of these assessments in full. The Appellant objected to the levying of withholding taxes on the payments to Payment Network 1 and Payment Network 2- payments were not derived under an Eswatini source services contract-Respondent's finding services were imported and therefore subject to VAT

[1] CIR v Lever Bros & Unilever Ltd 1946 AD 44, 14 SATC 1

meant that they were rendered outside Eswatini and therefore their source could not be in Eswatini- Appellant objected to the additional taxes levied on these withholding taxes- Respondent disallowed the objection in its entirety.

JUDGMENT

---

1) The Appellant is a company duly incorporated under the Companies Act[2] of the Kingdom of Eswatini and provides financial services in Eswatini.

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[3]. 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 Respondent's 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 below; The Appellant seeks to appeal the decision of the Commissioner General to levy withholding tax on payments made to Payment Network 2 and Payment Network 1. As a financial service provider (FSP), and as part of its business, the Appellant issues debit, credit as well as prepaid cards to its customers for a range of financial services, pursuant to an agreement it has with the two card companies. The Appellant owns and operates from rented premises countrywide MACHINES machines, where its customers can use these cards for different financial transactions. The Respondent conducted a withholding tax desk audit on the Appellant via a desk audit engagement letter dated 14th of February 2022 in respect of amongst other issues, payments made to Payment Network 1 and Payment Network 2 for card services for the tax years 2019 to 2021.

---

[2] Companies Act, 2009
[3] No. 1 of 2008

4) The Appellant responded to this enquiry via letter dated 7 April 2022, where they sought to clarify their position regarding the issues raised by the Respondent, in particular, the levy of withholding tax on the Payment Network 1 and Payment Network 2 payments. The Appellant's view on the issue was that no withholding taxes were due on these payments since they fell neither within Section 59A nor section 32B of the Order[4]. The Appellant further stated that in their view, section 59A was only applicable to contracts which gave rise to Eswatini source income whereas section 32 of the Act applied to royalties or management charges and these payments did not fall under either. Thus, they concluded that since Payment Network 1 and Payment Network 2 did not charge any royalties for the use of their trademarks and neither did they charge any management fees, there were no withholding tax implications. The Appellant then attached their agreements with the two card companies for the perusal and appreciation of the Respondent.

5) Via a letter dated 6 June 2022, the Respondent subsequently undertook a field audit on the Appellant's WHT And Value Added Tax Reverse Charge (VATRC) obligations on 20th June 2022. Pursuant to this audit, the Respondent issued a guidance letter dated 19th August 2022, concluding that the Appellant's agreements with Payment Network 1 and Payment Network 2 were Eswatini source service contracts as defined in section 59A of the ITO, to which withholding taxes were applicable. This guidance letter inter alia;

   a) Confirmed *that the definition of "Eswatini source service contract" required an agreement giving rise to Eswatini sourced income";*

   b) Confirmed *that the concept of source is the basis for the levying of WHT under this section 59A;*

   c) Made reliance on CIR v Lever Brothers & Unilever which established the principle to determine source;

   d) Confirmed *that the services supplied by Payment Network 1 and Payment Network 2 would have traditionally been considered to be sourced in the USA since that is where the originating cause of the income is located (the state where the work or effort for which the services for which the payments are made) thus aligning with the principles in the Lever Brother case on source or services rendered.*

[4] Income Tax Order 1975; https://www.ers.org.sz/LegalandPolicy/TaxLegislation

e) Confirmed *that in terms of this principle, the services and attendant payments would have been subjected to tax only in the USA, meaning that no WHT could have been levied on these payments.*

f) Confirmed *that the taxation of payments for non-resident services has been established in legislation through section 59A of the Order.*

6) Subsequent to this guidance letter, an Initial Audit Findings letter dated 14 September 2022 was issued by the Respondent which contrary to the assertions made in the guidance letter (re-captioned above), this letter changed the Respondent's position regarding the definition. Rather than stating that the definition of "Eswatini source service contract" requires "an agreement which gives rise to Eswatini sourced income", as they had stated in the guidance letter, the Respondent then stated in the initial audit findings letter that the definition of Eswatini source service contract required that "the execution of services shall generate income from Eswatini".

7) The Respondent further opined in this letter that Payment Network 1 and Payment Network 2 had been contracted by the FSP to offer card related services, and the FSP had been paying for the performance of these services and as such in accordance with the nature of the service rendered, the FSP should have withheld the applicable amount of tax from the payments made for these service providers.

8) The Respondent further elaborated that the imposition of the withholding tax was mandated by Section 59A of the Order, which defined Eswatini source service contract to be a contract whose principal objective is the performance of services that produce Eswatini source income. The Respondent continued to assert that if the origin of these payments received by these card service providers are within Eswatini borders, then tax is due and payable. A withholding tax assessment was raised based on these initial findings amounting to a total tax liability of E20 236 012 56 comprised of principal tax liability of E 16 863 343.80 and additional tax of E3 372 668.76

9) The Appellant responded to the Initial Audit Findings via a letter dated 14 November 2022, where they made their management comments to the Respondent's letter of findings dated 14 September 2022. In this letter they also registered their disagreement with the findings of the audit which sought to impose a WHT liability under Section 59A on the payments made to Payment Network 1 and Payment Network 2. The main thrust of their

management comments was that the source of the services rendered in relation to the Payment Network 1/Payment Network 2 fees was not in Eswatini and as a result, the payments could not be subject to WHT in terms of Section 59A of the Order. In the Appellant's view WHT was only leviable to non-resident payments in terms of this provision where:

a) *the principal purpose of the contract is the performance of services, and*
b) *any goods supplied under the contract are incidental, and*
c) *the service is performed in Eswatini.*

10) It is particularly on the last aspect, the Appellant based their objection on, that in their interpretation of S59A, the services were not performed in the country. Due to the nature of the Payment Network 1/Payment Network 2 payments, the Appellant went on to make their own exposition of what an "Eswatini Source Service Contract" was in response to the guidance given by the Respondent. They considered that receipts and accruals that had their true source (or deemed source) to be in Eswatini are those as defined by Section 11 (b) of the Order. The Appellant, rejecting the applicability of both the deeming and the WHT provision then highlighted the fact that since there was no definition of "source" in the Order, reliance should be placed on case law to answer the question of whether the amounts in question were sourced in Eswatini.

11) The Appellant relied on the case of ***CIR v Lever Bros & Unilever Ltd*** [5] the *locus classicus* on source for tax purposes. In this case, the court held that to determine the source of income, it was necessary to make an enquiry into two matters namely;

a) *What is the originating cause of the income?*
b) *And what is the location of that originating cause?*

12) The Appellant also cited the case *of* ***Commissioner of Inland Revenue v Hang Seng Financial Institution Ltd where*** the court held that one must look at the activity that the taxpayer has done to earn the profit in question. If the taxpayer has rendered a service, the profit will have arisen where that service was rendered, thus the location of the source is the place where the services are rendered. From a detailed analysis of these two cases, the Appellant

[5] 1946 AD 44, 14 SATC

thus concluded and made a case that the source of income is located at the place where the services are physically rendered.

13) Additionally, the Appellant referred to international tax principles, in particular, those enunciated by the *Organisation for Economic Corporation and Development* (*OECD) Commentary on the Model Tax Convention*, particularly, the commentary on Article 5 which provided as follows;

> *"It should be noted, however that all member States agree that a state should not have source taxation rights in income derived from the provision of services performed by a non-resident outside that State...that the mere fact that the payer of the consideration for services is a resident of a State, or that such consideration is borne by a permanent establishment situated in that State or that the result of the services is used within the State does not constitute a sufficient nexus to warrant allocation of taxing rights to that state"*

14) The Appellant then concluded that in light of the cited case law on source, and international tax principles, Section 59A could not find application on the payments made by it to Payment Network 1/Payment Network 2. The Appellant further argued that the Respondent had conflated the interpretation of source rules to bring services not physically performed in the country, within the purview of Section 59A of the Order, merely on the basis that such services were consumed and paid for within Eswatini. The Appellant further highlighted the fact that the construction of the wording of Section 59A placed reliance on the term "source", which unfortunately due to it not being defined in the Order, necessitated a reliance on case law, which in turn indicated that the source of these payments was not in the country.

15) The Appellant contended that the current source principles outlined in Lever Brothers case continued to be applicable in the interpretation of Section 59A and in that vein, since Payment Network 1 and Payment Network 2 had not performed any services in Eswatini, then the payments made in respect thereto could not have WHT implications. The Respondent had then responded to this objection via letter dated 26th January 2023, where they refuted the analysis, and conclusions proffered by the Appellant. Herein, the Respondent maintained its audit findings and submitted that Section 59A of the Order did not specify that the service must have been provided in Eswatini hence the Appellant could not confidently assert the physical presence requirement. The Respondent reiterated that the Order emphasized the primary purpose of service delivery rather than physical

presence. In addition to this the Respondent had further imposed a VAT Reverse Charge (VATRC) liability on these payments by virtue of them falling under the definition of exempt services under Section 19 of the VAT Act. The Respondent, thus maintaining the stance taken in their draft audit report findings, proceeded to issue a final audit report with WHT and VATRC assessment dated 27 January 2023, to the tune of E37 175 595.07

16) Subsequent to this assessment the Appellant lodged a formal objection thereto, on the grounds raised above via their letter of management comments dated 31 March 2023, whilst conceding that VATRC was payable on the imported services and paying such amounts. Other concessions which are not the subject of this appeal were also made and settled. Additionally, it was the Appellant's contention in their objection that the ERS had failed to fairly and objectively consider the submissions raised by the FSP through its management comments.

17) Amplifying its position, the Appellant made a lengthy exposition on the nature of the services rendered by Payment Network 2 and Payment Network 1, and that these were global technology companies providing financial institutions with a transactional processing network, for electronic card payments, in turn, enabling financial institutions to allow their clients to participate in the global payments industry. The Appellant further asserted that it was required to pay an access fee to the card companies for accessing their networks in order to process card payments under the agreement it had with each of these companies.

18) The Appellant further submitted that as an issuing FSP, this arrangement allowed its clients to purchase goods and services at retails POS and make withdrawals across the global networks. It was the Appellant's further submission that these services were primarily provided from the USA through a global presence of datacentres, innovation hubs and regional support offices none of which are located in Eswatini. An exception to this arrangement was Payment Network 1 which provided some treasury related services from the United Kingdom.

19) Coming to the fee structure, the Appellant explained in their objection that the card companies derived their income from the FSP through fees paid by clients based on the payments, value, number, and size of transactions processed. In addition to these fees were charged for license and membership costs, administrative fees, and value-added services. These were categorised into network services for the provision of a fully supported global

payments network; and miscellaneous fees which included risk management services, other value-added services, and penalties.

20) The Respondent disallowed the objection via their letter dated 14th August 2023 on the basis that the principle laid down by Lever Bros was superseded by the implementation of Section 59A of the Order which brought payments of such nature into the tax base by establishing source in Eswatini. As such the Respondent asserted that WHT was leviable on a gross basis on these payments. The Respondent's reasons for disallowing the objection and their stance on the issue will be more fully amplified below.

21) Discontented with the Respondent's 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 3rd October 2023.

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

22.1 The Appellant raised the Appeal on the following grounds:

22.1.1 Against the Respondent's finding that the meaning of "Eswatini source services contract" in terms of Section 59A referred to contracts under which the principal purpose is the performance of services giving rise to Eswatini source income and the contracts between the Appellant and Payment Network 1/Payment Network 2 fell within this definition.

22.1.2 The Respondent had confirmed that these services were imported services by levying VAT reverse charge on them, denoting that they were rendered from outside the country and lending credence to the non-applicability of Section 59A, if they were imported services, they could not give rise to Eswatini source income as contemplated by this provision.

22.1.3 Appealing against the Respondent's refusal to remit additional taxes of 20 percent on the basis that they were not liable to WHT and no intention to defraud or postpone payments or evade taxation.

23) Appellant's submission

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

23.1 The Appellant submits that these payments are not in terms of Section 59A (1) of the Income Tax Order of 1971 and that section does not apply so as to require any withholding tax against the amounts be paid. In support, the Appellant has relied on South African and foreign case law, and the United Nations Tax mannual ("UN") and the Organisation of Economic Co-operation and Development ("OECD") Commentary on the Model Tax Convention ("MTC") on "source" rules for income.

23.2 Appellant contended that the source of income received for services rendered is where the services are physically provided which in this case is not in Eswatini. In support of these submissions, Appellant have cited the *Lever Brothers* case which enunciated the source principle to mean that these services which Payment Network 1 and Payment Network 2 are supplying would have traditionally been considered to be sourced in the USA since that is where the originating cause of the income is located (the State where the work or effort for which the service for which the payments are made is being carried out), meaning no withholding tax could have been levied on these payments.

23.3 The Appellant submit further that in essence, the Respondents accept that the Payment Network 1 and Payment Network 2 services were provided from data centres and servers physically located outside Eswatini, hence the imposition of VAT reverse charges.

23.4 As such, Appellant submits that it correctly did not deduct WHT against the payments to Payment Network 1 and Payment Network 2 and that the Respondent has incorrectly imposed additional tax on the Appellant for not deducting WHT against the payments to Payment Network 1 and Payment Network 2.

23.5 Lastly in this vein, Appellant contends that it was not negligent or fraudulent and did not intend to evade or delay the payment of WHT. The Appellant correctly

did not deduct WHT on the payments to Payment Network 1 and Payment Network 2.

23.6 The Appellant should not have been subjected to additional tax of 20% and that Eswatini is a member of the OECD Inclusive Framework, the Respondents should thus recognise both the UN and OECD MTC source rules in domestic legislation.

23.7 Dissenting to this interpretation of S59A of ITO by the Respondent, the Appellant submits that Section 59A of the ITO however does not state that, in Eswatini, the source of income from services is the origin of the payment (i.e. the place from where payment for those services is made) nor does S59A state that all payments by Eswatini residents or made from Eswatini to non-residents of Eswatini are deemed to be from a source in Eswatini regardless of where the services are rendered.

23.8 According to the Appellant, the Respondent's interpretation of "source" gives rise to uncommercial outcomes. Any person in Eswatini making payments for foreign services consumed while physically in Eswatini would be liable to deduct WHT.

23.9 In this vein, they have also cited numerous case law and practical examples. Appellant submit that there is nothing in Section 59A of the ITO which indicates that "Eswatini-source income" means anything other than income from a source in Eswatini.

24) The Respondent's submission

24.1 The Respondent argues that "source" means source of payment. In this vein, Respondent submit that the Appellant is Eswatini resident and paid Payment Network 1 and Payment Network 2 from Eswatini therefore, the payments are Eswatini source income which are subject to withholding tax (WHT) under Section 59A.

24.2 In dissent, the Respondent submits that in Eswatini, the previously held principle established in case law that, the term "source" for tax purposes is premised on an understanding of "what is the originating cause of the income" and "where is

that originating cause located" ***(CIR v Lever Brother & Unilever),*** was superseded by the implementation of domestic legislation, through Section 59A of the Income Tax Order.

24.3 Respondent further submits that the intention of Section 59A was therefore to bring the payments for such services into the tax base, by establishing source in Eswatini on such payments, through the withholding at source on a gross basis on these payments.

24.4 Respondent further submits, in response to the increased use of digital services and other virtual means of delivering services which entailed the service provider not necessarily having to be physically present in a country when providing a service, Eswatini and other third world developing countries who are net importers of services had to enact relevant legislation to protect their tax base from these base eroding payments which also had an additional disadvantage of allowing for the deductibility of the service payments made to the non-resident service provider as an expense to the Eswatini resident importer of the service. Respondent did not however cite similar provisions from these other jurisdictions.

24.5 Respondent submits further that Section 59A is a catch all provision which was meant to cater for liability to withholding tax for all other service payments to non-residents for performance of services in Eswatini not already covered by the existing withholding tax levying provisions. The emphasis in this provision is on the liability to withholding tax due to a payment being derived by a non-resident.

25) Tribunal's Analysis

25.1 Having gone through the entire record of proceedings, the Tribunal upon consideration of the submissions made by the parties established that the parties' dispute emanates from a decision made by the Commissioner General of the Eswatini Revenue Service (the 'Respondent') finding that Section 59A of the ITO justifies the imposition of withholding tax on payments made to Payment Network 1 and Payment Network 2 for card services during the 2019 to 2021 tax years, by the Appellant, emphasising that the primary purpose of the arrangement is the provision of services.

25.2 Regarding the Respondent's findings, the Appellant contends that the payments made by the Appellant to Payment Network 2 and Payment Network 1 for card services do not constitute payments under Eswatini source services contracts as contemplated in section 59A of the ITO.

25.3 Therefore the issues for determination by the Tribunal are:.

25.3.1 Whether the payments made by the Appellant to Payment Network 2 and Payment Network 1 for card services were made under Eswatini source services contracts as contemplated in section 59A of the Income Tax Order (ITO).

25.3.2 Whether the 'source' of Payment Network 2 and Payment Network 1's income from card services rendered to the Appellant is the place from where the payment is made.

25.3.3 Whether the income from card services provided by Payment Network 2 and Payment Network 1 can be simultaneously subject to VAT reverse charges as 'imported services' and to withholding tax on the basis that it is from a 'source' in Eswatini.

25.3.4 Whether the imposition of additional tax of 20% under section 40bis (1) of the ITO is justified.

25.4 The Tribunal wishes to state at the onset that it stands guided in this matter by both the ITO and the OECD Model Tax Convention. The Tribunal recognises that OECD Model Tax Convention not binding, but that it does provide useful guidance on international tax norms. ***Article 7 of the OECD Model Tax Convention on Income and on Capital (2017)***[6] generally allocates the right to tax business profits to the country where the enterprise is resident, unless the enterprise has a permanent establishment in the other country. Article 7 reads as follows:

---

[6]https://www.oecd.org/en/publications/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en.html

Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State.'

26) As to whether the payments made by the Appellant to Payment Network 2 and Payment Network 1 for card services were made under Eswatini source services contracts as contemplated in Section 59A of the Income Tax Order (ITO).

26.1 The decisive point to this appeal is the meaning of "source" for purposes of the ITO and whether in light of such meaning, the payments by the Appellant to Payment Network 2 and Payment Network 1 for card services were made under an "Eswatini source services contract" as contemplated by S59A of the Order (the general withholding tax provision), which stipulates as follows;

"(*1) For the purpose of this section*

"Swaziland source services contract" means a contract (other than an employment contract) -

(a) under which the principal purpose of the contract is the performance of services which gives rise to Swaziland-source income; and

(b) where any goods supplied under the contract are only incidental to that purpose;

"Non-resident person" has the meaning assigned to it under section 59(1).

(2) A non-resident person shall be liable to withholding tax at the rate of fifteen percent on the gross amount of any payment derived by the non-resident under a Swaziland source services contract.

6) The tax withheld under this section shall be on account of the liability to tax of the non-resident person on the profits derived from the contract."

26.2 The Tribunal deems it necessary to briefly deal with this provision of Section 59A of the ITO. Section 59A of the ITO defines an 'Eswatini source service contract' as a contract whose principal objective is the performance of services that produce

Eswatini source income. Now the critical question for the Tribunal is whether the card services provided by Payment Network 1 and Payment Network 2 produce Eswatini source income.

26.3 In this judgment the Tribunal has considered the Respondent's Guidance Letter dated 19 August 2022 acknowledging that traditionally, these services would have been considered sourced in the USA, where the originating cause of the income is located, aligning with the principles established in ***Commissioner for Inland Revenue (CIR) v Lever Brothers & Unilever 1946***. However, the Respondent in its contention argued that Section 59A of the ITO establishes new rules for the taxation of payments for non-resident services.

26.4 In terms of the Appellant's objection, it is submitted that Section 59A could not find application on the payments made by it to Payment Network 1/Payment Network 2. The Appellant further argued that the Respondent had conflated the interpretation of source rules to bring services not physically performed in the country, within the purview of Section 59A, merely on the basis that such services were consumed and paid for within Eswatini.

26.5 The Respondent in contention maintained "source" means source of payment. Further that the Appellant is Eswatini resident and paid Payment Network 1 and Payment Network 2 from Eswatini therefore, the payments are Eswatini source income which are subject to withholding tax (WHT) under section 59A of the order.

26.6 The Tribunal is of the considered view that while it is true that domestic law can establish source rules, such rules must be clear and unambiguous. The Tribunal when considering the arguments advanced by both parties on the issue of source is of the view that section 59A does not explicitly redefine the source of income for international card services. It merely creates a category of contracts that may be subject to withholding tax. The mere fact that payment originates from Eswatini does not necessarily make the income Eswatini-sourced under established principles of international tax law.

26.7 The Tribunal finds it prudent to consider that ***Eswatini does not have a double tax treaty with the United States,***[7] where Payment Network 2 and Payment Network 1 are based. In the absence of such a treaty, we must rely on domestic law and general principles of international tax law to determine the appropriate tax tremachinesent of these transactions.

26.8 It is the Tribunal's considered view that on the examination of the OECD Model Tax Convention, ***Article 7 of the OECD Model Tax Convention on Income and on Capital (2017)***[8] generally allocates the right to tax business profits to the country where the enterprise is resident, unless the enterprise has a permanent establishment in the other country.

26.9 For that reason, it is the Tribunal's considered view that from the submission made in this case, there is no evidence to suggest that Payment Network 2 or Payment Network 1 have a permanent establishment in Eswatini. It is therefore essential that the permanent establishment is proven conclusively by the Respondent.

26.10 The concept of 'source' in international taxation is fundamental and has been extensively discussed in tax literature and case law. As noted by the OECD the source principle allows a State to tax income arising within its borders, regardless of the taxpayer's residence. The ***OECD (Chapter 2 Fundamental Principles of Taxation, 2014) provision*** [9] provides as follows

> *'A country applying a territorial CIT system subjects its residents to tax only on the income derived from sources located in its territory. This means that resident companies are taxed only on their local income – i.e. income deemed to have their source inside the country. Determining the source of business income is therefore key in a territorial system.'*

---

[7] https://www.oecd-ilibrary.org/taxation/prevention-of-tax-treaty-abuse-sixth-peer-review-report-on-treaty-shopping_2d9fe5a1-en

[8] https://www.oecd.org/en/publications/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en.html

[9] OECD, Fundamental Principles of Taxation (Chapter 2) 2014; https://www.oecd-ilibrary.org/fundamental-principles-of-taxation_5jxv8zhcggxv.pdf

26.11 In light of the above principles, the OECD statement emphasises that in a territorial tax system, companies are taxed only on income deemed to have its source inside the country. The Tribunal finds that the core income-producing activities of Payment Network 1 and Payment Network 2 occur outside of Eswatini, through their global payment systems. Therefore, following the OECD principle, this income should not be considered as having its source in Eswatini for tax purposes.

26.12 Further, the Tribunal directs its mind to the ***United Nations Conference on Trade and Development*** (***UNCTAD) Series on Taxation (2000)***[10] where it elaborates on 'source' taxation. The UNCTAD provides as follows:

> *'A jurisdictional conflict arises when a taxable event falls under the jurisdiction of two or more sovereign powers. These are generally the source countries and the countries of residence. The source country is where the activity is exercised, where the payer is resident, or where the property producing the income is situated. The country of residence is where the persons deriving the income or the owners of the property producing the income have their residence or domicile.'*

26.13 In our view, the UNCTAD statement defines the source country as 'where the activity is exercised, where the payer is resident, or where the property producing the income is situated.' While this definition provides multiple criteria, the Tribunal finds that in the context of international digital services like those provided by Payment Network 1 and Payment Network 2, the most relevant and appropriate criterion is 'where the activity is exercised.' The Tribunal decisively rejects the argument that the source of income should be determined solely by where the payment is made (where the payer is resident).

26.14 This interpretation is also supported by case law, particularly the landmark case of ***CIR v Lever Brothers and Unilever Ltd (1946)***, which established that the source of income is the 'originating cause' - in other words, where the income-producing work is done. The court in this case clearly established that the source of income is not where the contract is made or where payment is made, but rather where the

[10] UNCTAD Series. Taxation (Geneva, 2000), https://unctad.org/system/files/official-document/iteiit16_en.pdf

income-producing activities take place. This principle has been widely accepted in international tax jurisprudence.

26.15 In the case of digital services provided by global payment networks, the income-producing activities clearly take place where the systems are operated and maintained, not in every jurisdiction where a payment happens to be made. For the Tribunal to rule otherwise would lead to impractical and potentially unfair results, where the same income is taxed in multiple jurisdictions.

26.16 Furthermore, this interpretation aligns with the evolving understanding of digital economy taxation, as reflected in the ***Final Report of the OECD/G20 BEPS Project on Addressing the Tax Challenges of the Digital Economy (2015).***[11] While the Tribunal recognises the challenges posed by the digital economy, the OECD still emphasises the importance of significant economic presence in determining taxing rights.

26.17 The Tribunal has carefully considered the ***OECD's Final Report on Addressing the Tax Challenges of the Digital Economy (2015),*** particularly its discussion on significant economic presence. While this report proposes new concepts for taxing the digital economy, it also highlights the complexities and challenges in implementing such measures. The Tribunal finds that this report, rather than undermining its decision, actually supports its cautious approach in applying traditional principles of international taxation to the case at hand. The OECD emphasises that 'revenues will not be sufficient in isolation to establish nexus'. This aligns with our finding that the mere fact of payments originating from Eswatini does not create a taxable presence for Payment Network 1 and Payment Network 2 in the country.

26.18 The OECD suggests that significant economic presence should be based on factors evidencing 'purposeful and sustained interaction with the economy of that country'. This supports our emphasis on where the core income-producing activities occur, which in the case of Payment Network 1 and Payment Network 2, is primarily outside of Eswatini. The OECD recommends a multi-factor approach to establishing

[11] OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges of the Digital Economy (2015), https://www.oecd-ilibrary.org/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_5jrw8x0hdl42.pdf

significant economic presence. This underscores the inadequacy of relying solely on the origin of payments, as argued by the Respondent.

On reading of the guidance by the OECD, the Tribunal has come to the consideration that the OECD acknowledges difficulties in accurately identifying and measuring remote sales activities. This supports our cautious approach to expanding taxing rights in the absence of clear legislative guidance. The OECD's approach underscores the importance of considering international norms and principles in addressing digital economy taxation. This aligns with our consideration of broader international tax principles in reaching our decision. While proposing new concepts, the OECD report also demonstrates that international consensus on taxing digital services is still developing.

26.19 In light of these findings, the Tribunal concludes that while the concept of significant economic presence represents an evolving approach to digital taxation, it does not yet provide a sufficiently established basis for overriding traditional principles of international taxation. The OECD's cautious and nuanced approach to this concept reinforces our decision to rely on established principles of source and permanent establishment. Furthermore, even if we were to consider the concept of significant economic presence, the activities of Payment Network 1 and Payment Network 2 in Eswatini do not appear to meet the threshold of 'purposeful and sustained interaction' with the Eswatini economy as enPayment Network 1ged by the OECD.

26.20 This being the core income-producing activities – the operation and maintenance of the global payment systems – occurring outside of Eswatini. As a member of the ***OECD Base Erosion and Profit Shifting (BEPS) Inclusive Framework*****,** Eswatini has committed to implementing BEPS minimum standards. The services provided by Payment Network 1 and Payment Network 2 are quintessential examples of digital economy transactions, which often challenge traditional concepts of source and permanent establishment.

26.21 Therefore, our analysis of the OECD report strengthens our conclusion that the payments made by the Appellant to Payment Network 2 and Payment Network 1 for card services do not constitute payments under Eswatini source services contracts as contemplated in section 59A of the ITO. The source of Payment

Network 2 and Payment Network 1's income from these services remains outside of Eswatini, and thus, these payments are not subject to withholding tax in Eswatini.

26.22 In light of this, the Tribunal strongly affirms that for services of this nature, the source of income must be determined by where the core income-producing activities take place, not by the mere location of the payer. This interpretation provides a clear, consistent, and internationally aligned approach to sourcing income from global digital services.

26.23 Further, having reviewed the ***License Agreements*** between Payment Network 2 International Incorporated and the Appellant, it is clear that the services provided by Payment Network 2 are of a global nature. The agreement provides as follows:

> *'Payment Network 2 owns all right, title and interest in and to the trademark, trade name and service mark 'Payment Network 2' and marks utilizing that designation, including Payment Network 2 Electronic and Payment Network 2 Cash, and United States and worldwide registrations for such marks (the 'Payment Network 2 Marks')."*

26.24 It is therefore the Tribunal's conclusive view in this regard that this clause underscores the international scope of Payment Network 2's operations and intellectual property rights. The services provided are not limited to or specifically tailored for Eswatini but are part of a global payment system. While the Tribunal acknowledges the merit in some of the Respondent's arguments, particularly regarding the legislative intent behind Section 59A of the ITO, we find that the broad application of this provision to services performed entirely outside of Eswatini is not justified when balanced against international tax principles and bodies.

27) Whether the 'source of income' of Payment Network 2 and Payment Network 1's income from card services rendered to the Appellant is the place from where the payment is made.

27.1 The Respondent's position that the source of income is determined by the place of payment is not consistent with established principles of international tax law. The generally accepted principle, as reflected in the ***CIR v Lever Brothers and Unilever Ltd (1946)*** case, is that the source of income for services is where the services are performed. In this case, the card services provided by Payment Network 1 and Payment Network 2 are likely performed primarily through their international

networks and systems, which are not located in Eswatini. The fact that the payment originates from Eswatini does not alter the fundamental nature of where the services are performed.

27.2 The Tribunal acknowledges the principle that the source of income for services is where the services are performed as argued by the Respondent is consistent with the 'benefit principle' of taxation, which has been articulated by ***Schön in 'International Tax Coordination for a Second-Best World (Part I)' (2009) World Tax Journal.***[12] The Tribunal directs its mind to evaluating this principle which suggests that a country should have taxing rights when it provides benefits or infrastructure that enable the income-generating activity in the context of the appeal at hand. To evaluate this principle, the Tribunal directs its mind to Schön's analysis on application of the benefit principle in international taxation. The Schön's analysis on application of the benefit principle in international taxation provides as follows:

> *'The benefit principle is meant to justify income taxation with respect to the support granted by a country to the generation of income in its territory. This principle is in particular invoked by source countries to legitimise taxation in jurisdictions where the taxpayer is not resident but carries on all or part of his income-generating operations.'*

27.3 In the Tribunal' view, this supports the argument that the country where services are performed has a strong claim to taxing rights based on the benefits it provides. However, Schön also highlights the complexities in applying this principle in a globalised economy. He observes as follows:

> *'Nowadays, a business located in country A may well be supplied from country B, selling final products to country C. It seems to be more and more unfeasible to identify the benefits a company has received from a specific government or a defined market as compared to benefits received from other governments or markets.'*

27.4 This observation the Tribunal finds it particularly relevant to the case at hand, where Payment Network 1 and Payment Network 2's services are provided through

[12] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577035

global networks rather than being clearly localised in any single jurisdiction. Schön further elaborates on the challenges of quantifying benefits by detailing as follows:

> *'Even if it were possible to link the income-generating activity to a certain territory and the respective market, there is no reliable proportionality between the size of the income arising from a certain economic activity and the amount of public goods used to generate this income.'*

27.5 Accordingly, the Tribunal is of the view that the mere fact of payments originating from Eswatini does not necessarily justify source taxation, as the relationship between these payments and any benefits provided by Eswatini is not clearly proportional. Schön also addresses the interplay between the benefit principle and modern tax policy considerations as follows:

> *'Against this background, the benefit principle is not helpful when it comes to the allocation of income between different countries, as it does not take into account the volatile and personal nature of income as a conceptual basis. This becomes expressly clear if we compare the benefit principle with the mechanics of international tax competition.'*

27.6 The above analysis by Schön supports the Tribunal's approach of considering broader economic and policy factors beyond a strict application of the benefit principle. It suggests that while the benefit principle provides a useful starting point, it must be balanced against other considerations in determining appropriate allocation of taxing rights in complex international transactions.

27.7 In the case at hand, the services provided by Payment Network 2 and Payment Network 1 are predominantly performed through their global networks and systems, which are not located in Eswatini. This principle is further reinforced by several international cases and tax principles. The Indian Supreme Court's decision in ***Ishikawajima-Harima Heavy Industries Ltd. v. DIT Mumbai (2007) 288 ITR 408***[13] supports this view. The court emphasised that even in a composite contract, offshore services should be treated separately for tax purposes. The Court states as follows:

[13] Ishikawajima-Harima Heavy Industries Ltd. v. DIT Mumbai (2007) 288 ITR 408; https://indiankanoon.org/doc/245369/

> *In cases such as this, where different severable parts of the composite contract is performed in different places, the principle of apportionment can be applied, to determine which fiscal jurisdiction can tax that particular part of the transaction. This principle helps determine, where the territorial jurisdiction of a particular state lies, to determine its capacity to tax an event. Applying it to composite transactions which have some operations in one territory and some in others, is essential to determine the taxability of various operations.*
>
> ***Further, the Court held:***
> *'We, therefore, hold as under:*
> *(2) Since all parts of the transaction in question, i.e. the transfer of property in goods as well as the payment, were carried on outside the Indian soil, the transaction could not have been taxed in India.*
>
> *(3) The principle of apportionment, wherein the territorial jurisdiction of a particular state determines its capacity to tax an event, has to be followed.'*

27.8 The Tribunal is of the considered view that, the *ratio decidendi* clearly show that the Supreme Court of India supported treating offshore services separately and applying the principle of apportionment to determine taxability based on where the services were actually performed, even in composite contracts. Applying this ratio to the case of Payment Network 1 and Payment Network 2 suggests that the processing of transactions, which occurs primarily on servers outside Eswatini, should be considered separately from any ancillary services that might be performed within the country.

27.9 *In* ***Commissioner of Inland Revenue v Hang Seng Financial Institution Ltd***,[14] the Privy Council stated that for services, profit will have arisen or derived from the place where the service was rendered, or the profit-making activity carried on:

> *'The broad guiding principle, attested by many authorities, is that one looks to see what the taxpayer has done to earn the profit in question. If he has rendered a service or engaged in an activity such as the manufacture of goods, the profit will have arisen*

[14] [1991] 1 AC 306

or derived from the place where the service was rendered, or the profit-making activity carried on.'

27.10 In the context of Payment Network 1 and Payment Network 2's operations, this would point to the location of their main processing systems and networks, which are situated outside Eswatini. The principle of looking at where the actual service is performed, rather than where payment is received or where the customer is located, is also consistent with the approach taken in international tax treaties. The OECD Model Tax Convention, which forms the basis for many bilateral tax treaties, generally allocates the primary right to tax business profits to the country where the enterprise is resident, unless it has a permanent establishment in the other country.

27.11 While it's true that digital services present new challenges to traditional concepts of source, and there is a global trend towards recognising market jurisdictions in digital taxation, the fundamental principle of sourcing income where the value-creating activity occurs remains strong. In the case of Payment Network 1 and Payment Network 2, in our view, would primarily be where their global payment processing systems are operated and maintained, not in every jurisdiction where a card transaction occurs.

27.12 This interpretation in our view is practical. If every country where a card transaction takes place were to claim taxing rights over the entire income from that transaction, it would lead to multiple taxation and create significant compliance burdens for international payment processors. It is our considered view that such an approach would be contrary to the principles of avoiding double taxation and promoting international trade, which are cornerstones of international tax law.

27.13 The ***License Agreement*** between Payment Network 2 International Incorporated and the Appellant further supports the conclusion that the income-generating activities are performed primarily outside of Eswatini. The agreement grants a ***'non-exclusive license to use the Marks identified in the Summary of Licenses Granted… in the geographic areas set forth therein, solely in connection with the Program(s).'*** This indicates that the core services - the maintenance and operation of the global payment system - are performed by Payment Network 2 internationally, while the licensee (in this case, the Appellant) is merely granted permission to use the marks and system within a specified geographic area. This aligns with the principle

established in ***CIR v Lever Brothers and Unilever Ltd (1946)***, ***which held that the source of income is where the income-producing activities take place***. In this case, the income-producing activities, in our view are clearly centred around Payment Network 2's global operations, not within Eswatini.

27.14 The Respondent argues that despite limited physical nexus, the income received by Payment Network 1 and Payment Network 2 has an economic link to Eswatini. This concept aligns with emerging international tax principles, particularly those addressing the digital economy. However, the application of these principles must be balanced against existing international norms and treaty obligations. The ***OECD BEPS Project*** recognises the challenges in determining nexus and source for digital transactions. While it proposes new nexus rules based on 'significant economic presence as discussed by the Tribunal earlier, these are not yet widely implemented and must be carefully considered in the context of existing international agreements.

27.15 The Tribunal, therefore, finds it necessary to expand on its analysis of the concept of 'source' in relation to income from services. The Tribunal directs itself to cases drawn from various African jurisdictions that provide guidance on how to interpret and apply the principle of source in the context of cross-border service provision.

27.16 The South African courts have consistently held that the source of income from services rendered is the place where those services are physically performed. This principle is clearly articulated in several landmark cases as follows:

27.16.1 In ***CIR v Lever Brothers and Unilever Ltd (1946),*** the court established that the source of income is not where the payment is received, but rather the 'originating cause' of the income. The court held that this originating cause is 'the work which the taxpayer does to earn them, the *quid pro quo* which he gives in return for which he receives them.'

27.16.2 In ***Commissioner of Inland Revenue v Hang Seng Financial Institution Ltd,*** the court further clarified that 'one looks to see what the taxpayer has done to earn the profit in question. If he has rendered a service or engaged in an activity such as the manufacture of goods, the profit will

have arisen or derived from the place where the service was rendered, or the profit-making activity carried on.'

27.16.3 In ***ITC 837, 21 SATC 413 (1957)***,[15] Herbstein J stated explicitly that:

> *'In the case of personal services, the originating cause, i.e. the source, of the income resulting therefrom is 'the work the taxpayer does to earn it'. The next problem is to locate that source and in the case of personal services, the location of the source is the place where the services are rendered.'*

27.16.3.1 ***These cases establish clear principles that:***

27.16.3.1.1 Source is not determined by where the payment is received or where the contract is concluded.

27.16.3.1.2 The originating cause of the income is crucial - what work did the recipient perform to earn the payment?

27.16.3.1.3 For services, the source is located where the services are physically rendered.

27.16.4 The case of ***Tanzania Revenue Authority v Pan Africa Energy (Tanzania) Limited (Civil Appeal No. 146 of 2015)***[16] is particularly relevant to the case between Appellant and Respondent. The Tanzanian Court of Appeal held that withholding tax is not applicable to payments for services rendered outside of Tanzania. This decision was made despite arguments about territorial nexus based on where the payment originated or where the beneficiary of the services was located. The Court stated as follows:

[15] Cited and quoted in Labuschagne, T. 'Residence status and its Implications on Income and Capital Gains Tax'; https://researchspace.ukzn.ac.za/bitstreams/3c2c04d0-3ab5-47c6-818b-c11888b2f239/download

[16] Tanzania Revenue Authority v Pan Africa Energy (Tanzania) Limited (Civil Appeal No. 146 of 2015); https://tanzlii.org/akn/tz/judgment/tzca/2016/807/eng@2016-05-16

'Section 69(i)(i) makes a distinction between payments made by an individual person and that made by the government under section 69(i)(ii). Where the government is the payer, income tax is chargeable regardless of the place where the services are rendered. It is chargeable even when it is rendered outside the United Republic. This is not the case with section 69(i)(i). A private company like the respondent has no obligation to withhold tax where the services fee paid were for services rendered outside the country.'

27.16.5 It is the Tribunal's considered view that this ruling supports the principle that the location where services are performed is crucial in determining tax liability, rather than where payment originates or where the beneficiary is located.

27.16.6 A ***Namibian Special Court Case (Case No. TA 1/2011)***[17] further reinforces this principle. The court held that income received for services rendered outside Namibia (in this case, in Botswana and Lesotho) should not be included in the taxpayer's Namibian income"

'We find that the Respondent was wrong when it included in its assessment of the Appellant, the income received for his services rendered in Botswana and Lesotho, in that same should have been excluded from his assessment.'

27.16.7 This ruling supports the principle that the location where services are performed is crucial in determining tax liability, rather than where the payment originates or where the employer is based. The court further elaborated on this point as follows:

'There can, in my view, be no question that his division of time between Namibia, Lesotho and Botswana is 'part of a fixed and permanent modus operandi on his part in terms of which a substantial period of time as a regular pattern, in fact 60% of his time, is set aside by him for visits to the

[17] Namibian Special Court Case (Case No. TA 1/2011); https://ejustice.jud.na/High%20Court/Judgments/Tax/TA%201%202011%20%5B2011%5D%20NATACMD%20312%20(18%20October%202011).rtf

neighbouring territories of Lesotho and Botswana for the purposes of engaging in the income-earning activities there.'

27.16.8 This case the Tribunal finds to provide a strong precedent for the principle that income earned from services performed outside the country should not be subject to domestic taxation, even when the employer is based domestically.

27.16.9 The Tribunal finds it pertinent to also consider the High Court of Kenya decision in ***Seven Seas Technologies Ltd vs Commissioner of Domestic (Income Tax Appeal 8 of 2017 [2021] KEHC 358 (KLR)[18].*** This case considered the tremachinesent of payments for software licensing agreements in the context of withholding tax obligations. Seven Seas Technologies, under a software license agreement, purchased software from a US company (Callidus Software) for internal use and distribution to local customers. The Kenyan tax authorities issued an assessment claiming that payments under this agreement were subject to withholding tax as they constituted 'consideration for the use and right to use copyright in the literary work of another person.' The High Court of Kenya granted the appeal in favour of Seven Seas Technologies Ltd, setting aside the additional tax assessment, stating that:

> *'The Court finds that it is not disputed that copyright is transmittable by license, that payment of license fees as consideration of the right to use software falls within the definition of a royalty. However, an agreement would spell out the terms of any right to use or reproduce the copyright work or the license is to access copyrighted article. The annual subscriptions of licences do not confirm payment as royalty as defined refers to some device, formula or contraption which the user applies to make something else and in return for that advantage, the user must pay the original creator of the capital asset as described in Republic v Commissioner of Income Tax & anor [2005]eKLR supra.'*

[18] Seven Seas Technologies Ltd vs Commissioner of Domestic (Income Tax Appeal 8 of 2017 [2021] KEHC 358 (KLR); http://kenyalaw.org/caselaw/cases/view/225266/

27.16.10 This highlights the court's reasoning that while license fees can potentially be considered royalties, the specific terms of the agreement are crucial in determining whether the payment is for the right to use or reproduce the copyrighted work, or merely for access to a copyrighted article. In this case, the court found that the annual subscriptions for licenses did not constitute royalties as defined under Kenyan tax law. The Court's decision was based on the following key points:

27.16.10.1 ***Nature of Software Licensing:*** The Court, relying on the Indian Supreme Court decision in ***Engineering Analysis Centre of Excellence Private Limited v. Commissioner of Income Tax (2021),***[19] held that the licensing of software is essentially the sale of a physical object containing an embedded computer program, and therefore constitutes the sale of goods rather than the transfer of copyright.

27.16.10.2 ***No Transfer of Copyright:*** The Court found that Seven Seas Technologies did not acquire any partial rights in the copyright of the software. The payments were for the acquisition of software copies, not for the right to exploit the software copyrights.

27.16.10.3 ***OECD Model Tax Convention:*** The Court referred to the OECD Model Tax Convention, which suggests that payments in such transactions should be treated as business profits rather than royalties.

27.16.10.4 ***Distributor vs. Copyright User:*** The Court emphasised that Seven Seas Technologies was a vendor of copyrighted material, not a user of copyright, and therefore did not receive any right to exploit the copyright.

[19] Engineering Analysis Centre of Excellence Private Limited v. Commissioner of Income Tax (2021 SC 102); https://indiankanoon.org/doc/170521216/

27.17 The above being convincingly comprehensive, the Seven Seas Technologies case bears striking similarities to the case before the Tribunal:

27.17.1 ***Nature of Services:*** Like the software licensing in the Seven Seas case, the services provided by Payment Network 1 and Payment Network 2 to Appellant, are for the use of a global payment system, not for the transfer of copyright or intellectual property rights.

27.17.2 ***Business Model:*** Appellant, like Seven Seas Technologies, is essentially a distributor or user of a service, not an entity exploiting the underlying intellectual property.

27.17.3 ***International Standards:*** The Kenyan High Court's reference to the OECD Model Tax Convention aligns with our previous arguments about adhering to international tax norms.

28) Applying these principles to the case at hand, the Tribunal finds that the payments made by Appellant to Payment Network 1 and Payment Network 2 are not subject to withholding tax under Section 59A of the ITO. These payments are more appropriately characterised as business profits, which, in the absence of a permanent establishment in Eswatini, should not be subject to local taxation.

29) These precedents from various African jurisdictions strongly support the principle that the source of income for services is where the services are physically performed. In the case of Payment Network 1 and Payment Network 2, the services are primarily performed through their global networks and systems, which are not located in Eswatini. The Respondent's argument that the income has an economic link to Eswatini because the payment originates there is directly contradicted by these precedents.

30) As established in ***CIR v Lever Brothers*** and reinforced in subsequent cases, the source is not determined by where the payment comes from, but where the work is done to earn that payment. Further, the Tanzanian case is particularly instructive. Even though the beneficiary of the services was in Tanzania and the payment originated there, the court still held that withholding tax did not apply to services performed outside the country. This closely parallels our current case between Appellant and Respondent with Payment Network 1 and Payment Network 2.

31) As to whether the income from card services provided by Payment Network 2 and Payment Network 1 can be simultaneously subject to VAT reverse charges as 'imported services' and to withholding tax on the basis that it is from a 'source' in Eswatini.

31.1 The Appellants submit further that in essence, the Respondents accept that the Payment Network 1 and Payment Network 2 services were provided from data centres and servers physically located outside Eswatini, hence the imposition of VAT reverse charges. As such, Appellant submits that it correctly did not deduct WHT against the payments to Payment Network 1 and Payment Network 2 and that the Respondents have incorrectly imposed additional tax on the Appellant for not deducting WHT against the payments to Payment Network 1 and Payment Network 2.

31.2 The Respondent's position on the application of VAT Reverse Charge due to the Appellant's status as a supplier of exempt supplies under the VAT Act of 2011 is noted by the Tribunal. The Tribunal takes the view that the Respondent's position that the same income can be subject to both VAT reverse charges as 'imported services' and withholding tax as Eswatini-sourced income appears to be inconsistent. It is our view that, if the services are considered 'imported,' it logically follows that they are performed outside of Eswatini.

31.3 This in our view contradicts the assertion that the income is from a source within Eswatini for withholding tax purposes. The inconsistency in treating the same income as both 'imported services' for VAT and Eswatini-sourced for withholding tax purposes contradicts the principle of coherence in tax systems, as discussed by ***Thuronyi in 'Comparative Tax Law'.***[20] A coherent tax system should not simultaneously treat the same transaction as both foreign and domestic-sourced.

32) As to whether the imposition of additional tax of 20% under section 40bis (1) of the ITO is justified.

32.1 The Appellant submitted that it was unjust for the Respondent to subject them to additional tax of 20% and that Eswatini is a member of the OECD Inclusive

[20] Thuronyi, V. *Comparative Tax Law* (Kluwer Law International, 2003).

Framework the Respondent should thus recognise both the UN and OECD MTC source rules in domestic legislation. In contention, the Respondent further submitted the imposed VAT Reverse Charge (VATRC) liability on these payments was justified as per the VAT Act.

32.2 Given the complexity of the issues and the lack of clear legislative guidance on the tremachinesent of international card services under section 59A of the ITO Act, it would be unreasonable for the Tribunal to conclude that the Appellant intended to defraud or evade tax payment. Having regard to the above submission, it is the Tribunal's view that the imposition of additional tax under these circumstances is not justified.

32.3 The Tribunal has considered international tax on this matter and the findings are that the absence of a double tax treaty between Eswatini and the USA highlights the importance of adhering to internationally recognised principles of taxation. While countries have the sovereign right to determine their tax laws, deviation from accepted international norms can lead to double taxation and hinder international trade and investment.

32.4 The ***UN Model Double Taxation Convention between Developed and Developing Countries*** provides guidance on the taxation of technical services in ***Article 12A provides as follows****:*

32.4.1 *'Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State'.*

32.4.2 *However, notwithstanding the provisions of Article 14 and subject to the provisions of Articles 8, 16 and 17, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed ___ percent of the gross amount of the fees [the percentage to be established through bilateral negotiations].*

32.4.3 ***The term "fees for technical services" as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:***

32.4.3.1 *(a) to an employee of the person making the payment;*

32.4.3.2 *(b) for teaching in an educational institution or for teaching by an educational institution; or*

32.4.3.3 *(c) by an individual for services for the personal use of an individual.*

33) However, the Tribunal takes note that this article is not universally adopted and is not applicable in the absence of a treaty. Further, the services provided by Payment Network 2 and Payment Network 1 are more akin to business profits than technical services.

34) In the absence of a double tax treaty between Eswatini and the USA, we must rely on customary international law and generally accepted principles of international taxation. The International Court of Justice in the ***North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands, ICJ Reports 1969)***[21] recognised that widespread and representative participation in a convention might lead to a rule of customary law:

> *'With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.' (para. 73, p.42)*

35) The Court indicated that widespread adoption of a convention by states, especially those most affected, could lead to the development of customary international law, even without a long passage of time. This principle could potentially apply to widely adopted international tax practices, ***even in the absence of a specific treaty between two countries.***

36) Further, the principle of avoiding double taxation is widely recognised and can be considered a principle of customary international law. As stated by ***Avi-Yonah in 'International Tax as International Law' (2004, p.25)***[22]**,** there is a strong argument that the avoidance of double taxation has become part of customary international law:

---

[21] North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands, ICJ Reports 1969, p.3); https://www.icj-cij.org/node/103134

[22] Avi-Yonah, R. 'International Tax as International Law' (2004) *Law and Economics Working Papers, University of Michigan*;https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1006&context=law_econ_archive

> *'Many economists argue that countries should only give a deduction for foreign taxes rather than a credit. However, countries generally grant either an exemption for foreign source income or a credit for foreign taxes paid. Remarkably, in most cases (following the lead of the US) this is done even in the absence of a treaty. It is likely that at this point countries consider themselves in practice bound by the credit or exemption norm, and a country would feel highly reluctant to switch to a deduction method instead. Thus, arguably preventing double taxation through a credit or exemption has become part of customary international law.'*

37) The ***License Agreement*** explicitly states that Payment Network 2 'owns all rights, title and interest' to various marks and intellectual property. It further stipulates that any use of the marks 'inures to the benefit of the Exclusive Owner of that Mark.' This reinforces the notion that the payments made by the Appellant to Payment Network 2 are for the use of intellectual property and a global payment system, rather than for services performed within Eswatini.

38) The OECD Model Tax Convention, in Article 12, generally assigns the primary right to tax royalties to the country of the recipient's residence, unless there is a permanent establishment in the source country to which the royalties are attributable. Nothing in the License Agreement suggests that Payment Network 2 maintains a permanent establishment in Eswatini. The agreement's global nature and the fact that it grants rights to use intellectual property and systems developed and maintained outside Eswatini further support the conclusion that Payment Network 2 does not have a permanent establishment in the country.

39) Conclusion

39.1 In the above respect, the Tribunal finds that the payments made by the Appellant to Payment Network 2 and Payment Network 1 for card services do not constitute payments under Eswatini source services contracts as contemplated in section 59A of the ITO.

39.2 It is the Tribunal's considered view that the source of Payment Network 2 and Payment Network 1's income from card services is not determined by the place of payment, but rather by where the services are predominantly performed, which is outside of Eswatini. The source of income for the services provided by Payment

Network 1 and Payment Network 2 is not in Eswatini. The originating cause of the income and the work done to earn the payments occurs primarily outside of Eswatini through the operation and maintenance of global payment systems.

39.3 The income from card services provided by Payment Network 2 and Payment Network 1 cannot be simultaneously treated as 'imported services' for VAT purposes and as Eswatini-sourced income for withholding tax purposes.

39.4 Similarly to the stance taken on the imposition of additional tax of 20% under section 40*bis* (1) of the ITO the Tribunal is led to dismiss this argument.

39.5 In the absence of a double tax treaty between Eswatini and the USA, the Tribunal finds that adhering to internationally recognised principles of taxation is crucial. The imposition of withholding tax on payments for services performed outside Eswatini, without a clear legislative mandate, would be inconsistent with these principles.

39.6 Based on the License Agreement between Payment Network 2 and its licensees, the Tribunal finds that the services provided by Payment Network 2 are of a global nature, with the core income-producing activities taking place outside of Eswatini. The payments made by the Appellant to Payment Network 2 are primarily for the use of intellectual property and access to a global payment system, rather than for services performed within Eswatini. In the absence of a permanent establishment of Payment Network 2 in Eswatini, and in line with international tax principles, such payments should not be subject to withholding tax in Eswatini.

39.7 While Section 59A of the ITO may, on a literal reading, appear to capture the payments to Payment Network 1 and Payment Network 2, its application in this case would be inconsistent with Eswatini's commitments under the *OECD BEPS Inclusive Framework and general principles of international taxation.* The concept of economic nexus, while relevant in the context of the digital economy, is not sufficiently developed in international tax law to justify overriding traditional principles of source and permanent establishment. The Tribunal finds that the core income-producing activities of Payment Network 1 and Payment Network 2 occur outside of Eswatini.

40) ORDER

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

1. The Appellant's Appeal is hereby upheld.

2. The imposition of withholding tax on payments, VAT reverse charges and the additional tax of 20% under section 40bis(1) of the ITO is set aside.

3. ***Withholding Tax and VAT Reverse Charges;*** The Appellant, having conceded withholding tax (WHT) on rental payments and VAT reverse charges on same (hereinafter referred to as VATRC) as payable and having settled the amounts in respect of these assessments in full, the Tribunal makes these concessions part of its Orders.

4. Each party to pay its own costs.

____

MR MBUSO SIMELANE
PRESIDENT OF THE TRIBUNAL

I Agree.

____

MS FIKILE DLAMINI
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 Kenneth Simelane
2. Mr Joshua Leroni
3. Mr Joon Chong
4. Mr Ransford Quaynor
5. Mr Bong’menzi Mabuza

For Respondent:

1. Ms Bongekile Singwane
2. Mr Bongisipho Dlamini
3. Mr Bongani Gamedze