JUDGMENT

A. Background

1. This is an Appeal by GTZ, Department for International Services (Formerly GTZ International Services) hereinafter referred to as the Appellant. It was contracted by the United Nations World Food Programme (UNWFP) as a development agency to assist rehabilitate roads and dykes in South Sudan.

2. The Respondent is a principal officer of the Kenya Revenue Authority, which is a Government agency mandated with the task of assessing due taxes, collection and providing advice to individuals on their tax obligations.

3. The Respondent audited the Appellant on the taxes with regard to the Appellant’s expatriate staff in Nairobi and South Sudan during the project period for PAYE.

4. The Appellant appeals the decision of the Respondent to charge the Appellant PAYE in respect of the non-resident employees working in South Sudan and all the employees working in the Nairobi office of GTZ.
International Services. The principle sum charged stood at Kshs. 20,754,704.00 and the associated penalties and interests thereon.

5. The Appeal stemmed from two points in the Respondent’s decision:
   
i. That according to Section 3, 5(1) (b) and the PAYE Rules of the Income Tax Act, the Appellant had the obligation to deduct, remit and account for PAYE in respect of the non-resident employees working in South Sudan and all the employees working in the Nairobi office; and
   
ii. That the Appellant’s office in Nairobi is a permanent establishment of GTZ in Germany and also of South Sudan operations and as such liable to PAYE taxes.

B. Appeal and Grounds

6. The Appellant commenced the Appeal process through a Memorandum of Appeal and Statement of Facts filed with the Nairobi Area Local Committee on the 22nd December 2011.

7. The Appellant has set out several grounds of Appeal with the principal ones being:
   
a) THAT the Appellant was a permanent establishment of GTZ in Germany.
   
b) THAT the Appellant’s office in Nairobi had existed since 2004 for the sole purpose of the business carried by itself.
c) THAT the Appellant’s South Sudan office was an independent set up that did not report to the Nairobi office but reported directly to the GTZ head office in Eschborn, Germany.

d) THAT the Appellant had remitted income tax for the more than 250 Kenyan staffs in South Sudan.

8. In support of the grounds of Appeal the Appellant relied on the Written Submissions filed with the Tribunal on the 17th day of August 2016 together with several authorities which the Tribunal has considered.

9. The Appeal turns on the interpretation of “Permanent Establishment” and tax obligation in relation to “PAYE” under the Income Tax Act (hereinafter referred to as the Act) for taxation.

C. The Submissions by the Parties

a) Appellant’s Submissions

10. The Appellant’s contention is that having been contracted by United Nations World Food Programme (UNWFP) as a development agency to assist rehabilitate roads and dykes in South Sudan it was not a Permanent Establishment within the meaning contemplated in the Income Tax Act.

11. That over the entire project period some expatriate staff were employed and as such disagreed with the Respondent’s averment that the Appellant is a Permanent Establishment of GTZ in Germany and that emoluments paid to all employees working in South Sudan should be subject to income tax.
12. The Appellant averred that its South Sudan office was an independent set up that did not report to the Nairobi office but reported directly to GTZ head office in Eschborn, Germany and as such refuted allegations that the Appellant’s Nairobi office based in Kenya controlled the activities of GTZ International Services office in South Sudan. The Appellant further argued that the Nairobi office did not create a permanent establishment for the South Sudan office thus the provisions of Sections 3(2) (a) (ii) and 5 (1) (b) of the Income Tax Act cannot and should not be stretched to South Sudan as the same was not the intention of the law to impose itself on other jurisdictions.

13. The Appellant submitted that due to the volatile situation in South Sudan, there were no formal banking facilities and the GTZ in Germany had to rely on Kenya for logistical support as a neighbouring country to the office in South Sudan. Further that there was a sanction imposed by the United States of America Government regarding payment of transactions in USA Dollars in South Sudan and as such the Nairobi office had to be used to channel the funds to Sudan for the roads and dykes project.

14. The Appellant submitted and further relied on the Kenya-Germany Double Tax Agreement to support its contention that its Nairobi office was established for auxiliary purposes in order to provide assistance to the GTZ International Services Project office in South Sudan and not to conduct any trade activities.
15. That all the contracts of employment of GTZ International Services employees were concluded and signed either in Eschborn, Germany or Narus, South Sudan. Further that the location of assignment of all employees was in South Sudan with the exception of one employee Ms. Makeda whose place of work was in Nairobi.

16. The Appellant relied on the doctrine of *state decisis* by which the precedent of a higher court of law binds upon the lower courts and tribunals and cited the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & Two Others (2014) e KLR* where the Supreme Court stated that Article 163 (7) of the Constitution of Kenya, 2010 is the embodiment of the time hallowed common law doctrine of *state decisis*. It held that precedents set by this court are binding on other courts in the land.

17. The gravamen of the Appellant’s case is that the Respondent’s assessment is erroneous and as such absurd in seeking to tax international expatriates who were nationals of different countries not working under the Respondent’s jurisdiction. Further, concluded that the PAYE assessments on the GTZ International Services employees based in South Sudan are unwarranted and illegal due to the Respondent’s flawed interpretation and application of the Income Tax Act provisions relation to what constitutes a permanent establishment in Kenya.

18. The Appellant thus prays that this Honourable Tribunal upholds the Appeal.
b) The Respondent’s Submissions

19. The Respondent fully relied on the presentations and arguments made in its Statement of Facts and replying Memorandum dated 4th April 2016 and the Written Submissions filed with the Tribunal on its part on the 25th day of August 2016.

20. The Respondent argued that the Appellant in its letter dated 23rd March 2016 conceded to tax in relation to the Nairobi Head Office and offered to settle the matter through Alternative Dispute Resolution mechanisms. That the Respondent gave time for ADR process and the parties had a number of meetings in which the Appellant repeatedly asked for adjournments but failed to furnish the documents as requested by the Respondent.

21. The Respondent contended that the Appellant had clearly altered the facts of the Appeal in order to apply *Civicon and Diakonie cases* as the Courts in the two cases were desirous to do justice according to the interpretation of the law and inconsonant with the facts available to the courts at the moment. Further, that neither the courts nor the Tribunal had any intention of lending their decisions however faulty to misrepresentation or manipulation by any person intent on evading tax.

22. The Respondent further argued that the GTZ International Services office in Nairobi is a permanent establishment of GTZ in Germany and also of the Sudan operations. The Respondent rejected the Appellant’s contention
that the Nairobi office was just a conduit for the payment to salaries to staff in South Sudan as money transfer is not auxiliary to business. Without facilitation of the money transfer the South Sudan business would literally come to an end.

23. To buttress its point the Respondent submitted that according to Section 3, Section 5 (1) (b) and the PAYE Rules of the Income Tax Act, GTZ International Services had the obligation to deduct, remit and account for PAYE in respect of the non-resident employees working in South Sudan and all the employees working in the Nairobi office of GTZ International Services.

24. The Respondent did not submit or rely on any authorities save for the distinction made between the cases relied on by the Appellant and the actual facts surrounding the Appellant’s case.

25. Thus the Respondents asked this Honourable Tribunal to uphold the Commissioner’s assessment to a principle tax of Kshs. 20,754,704.00 and related penalties and interest to this date.

D. Issues for determination

26. Having duly considered the pleadings filed and the submissions of the parties it is our view that the main issues for the Tribunal’s determination are:-
i. Whether the GTZ International Services office in Nairobi is a permanent establishment of GTZ in Germany as contemplated within provisions of the Income Tax Act?

ii. Whether GTZ International Services had the obligation to deduct, remit and the account for PAYE in respect of the non-resident employees working in South Sudan and all the employees working in the Nairobi office?

E. Analysis and findings of the Tribunal

27. The Tribunal wishes to highlight the following material facts:-

i. The Appellant through a letter dated 23rd March 2016 requested to settle the case through Alternative Dispute Resolution (ADR) in which it set out a settlement proposal including the proposal that, the Respondent allows the Appellant to pay Kshs. 8,844,980/= as principal tax of assessed PAYE for the Nairobi based employees (instead of Kshs. 21,670,201.00 including penalties and interests).

ii. The Respondent assessed as tax Kshs. 28,907,234/= (inclusive of penalties and interest) on South Sudan based employees to which the Appellant objected on the ground that GTZ International Services' operations in Kenya were limited to providing support services to the South Sudan project.
iii. The Respondent dropped the tax demanded on the South Sudan employees who were citizens or nationals of South Sudan due to the existing war situation in a letter dated 28th September 2009. The Appellant in the letter dated 23rd March 2016 requested that the same be accorded to the other expatriates who were working in South Sudan in the same volatile situation.

iv. The Appellant relied on the legal precedence set by the Court in the Civicon Case (Misc. Civil Application No. 1044 of 2006 – Republic v KRA-exparte) where the Court ruled that the tax demanded by KRA on salaries paid to South Sudanese nationals was unreasonable as the employees were foreign nationals who rendered services in a foreign nation using money sourced from another foreign country and paid in a foreign country.

28. Having stated the above, under Section 2 of the Income Tax Act a “permanent establishment” in relation to a person means a fixed place of business in which that person carries on business and for the purposes of this definition, a building site, or a construction or assembly project which has existed for six months or more shall be deemed to be fixed place of business: A permanent establishment is further given an exhaustive and inclusive meaning in the Kenya-Germany Double Tax Agreement. The Appellant content that its Nairobi office was established not to conduct any trading activities but for auxiliary purposes in order to provide
assistance to the GTZ International Service project office in South Sudan and further submitted that the activities of auxiliary or preparatory character are expressly excluded from the definition of a permanent establishment under Kenya-Germany Double Tax Agreement.

29. The key words in the definition are as highlighted above under Paragraph 28 of this Judgment. Section 41 of the Income Tax Act allowed Kenya to negotiate double tax treaties with other countries. It is indeed evident that there exists a Double Tax Agreement between Kenya and Germany. The Tribunal wishes to affirm that the purpose of Double Tax Agreements is to promote among others, cross border trade, sharing of tax information as between countries, resolving of unfair complex areas of taxation, help relief countries from the unfairness of double taxation.

30. From the facts GTZ International Services, is a foreign Company that has its office in Nairobi and further most of its activities in South Sudan are carried out from the Nairobi office. It is therefore evident from the facts and the correspondences exchanged as between the Appellant and Respondent that the Nairobi office is a permanent establishment within the meaning of the Act and/or under the provisions of the Double Treaty Agreement between Kenya and Germany. Furthermore, the Nairobi office has been in existence for quite some time and been carrying out business. The Appellant’s allegation that the same was merely being used for auxiliary purposes without furnishing any evidence to support the same
and/or that the controls and approvals were made from Germany for the South Sudan office is baseless and as such cannot stand. There was no evidence that was furnished to support the independence of the South Sudan office in its operations.

31. The Tribunal considered the foregoing arguments and submissions by both the parties. It is worthy of note that when the Appellant was tasked to produce documentation regarding the employees including those on the independence of the South Sudan office, the Appellant did not furnish the requisite documents as it claimed that the assets and the documents in the South Sudan office were destroyed and looted when its offices were attacked during the civil strife in South Sudan. With regard to the employment contracts of staff in South Sudan whose emoluments are subject to the Appeal, the Appellant could not provide the same purportedly due to prohibitions existing in German Labour and data privacy laws.

32. With regard to the South Sudanese Nationals, the Respondent did an action of redemption and rightly so by choosing to drop the claims made against the payment made to South Sudanese nationals as to do so would have been unreasonable and unjustified as Honourable Justice Sergon J.K stated in Republic v Kenya Revenue Authority Misc. Civil Application 1004 of 2006, Civicon Limited – ex-parte to the effect” that the Respondent’s demand is still unreasonable because there is evidence that
the employees are foreign nationals who rendered services in foreign nation using money sourced from another foreign country and paid in a foreign country.”

33. As for the **Kenyan Nationals in South Sudan**, the Appellant conceded to taxes in the amount of Kshs. 8,844,980/= as principal tax of assessed PAYE (instead of Kshs. 21,670,201/= including penalties and interests) in its letter dated the 23rd March 2016 whilst requesting for a resolution through an ADR process. Further, vide a letter dated 9th August 2016, the Appellant conceded and agreed to settle the principal tax liability for the years of income 2005 and 2006 amounting to Kshs. 1,248,020/= arising from emoluments paid to one Ms. Makeda Tadesse. There was also a further request made to the Respondent to drop the tax demand made on the other expatriates and as such it be accorded the same treatment as their Sudanese colleagues since they were also working in the same volatile and hostile environment.

34. The Appellant relied on the cases of **Republic v The Kenya Revenue Authority – Civicon and the Tax Appeal Tribunal Appeal case No. 46 of 2015 – Diakonie Emergency Aid v The Commissioner of Domestic Taxes** to support its case. The above cases are similar to this case only in so far as it relates to taxation of the foreign (South Sudanese) nationals working in a foreign country but otherwise the authorities are highly distinguishable. The Tax Appeals Tribunal in the **Diakonie Case** took judicial notice of the
fact that there had been and continues to be civil strife in South Sudan during the period in question and in particular 2006-2010 for which audit was conducted by the Respondent upon Appellant and that there had been sanctions on remittance of funds directly into the country in question and this it required rerouting of funds through a third party. This, however, is no basis or ground of waiver of tax in relation to Kenyan Citizens who worked in South Sudan. This particular argument would hold water only if their situation made the employees not earn their respective emoluments, however no evidence has been furnished before this Honourable Tribunal to buttress the same. To further distinguish the facts of the two cases and the current case, evidence was produced in the two cases to show that the Employers were tax compliant to the respective countries that is to both Kenya and the foreign countries this the Commissioner of Domestic taxes claims were unjustified and illegal. The Tribunal is therefore guided by the well-known principle of equity that he who comes to equity must do so with clean hands.

35. The Tribunal has also found that the Respondent ought to have followed the principles guiding tax legislation and the Tribunal relies on Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) ex-parte Barclays Bank of Kenya Limited (2015) eKLR in the Appellant’s List of authorities in so far as it relates to the principles guiding tax legislation since the facts in the two cases are distinguishable. The court cited the
case of *Cape Brandy Syndicate v Inland Revenue Commissioner* (1921) 1 kb 64 where it was held that:

"In a taxing act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".

36. The Respondent took exception to the heavy reliance made by the Appellant on the *Civicon and Diakonie cases* and stated that the key word in Section 5 (1) (b) of the Income Tax Act is 'deemed' to which the Tribunal had no issue. However for the Respondent to go into the issues of intention and equity of taxation and further state that the same were irrelevant consideration by the High Court was way out of bounds and utterly disrespectful. We however wish to categorically state that the Tribunal is not entitled to attempt a discovery at the intention of the legislature but is restricted to the clear words of the statute. What matters here is whether the amount is lawfully due and whether the law allows its recovery.

37. The Tribunal further stands by the doctrine of state decisis and the principles guiding tax legislation as quoted by the Court in the case of *Republic v Commissioner of Domestic Taxes (Large Taxpayers Office) ex-parte Barclays Bank of Kenya Limited* (2015) eKLR. We further borrow from the words of the Tribunal in *Diakonie case* and state that the
subordinate court cannot challenge the decision of a higher court as the same can only be done by way of an appeal to the decision being challenged. It is therefore wrong for the Respondent to assert that the Civicon Case is poorly informed without any challenge on the same by way of Appeal.

38. Furthermore, Section 3(2) of the Income Tax Act provides that:

(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—

(a) gains or profits from—

(i) any business, for whatever period of time carried on;

(ii) any employment or services rendered;

Section 5 (1) provides that:

5(1) For the purposes of section 3(2)(a)(ii) of this Act, an amount paid to—

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

(b) a non-resident person in respect of any employment with or services rendered to an employer who is resident in Kenya or the permanent establishment in Kenya of an employer who is not so resident,
The import of the foregoing is that the emoluments of the Kenyan employees were taxable in Kenya but those of the foreign employees, contracted outside Kenya and services given outside Kenya fell outside the jurisdiction of the Income Tax Act. In making this finding, the Tribunal observed that the local establishment served only as a communication channel for the German office which contracted the employees.

**F. The Tribunal’s Decision**

39. The Tribunal finds that the Appeal fails and accordingly makes the following Orders:

i. The disputed PAYE for the Kenyan nationals who worked in South Sudan during the period of the project is payable however under strict compliance with the provisions of the Income Tax Act which must be adhered to and the same must be computed pursuant to the Third Schedule of the Act;

ii. The principal tax liability for the years of income 2005 and 2006 amounting to Kshs. 1,2480,020/= arising from emoluments paid to one Ms. Makeda Tadesse is to be remitted by the Appellant;

iii. The Respondent’s tax assessment for the German Nationals to wit Kreimeier and Zirkuli, are not payable as their labour contracts were
signed in Germany and their place of work was South Sudan and not Kenya;

iv. Penalties and interest to be computed for the amounts payable up to 22\textsuperscript{nd} December 2011 when the matter was filed with the Nairobi Area Local Committee and;

v. Each party to bear its own costs.

DATED and DELIVERED at NAIROBI this 28\textsuperscript{th} day of August, 2020.

ERIC NYONGESA
CHAIRMAN

CATHARINE N. MUTAVA
MEMBER

GABRIEL M. KITENGA
MEMBER

WILFRED GICHIKI
MEMBER

ABRAHAM KIPROTICH
MEMBER