BACKGROUND

1. The Appellant is a Limited Liability Company incorporated in the Republic of Kenya. It is a subsidiary of Stefanutti Stocks International Holdings (Pty) Limited which is part of Stefanutti Stocks group, a South African group of companies. It carries on the business of providing engineering solutions and construction services for marine, civil and general works.

2. The Respondent is a principal officer of Kenya Revenue Authority (KRA). KRA is established under the Kenya Revenue Authority Act (Cap 469) and is charged with the mandate of administration, assessment and collection of revenue as an agent of the Government of Kenya.

3. Following the Respondent’s audit of the Appellant’s tax affairs, the latter was issued with an additional assessment for Corporation tax for the 2013 year of income. The assessment was issued vide the letter of the 6th September, 2019 and was for the sum of Kshs. 158,444,585.00. The Appellant objected to the additional assessment vide the letter dated 4th October, 2019 and the same was received by the Respondent on 8th October, 2019.
4. Following the Appellant’s objection to the additional Corporate tax assessment, the Respondent resolved to allow the contested salaries and wages expenses which it reconsidered as expenditure incurred in the production of the business income of the Appellant. The decision to allow the expenditure was after the Appellant supported the same with explanations and documentary evidence. However, the Respondent considered the allowed expenditure as being subject to Pay As You Earn (PAYE). In this connection, it raised an additional PAYE assessment for the sum of Kshs. 80,302,793.00 vide its letter dated 9th December, 2019.

5. Being dissatisfied with the notice of additional PAYE assessment, the Appellant raised an objection to the same vide the letter dated 8th January, 2020. The notice of objection set out the grounds on which the Appellant was objecting to the assessment.

6. After considering the grounds of objection by the Appellant, the Respondent issued an Objection decision dated 5th March, 2020. The Objection Decision was received by the Appellant via email on 6th March, 2020. In the Objection decision, the Respondent confirmed the PAYE additional assessment in the sum of Kshs. 80,302,793.00 being principal tax. In the letter communicating its decision, the Respondent stated that the “requisite interest & penalties is still due and payable” without quantifying the same.

7. The Appellant, not content with the Objection decision, filed a notice of intention to Appeal on 31st March, 2020. The respective Memorandum of Appeal and Statement of Facts were filed on 15th April, 2020.

THE APPEAL

9. The Appeal is premised on the grounds that;
   a) The Respondent may not amend a tax assessment later than five (5) years after the date of filing of the self-assessment return by a taxpayer;
   b) The circumstances of the case do not support a finding of gross and willful neglect against and Appellant; and
   c) In the absence of any lawful determination of gross and willful neglect, the Respondent is bound by the statutory timelines spelt out in Section 31 of the Tax Procedures Act 2015 (TPA) and thus the tax assessment is not legally tenable.

10. As per the Appellant, the Respondent instituted an in-depth audit of the Appellant’s tax affairs for the period August 2012 to February 2014 and issued its notice of additional PAYE assessment on 9th December, 2019. In computing the respective tax liability, the Respondent:-
   a) Raised a tax assessment in excess of five (5) after the date the self-assessment return was filed by the Appellant in contravention of Section 31 of the TPA; and
   b) Determined that the Appellant had committed gross and willful neglect and proceeded to issue an assessment beyond the stipulated statutory timelines contrary to the facts of the case and in contravention of Section 31 of the TPA.

11. The Appellant’s contractual obligations necessitated the employment of resources in possession of a related party, Stefanutti Stocks (Pty) Limited, a company that is resident in the Republic of South Africa. The Appellant utilized the resources of related parties because the assets and services required to fulfill its contractual obligations were not readily available in the local market.
12. The Appellant contends that;
   a) The majority of the expatriates that worked in Kenya were present in the country for less than six (6) months for each year of income and are thus not required to be registered for tax in Kenya. The expatriates were also not required to account for any tax in respect of their presence in Kenya because they fell below the threshold for residence.
   b) Part of the payroll costs related to intercompany allocation of staff costs of employees working on projects that were implemented in Kenya by the Appellant but were not its employees. These payments constituted compensation for use of workforce of a related party. The Appellant maintains that since the employees were not present in Kenya and were not its employees, the payments were thus not subjected to PAYE.

13. In the notice of the additional PAYE assessment, the Respondent brought to tax charge employee emoluments and benefits amounting to Kshs. 267,675,976.00. The principal tax demanded thereof amounted to the sum of Kshs. 80,302,793.00.

14. In respect of gross or wilful neglect, the Appellant argued as follows;
   (a) That it did not commit any act of commission that constitutes gross or wilful neglect and thus there is no statutory or evidentiary basis for finding of gross or wilful neglect and for issuance of a tax assessment by the Respondent beyond the stipulated period of five years.
   (b) Gross negligence is defined as a conscious and voluntary disregard of the need to use reasonable care. It is conduct that is extreme when compared to ordinary negligence. Gross negligence would require that the party involved possesses and appreciates the risk of harm and some degree of fault or blame and that such degree of blame should be more exceptional than is required for ordinary negligence.
   (c) Intent remains as one of the defining characteristics in attempting to distinguish between ordinary negligence and gross negligence. In
Garric Vs Florida C & P.R Co. 53 SC 448, 31 SE334 and Hays Vs Gainsville Street R. Co., 70 Tex 602, 8sw 491, the courts held that the element of virtual intent is required to be present in order to constitute gross negligence.

(d) While making a finding of gross negligence, a subjective assessment is required to assess the skill level of the party with regard to the function or task that the party is required to perform. The finding of gross negligence would be difficult to ascertain without assessing the circumstances, skill and technical disposition of the party involved.

(e) It is also plausible for a party with the requisite skill level to commit an inadvertent act of commission or omission and for such commission or omission to remain undetected. In Kenya Fluorspar Company Limited VS Commissioner of Domestic Taxes (Tax Appeal Number 1 of 2016 and 37 of 2016- Consolidated), the Tax Appeals Tribunal reviewed the issue of the tax assessment issued beyond the statutory timelines by reason of gross or wilful negligence. In this instance, a company assigned the duties of filing tax returns to an in-house accountant. The accountant failed to account for reverse VAT as required by the Value Added Tax Act, Cap 476. However, the tax assessment was raised beyond the statutory time limit of five years. The Tax Appeals Tribunal ruled that, while the accountant failed to account for reverse VAT as required, the omission to account for reverse VAT did not amount to wilful or gross neglect that would entitle the commissioner to issue a tax assessment beyond the designated statutory time limit. It is thus clear that the mere failure to account for tax is not of itself an indicator of gross negligence.

(f) That the in-house accounting team of the Appellant were competent and qualified and that the omission to properly and accurately account for tax was an inadvertent omission.

15. In conclusion, the Appellant prays that the Tribunal quashes and sets aside the Respondent’s PAYE assessment.
THE RESPONSE

16. The Appellant commenced operations in 2012 and was awarded the first contract in Kenya in 2013 and the second one in June 2017 both by Base Titanium. The Appellant’s mandate was to provide civil, structural, mechanical, electrical, instrumentation, piping and plate work.

17. The Appellant’s parent company is headquartered at Kempton Park, Gauteng, South Africa and the Appellant’s representatives are Mazars-Kenya who are also its tax agents. Mazars-Kenya are located at Green House along Ngong Road, Nairobi.

18. In the course of its tax audit, the Respondent noted a variance between employment costs as shown in the Appellant’s audited financial statements and gross salaries from the payroll PAYE returns filed by the Appellant. As per the Respondent, the Appellant did not support the variance as expenditure which was wholly and exclusively incurred in the production of its income as required by Section 15 of the Income Tax Act (ITA). The Respondent therefore sought to disallow the amount in accordance with Section 16(1)(a) of the ITA.

19. In addition, the Respondent’s audit exercise observed that for the year 2013, the Appellant claimed expatriate personnel costs under various account codes indicated in its trial balance for the year. The costs related to rent, cable television subscription, installation and activation fees as well as other miscellaneous payments incurred by the Appellant for the benefit of expatriate personnel and thus not allowable against business income as the provisions of Section 16(2) (a) of the ITA.

20. After internal consultations, the Respondent resolved to allow the costs as being incurred wholly and exclusively in the production of business income of the Appellant. However, the costs would be subjected to PAYE.
21. In respect to limitation of time, the Respondent, after a review of the Appellant’s grounds of objection made the following observations:

(a) The emoluments of the expatriates were first subjected to Corporation tax which amendment was done in 2019. The assessment on the same under PAYE was done within a month of the amendment to the earlier assessment.

(b) The earliest tax return filed by the Appellant with the Respondent is the 2014/15 return that was filed on 23rd October 2017.

(c) The PAYE additional assessment refers to the period 2012 to 2014 and the said salaries and wages expenses were claimed in the financial periods 2012/2013 and 2013/2014 for which the income tax returns were not evident in the Respondent’s systems and neither do the manual returns bear received stamps imprint to indicate that they were indeed received in the Respondent’s offices.

22. In conclusion, arising from the Respondent’s observations, it maintains that it is clear that the five-year rule was not breached since the first return in its records is the self-assessment return for the year ended February 2015 that was filed on 23rd October, 2017.

23. On acts of commission or omission that amounted to gross or willful neglect, the Respondent stated as follows:

(a) It was evident from the Appellant’s arguments in support of its objection to the original Corporation tax assessment that it was aware that the services for which it paid the expatriate staff were rendered in Kenya and should have been subjected to PAYE in accordance with Sections 3 & 5 of the ITA.

(b) It was further clear that the Appellant’s failure to account for PAYE relating specifically to expatriate employees’ emoluments as well as non-cash benefits accruing to this specific cadre of employees, is evidently willful in that it was a deliberate decision to only account for PAYE on emoluments paid to the local staff. Consequently, gross or willful negligence
threshold has been met and as such, without prejudice, the Respondent was entitled to raise the assessments beyond the stipulated five years.

(c) The Respondent also noted that the Appellant had retained BDO-Kenya to manage its payroll function and hence, it is clear that the persons charged with the payroll responsibility were competent enough to understand Kenya tax laws and requirements. As such, they should have adequately addressed the Appellant’s tax affairs.

24. On the residence status of the expatriates, the Respondent stated as follows:

(a) The Appellant claimed that the expatriate employees on whose emoluments were the basis of the additional PAYE assessment were not resident in Kenya in the years in question having been in Kenya for less than six (6) months. It was therefore the Appellant’s contention that the emoluments should not have been brought to tax charge in accordance with the provisions of Sections 3 and 5 of the ITA.
(b) The Respondent’s review of the objection found that no supporting documents were availed to support the Appellant’s claim.
(c) The Respondent avers that the burden of proof of an assertion was placed on the Appellant as provided for in the TPA.

25. On intercompany recharges, the Respondent examined the documents used to support the expenses and found that they were legitimate business costs. However, the Appellant did not segregate the expenses relating to the Appellant’s expatriate staff and the intercompany charges. It was also noted that all the expenses were debited to the salaries and wages account which account was reserved for employees’ emoluments. The Appellant did not provide any documents to prove the contrary.
26. The Respondent avers that there was no dispute that services were rendered to the Appellant by the expatriates. It was also not in dispute that non-cash benefits accrued to these employees and were enjoyed in Kenya and were a result of services rendered in Kenya by these expatriates. It is therefore the Respondent’s position that the benefits were earned by employees who offered their services in Kenya to a resident employer and as such these emoluments are taxable as per the provisions of Sections 3 and 5 of the ITA.

27. In conclusion, the Respondent prays that the Appeal be dismissed with costs.

ISSUES FOR DETERMINATION
28. The Tribunal has carefully studied the parties’ pleadings and documentation and is of the respectful view that the issues that call for its determination are as hereunder:

(a) Whether there was gross or willful neglect by or on behalf of the Appellant in accounting for PAYE during the period August 2012 to February 2014.

(b) Whether the Respondent erred in law or in fact by raising a PAYE additional assessment on the Appellant in respect of the period August 2012 to February 2014.

ANALYSIS AND FINDINGS
29. The Tribunal will note from the outset that during the hearing on 22\textsuperscript{nd} of April 2021 the parties requested for time to file their written submissions, which was allowed. Unfortunately, both parties did not file the submissions within the fourteen days allowed and they have not done so even at the time of writing this judgment.
30. The Tribunal having considered the above issues wishes to analyses same as hereunder: -

(a) Whether there was gross or willful neglect by or on behalf of the Appellant in accounting for PAYE during the period August 2012 to February 2014.

31. The Appellant argued at length that it did not commit any act of commission or omission that would constitute gross or willful neglect and that there was no statutory or evidentiary basis for a finding of gross or willful neglect by the Respondent. Further, it stated that the issuance of a tax assessment beyond the stipulated period of five years by the Respondent was therefore out of order.

32. The Appellant admitted that it had a qualified and competent in-house accounting team and the omission to properly and accurately account for tax was an inadvertent omission. However, the Appellant also maintains that the emoluments and benefits incorrectly subjected to PAYE by the Respondent related to expatriates who were not its employees and were non-resident for tax purposes. In this respect, the Appellant argued that the expatriates' costs were not subject to PAYE. The Tribunal notes that this argument has no legal basis as will be demonstrated in its coverage herein below in relation to issue (b).

33. The Appellant has sought reliance in *Kenya Fluorspar Company Limited Vs Commissioner of Domestic taxes* (Supra). In this case, the Tribunal found that “in the circumstances that the imported services provided to the Appellant were chargeable to reverse VAT in accordance with the provisions of Section 10(1) of the VAT Act 2013 and that the same should be subjected to the five-year limit pursuant to Section 45(5) of the VAT Act, 2013.”
34. The Respondent noted that the Appellant had outsourced its payroll services to BDO-Kenya, a global audit firm. In addition, Mazars-Kenya, another global audit firm with local presence, were its tax agents. Consequently, this was a confirmation that the Appellant had competency in handling its tax matters.

35. The Respondent continued to argue that the PAYE additional assessment was in reference to 2012 to 2014, during which period it had no evidence that the Appellant had filed its income tax self-assessment returns. It therefore concluded that it was clear that the five-year rule was not breached since the first return in its records was for the year ended February 2015 that was filed by the Appellant on 23rd October, 2017. The Tribunal, however is quick to note that the reference by the Respondent is in respect of income tax, a direct tax, while the issue at hand is on PAYE, an agency tax.

36. On the assertion by the Appellant that the expatriates' costs were not subject to PAYE, the Respondent avers that there was no dispute that services were rendered to the Appellant by expatriates. In addition, there was also no dispute that the cash benefits accrued to the expatriates for services rendered in Kenya. In this regard, the Respondent concluded that the emoluments and the benefits were taxable in Kenya as per the provisions of Sections 3 and 5 of the ITA.

37. In this matter, the Tribunal makes reference to Section 31 (4) of the TPA which states as follows: -

"The Commissioner may amend an assessment-
(a) In the case of gross or wilful neglect, evasion or fraud by, or on behalf of, the taxpayer, at any time or,
(b) In any other case, within five years of-
(i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or
(ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment.”

The Tribunal is quick to note that gross or wilful neglect is not defined under the TPA. The Black’s Law Dictionary describes gross negligence as “a severe degree of negligence taken as reckless disregard. Blatant indifference to one’s legal duty, others safety, or their rights, are examples.”

38. The Tribunal is inclined to pose the question; Did the Appellant, in dealing with the accounting for PAYE during the period August 2012 to February 2014, act in blatant indifference to its legal duty? In this connection, the Appellant has referred us to Kenya Fluorspar Company Limited Vs Commissioner of Domestic Taxes (Supra). In this case, the Tribunal found that the Appellant had not committed gross or wilful neglect by not correctly accounting for its reverse VAT on imported services.

39. Having thoroughly studied the said judgment, we are of the view that the same is distinguishable from the Appeal at hand. In Kenya Fluorspar Company Limited, the responsibility of the filing of the returns was assigned to its payroll clerk, which was a function delegated to the officer by the Appellant. In addition, the omission was in respect of reverse VAT, an indirect tax. However, in the instant case, the Appellant confesses to have had a qualified and competent in-house accounting team. To complement the team, its payroll services were outsourced to BDO-Kenya, a member firm of BDO International which has offices in Nairobi. In addition, its tax agents are Mazars-Kenya, a member firm of Mazars International, which describes itself as “a leading international audit, tax and advisory firm”. In this case, the omission was in accounting for PAYE during the period of nineteen (19) months, August 2012 to February 2014. PAYE is an agency tax as contrasted with VAT which is an indirect tax.
40. Both parties dealt at length on filing of self-assessment returns in respect to Corporation tax. The Tribunal considers the arguments of both parties, in this respect, of insignificant value since the matter at hand is on the Appellant’s PAYE obligations.

41. The Tribunal notes that the Appellant had the competency to handle its PAYE affairs and had continuous omission for nineteen (19) months. The omission could not have been inadvertent as claimed by the Appellant. We are of the view that the Appellant acted in blatant indifference to its legal duty in dealing with accounting for PAYE during the period August 2012 to February 2014.

42. In view of the foregoing, the Tribunal finds that there was gross or willful neglect by or on behalf of the Appellant in accounting for PAYE during the period August 2012 to February 2014.

(b) Whether the Respondent erred in law or in fact by raising a PAYE additional assessment on the Appellant in respect of the period, August 2012 to February 2014.

43. Having found that there was gross or willful neglect by, or on behalf of the Appellant in accounting for PAYE during the period August 2012 to February 2014, the Respondent’s right to issue a PAYE additional assessment was not limited to five years. The Tribunal therefore turns to determine whether the expatriates’ and recharge costs allowed for Corporation tax by the Respondent are subject to PAYE.

44. It is worth noting that imposition of income tax in Kenya is spelt out under Section 3 of the ITA and which states as follows:-

“(1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident which accrued in, or was derived from Kenya.
(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) ...;
       ii) employment or services rendered;
       iii) ...”
   (Emphasis supplied).

45. Moreover, income in respect of employment or service rendered is expounded in Section 5(2) of the ITA and it states; -
   “for the purposes of Section 3(2)(a)(ii), ‘gains or profits’ includes -
   (a) Wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered...” (Emphasis supplied)

46. Furthermore, an employer is obligated to deduct tax (PAYE) from emoluments under Section 37(1) of ITA which states that:
   “An employer paying emoluments to an employee shall deduct therefrom and account for tax thereon, to such extent and in such a manner as may be prescribed”; and under Section 2 of the ITA, an “employer” includes any resident person responsible for payment of, or on account of emoluments to an employee, and an agent, manager or other representative so responsible in Kenya on behalf of a non-resident employer;” (Emphasis supplied).

47. The Tribunal notes that failure to deduct PAYE from emoluments has consequences spelt out under Section 37(2) of the ITA which states as follows:-
   “if an employer paying emoluments to an employee fails-
   (a) To deduct tax thereon;
   (b) To account for tax deducted thereon, or
(c) To supply the Commissioner with a Certificate provided by rules prescribing the certificate. The Commissioner may impose a penalty equal to twenty-five percent of the tax involved or ten thousand shillings whichever is greater and the provisions of this Act relating to collection and recovery of that tax shall also apply to the collection and recovery of the penalty as if it were tax due from the employer;...

48. We have perused paragraph 17 of the Appellant’s Statement of Facts, which states as follows:-

“That the majority of the expatriates that worked in Kenya were present in the country for less than six months for each year of income and are thus not required to be registered for tax in Kenya.”

49. The Tribunal notes that PAYE is an obligation on the part of an employer not the employee and the period of stay in Kenya for an employee is not relevant for PAYE operations. The expatriates’ costs met by the Appellant are subject to tax under Section 3(2)(a)(ii) of ITA. The costs form part of income from employment as set out in Section 5(1) of the ITA and the same are subject to PAYE under Section 37(1) of the ITA.

50. Furthermore, paragraph 18 of the Appellant’s Statement of Facts, in respect of intercompany recharges, states as follows: -

“That part of the payroll costs relate to intercompany allocation of the staff cost of employees working on projects that are being implemented in Kenya by the Appellant but are not employees of the Appellant.”

51. The Tribunal notes that the payroll costs relating to employees of the non-resident employer were met by the Appellant. The Appellant is therefore an employer of the said employees in accordance with Section 2 of the ITA and it should have accounted for PAYE in respect of the said emoluments and benefits thereof.
52. In view of the foregoing analysis, the Tribunal finds that the Respondent did not err in law or in fact by raising a PAYE additional assessment on the Appellant in respect of the period August 2012 to February 2014.

FINAL DECISION

53. The upshot of the foregoing is that the Appeal is not merited. Consequently, the Tribunal makes the following Orders:-

(a) The Appeal is hereby dismissed.

(b) The Respondent’s Objection Decision dated 5th March, 2020 and the respective tax assessment in the sum of Kshs. 80,302,793.00 plus interest and penalties is hereby upheld.

(c) Each party to bear its own costs.

54. It is so ordered accordingly.

DATED and DELIVERED at NAIROBI this 11th day of June, 2021.

JOSEPHINE K. MAANGI
CHAIRPERSON

PATRICIA M. ANAMPIIU
MEMBER

TANVIR ALI
MEMBER

GEOFFREY KARUU
MEMBER

DELILAH K. NGALA
MEMBER