JUDGMENT

A. INTRODUCTION

1. The Appellant is a business lady and holds Personal Identification Number (PIN) A004045851Q.

2. The Appellant is also a Director of Ngurumani Limited and Lodwar Wholesalers, both of which companies in Kenya and dealing in supply of general merchandise and medical equipment.

3. The Respondent is a principal officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, Cap 469 Laws of Kenya.

B. BACKGROUND

4. The Respondent commenced investigations against the Appellant on 30th September 2016 after the Respondent received information from Ethics and Anti-Corruption Commission (EACC) that the Appellant was a subject of investigations on allegations of economic crimes.
5. The Respondent requested for records from the Appellant and third parties for the purpose of quantifying if there were any taxes due and payable.

6. Due to incomplete trading records provided by the Appellant, the Respondent adopted the banking analysis method from the bank accounts provided in the name of the Appellant’s bank statement.

7. The Respondent issued the Appellant with a letter of initial findings of her tax liability on 11th January 2018. The findings estimated the Appellant’s tax liability for January 2011 to December 2016 to be Kshs. 30,236,712.00.

8. On 27th March 2018, the Respondent issued the Appellant with a tax demand of Kshs. 35,078,169.00 with respect to income tax.

9. The Appellant through her representative Kimani and Associates, objected to the tax assessment on 16th April 2018 stating that:
   a) The Appellant is a Housewife.
   b) Income to any bank account in her name is a transfer from either the husband Mr. John Githua, or 2 family companies, namely Lodwar Wholesalers Ltd and Ngurumani Traders Ltd, hence contras and these had already been taxed.
   c) A chart of the said contras had been provided and was attached.
   d) Corporation rate of tax has been used instead of individual rates.

10. The Respondent vide a letter dated 20th April 2018 requested the Appellant to provide the documents mentioned in support of her Objection.

11. The Respondent confirmed the assessment of Kshs. 35,078,169.00 on 13th June 2018.
C. APPEAL

12. The Appellant filed a Memorandum of Appeal dated 12th July 2018 and Statement of Facts stating that the Respondent’s assessments are wrong and should be amended in light of fresh data and information provided by the Appellant.

13. The grounds for Appeal were stated as follows:

   a) The Appellant is a house wife.
   
   b) The Appellant had filed returned and accounts for the years 2012 – 2016.
   
   c) The Respondent had been supplied with documents required directly from the Appellant and the Agent, and indirectly from the Bank.
   
   d) The Respondent raised assessments on 4th January 2018 after inspecting bank statements for the period 2012-2016.
   
   e) The Appellant objected to the estimate assessments on 16th April 2018.
   
   f) The assessments were confirmed by the Respondent on 13th June 2018.
   
   g) The Appellant attended to all queries raised by the Respondent and attached revised financial statements to facilitate appropriate amendment of the assessments.
   
   h) The Appellant had challenges in knowledge which lead to the poor book or record keeping.
Respondent’s Response to the Appellant’s Statement of Facts

14. In response the Respondent contends as follows:-

a) The Respondent through various correspondences requested for records from the Appellant and third parties for the purpose of quantifying if there were any taxes due and payable.

b) The Appellant was severally invited for meetings by the Respondent to discuss her tax matters.

c) Due to incomplete trading records provided by the Appellant, the Respondent adopted the banking analysis method from the bank accounts provided in the name of the Appellant’s bank statement.

d) The banking analysis done by the Respondent established that the Appellant’s income was derived from bank deposits from specified source (rental income) and other unspecified sources.

e) The Appellant issued the Appellant with a letter of initial findings of her tax liability on 11th January 2018. The findings estimated the Appellant’s tax liability for January 2011 to December 2016 to be Kshs. 30,236,712.00.

f) The Appellant was given an opportunity to respond and provide additional information and evidence to facilitate a reconciliation of the initial findings if in dispute before a formal assessment could be issued.

g) Following the objection, the Respondent requested the Appellant to provide additional documents in support of her objection but none was ever provided despite several requests.

h) The Respondent rendered its objection decision on 13th June 2018 which confirmed the assessment of Kshs. 35,078,169.00 with respect to income tax as per the table below:
<table>
<thead>
<tr>
<th></th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income as per banking</td>
<td>14,970,946</td>
<td>1,880,000</td>
<td>11,194,228</td>
<td>3,559,737</td>
<td>14,845,870</td>
<td>5,170,000</td>
<td>51,620,782</td>
</tr>
<tr>
<td><strong>Less:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loans</td>
<td>3,860,600</td>
<td>-</td>
<td>582,000</td>
<td>1,934,000</td>
<td>-</td>
<td>-</td>
<td>6,376,600</td>
</tr>
<tr>
<td>Transfers from Njogu</td>
<td>8,500,000</td>
<td>200,000</td>
<td>600,000</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>9,300,000</td>
</tr>
<tr>
<td>Standing order from Njogu</td>
<td>1,680,000</td>
<td>1,680,000</td>
<td>280,000</td>
<td>-</td>
<td>140,000</td>
<td>280,000</td>
<td>4,060,000</td>
</tr>
<tr>
<td>NET income from business</td>
<td>930,346</td>
<td>-</td>
<td>9,732,228</td>
<td>1,625,737</td>
<td>14,705,870</td>
<td>4,890,000</td>
<td>31,884,182</td>
</tr>
<tr>
<td><strong>Add:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rental Income</td>
<td>8,071,380</td>
<td>8,898,177</td>
<td>10,499,830</td>
<td>2,762,863</td>
<td>2,150,280</td>
<td>10,926,190</td>
<td>43,308,720</td>
</tr>
<tr>
<td>Total Income</td>
<td>9,001,726</td>
<td>8,898,177</td>
<td>20,232,058</td>
<td>4,388,600</td>
<td>16,856,150</td>
<td>15,816,190</td>
<td>75,192,902</td>
</tr>
<tr>
<td>Tax</td>
<td>2,627,706</td>
<td>2,596,641</td>
<td>5,996,806</td>
<td>1,243,768</td>
<td>4,984,033</td>
<td>4,672,046</td>
<td>22,121,000</td>
</tr>
<tr>
<td>Penalty</td>
<td>525,541</td>
<td>519,328</td>
<td>1,193,361</td>
<td>248,754</td>
<td>996,807</td>
<td>934,409</td>
<td>4,424,200</td>
</tr>
<tr>
<td>Interest</td>
<td>1,891,948</td>
<td>1,557,985</td>
<td>2,878,467</td>
<td>447,756</td>
<td>1,196,168</td>
<td>560,645</td>
<td>8,532,970</td>
</tr>
<tr>
<td>Total</td>
<td>5,045,196</td>
<td>4,673,954</td>
<td>10,074,634</td>
<td>1,940,278</td>
<td>7,177,008</td>
<td>6,167,100</td>
<td>35,078,169</td>
</tr>
</tbody>
</table>

15. In raising the assessments, the Respondent primarily relied on bank deposits in the Appellant’s account for the years of income January 2011 to December 2016.
16. The Respondent adjusted the bankings to extract loans, bank transfers and bank standing orders from the husband John Njogu to derive the net taxable income from the unspecified sources of income which were then added to the specified rental income.

17. The Respondent avers that only the net taxable income which was derived after making the adjustments was brought to charge in the name of the Appellant.

18. The Respondent shared its findings with the Appellant on 4th January 2018 and gave her an opportunity to respond to the findings and support any expenses left out in the estimated assessment. She failed to support any expenses to facilitate further adjustments.

19. It is therefore false that the Respondent considered all bankings as profit.

20. The Respondent avers that it did not include the Appellant’s husband’s income as part of her income. Paragraph 16 is clear that the Respondent adjusted bankings from the husband in coming up with her net income which was brought to charge.

21. The Respondent avers that the Appellant is a Director of Ngurumani Traders Limited and Lodwar Wholesalers.

22. The Respondent further states that the Appellant receives substantial amounts of deposits into her bank account as rental income.

23. The Respondent states that the returns for the years of income 2012 to 2016 were filed after the start of investigations.

24. The Respondent further confirms that the returns were filed on 16th January 2018 and revealed huge under-declarations of income for tax purposes. The amounts declared have also not been paid.
25. The Respondent states that Sections 58 and 59 of the Tax Procedures Act give the Respondent authority to obtain information from any person for the purpose of assessing taxes.

26. The Respondent asserts that the Appellant’s objection dated 16th April 2018 was devoid of merit and substance as it failed to include any supporting records to validate it as required under Section 51 of the Tax Procedures Act.

27. The Respondent further confirms that it sought for more information and records from the Appellant to support the claim but the same were not availed.

28. Following the lack of supporting documents, the Respondent issued an objection decision confirming the assessment pursuant to Section 51(9) of the Tax Procedures Act.

29. The Respondent contends that the revised financial statements had no supporting documentation and were not signed. They could therefore not be used by the Respondent in computation of taxes due as they could not be authenticated as financial statements of the Appellant.

30. The Respondent states that Section 23(1)(b) of the Tax Procedures Act makes it an obligation of a taxpayer to maintain any document required under a tax law so as to enable the person’s tax liability be readily ascertained.

31. The Respondent further states that the Appellant admitted to not having proper records and requested the Respondent to explore the possibility of settling the matter on the basis of market gross profit margin.

32. Section 56(1) of the Tax Procedures Act provides that the burden of proving that the tax assessment is wrong lies with the taxpayer and the Appellant failed to prove to the satisfaction of the Respondent that the bank deposits were not subject to taxation. In absence of such proof, the Respondent confirmed the assessments through its objection decision.
33. The Respondent avers it acted within its mandate and within the law and therefore the Appellant’s income for the period under investigation was properly assessed as income chargeable under Section 3 of the Income Tax Act.

34. The Respondent prays that the Appellant’s Appeal be dismissed with costs; its assessment be confirmed and the Appellant be ordered to pay the taxes due together with accrued interest and penalties.

D. SUBMISSIONS

I. APPELLANT

35. The Appellant adopted her Written submission; and wholly relied on them in support of the Appeal.

36. In her submissions the issues for determination are:-

   a) Whether summaries from bank statements can be taken as income?

   b) Whether income already assessed on the husband, Mr. John Githua Njogu, can at the same time be assessed on her?

   c) Whether the Appellant had operating costs which should be deducted from sales?

   d) Whether the Penalty levied by the Respondent is against the provisions of Sections 80 and 89(3) of the Tax Procedures Act?

i) **Whether summaries from bank statements can be taken as income?**

37. The credit amounts on the bank statement do not necessarily reflect income. The Appellant has filed personal returns which reflected correctly computed taxable income.
ii) Whether income already assessed on the husband, Mr. John Githua Njogu, can at the same time be assessed on her?

38. The Appellant being a Housewife only had rental income which was already assessed on the husband.

iii) Whether the Appellant had operating costs which should be deducted from sales?

39. Expenses incurred in the production of her income, rental income, had not been deducted in arriving at the taxable income.

iv) Whether the Penalty levied by the Respondent is against the provisions of Sections 80 and 89(3) of the Tax Procedures Act?

40. The Appellant avers that there are proceeding in the Nairobi Criminal Case CR. No.148/22/2018 where the Respondent (Kenya Revenue Authority) has filed a complaint against the Appellant and other directors with respect to alleged offences committed by the Appellant during the period.

41. The Appellant has relied on Sections 80 and 89(3) of the Tax Procedures Act to show that a taxpayer shall not be subject to both a penalty and to prosecution in respect of the same act or commission in relation to the law.

42. That the Respondent has offended the legal principal of “double jeopardy” by referring the matter to the Directorate of Criminal Prosecutions for criminal prosecution and at the same time imposing penalties on the assessed taxes.

43. The Appellant prays that the Tribunal finds that:

   a) It is unconstitutional to demand the taxes assessed.

   b) The assessment raised and tax demanded be vacated.

   c) The objection dated 16th April 2017 be treated as fully accepted.

   d) It is unconstitutional to demand tax through tax assessments and at the same time pursue criminal proceedings.
II. RESPONDENT

44. The Respondent relied on its submissions dated 30th August 2019 and highlighted by commentary before the Tribunal on the issues as identified by the Appellant as hereunder:-

i) **Whether summaries from bank statements can be taken as income?**

45. In raising the assessments, the Respondent primarily relied on bank deposits in the Appellant’s account for the years of income January 2011 to December 2016.

46. The Respondent adjusted the bankings to extract loans, bank transfers and bank standing orders from the husband John Njogu to derive the net taxable income from the unspecified sources of income which were then added to the specified rental income.

47. The Respondent avers that only the net taxable income which was derived after making the adjustments, was brought to charge in the name of the Appellant.

48. The Respondent shared its findings with the Appellant on 4th January 2018 and gave her an opportunity to respond to the findings and support any expenses left out in the estimated assessment. She failed to support any expenses to facilitate further adjustments.

49. It is therefore false that the Respondent considered all bankings as profit.

50. The Respondent relied on a number of cases to show that bankings can be relied on to arrive at taxable income:

a) *Mcluskey's Executrix Vs. Commissioners Of Inland Revenue [1955] Slt 279; 1995 Sc 241*

b) *Kilburn Vs. Bedford (H.M. Inspector Of Taxes) 1955 Chancery Division, 36, P.262*
51. In the case of, *Pili Management Consultants Ltd Vs. Commissioner Of Income Tax, Kenya Revenue Authority [2010] eKLR*, the Court stated,

"....... In its motion seeking judicial review, Pili annexed a detailed ‘statement’ and verifying affidavit sworn by Hezron Awiti Bollo which affidavit ran into some thirty one (31) paragraphs. But neither in the statement nor in Bollo’s affidavit is a single word said in respect of the money in the Bank and why it was not liable to tax.

"....... For the judge to be able to conclude that no tax was due from Pili for the year 2004, the Judge would have to determine first whether the money in Pili’s account at the Bank was or was not liable to tax."

52. The Respondent submitted that to determine that the money in the Appellant’s bank account was not liable to tax, the Appellant should have explained the source of the funds and its intended use and why the money should not be subjected to tax. The Appellant other than stating that the amount in the bank was not taxable has not rendered any explanation and therefore based on the information available, the only logical conclusion is that the money was liable to tax.

ii) **Whether the Respondent included the Appellant’s husband’s income as her income for the years under investigation?**

53. The Respondent avers that it did not include the Appellant’s husband’s income as part of her income. The Respondent adjusted for bankings from the husband’s account in coming up with her net income which was brought to charge.

iii) **Whether the Appellant had operating costs which should be deducted from sales?**

54. The Respondent confirmed that it sought for more information and records from the Appellant to support the claim but the same were not availed.
55. Following the lack of supporting documents, the Respondent issued an objection decision confirming the assessment pursuant to Section 51(9) of the Tax Procedures Act.

56. The Respondent contends that the revised financial statements had no supporting documentation and were not signed. They could therefore not be used by the Respondent in computation of taxes due as they could not be authenticated as financial statements of the Appellant.

iv) Whether the Penalty levied by the Respondent is against the provisions of Sections 80 and 89(3) of the Tax Procedures Act?

57. The Respondent submits that this is not one of the grounds that is contained in the Appellant’s Memorandum of Appeal and Statement of Facts. The Appellant has also not been granted leave to introduce a new ground and therefore the introduction at the submission’s stage is in contravention of the law. This ground should therefore be disregarded.

58. The Respondent relied on Section 13 (6) of the Tax Appeals Tribunal Act which provides that the Appellant shall, unless the Tribunal orders otherwise, be limited to the grounds stated in the appeal to which the decision relates.

59. The Respondent in support of its submissions relied on the following case law:

a) Independent Electrol and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others [2010] eKLR

b) Daniel Otieno Migore V South Nyanza Sugar Co. Ltd [2018] eKLR

60. The Respondent had a look at the extract annexed to the Appellant’s submissions which discloses various charges by the Ethics and Anti-Corruption Commission (EACC). Counts XVIII, XIX, XXVI, XXVII & XXVIII are not related to the tax dispute in the Appeal before this Tribunal as they involve fraudulent acquisition of public property. Count XXXV relates to the failure to pay taxes amounting to Kshs. 199,554,741.00.
61. The dispute which is the subject of this Appeal relates to taxes amounting to Kshs. 35,078,169.00 and not Kshs. 199,554,741.00 which is the subject of the EACC charges as exhibited.

62. It is therefore clear that the two taxes are not related. No further particulars have been provided by the Appellant to enable the Respondent substantiate and distinguish the two taxes. These charges have also been preferred by EACC and not the Respondent herein from the document exhibited by the Appellant.

E. ISSUES FOR DETERMINATION

63. The Tribunal has considered the entirety of the contesting submissions and the applicable law and found the following issues are for determination:

a) Whether the Appellant’s bank account credits, bankings, could be relied on to compute taxes?

b) Whether the Respondent should charge penalty on the said taxes whilst pursing a criminal case on the same matter?

F. ANALYSIS

a) Whether the Appellant’s bank account credits, bankings, could be relied on to compute taxes?

64. The Appellant’s objection dated 16th April 2018 faulted the assessment made by the Respondent on the grounds that transactions in her bank account were contra entries from her husband’s, Mr John Githua Njogu, and other related companies bank accounts.

65. A chart of these contra entries is said to have been attached to the Objection Letter but the Tribunal did not have the benefit of seeing the chart.
66. The Respondent in its letter dated 20th April 2018 requested for the same attachments and other information which in its submissions claim not to have received.

67. However, in the tax computation table shown in the Assessment Letter and Objection Decision Letter dated 27th March 2018 and 13th June 2018, respectively, the bankings have been adjusted for; Loans received, Transfers from Njogu and Standing Orders from Njogu, to arrive at net income from business.

68. The Appellant filed amended returns as confirmed but the Respondent contends that the revised financial statements had no supporting documentation and were not signed. They could therefore not be used by the Respondent in the computation of taxes due as they could not be authenticated as financial statements of the Appellant.

69. In reviewing this matter, the Tribunal considered the case of, Pili Management Consultants Ltd Vs. Commissioner of Income Tax, Kenya Revenue Authority [2010] eKLR, the Court stated:

"........ In its motion seeking judicial review, Pili annexed a detailed 'statement' and verifying affidavit sworn by Hezron Awiti Bollo which affidavit ran into some thirty one (31) paragraphs. But neither in the statement nor in Bollo's affidavit is a single word said in respect of the money in the Bank and why it was not liable to tax."

"........ For the judge to be able to conclude that no tax was due from Pili for the year 2004, the Judge would have to determine first whether the money in Pili's account at the Bank was or was not liable to tax."

70. In this Appeal, the Appellant has not provided the Tribunal with enough evidence to show that the net income the Respondent has based the tax assessment was not income or is subject to further cost deduction in arriving at a net profit.
71. It is trite law that the burden of proof is on the taxpayer to show that the tax so assessed is not due from her.

b) **Whether the Respondent should charge penalty on the said taxes whilst pursuing a criminal case on the same matter?**

72. The Tribunal has had a look at the extract annexed to the Appellant’s submissions which discloses various charges by the Ethics and Anti-Corruption Commission (EACC). Counts XVIII, XIX, XXVI, XXVII & XXVIII involve fraudulent acquisition of public property.

73. Count XXXV relates to the failure to pay taxes amounting to Kshs. 199,554,741.00.

74. The dispute which is the subject of this Appeal relates to taxes amounting to Kshs. 35,078,169.00 and not Kshs. 199,554,741.00 which is the subject of the EACC charges as exhibited.

75. For the reason of differing amounts, the Respondent contends that the two taxes are not related.

76. No further information was presented before the Tribunal showing what the tax of Kshs. 199,554,741.00 in the Criminal case relates to or if that tax includes the Kshs. 35,078,169.00 being the assessment of tax and penalties which is the subject of this Appeal.

77. Section 80(3) of the Tax Procedures Act provides that:-

   "If a person has paid a penalty under a tax law and, in respect of the same act or omission for which a penalty was paid, the Commissioner commences a prosecution, the penalty shall be repaid to the person as a refund of tax under Section 48, and the person shall not pay a penalty, in the case of a prosecution unless the prosecution is withdrawn."

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78. The import from the foregoing provision of the law is that we need not belabour the issue of whether the criminal matter and the penalty charged in the assessment by the Respondent results in double jeopardy to the Appellant, as the law provides an option for the Appellant to be repaid should it turn out that the criminal matter and the tax assessment in this appeal are the same.

F. DETERMINATION

79. In light of the foregoing analysis, coupled with the Appellant’s failure to prove its case, this Appeal hereby fails and the Tribunal accordingly makes the following Orders:

a) The Appeal is dismissed.

b) The Respondent’s objection decision for confirmation for the tax assessment for the sum of Kshs. 35,078,169.00 dated the 13th day of June, 2018 be and is hereby upheld.

c) That each party to bear its own costs.

DATED and DELIVERED at NAIROBI this 2nd day of October, 2020

PATRICK LUTTA
CHAIRMAN

HELEN BILA
MEMBER

MWAI MBUTHIA
MEMBER

ELISHAH NJERU
MEMBER