JUDGMENT

A. INTRODUCTION

1. The Appellant is a businessman based in Nairobi and holds Personal Identification Number (PIN) A001130339W.

2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 Laws of Kenya. Under Section 5(1), the Kenya Revenue Authority (the Authority) is an agency of the Government for the collection and receipt of all revenue. Further, in pursuant to Section 5(2) with respect to the performance of its function under subsection (1) the Authority is mandated to administer and enforce all provisions of the written laws as set out in part 1 & 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance to those laws.

B. BACKGROUND

3. The Respondent commenced an investigation on 30th September 2016 on the Appellant after receiving information from the Ethics and Anti-Corruption Commission (EACC) that the Appellant was a subject of investigations on allegations of economic crimes.
4. The investigation covered the period from January 2010 to December 2016.

5. The Respondent requested for records from the Appellant and other third parties for the purpose of quantifying if there were any taxes due and payable.

6. Due to failure by the Appellant to provide his accounting records, 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 his tax liability on 4\textsuperscript{th} January 2018. The findings estimated the Appellant’s tax liability for January 2010 to December 2016 to be Kshs 656,218,071.00 and the Appellant was given an opportunity to respond.

8. On 27\textsuperscript{th} March 2018, the Respondent issued the Appellant with a tax demand of Kshs. 656,218,071.00 with respect to Income tax and VAT.

9. The Appellant through his tax representative Kimani and Associates, objected to the tax assessment on 16\textsuperscript{th} April 2018 on the grounds that:-

1) Banking had been taken as sales which was wrong as they do not represent sales.

2) Some of the sales made were either exempt or zero rated.
10. The Objection letter stated that:-

i. Operating costs have not been allowed

ii. Costs of Sales have not been allowed

iii. Banking are not sales and consequently, revised accounts to cover both additional sales, purchases and operating costs were filed to the Respondent but were not considered.

iv. Since the letter of 13.02.2018 to the Respondent, there was no communication to indicate the accepted information and required additional information/evidence, if any, but proceeded to issue additional assessment.

v. Some obvious costs such are rent are obvious and no business can be conducted without an office.

vi. The Appellant is a 'one-man-show', Mr J Githua, and whose background is not accounting and that is why he never kept complete books of accounts. Incomplete records were presented to the Agent and that was what was depended on. It is unfair to penalize the for not keeping records as the tax Agent has advised him on how to do it henceforth.

vii. From the Respondents assessment it is difficult to know the allowed or disallowed expenses

viii. The under-declared income has did give credit of the sales in the declared profit/loss presented in the financial statements.

ix. The criteria to consider purchases under Equity Bank Limited and Barclays Bank of Kenya Limited are neither clear nor disclosed and likely to be “trial and error”.

x. The criteria to disallow rent and rates, if any is allowed, is not indicated in the Respondents analysis.
xi. How expenses allowed from the bank was not disclosed.

11. The Respondent wrote to the Appellant its vide letters dated 20\textsuperscript{th} April 2018 and 24\textsuperscript{th} May 2018 requesting the Appellant to provide the documents mentioned in support of his Objection.

12. The Respondent confirmed the assessment by a letter dated on 13\textsuperscript{th} June 2018.

B. APPEAL

13. The Appellant filed a Memorandum of Appeal dated 12\textsuperscript{th} 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.

14. The grounds for Appeal were stated as follows:-

a) The Appellant is a businessman who deals with general merchandise with medicine and medical equipment forming part of it.

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 is a small trader with challenge in personnel leading to poor book or record keeping.

15. In response the Respondent through its Statement of Facts 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) 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.

c) The Appellant issued the Appellant with a letter of initial findings of his tax liability on 4th January 2018. The findings estimated the Appellant’s tax liability for the period January 2010 to December 2016 to be Kshs. 656,218,071.00.

d) 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.

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

f) The Respondent rendered its objection decision on 13th June 2018 which confirmed the assessment of Kshs. 656,218,071.00 with respect to income tax as per the table below:-

<table>
<thead>
<tr>
<th>TAX HEAD</th>
<th>PRINCIPAL TAX</th>
<th>INTEREST</th>
<th>PENALTY</th>
<th>TOTALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>VAT</td>
<td>215,849,188</td>
<td>158,189,999</td>
<td>840,000</td>
<td>374,879,187</td>
</tr>
<tr>
<td>INCOME TAX</td>
<td>161,072,077</td>
<td>88,052,392</td>
<td>32,214,415</td>
<td>281,338,884</td>
</tr>
<tr>
<td>TOTALS</td>
<td>376,921,265</td>
<td>190,404,414</td>
<td>88,892,392</td>
<td>656,218,071</td>
</tr>
</tbody>
</table>

16. The Respondent states that investigations have revealed that the Appellant is a businessman carrying on business within Kenya.

17. It is also on record with respect to the Appellant’s assertion that the Appellant has indeed filed returns and accounts for the years of income 2011 to 2015. The returns were filed after the start of the investigations. Further, the self-assessment returns so filed revealed huge under declarations of income for tax purposes by the Appellant.

18. The Respondent contends that the revised financial statements had no supporting documentation and were not signed.
19. Further, from the amended financial statements, the Appellant had arrived at a tax liability of Kshs. 13,064,466.00 over the five years period under review.

20. Requests by the Respondent to the Appellant to provide signed hard copies of the financial statements and pay the self-assessed taxes were futile.

21. From the foregoing therefore, the said financial statements were not used by the Respondent in computation of the taxes due as they could not be authenticated as the financial statements of the Appellant.

22. That the Appellant avers that he had challenges of personnel in knowledge that the cash deposits were related to the business of the companies and the wife’s deposits for want of exclusion from taxation that led to poor record keeping.

23. This is no defence in this matter as Section 23(1)(b) of the Tax Procedures Act makes it an obligation of a tax payer to maintain any document required under a tax law so as to enable the person’s tax liability to be readily ascertained.

24. It is the Respondent’s response that the Appellant’s Objection dated 16th April 2018, was devoid of substance and failed to include any supporting records to validate his claims as required under Section 51 of the Tax Procedures Act.
25. Following the lack of supporting documents and due to the statutory timelines, the Respondent had no option but to issue an Objection Decision confirming the assessment pursuant to Section 51(9) of the Tax Procedure Act.

D. SUBMISSIONS

1. APPELLANT

26. The Appellant adopted his Written Submissions and wholly relied on them in support for the appeal.

27. In his submissions the issues for determination are:-

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

ii) Whether income already assessed on the wife, Mrs Grace Njeri Githua, can at the same time be assessed on him?

iii) Whether VAT should be charged on non-vatable goods?

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

v) 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?**

28. 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 wife, Mrs Grace Njeri Githua, can at the same time be assessed on him?

29. The Appellant’s wife filed her personal tax returns and declared income and subsequent taxes which were paid to the Respondent. The same income has also been taxed on the Respondent.

iii) Whether VAT should be charged on non-vatable goods?

30. The Appellant trades in medicine and medical items as his merchandise. Sales from these items are not subject to VAT but the Respondent has indiscriminately charged VAT on all income.

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

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

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

32. The Appellant avers that there are proceedings 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.

33. 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.

34. 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.

35. The Appellant prays that the Tribunal finds that:-
   i) It is unconstitutional to demand the taxes assessed.
   ii) The assessment raised and tax demanded be vacated.
   iii) The objection dated 20th April 2017 be treated as fully accepted.

RESPONDENT

36. 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?**

37. In raising the assessments, the Respondent relied on bank deposits in the Appellant’s accounts.

38. That in determining the taxable income, the Tribunal considered the Appellant’s declared taxable income in his returns for the years 2011 to 2015 and added back the unsupported costs and undeclared income established from the banking deposits.
39. Further that, the Respondent allowed and deducted identified purchases and expenses from bank inflows and outflows to arrive at the net adjusted taxable income.

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

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

1) Mcluskey’s Executrix Vs. Commissioners Of Inland Revenue [1955] SLT 279; 1995 Sc 241

42. 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.”

43. 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, 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 did not render any explanation and therefore based on the information available, the only logical conclusion was that the money was liable to tax.

ii) Whether the income assessed on the wife, Grace Njeri Githua could be assessed on the Appellant?

44. The Respondent submitted that from the analysis of the Appellant’s bank inflows there were transfers and standing orders from the Appellant’s banks accounts to the wife’s accounts. However, the same did not show any deposits by the wife or transfers from the wife’s bank accounts.

45. Thus, there was no double counting of the Appellant’s income including his wife’s income. That this allegation was not only baseless but not supported by any evidence from the Appellant.

46. The Respondent claims to have adjusted the total bankings from the Appellant’s income in coming up with his net income that was taxed.
47. The Respondent submits that the Appellant has not claimed for any expenses listed under Section 15 of the Income Tax Act. Further, the Appellant has not supported any expense through documentation to the Tribunal.

iii) Whether the Respondent charged VAT on the Appellant’s Non-vatable items?

48. The Respondent submits that it used the information that the Appellant deals in the supply of general merchandise to separate the vatable from non-vatable items as provided for under the VAT Acts of 2006 and 2013.

49. The Respondent submitted it requested for information from the Appellant on actual quantities of the items that fell under the non-taxable items in his trading volumes but this information was however never availed.

50. That Section 29 of the Tax Procedures Act, 2015 anticipated a scenario where a taxpayer does not provide supporting documentation with regard to his tax affairs. It gives the Respondent the power to make a judgement to the best of his knowledge with available information available. It provides that:-

"Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgement, make an assessment."

51. The Respondent further submits that on 4th January, 2018, initial findings were shared with the Appellant and the Appellant was
requested to provide records to facilitate reconciliation of any taxes in dispute. However, the Appellant did not.

52. In buttressing its case, the Respondent relied on Section 17 of the VAT Act, 2013 that provides that:-

“For input VAT to be allowed, it has to be supported by a proper tax invoice or an import entry within 6 months of purchase to confirm that the input VAT so claimed was paid by the purchaser.”

v) Whether the Penalty Levied By The Respondent Is Against The Provisions of Sections 80 And 89 (3) Of The Tax Procedures Act?

53. In response to this, the Respondent submitted that Section 13 (6) of the Tax Appeals Tribunal Act provides that the Appellant shall, unless the Tribunal orders otherwise, be limited to the grounds stated in the Appeal to which the decision relates.

54. 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 this introduction at the submission’s stage is in contravention of the law. This ground should therefore be disregarded.

55. In support of this the Respondent relied on the following Cases where the court ruled that Parties are bound by their pleadings:-

i) Independent Electrol And Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others [2010] eKLR.
ii) Daniel Otieno Migore V South Nyanza Sugar Co. Ltd [2018] eKLR.

56. The Respondent would be prejudiced if the Tribunal considered such evidence since the Respondent had not been given an opportunity to respond to the same as it was not pleaded when parties exchanged their pleadings and no application had been made by the Appellant to amend his pleadings to introduce the new issues so that the Respondent would have an opportunity to respond.

57. The Respondent further relied on Section 56 (3) of the Tax Procedures Act which provides that in an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.

Respondent’s Conclusion

58. The Appellant’s Appeal is devoid of merit, not supported by any evidence or facts and the same should be dismissed with costs to the Respondent.

59. The Respondent prays that its Objection decision issued on 27th March 2018 for Kshs. 656,218,071.00 and confirmed in the objection decision given on 13th June 2018 be allowed together with the subsequent penalties and interest accrued until the date of payment in full.
E. ISSUES FOR DETERMINATION

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

i) Whether the Appellant’s bank account credits, bankings, could be relied on to compute taxes due from the Appellant with respect to Income tax and VAT?

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

F. ANALYSIS

i) Whether the Appellant’s bank account credits, bankings, could be relied on to compute taxes due from the Appellant with respect to Income Tax and VAT?

61. The Appellant’s objection dated 16th April 2018 faulted the assessment made by the Respondent on the grounds that banking had been taken as sales which was wrong as they do not represent sales and some of the sales made were either exempt or zero rated.


63. The resulting tax from the self-assessment was however not paid.

64. It is unclear as to what self-assessment returns the Appellant has done with respect of VAT as this was not presented before the Tribunal.
65. The Respondent has presented before the Tribunal copies of various letters to the Appellant and other third parties requesting for information, additional information and financial records.

66. The Respondent required the Financial Statements to be signed as well as supporting documents to be availed and claims that neither was forthcoming from the Appellant.

67. The Respondent in arriving at the assessment of Kshs. 656,218,071.00 relied mainly on bank credits in the Appellants bank accounts.

68. In reviewing this matter, the Tribunal considered provisions of Section 31(1) (c) of the Tax Procedures Act which provides that:-

"...the Commissioner may amend an assessment (referred to in this Section as the ‘original assessment’) by making alterations or additions, from the available information and to the best of the Commissioner’s judgment..., to ensure that the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates."

69. The Tribunal also considered the case of *Pili Management Consultants Ltd Vs. Commissioner of Income Tax, Kenya Revenue Authority* [2010] eKLR, where the Court stated as follows:-

"....... 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."
199554.74.00.

73. Count XXXV relates to the failure to pay taxes amounting to Rs.

XXVIII which involve fraudulent acquisition of public property.
Corruption Commission (EACC). Counts XXVIII, XIX, XXVI, XXVII &
submissions which disclose various charges by the Ethics and Anti-

72. The Tribunal has had a look at the extract annexed to the Appellant's

Pursuing a criminal case on the same matter

Whether the Respondent should charge penalty on the said taxes whilst
profit

not income or is subject to further cost deduction in arriving at a net
that the net income the Respondent has based the tax assessment was

71. In this Appeal, the Tribunal did not find enough evidence to show

or should have been made differentially

(b) in any other case, that the tax decision should not have been made

excessive or

(e) where an appeal relates to an assessment, that the assessment is

Providing

In a proceeding before the Tribunal, the Appellant has the burden of

particularly Section 30 of the Tax Appeals Tribunal which provides

70. The Tribunal has considered the provisions of the law and more

Table 2. To tax.

whether the money in Pill's account at the Bank was or was not
from Pill for the year 2004, the Judge would have to determine first

"...... For the Judge to be able to conclude that no tax was due
74. 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 was part of the Kshs. 656,218,071.00 being the assessment of tax and penalties which is the subject of this Appeal.

75. The Respondent submitted that this evidence was in-admissible as it was not filed with the Appeal as per the **Section 13 (6) of the Tax Appeals Tribunal Act** provides that:-

"The Appellant shall, unless the Tribunal orders otherwise, be limited to the grounds stated in the appeal to which the decision relates."

76. The Respondent also cited case law in support of this position.

77. The Respondent however recognized that the rules of natural justice require that no person should be condemned unheard and indeed this right is protected under the Constitution of Kenya, 2010.

78. 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."

79. The import from this law is that the Tribunal need not belabour the issue of whether the criminal matter and the penalty charged in the assessment by the Respondent results in double jeopardy, as the Appellant has alluded to, since 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.

G. DETERMINATION

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

a) That the Appeal is dismissed.
b) That the Respondent’s objection decision for confirmation for
the tax assessment for the sum of Kshs. 656,218,071.00 dated
the 13th day of June, 2018 be and is hereby upheld.
c) 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