A. INTRODUCTION

1. The Appellant herein is a company incorporated in accordance with the Companies Act Cap 486 of the Laws of Kenya (now repealed) whose principal activity is that of civil engineering works.

2. The Respondent is a Commissioner duly appointed under Section 13 of the Kenya Revenue Authority Act and is duly authorized under the Income Tax Act (Cap 470 of Laws of Kenya), the Value Added Tax (Cap 476 of the Laws of Kenya) now repealed, the Value Added Tax Act, 2013 and the Tax Procedures Act, 2015 to assess and collect revenue and to administer and enforce the laws relating to revenue.
B. BACKGROUND

3. The Appellant was issued with a notice of intention to audit on the 17th of September 2015. This audit was to cover the years of 2012 to 2013 focusing particularly on verification of purchases as per the audited financial statements, verification of purchases of raw materials as per the financial reports, stock valuation and WIP records, verification of construction costs and sub-contracting cost and input VAT claims. The Appellant was notified to avail it records and books of accounts on or before the 1st October 2015.

4. Vide a letter dated 30th May 2016, the Respondent revised its previous notice of intention to audit dated 17th September 2017 in order to cover the years of income 2013 and 2014 for Corporation tax and from January 2013 to date for agency taxes having been audited previously to the period ending December 2012.

5. After various meetings and correspondences, the Respondent tabled its findings of the audit process on 25th October 2016. On Corporation tax, the Respondent found under declaration of income. With regards to VAT, the Respondent established that there were variances between the sales as per VAT 3’s and turnover as per audited accounts and variances between sales as per VAT 3’s and the sales obtained using the banking method. This comprehensive audit also found non-remittance of PAYE. A sum total of Kshs. 89,370,551.00 in taxes was due from the Appellant.

6. The Appellant lodged an objection to these findings on 21st November 2016 on the following grounds;
a) The assessments were excessive
b) The bases on which certain categories of income were assessed was erroneous
c) The taxable income had been duplicated resulting in double taxation.
d) In certain cases, the facts relating to tax issues at hand were either misconstrued or grossly misunderstood.

7. In response via a letter dated 29th November 2016 the Appellant was notified that its objection as lodged was in default of Section 51 (3) (a) of the Tax Procedures Act, 2015. While the objection set forth the grounds of objection, it failed to indicate the necessary amendments required to be made to correct the decision and the reasons for amendments. Therefore, the Appellant was informed that its objection as lodged was not valid. Thereafter, the Appellant’s tax agent visited the Respondent’s office seeking clarification, wherein he was advised to make a late objection.

8. On the 18th of December 2016 the Appellant’s tax agent lodged another objection, this time precisely stating the grounds of objection and demonstrating by way of reconciliation of figures.

9. The Respondent reviewed the Appellant’s objection dated 18th December 2016 and communicated its objection decision taking into account the grounds of objection and the reasons for amendments. In its objection decision, the Appellant’s tax liability was assessed at Kshs. 65,281,768.00.
10. The Appellant in a letter dated 13th March 2017 objected to the Respondent's assessment in terms of Corporation tax, Value Added Tax, PAYE and Withholding tax. In the same letter the Appellant demonstrated its willingness to cooperate and settle the outstanding PAYE as agreed upon. However, in its response the Respondent on 21st March 2017 advised the Appellant of its right to appeal the tax decision if dissatisfied. Accordingly, the Appellant filed its Notice of Appeal on 28th March 2017.

C. APPEAL

11. The Appeal is premised on the following grounds as captured in the Memorandum of Appeal dated the 8th day of April, 2017:-

a) That the Commissioner-erred in law and in fact in finding that the Appellant did not declare the correct turnover in self-Assessment Returns as was filed by the Appellant and bringing to charge additional Assessments for the years 2013 to 2015.

b) That the Commissioner erred in law and in fact by duplicating income bringing to charge as income amounts reflected in the bank statements from the same source thereby resulting to double taxation.

c) That the Commissioner erred in law and in fact by employing a wrong banking method in assessing VAT.

d) That the Commissioner erred in law and in fact in demanding PAYE despite the fact that the Appellant has cleared all outstanding PAYE that was due and demanded by the Respondent.
e) That the Commissioner erred in law and in fact in charging withholding Tax on professional service that were not undertaken by the Appellant as per Section 37 if Income Tax Act Cap 470.

12. The Appellant prays that;

a) This Honorable Tribunal be pleased to set aside the Assessments under review herein;

b) Thereafter, this Honorable Tribunal be pleased to substitute the Assessment under review herein in line with the Appellants computations set out under the Appellant’s Statement of Facts;

c) In the alternatives to (b)above and further to (a)above, this Honorable Tribunal be pleased to vary the Assessments herein as per it’s on wisdom;

d) This Honorable Tribunal be pleased to Order the Respondent to pay costs of this Appeal to the Appellant and

e) This Honorable Tribunal be pleased to issue any other Order favorable to the Appellant as it may find just and expedient to issue.

13. In response the Respondent contends in its Statement of Facts dated the 10th day of May, 2017 as follows;

a. Under Corporation Tax, the Appellant claims that he does not know where the figure of KES 27,398,390 which was used to arrive at the tax liability of KES 812,519 and an additional KES 410,975 came about. The Respondent is also not sure where the Appellant is getting the figures from. The Official letter communicating the objection decision clearly stated that, the respondent was in agreement with
the Appellants contentions as expressed in the objection letter. This resulted in a revision (downwards) of Corporation Tax from KES 26,723,304 to KES 13,812,585. This revision is according to the Appellant’s reconciliation and proposal in the letter dated 18th December 2016. The Appellant is misleading the Tribunal by insinuating that he’s not aware of the changes yet the letter communicating the objection Decision clearly explained how contention during the objection. The Table below will clarify how the taxable income was arrived at:

<table>
<thead>
<tr>
<th>Details</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under Declared Income (Original Position)</td>
<td>18,956,772</td>
<td>72,457,679</td>
<td>7,468,320</td>
</tr>
<tr>
<td>Adjustments during Objection (Agreed with the Appellant Contention)</td>
<td>(2,000,000)</td>
<td>(23,301,179)</td>
<td>(1,641,588)</td>
</tr>
<tr>
<td>Revised Taxable Income</td>
<td>16,956,772</td>
<td>49,156,500</td>
<td>5,826,732</td>
</tr>
<tr>
<td>Self-Assessment Return</td>
<td>(22,102,390)</td>
<td>(16,612,492)</td>
<td>(13,708,812)</td>
</tr>
<tr>
<td>Adjusted (Loss)/profit</td>
<td>(5,145,618)</td>
<td>32,544,008</td>
<td>(7,882,080)</td>
</tr>
<tr>
<td>Loss B/F</td>
<td>0.00</td>
<td>(5,145,618)</td>
<td>0.00</td>
</tr>
<tr>
<td>Taxable Income</td>
<td>0.00</td>
<td>27,398,390</td>
<td>0.00</td>
</tr>
</tbody>
</table>
b. For the year 2013 the Appellant taxable loss is KES 5,145,618 which was used in arriving at the taxable income of 2014 of KES 27,398,390. The advance tax of KES 43,035 and Tax paid of KES 12,000 belong to 2013 and they are at liberty to utilize but only if they make an application to have them moved to 2013 and they are at liberty to utilize but only if they make an application to have assumed this without formal application from the Appellant.

c. For the year 2014 the Revised Taxable Income is KES 27,398,390 (As above) this figure is not mysterious so is the tax on it of KES 8,219,517. The Respondent has stated that KES 400,975 is as a result of the Appellant not complying with Section 72(1) of the Income Tax Act Cap 470. This is clearly captured on the Company Additional Assessment Notice. The KES 10,000 is a penalty for late submission on 3rd July 2015 which is after the due date and the Respondent correctly charged the penalty giving a total of KES 410,975.

d. The penalty is based on KES 8,630,492 which is the summation of the Principal Tax of KES 8,219,517 and the Additional Tax of KES 410,975 this gives the total penalty of KES 1,726,098. The Appellant has agreed to KES 1,724,098 with the variance being KES 2,000.

e. On interest the Respondent is right in charging the interest of two percent per month for the period April 2015 (due date for balance tax) to the date when the tax procedures Act 2015 came into effect on 29th January 2016. Thereafter the interest has been charged at one percent per month in accordance with the provisions of the TPA 2015. The interest has been charged on the principal tax of KES 8,219,519 for the months in which the tax liability was outstanding.
f. Under VAT, the Respondent explained to the Appellant still in the same letter communicating the objection decision that the adjustments came about as a result of the under declared income reflected in the Corporation Tax adjustments. The Respondent is confused as to why the Appellant is now shifting positions by alleging that the figures used to calculate the VAT tax liability are erroneous yet the Respondent agreed with the Appellant contention during the objection stage and revised downwards the taxable sales. The table below will clarify how the taxable sales was arrived at:

<table>
<thead>
<tr>
<th>Details</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expected Sales (Banking Analysis)</td>
<td>193,720,172</td>
<td>174,900,834</td>
<td>86,473,174</td>
</tr>
<tr>
<td>Sales Declared in the VAT’3s</td>
<td>57,622,512</td>
<td>70,789,593</td>
<td>79,998,478</td>
</tr>
<tr>
<td>Variance (Initial additional Assessment)</td>
<td>136,097,660</td>
<td>104,111,241</td>
<td>6,474,696</td>
</tr>
<tr>
<td>Adjustments during objection (In agreement with the Appellant’s Contention)</td>
<td>(2,000,000)</td>
<td>(23,301,179)</td>
<td>(1,641,588)</td>
</tr>
<tr>
<td>Revised Under Declared taxable sales</td>
<td>134,097,660</td>
<td>80,810,062</td>
<td>4,833,108</td>
</tr>
</tbody>
</table>

g. The Appellant is misleading the tribunal by stating that the figures used are erroneous yet they are consistent with the variance arrived at after reviewing the Appellant’s objection. In the spirit of fairness,
the Respondent added the above variances to the last month of the year instead of making adjustment monthly. If the adjustments were done on a monthly VAT being a monthly tax the Respondent could have had a higher tax liability as all months he filed credit returns could have been payment position in addition the interest could have been higher than demanded by the Respondent.

h. The Respondent taking the amount of variance and charging sixteen percent tax is not how the VAT additional Assessments arrived at. The Respondent took the credit brought forward in the month of November 2013 VAT Return and reduced it from the variance, this is why the principal tax is KES 19,152,516 and not KES 21,455,626.

i. For the year 2014 the adjustment made in the 2013 December VAT returns for the months of January 2014 to June 2014 and August 2014 and also for the months of October to December 2014 this resulted into additional tax liability of KES 2,343,363 thus overall Principal Tax of KES 15,272,973. Again in this year the Respondent could have brought to charge the variances in the respective months which could have resulted into more taxes and interest.

j. For the year 2015 the VAT return for the month of January 2015 is in credit and if the entire variance was brought to charge in the respective months it could have resulted in a higher tax liability than the amount being contested by the Appellant. All these were explained to the Appellant in the Respondent’s objection Decision and during the various meetings held between the Respondent Auditors and Appellant’s Auditors. In all the year the Appellant clearly explained and they cannot say the VAT Additional
Assessments was erroneous and that they don’t understand the figures. The VAT tax liability of KES 47,495,660 is due and payable.

k. The Appellant’s contention in response to charging the car benefit is not clear. It is a statement explaining what was done to arrive at the tax payable. The Respondent hereby assumes that the Appellant is in agreement with the charge of the car benefit and tax emanating therefrom of KES 3,227,011 is due and payable. The amount of tax liability from car benefit is KES 3,042,649 inclusive of the interest and penalties. The Respondent explained via a letter of 15th March 2017 why it did not agree with the Appellants explanation at objection stage mainly because the additional income of KES 30,000 for each director was not attributed to car benefit was charged.

l. The difference of KES 184,362 is the interest on the delayed payment of the taxes due (this amount was agreed to and never objected to) which is still outstanding. The total PAYE tax liability of KES 3,277,011 due and payable.

m. Under WHT, the Appellant did not provide any proof of payment of the WHT from contractual agreements documents at the objection stage. In their objection letter dated 18th December 2016, the Appellant clearly stated that ‘the information on WHT is being compiled and will be forwarded to you in due course’. The Respondent wishes to clarify that the information was never sent therefore the decision was made without considering the information.
14. Consequently, the Respondent prays that;

a) The Honorable Tribunal dismisses the Appellant’s Appeal because the same offends the provisions of Section 13(2) of the Tax Appeals Tribunal Act.

b) That in the alternative and without prejudice to prayer one above, the Honorable Tribunal dismisses the Appellant’s Appeal for lacking merit and upholds the Respondent’s Objection decision and the assessments thereon.

c) The Honorable Tribunal awards the costs of this Appeal to the Respondent.

D. ISSUES FOR DETERMINATION

15. In our view, this Appeal raises two issues which crystalize for determination by this Honorable Tribunal. These issues are;

a. Whether the Respondent erred in finding that the Appellant under declared its income?

b. Whether the Respondent erred in bringing to charge the variances between the Appellant VAT3’s and turnover as per the audited accounts?

E. ANALYSIS

a) Whether the Respondent erred in finding that the Appellant under declared its income?

16. Before proceeding with analysis under this issue the Tribunal will like to point out that the assessment of the Appellant’s tax compliance was to
cover the tax heads of Value Added Tax (VAT), corporation tax, PAYE and Withholding tax. During the oral hearing of the Appeal, the Appellant conceded to the assessment in respect of PAYE. Accordingly, issues for PAYE will not be covered in this Judgment.

17. Having cleared that, the first issue for determination before us is that of the Respondent’s findings that the Appellant did not declare the correct turnover in its self-assessment returns, specifically with regards to the 2014 year of income. The Appellant contends that its account for the year 2013 opened at Kshs. -5,200,618.00 with an advance tax of Kshs. 43,035.00 and tax paid of Kshs.12,000.00 bringing the Appellant’s outstanding obligation by the end of year to Kshs. -5,200,653.00 against the Respondent’s assessment of Kshs. 27,398,390.00.

18. The Respondent on its part has disassociated itself with the figure of Kshs. 27,398,390.00 as the total Corporation tax due from the Appellant for the year 2014. Instead the Respondent avers that its initial finding had a figure of Kshs. 26,723,304.00, which it revised down in its objection decision to Kshs. 13,812,585.00 after taking into account the reconciliations offered by the Appellant.

19. We have had the opportunity to thoroughly review the Respondent’s initial findings vis-a-viz the objection decision of 29th November 2016 taking into account and effecting amendments as per the Appellant’s contention. We also note that the Appellant, rather than defend itself against the Respondent’s actual assessment against the under declarations, the Appellant has resorted to making allegation without tendering any evidence in support of its position.
20. The Respondent’s assessment for the year 2014 established, after analyzing the self-assessed returns and bankings, an under declaration to the tune of Kshs. 52,699,569.00 which it appropriately brought to charge. What the Appellant needed to do in order to successfully defend its position is provide documentary evidence to back up its self-declarations.

21. We note that the Appellant was also not able to do this during its objection dated 21st November 2016. The Respondent categorically informed the Appellant vide a letter 29th November 2016 that the said objection was not compliant with the provisions of Section 51 (3) of the Tax Procedures Act, 2015 for want of stating amendments, reasons for the amendments and any documents in support thereof.

22. The Tribunal has indubitably been clear on the burden on tax payers to have documents in disputing tax assessments. This responsibility is precisely provided for in Section 54 A (1) of the Income Tax Act which provides thus:

“A person carrying on a business shall keep records of all receipts and expenses, goods purchased and sold and accounts, books, deeds, contracts and vouchers which in the opinion of the Commissioner, are adequate for the purpose of computing tax.”

23. In addition Section 56 (1) of the Tax Procedures Act, 2015 provides as follows;

“In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”
24. The burden of proof was on the Appellant to raise the specific items and/or aspects of the tax assessment that were manifest errors, wrongfully imposed or not liable to be paid as tax. More particularly, the burden was on the Appellant to demonstrate that it did not under declare its income in its self-assessed returns. However, that was not the case with this Appellant.

25. Our resolve in this respect is further cemented by the following paragraph from *Pierson v Belcher (H.M. Inspector of Taxes) (1956-1960)* 38 TC 387 wherein it was held:

> "But the matter may be disposed of, I think, even more shortly in this way: there is an assessment made by the Additional Commissioners upon the Appellant; it is perfectly clearly settled by cases such as Norman v Golder 26 T.C 293, that the onus is upon the Appellant to show that the assessment made upon him is excessive or incorrect; and of course he has completely failed to do so. That is sufficient to dispose of the appeal, which accordingly I dismiss with costs."

26. Accordingly, in the absence of proper arguments supported by evidence against the Respondent’s allegation that the Appellant under declared its self-assessed returns, the Tribunal finds that the Respondent assessed the Appellant appropriately and provided reasons for his decision to bring to charge the variances established.

**b) Whether the Respondent erred in bringing to charge the variances between the Appellant VAT3’s and turnover as per the audited accounts?**
27. This brings us to the issue for determination in respect of the Value Added Tax assessment. The Appellant also disputed this assessment by claiming that the figures in the Respondent's amended VAT 57A from January to December 2013 are not consistent. That both December 2013 and December 2014 the Respondent implies that the Appellant had a turnover more than three times its annual turnover which is erroneous.

28. On its part the Respondent avers that it explained to the Appellant in its objection decision that are as a result of the adjustments in the Corporation tax because of the under declared income, it had to adjust the Value Added Tax assessment as well.

29. That the figures used to raises the VAT assessment are consistent with the variances established between the sales declared by the Appellant in VAT3s and the analysis of the Appellant's bankings. In fact in the spirit of fairness the Respondent added the above variance to the month of December for each year under assessment as opposed to making a monthly adjustment which would have led to a higher tax liability for the Appellant.

30. The Respondent further avers that it did not charge the standard 16% on the variance at once. It took into account the credit brought forward in the month of November 2013 and reduced it from the variance before charging vat thereon.

31. Just like the Income Tax assessment all we can decipher from the Appellant's Appeal in this respect are baseless and materially unchallenged allegations of how these variances are erroneous. No evidence has been placed before us to dissuade us from agreeing with the position advanced by the Respondent.
32. We note that this Tribunal is not moved by mere allegation but by evidence proving a tax payer’s dispute of an assessment. In the absence of such cogent evidence, we have no option but to adopt the findings of the Respondent as a true reflection of the Appellant’s tax liability.

F. CONCLUSION

33. In light of the foregoing analysis the Tribunal makes the following Orders:

a. The Appeal herein lacks in merit.

b. The Appellant has conceded to the assessment in respect of PAYE and is liable therefor.

c. The Respondent’s objection decision dated 15th February 2017 is hereby upheld.

d. Each party to bear its own costs.
DATED and DELIVERED at NAIROBI this 25th day of September, 2020

MAHAT SOMANE
CHAIRMAN

PATRICIA MAGIRI
MEMBER

TIMOTHY CHESIRE
MEMBER

WAMBUI NAMU
MEMBER