REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 365 OF 2020

ABDI GEDI AMIN alias ABDI IBRAHIM AHMED..... APPELLANT

-VERSUS-

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT..... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a Kenyan national of ID No.11224764 with KRA PIN A002557439D bearing the name Abdi Ibrahim Ahmed according to the iTax records. The Appellant is engaged in different income generating activities including operating a petrol station, importation of cooking oil and flour, transportation services for UN and dealing in general commodities like sugar and rice.

2. The Respondent is a principal officer appointed under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya. Under Section 5(1) thereof, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2), with respect to the performance of its functions 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 with those laws.

3. The Respondent conducted an investigation on the Appellant covering the period 2016 to 2018 for Income tax and Value Added Tax for the period 2016 to 2019. The investigation relied on information available on the iTax system and further information requested from third parties particularly Gulf Bank.

4. Sequel to the investigation, the Respondent issued a tax assessment on 29th October 2019 as shown below and stated the basis of its findings.

PARTICULARS	AMOUNT Ksh
Income Tax	512,919,521
VAT	274,952,369
Total	787,871,890

5. The Appellant objected to the assessment vide his letter dated 27th November 2019 without attaching supporting documents and stated that he was willing to engage in ADR. On 29th November 2019 the Respondent wrote to the Appellant informing him that he had not filed a valid objection and that he should provide documents to support his objection.

6. On 5th December 2019 the Appellant wrote to the Respondent seeking for four months to provide documents to support his objection. On 7th January 2020 he sought for a further 60 days and on 24th March 2020 for a further 120 days. On 14th April 2020 the Respondent granted him 60 days. The Appellant on 12th June 2020 asked for more 120 days.

7. On 30th June 2020 the Respondent issued its objection decision.

8. The Appellant being dissatisfied with the objection decision filed a Notice of Appeal on 13th July 2020 and subsequently a Memorandum of Appeal and Statement of Facts on 19th August 2020.

THE APPEAL

9. The Appellant cited the following as its grounds of Appeal.

a) **That** the Appellant's Notice of Objection letter dated 27th November 2019, which was received by the Respondent on the same date; was a valid objection within the meaning of the Section 51(3) of the Tax Procedures Act.

b) **That** the Respondent erred in law and in fact in determining that the Appellant's Notice of Objection letter dated 27th November 2019 was not validly lodged.

c) **That** by dint of the operation of Section 51(11) of the Tax Procedures Act, the Appellant's valid Notice of Objection letter dated 27th November 2019, which was received by the Respondent on the same date, was automatically allowed by operation of Statute and thus the Respondent's assessment were extinguished by operation of Law.

d) **That** the Respondent erred in law and in fact by not serving the Appellant with a Notice of Intention to Audit, and also by not conducting an in-depth audit of the Appellant's tax affairs; instead choosing to conduct a superficial and manifestly inadequate desk audit whose outcome was predetermined.

e) **That** the Respondent erred in law and in fact by failing to raise procedurally proper assessments pursuant to the provisions of Sections 29 and 30 of the Tax Procedures Act.

f) **That** the Respondent's Demand Notice dated 29th October 2019 was legally improper and did not conform with the applicable provisions of Law; and thus it was null and void *ab initio*.

g) **That** the Respondent erred in law and in fact in determining that the Appellant owed additional Income Tax for the years of income 2013, 2014 ,2015, 2016 and 2017 by taking the Appellant's alleged bankings in his bank accounts and bringing them to charge.

h) **That** the Respondent erred in law and in fact in determining that the Appellant owed Value Added Tax arising from the banking analysis of the Appellant's bank accounts for the years 2013, 2014 ,2015, 2016 and 2017; as well as an erroneous legal and factual determination that Value Added Tax was owed by the Appellant arising from alleged undeclared sales derived from the banking analysis of the Appellant's bank accounts.

i) **That** the Respondent erred in law and in fact by applying Value Added Tax to an unregistered and unregistrable person, the Appellant herein; and with respect to transactions that do not qualify for or merit the application of Value Added Tax.

j) **That** the Respondent erred in law and in fact in its depiction and appreciation of the Appellant's business, financial and tax affairs; and the same was not a true or correct portrayal of the Appellant's commercial and financial status.

k) **That** the Respondent's Demands for additional Income Tax and for Value Added Tax illegally lift the corporate veil and seek to impose the tax liability of other taxable persons on the Appellant; as well

as seeking to collect taxes from the Appellant that have already been demanded from other taxable persons and/or paid by them.

l) **That** the Commissioner erred in Law by failing to take into account all the information relevant to this Matter and without due regard to the Objection, or to the information and documents adduced by the Appellant or to the information and records of the Appellant held by the Kenya Revenue Authority.

m) **That** the Respondent erred in law and in fact by failing to utilize its *Suo moto* powers under Section 31(1) of the Tax Procedures Act, by dint of which Section the Respondent could and should have amended the Appellant's Corporation Tax and Value Added Tax for the tax periods in question to reflect the correct amount of tax owed, if at all any tax was owed.

n) **That** if at all any additional Income tax and/or Value Added Tax are owed by the Appellant; the same would be far less than the extremely exaggerated and excessive sums raised by Respondent.

o) **That** the Respondent acted illegally, unreasonably and *ultra vires* the powers conferred on that Office by the applicable Tax Statutes.

p) **That** the Respondent's decisions were guided by extraneous considerations that the Commissioner is not legally entitled to consider; and the assessments flowing therefrom were consequently incurably tainted and thus illegal.

q) **That** the Demands of Tax being the Income tax and Value Added Tax assessments raised vide the Demand Notice dated 29th October 2019 in the amounts of Kshs. 512,919,524.00 and Kshs. 274,552,369.00 respectively, and in the aggregate amount of Kshs.

787,471,892.00; as confirmed through the Objection Decision/Confirmation Notice dated 30th June 2020; are *ultra vires*, arbitrary, excessive and erroneous; and have been levied on the Appellant in a manner that contravenes the Law.

The Appellant's Case

10. The Appellant's case is premised on the hereunder documents as filed by the Appellant before the Tribunal: -

a) The Appellant's Statement of Facts dated 19th August, 2020 and filed on the same date.

b) The List of Documents dated 8th March, 2020.

c) The Appellant's Written Submissions dated 19th February, 2021.

d) The Further List and Bundle of Authorities dated 8th March, 2020 filed on the 9th May, 2020.

e) The Appellant's Further Written Submissions dated 8th March, 2021.

11. The Appellant submitted that the Respondent conducted a Desk Audit of the Appellant. The Appellant was notified of the same vide an Assessment/Demand Letter dated 29th October 2019 [Ref: A002557439D] annexed to the Appellant's Statement of Facts dated and filed on 19th August 2020. The Respondent's Audit findings as set out in the Assessment/Demand letter dated 29th October, 2019 were as follows:

a. **Income Tax** – The Respondent conducted a 'bankings analysis' of the Appellant's bank accounts, which were not specified; and took the total alleged bankings in the years 2013, 2014, 2015, 2016, and 2017 and brought them to charge at 30%; and

b. **Value Added Tax** – The Respondent took the above alleged bankings and deemed them to be sales; and thereafter brought them to charge for Value Added Tax at 16%.

12. The Appellant added that pursuant to the applicable enabling provisions of the law the Appellant through a letter dated 27th November 2019, objected to the above-mentioned Assessment/Demand. The Respondent acknowledged receipt of the Objection *vide* a letter dated 7th January 2020 and informed the Appellant and six other Taxpayers that it had granted them an additional sixty (60) days from the date of the letter to, in its words *"file an objection"*.

13. The Appellant averred that it requested for an additional 120 days, predicated on the still ongoing *COVID-19* Pandemic and the restrictions that had been put in place by the Government to contain the same, to preset findings with respect to the Demand letter dated 29th October 2019 through its letter dated 12th June 2020. The Respondent acknowledged receipt of the letter dated 12th June, 2020 and informed the Appellant that it had rejected the Appellant's Objection on the grounds that it was not a valid Objection within the meaning of Section 51(3) of the Tax Procedures Act *vide* an Objection Decision/Confirmation Notice letter dated 30th June, 2020.

14. The Appellant stated that it wished to highlight the fact that with regard to the Objection Decision/Confirmation Notice letter dated 30th June 2020, the Respondent failed to address any of the limbs articulated in the Objection and instead proceeded to formally escalate taxes at issue for enforcement action and confirmed that the principal taxes were in the aggregate of Kshs. 787,471,892.00.

15. The Appellant submitted that aggrieved by the Tax Decision taken by the Respondent, it moved to this Honourable Tribunal *vide* a Notice of Appeal dated and filed on 13th July, 2020 which was served on and received by the Respondent on 14th July, 2020.

16. The Appellant argued that it was of the considered opinion that there are 13 issues raised in the Tax Appeal herein which require determination by this Honourable Tribunal namely: -

a. Whether the Appellant's Notice of Objection dated 27th November, 2019, which was received by the Respondent on even date, was a valid objection within the meaning of Section 51(3) of the Tax Procedures Act;
b. Whether by dint of the operation of Section 51(11) of the Tax Procedures Act, the Appellant's valid Notice of Objection letter dated 27th November, 2019, which was received by the Respondent on the same date, was automatically allowed by operation of Statute and thus the Respondent's assessments were extinguished by operation of law;
c. Whether the Respondent erred in law and in fact by not serving the Appellant with a Notice of Intention to Audit, and also by not conducting an in-depth audit of the Appellant's tax affairs; instead choosing to conduct a superficial and manifestly Desk Audit whose outcome was predetermined;
d. Whether the Respondent erred in law and in fact by failing to raise procedurally proper assessments pursuant to the provisions of Sections 29 and 30 of the Tax Procedure Act. The Respondent's Demand Notice dated 29th October, 2019 was legally improper and did not conform with the applicable provisions of law;
e. Whether the Respondent erred in law and in fact by failing to give the Appellant an opportunity to provide input and adduce information and documentation before the issuing of the Demand Notice dated 29th October, 2019;
f. Whether the Respondent erred in law and in fact in determining that the Appellant owed additional Corporation Tax for the years

of Income 2013, 2014 and 2015 by taking the Appellant's banking in its two bank accounts and bringing them to charge;

g. Whether the Respondent erred in law and in fact in determining that the Appellant owed Value Added Tax arising from the banking analysis of the Appellant's bank accounts for the years 2013, 2014, 2015, 2016, and 2017; as well as an erroneous legal and factual determination that Value Added Tax was owed by the Appellant arising from alleged undeclared sales derived from the bankings analysis of the Appellant's bank accounts;

h. Whether the Respondent erred in law and in fact by applying Value Added Tax to an unregistered and unregistrable person, the Appellant herein; and with respect to transactions that do not qualify for or merit the application of Value Added Tax;

i. Whether the Respondent erred in fact and in law in its depiction and appreciation of the Appellant's business, financial and tax affairs; and the same was not a true or correct portrayal of the Appellant's commercial and financial status;

j. Whether the Respondent's Demands for additional Income Tax and for Value Added Tax illegally lift the corporate veil and seek to impose the tax liability of other taxable persons on the Appellant; as well as seeking to collect taxes from the Appellant that have already been demanded from other taxable persons and/or paid by them;

k. Whether the Respondent erred in law and in fact by not taking into account the effect of the prevailing COVID-19 Pandemic and the containment measures put in place by the Government of Kenya in response to the Pandemic on the Appellant, as brought to the attention of the Respondent and by the Appellant; and thereafter failing to accede to the Appellant's reasonable request for dispensation;

l. Whether the Respondent erred in Law by failing to take into account all the information relevant to this Matter and without due regard to the Objection, or to the information and documents adduced by the Appellant or to the information and records of the Appellant held by the Kenya Revenue Authority; **AND**

m. Whether the Respondent erred in law and in fact by failing to utilize its *suo moto* powers under Section 31(1) of the Tax Procedures Act, by dint of which Section the Respondent could and should have amended the Appellant's Corporation Tax and Value Added Tax Returns for the tax periods in question to reflect the correct amount of tax owed, if at all any tax was owed.

17. The Appellant contended that it was appealing against the Income Tax and VAT Assessments/Demands made by the Respondent based on the grounds set out under the Memorandum of Appeal dated and filed on 19th August, 2020; and as elucidated in the Appellant's Statement of Facts dated and filed on 19th August, 2020 at pages 4-9 of the same. The Appellant's contention was that: -

a. If at all any additional Income Tax, as well as the imposition of Value Added Tax on the Appellant is possible; the same would be far less than the extremely exaggerated and excessive sums raised by Respondent.

b. The Respondent acted illegally, unreasonably and *ultra vires* the powers conferred on that Office by the applicable Tax Statutes.

c. The Respondent's decisions were guided by extraneous considerations that the Commissioner is not legally entitled to consider; and the assessments flowing therefrom were consequently incurably tainted and thus illegal; **and**

d. The Demands of Tax being the Income Tax and Value Added Tax assessments raised vide the Demand Notice dated 29th October 2019

in the amounts of Kshs. 512,919,524.00 and Kshs. 274,552,369.00 respectively, and in the aggregate amount of Kshs. 787,471,892.00; as confirmed through the Objection Decision/Confirmation Notice dated 30th June 2020; are *ultra vires*, arbitrary, excessive and erroneous; and have been levied on the Appellant in a manner that contravenes the Law.

18. The Appellant argued that contrary to the finding and subsequent decision of the Respondent the Appellant's Notice of Objection dated 27th November, 2019, which was received by the Respondent on the same date, was a valid objection within the meaning of Section 51(3) of the Tax Procedures Act. It argued that its Objection letter dated 27th November, 2019 was fully compliant with the requirements of Section 51(3) of the Tax Procedures Act due to the fact that:

    i. It affirmed that the Demand Notice dated 29th October, 2019 failed to portray a true and accurate picture of the Appellant's business, financial and tax affairs and thus was erroneous *ab initio*;
    ii. It affirmed that the Respondent had erred by not considering or taking into account operational costs towards the sales in arriving at the tax demand; and
    iii. It affirmed that the Respondent had covered banking credits that could not possibly be attributed to the Appellant's business income in arriving at its tax demands.

19. The Appellant relied on **Nairobi High Court Judicial Review Application No. 599 of 2017, Republic -v- Kenya Revenue Authority, ex parte M-Kopa Kenya Limited**; where the **Hon. Mr Justice G.V. Odunga** stated at Paragraphs 106 and 107 of the Judgement that;

"106. In my view since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the taxpayer is seeking further particulars or indulgence to enable it pay the taxes demanded. In this case the applicant had clearly made what was in substance an objection as envisioned under ***Section 51 of the Tax Procedures Act, 2015.*** *As the Responded defaulted in making a termination thereon within the prescribed time, the said objection was deemed to have been allowed.*

107. As the law deemed the objection to have been allowed, there is no reason why the Applicant should have appealed."

20. The Appellant further argued that its objection not only satisfied the express statutory requirements but also the wider purposive test adopted by the Hon. Mr. Justice Odunga in the aforementioned case. Accordingly, it humbly submitted that in view of the foregoing, this Honourable Tribunal ought to allow the Appellant's Notice of Objection dated 27th November, 2019.

21. The Appellant also argued that contrary to the finding and subsequent decision of the Respondent whether by dint of the operation of Section 51(11) of the Tax Procedures Act, the Appellant's valid Notice of Objection letter dated 27th November, 2019, which was received by the Respondent on the same date, was automatically allowed by operation of Statute and thus the Respondent's assessments were extinguished by operation of law. The Appellant humbly submitted that it has shown that every conceivable permutation of the dates in this matter leads to the Objection Decision having been rendered by the Appellant outside the mandatory sixty (60)

day period required by Section 51(11) of the Tax Procedures Act, which provides as follows: -

> *"(11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of objection, the objection shall be allowed."*

22. The Appellant submitted that Section 57 of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya) is the guiding law on matters computation of time where otherwise not established under another written law. It argued that It is manifestly clear from the contents of Section 57 of the Interpretation and General Provisions Act that the sixty (60) days period prescribed under Section 51(11) of the Tax Procedures Act is a period of sixty ordinary calendar days, inclusive of National Days, Public Holidays and Weekend Days. Only where the last day is an "excluded day" being a Public Holiday, a Sunday or a Non-Working Day is a day added.

23. The Appellant argued that in the present Appeal, the Respondent was bound to render the Objection Decision within sixty (60) days of the date of receipt of the Objection, that is on or before **26th January, 2020.** The Appellant invited the Tribunal to note that the Respondent's Objection Decision/Confirmation Notice dated 30th June, 2020, was received one hundred and fifty-six (156) days out of time.

24. Appellant directed the Tribunal to the decision of **Ivita v Kyumbu [1975] EklR** which outlines the principles on when delay is inexcusable and inordinate as follows –

> *"The test was enunciated by Lord Denning MR in Allen v Sir Alfred Mc Alpine & Sons Ltd at p. 547 and it was repeated by Edmund Davies LJ in Paxton v Allsopp [1971] 3 ALL ER 370 at p. 378, who put it as follows:*

"If I may be acquitted of immodesty by quoting some words of mine used in Austin Securities Ltd v Northgate & English Stores Ltd [1969] 2 ALL ER 753 where having set out the familiar tests to be applied in such cases, I said: 'But these questions are, as it were, posed enroute to the final question which override everything else and was enunciated by Lord Denning MR, in Allen v Sir Alfred McAlpine & Sons Ltd, in these words:

"The principle on which we go is clear: when the delay is prolonged and inexcusable and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away....". so the overriding consideration always is whether or not justice can be done despite the delay. Thus, Lord Denning MR referred later in his judgement in that case, to "delay.....so great as to amount to a denial of justice'..." So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because..."

25. That accordingly, it is beyond dispute that the Objection Decision rendered on 30th June, 2020 was given outside of the statutory period and therefore it was deemed to be allowed by operation of law.

26. The Appellant argued that contrary to the finding and subsequent Decision of the Respondent; The Respondent erred in law and in fact by not serving the Appellant with a Notice of Intention to Audit, and also by not conducting an in-depth audit of the Appellant's tax affairs; instead choosing to conduct a superficial and manifestly Desk Audit whose outcome was predetermined.

27. The Appellant contended that the Respondent's decision not to conduct a regular audit of the Appellant and thereby accord the Appellant with the opportunity to provide input, information and documentation was an error of both law and fact.

28. The Appellant relied on Section 59 (1) of the Tax Procedures Act No. 29 of 2015 which reads as follows: -

> "59. Production of Records
>
> *(1) For the purpose of obtaining full information in respect of tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorized officer may require any person, by notice in writing, to: -*
>
> *(a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;*
>
> *(b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or*
>
> *(c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person."*

29. The Appellant stated that as evidenced from the documents adduced by the Appellant in its Statement of Facts dated 19th August, 2020, the Respondent expressly admitted in its Demand Notice dated 29th October, 2019 as follows:

"Information in our possession indicates that you earned income in the years 2016 to 2019 but did not declare the same for Income Tax and VAT. The Commissioner has therefore raised default assessments and the related tax is as shown below...".

30. Further to this, the Respondent stated that:-

*"The above **Taxes** are **hereby assessed and by this Letter demanded.** Make arrangements to settle the outstanding taxes immediately."*

31. The Appellant submitted that the Respondent had no intention of conducting an audit to obtain full information of the Appellant's alleged tax liability. It is clear from the contents of the Objection Decision dated 30th June, 2020 that the Respondent's assessment was arbitrary, oppressive, and unjust. That the Respondent acted irrationally, unreasonably and maliciously when it confirmed the Assessments of the Desk Audit. The Appellant contends that the information in the Respondent's possession is an inadequate representation of his tax affairs.

32. The Appellant argued that it is manifestly clear that the Respondent failed to comply with the provision of Section 59(1) of the Tax Procedures Act No. 29 of 2015 by issuance of a Notice of Intention to Audit, the Respondent would have accorded the Appellant an audit interview that would have given the Appellant an opportunity to provide records and documents. As a result, that would have remedied the predictable gross errors, false assumptions, improper and illegal positions, and an illegal outcome.

33. The Appellant humbly submitted that in view of the fact that the Respondent failed to conduct an in-depth desk audit of the Appellant's tax

affairs and instead relied on and confirmed the findings of its fictitious desk audit, this Honourable Tribunal ought to find that the Commissioner erred in failing to comply with the provisions of Section 59(1) of the Tax Procedures Act No. 29 of 2015.

34. The Appellant argued that contrary to the finding and subsequent Decision of the Respondent; The Respondent erred in law and in fact by failing to raise procedurally proper assessments pursuant to the provisions of Sections 29 and 30 of the Tax Procedure Act. The Respondent's Demand Notice dated 29th October, 2019 was legally improper and did not conform with the applicable provisions of law.

35. The Appellant invited the Honourable Tribunal to note that the provisions of Sections 29 and 30 of the Tax Procedures Act with respect to the computation of assessments by the Commissioner are expressly ousted from consideration and application by the Respondent. It argued that perusal of the Respondent's Demand Notice dated 29th October, 2019 indicates that it does not meet the following mandatory requirements set out under Section 29(2) and 30(4) of the Tax Procedures Act No. 29 of 2015: -

    a. The amount of tax assessed;
    b. The amount of any penalty payable in respect of the tax assessed; **and**
    c. The due date for payment of the tax and penalty, and interest being a date that is not less than 30 days from the date of service of the notice.

36. The Respondent further argued that the assessment was not supported with any schedules or computations relied on by the Respondent when computing the assessments. As evidenced from the documents adduced by the Appellant in its Statement of Facts dated 19th August, 2020 and

contained on page 12, the Respondent had expressly stated that it relied on information in its possession rather than referencing the documents it relied upon. The information in the Demand Notice is ambiguous as is seen from its use of the terms: *"expected sales"* and *"total bankings"*.

37. The Appellant contends that the Respondent herein cannot simply ignore the provisions of law enacted by the legislature. It is trite law that unless a provision of law is unconstitutional, that provision of law is binding on all persons and authorities, including the Respondent.

38. That accordingly, this Honourable Tribunal should not entertain the Respondent's malicious actions and should affirm the position set-out by the Appellant at Paragraphs 5 and 6 of the Memorandum of Appeal.

39. That this Honourable Tribunal would not only be stepping outside the law but it would expedite chaos in the Tribunal and the Courts as the Respondent would be at liberty to ignore the laws.

40. The Respondent further stated that it is beyond dispute that the Respondent's Demand Notice dated 19th October, 2019 falls short of the mandatory requirements set out under Section 29 and 30 of the Tax Procedures Act No. 29 of 2015 and thus the Respondent ought to be compelled to adduce which Bank Account(s) of the Appellant were examined, which alleged bankings were considered, or provide the necessary information that is required by Statute of a Demand Notice.

41. The Appellant submitted that contrary to the finding and subsequent Decision of the Respondent; the Respondent erred in law and in fact by failing to give the Appellant an opportunity to provide input and adduce information and documentation before the issuing of the Demand Notice dated 29th October, 2019;

42. The Appellant further submitted that the procedure adopted by the Respondent in assessing the Appellant's alleged tax liability was inadequate and failed to give the Appellant ample opportunity to articulate its position amid the *COVID-19* Pandemic. It argued that the Respondent seeks to mislead this Honourable Tribunal by intimating that it had the intention of according the Appellant an opportunity to adduce information and documentation.

43. The Appellant contended that the contents of the Demand Notice dated 29th October, 2019 articulates the Respondent's malicious intention of demanding immediate payment of the inaccurate tax assessments by the Appellant. A perusal of the letter shows that it does not make any reference to Section 59 of the Tax Procedures Act No. 29 of 2015 nor does it make any indication that the Appellant was either required to produce any records for examination or furnish information relating to the tax liability specified; as evidenced from the documents adduced by the Appellant in his Statement of Facts. The letter turned out to be a tax assessment with a demand for **"immediate"** payment thereof.

44. The Appellant argued that it is trite law that tax administration in Kenya now requires that unless there is good reason not to give the taxpayer an opportunity to provide input or adduce information and documents, the Taxpayer ought to be accorded that opportunity. It submitted that it did inform the Respondent of its difficulty in meeting the agreed timeline due to the movement restrictions imposed by the Kenyan Government due to the *COVID-19* Pandemic as evidenced from the documents adduced by the Appellant in his Statement of Facts. He argued that in the present Appeal, the Respondent would not have suffered any prejudice whatsoever would it have accorded the Appellant that right. Furthermore, the Respondent

failed to provide a legally permissible reason for not giving the Appellant that right.

45. The Appellant argued that given that he was not accorded enough time to adduce information, there was a clear breach of Article 47 of the Constitution of Kenya, 2010, in that his right to fair administrative action that is lawful, reasonable and procedurally fair was expressly violated.

46. Accordingly, the Appellant submits that in light of the foregoing he was not afforded a fair opportunity to respond to a decision that materially and adversely affected him. That therefore, this Honourable Tribunal ought to find that the Respondent erred in law and in fact by failing to give the Appellant an opportunity to adduce information and provide input pursuant to the provisions of the Constitution of Kenya, 2010 and the Tax Procedures Act No. 29 of 2015.

47. The Appellant argued that contrary to the finding and subsequent Decision of the Respondent; The Respondent erred in law and in fact in determining that the Appellant owed additional Corporation Tax for the years of Income 2013,2014 and 2015 by taking the Appellant's bankings in its two bank accounts and bringing them to charge; it further stated that contrary to the finding and subsequent Decision of the Respondent; The Respondent erred in law and in fact in determining that the Appellant owed Value Added Tax arising from the banking analysis of the Appellant's bank accounts for the years 2013, 2014, 2015, 2016, and 2017; as well as an erroneous legal and factual determination that Value Added Tax was owed by the Appellant arising from alleged undeclared sales derived from the bankings analysis of the Appellant's bank accounts;

48. Appellant contended that the Respondent raised an assessment notice on the Appellant and demanded payment of Kshs. 787,471,892.00 being the

purported Corporation Tax, VAT, penalties and interest owed by the Appellant, which according to the Respondent was based on the computation of the Appellant's estimated bankings. This estimation was based on the pretext that the Respondent was relying on information in its possession that was deemed sufficient enough for the Respondent not to require a compliance check or supporting documents from the Appellant.

49. The Appellant argued that It is manifestly clear that the assessment was not based on receipt of any income as defined under the Income Tax Act or the Value Added Tax Act for rendering services or sale of goods as defined under the two statutes.

50. The Appellant further argued that the Assessment failed to reflect the Appellant's financial position since the figures stated therein as income were not only exaggerated, but they were also not supported as income by documentary or other evidence. The Demand Notice failed to lay a basis as to why the alleged banking credit amounts were undeclared and untaxed sales attributable to the Appellant.

51. The Appellant averred that despite his objection of 27th November 2019, the Respondent failed to withdraw his Assessment and instead by a letter dated 30th June, 2020 confirmed the same without conducting a proper assessment as is required by law. It was the Appellant's contention that the Respondent acted unreasonably, irrationally and contrary to the provisions of the Income Tax Act Chapter 470 of the Laws of Kenya.

52. That similarly, by using this much maligned approach that does not take into account that bankings are distinct from taxable incomes, the Respondent was actuated solely by the need to impose undue taxes upon the Appellant and thus acted *ultra vires.*

53. The Appellant humbly submitted that the Respondent had no right to raise the Assessments on the Appellant based on legally and factually erroneous bankings when it does not have documentary evidence in its possession and failed to conduct a compliance check on the Appellant's taxable income for the period in issue.

54. The Appellant argued that contrary to the finding and subsequent Decision of the Respondent; The Respondent erred in law and in fact by applying Value Added Tax to an unregistered and unregistrable person and with respect to transactions that do not qualify for or merit the application of Value Added Tax; The Appellant further highlighted that as of the date of filing the Statement of Facts dated 19th August, 2020, the Appellant had not been registered for Value Added Tax.

55. The Appellant relied on **Samrat Supermarkets Limited V Commissioner of Domestic Taxes (TAT No. 190 of 2018), where** the Tribunal held as follows-

> *"Our interpretation of the provisions of Section 17 of the VAT Act, 2013 is that in order to claim input VAT, a taxpayer must satisfy the following test, that:*
>
> *a. The taxpayer is registered for VAT purposes.*
> *b. The purchase was for the purpose of making taxable supplies.*
> *c. The input tax does not relate to the excluded purchases as set out under Section 17(4) of the VAT Act or exempt supplies.*
> *d. The input is claimed within six (6) months of receiving the supply; and*
> *e. The claim of the input tax should be based on the documentation required under Section 17(3) of the VAT Act and the Regulations thereunder."*

56. The Appellant averred that a perusal of the Respondent's letters dated 29th October, 2019 and 30th June, 2020 shows that the Respondent raised assessments for Value Added Tax without registering the Appellant. Furthermore, the Respondent in making its demand failed to outline the basis for this and even highlighted that the Appellant was engaging in activity that gave rise to the Value Added Tax chargeable in the amount of Kshs. 274,552,369.00.

57. The Appellant contended that as an unregistered person, he was well within his rights not to issue any invoice to a third party with regards to VAT pursuant to Section 42 (2)(b) of the VAT Act. Furthermore, the Appellant relied on the decision in **Tradeline Express Kenya Limited V Commissioner of Investigations and Enforcement, TAT No. 111 of 2019, p. 31**, where the Honourable Tribunal held that:

> *"31. The Tribunal will refer to the relevant law being Section 13(5) of the VAT Act 2013. The same provides as follows:*
>
> > *"In calculating the value of any service for the purposes of subsection (1) there shall be included any incidental costs incurred by the supplies of the services in the course of making the supply to the client. Provided that, if the Commissioner is satisfied that the supplier has merely made a disbursement to a third party as an agent of his client, then such disbursement shall be excluded from the taxable value."*

58. The Appellant argued that the Respondent is well aware that the Appellant is an agent of six (6) other Taxpayers who are either companies that the Appellant is a Director/Shareholder in or was formerly so. It further submitted that the Respondent used banking credit sums for such third parties as a merit for its application of the outrageous Value Added Tax

sums in issue. That moreover, the Respondent yet again failed to adduce evidence and information in support of such alleged credits that were deemed to be undeclared and untaxed sales amenable to Value Added Tax. To date, the Appellant has not been provided with any computation, schedule, or list of the same.

59. The Appellant argued that it is trite law that statutory powers and duties must be exercised and performed reasonably. That this position is buttressed by the holding of **Nyamu, J.** in **Keroche Industries Limited v Kenya Revenue Authority & 5 Others, Nairobi HCMA No. 743 of 2016 [2007] Eklr** where he held that:

> *"The taxman is not permitted to go on a frolic of his own to impose tax not specifically permitted."*

60. The Appellant submitted that the Respondent was in gross violation of its duty to exercise it powers within the confines of the law seeing as the assessment in this respect and its conclusions were baseless with regards to its application of Value Added Tax.

61. The Appellant argued that contrary to the finding and subsequent Decision of the Respondent; The Respondent erred in fact and in law in its depiction and appreciation of the Appellant's business, financial and tax affairs and the same was not a true or correct portrayal of the Appellant's commercial and financial status. It further argued that in light of the fact that the Respondent herein failed to carry out an audit of the Appellant, it is manifestly clear that the Respondent did not have an accurate depiction of what the Appellant's business, financial and tax affairs entailed.

62. The Appellant cited Section 58 of the Tax Procedures Act No. 29 of 2015 which reads as follows –

> *"(1) Notwithstanding anything to the contrary in any written law, an authorized officer may inquire into the affairs of a person under any tax law, and shall at all times have full and free access to all lands, buildings, places to inspect all goods, equipment, devices and records, whether in the custody or control of a public officer, or of a body corporate or of any other person, and may make extracts from or copies of those records.*
>
> *(2) An officer acting under subsection (1) may require the owner or employee, or a representative of the owner of the business, to give him all assistance and to answer all questions relating to the inquiry."*

63. The Appellant argued that the Respondent did not make any effort of investigating the Appellant and/or carrying out an interview or an opening meeting where the Appellant would have furnished the Respondent with the relevant documentation, which would have informed and guided the Respondent in coming up with accurate assessments and legal decisions. Based on the foregoing, the Appellant urged this Honourable Tribunal to find that the Respondent's assessments and actions fell short of its mandate as envisaged in the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya.

64. The Appellant argued that contrary to the finding and subsequent Decision of the Respondent; The Respondent's demands for additional Income Tax and for Value Added Tax illegally lift the corporate veil and seek to impose the tax liability of other taxable persons on the Appellant as well as seeking

to collect taxes from the Appellant that have already been demanded from other taxable persons and/or paid by them.

65. The Appellant argued that it is manifestly clear from the facts herein that the Respondent approached the Appellant with a preconceived mind and intention of raising exaggerated taxes from the Appellant. That furthermore, the Respondent raised exaggerated assessments from six other taxpayers who are either companies that the Appellant is a Director/Shareholder in or was formerly so.

66. The Appellant relied on the case of **Michael Kyambati V Principal Magistrate, Milimani Commercial Courts, Nairobi & Another [2016] Eklr** where **Justice Odunga** stated as follows;

> *"The mere fact that one is a director or shareholder of a corporation does not, ipso facto, make the director or shareholder liable for the actions or omissions of the Company unless the circumstances are such that the corporate veil of the Company can be lifted."*

67. The Appellant further buttressed its arguments by citing **China Wu Yi Company Limited V Edermann Property & 2 Others (2013) eKLR** where it was held that:

> *"Further, the 2nd and 3rd Defendants maintained that in accordance with the principles expounded in the well-known case of Salomon V Salomon & Co. Ltd (1897) A C 22 HL the veil of incorporation could not be lifted as against them unless there were allegations of fraud brought by the Plaintiff. To this end, the Courts attention was drawn to the findings of Ringera J. (as he then was) in Corporate Insurance Co Limited V Savemax Insurance Brokers Limited & Another HCCC No. 125 of 2002 (unreported) when he stated:*
> *'The veil of incorporation is not to be lifted merely because the company has no assets or it is unable to pay its debts and is thus insolvent. In such a situation, the law provides for remedies other than the director of the company being saddled with the debts of the company."*

68. The Appellant directed the gaze of the Tribunal to the case of **Ernie Campbell & Co. (K) Limited V Commissioner of Domestic Taxes (TAT No. 385 of 2018) para. 38** which it was held that:

> *"The Respondent claims that the suspect traders, though registered in I-Tax, cannot be located. The Respondent's efforts to trace the traders through their declared phone numbers have not borne fruit to date. The Tribunal hold the view that the Respondent has not exhausted the available machinery to trace the traders and therefore they are not "missing". In addition, the Tribunal notes that the said missing traders are duly registered in i-Tax and given PINs by the Respondent. Then one would pose and ask: On what basis did the Respondent deem the said traders to be missing?"*

69. The Appellant stated that in the present Appeal, the Respondent sought to circumvent the law by illegally lifting the corporate veil and imposing on the Appellant tax liabilities of other taxpayers; along with seeking to impose and collect taxes already demanded from them and/or paid by the taxpayers in question. The Appellant directs the attention of the Honourable Tribunal to the criminal charges brought against the Appellant by the Respondent and those other corporate taxpayers as a clear depiction of its intention to illegally lift the corporate veil. The charge sheet revealed that the Respondent sought to impose on the Appellant taxes that were not possibly his own.

70. The Appellant contended that as evidenced from the documents adduced by the Appellant in his Statement of Facts the Appellant wished to inform this Honourable Tribunal that the Criminal charges in question brought against the Appellant before the High Court of Kenya were quashed. The Appellant urged the Honourable Tribunal to find that the Respondent acted illegally, arbitrarily and *ultra vires.*

71. The Appellant argued that the Respondent erred in law and in fact by not taking into account the effect of the prevailing COVID-19 Pandemic and the containment measures put in place by the Government of Kenya in response to the Pandemic on the Appellant, as brought to the attention of the Respondent by the Appellant and thereafter failing to accede to the Appellant's reasonable request for dispensation. The Appellant argued that the Respondent was well aware of the fact that the Appellant was dealing with six (6) other related matters since the Respondent raised exaggerated assessments from six (6) other taxpayers who are either companies that the Appellant is a Director/Shareholder in or was formerly so. He argued that given the severity of the situation and the prejudice that the Appellant would suffer, the Respondent could have and should have granted the Appellant's understandable and reasonable request for more time.

72. The Appellant contended that the Respondent did not even accord the Appellant the chance to provide information and documents at that time, which was the peak of the prevailing *COVID-19* Pandemic and the containment measures put in place by the Government of Kenya is an indicator that the Respondent had sinister motives towards the Appellant.

73. The Appellant relied on the case of **Justice Amraphael Mbogholi Msagha V The Chief Justice of the Republic of Kenya & 7 Others [2006] EKlr** that "*a decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision.*" That accordingly, he is beyond dispute that the Respondent acted unreasonably by failing to accede to the Appellant's reasonable request for dispensation.

74. The Appellant argued that the Respondent erred in law by failing to take into account all the information relevant to this matter and without due regard to the Objection, or to the information and documents adduced by

the Appellant or to the_information and records of the Appellant held by the Kenya Revenue Authority;

75. The Appellant submitted that it is unclear how the Respondent managed to tabulate and raise the default assessments amounting to Kshs. 787,471,892.00. The Respondent has failed to provide any documentation or reasonable source supporting its claim and demand of the exaggerated sums.

76. The Appellant invited the Tribunal to note that the Respondent is charged with the mandate of administering the tax regime on behalf of the Government of Kenya and thus holds and has access to all the records of taxpayers. The Respondent chose to ignore the information and records of the Appellant in its system and instead opted to:

    a. Tabulate and allocate the VAT assessment amount of Kshs. 274,552,369.00 to the Appellant who is not registered for VAT.
    b. Tabulate exaggerated sums amounting to Kshs. 787,471,892.00 and confirming a default assessment of the same.
    c. Use the erroneous banking method to estimate the alleged tax owed by the Appellant.

77. The Appellant submitted that the Respondent erred in law and in fact on issues that could have been streamlined by simply crosschecking its own documentation and previous actions with respect to the Appellant. As evidenced from the documents adduced by the Appellant in its Statement of Facts. The Appellant informed the Tribunal that it did plead with the Respondent to accord it more time to adduce documents relating to this Appeal vide its Letter dated 12th June, 2020 and the same was rejected by the Respondent. That in the light of the foregoing, the Appellant humbly submitted that his Objection dated 27th November, 2019 be allowed.

78. The Appellant argued that the Respondent erred in law and in fact by failing to utilize its *suo moto* powers under Section 31(1) of the Tax Procedures Act, by dint of which Section the Respondent could and should have amended the Appellant's Corporation Tax and Value Added Tax Returns for the tax periods in question to reflect the correct amount of tax owed, if at all any tax was owed.

79. The Appellant contended that the Respondent's tax findings are not only inaccurate and unreasonable but also unfair to the Appellant since the Appellant had to the best of his knowledge not registered for Value Added Tax.

Appellant's Prayers

80. The Appellant prays that:

a) This Honourable Tribunal be pleased to allow the Appellant's Notice of Appeal and set aside the Assessments under review herein.

b) Thereafter, this Honourable Tribunal be pleased to find that the Appellant is not liable to pay any additional taxes with regard to the years of income and tax periods under review.

c) This Honourable Tribunal be pleased to Order the Respondent to pay the costs of this Appeal; and

d) This Honourable Tribunal be pleased to issue any other Order favourable.

Respondent's Case

81. The Respondent's case is premised on the hereunder material documents as filed before the Tribunal and on the evidence adduced by its witness on the 2nd March, 2021: -

a) The Respondent's Statement of Facts dated 18th September, 2020 and filed on the same date.
b) The Witness Statement of Asenath Obaga dated 12th February, 2021 and filed on 18th February, 2021.
c) The Respondent's Written Submissions dated 2nd March, 2021 filed on the same date.
d) The Respondent's Further Written Submissions dated 9th March, 2021 and filed on 10th March, 2021.
e) The respondent's Further Bundle of Documents dated 9th March, 2021 and filed on 10th March, 2021.

82. The Respondent submitted that it conducted an investigation relying on the information available on the *iTax* System and further requested for other third parties' information from Gulf Bank (Bank Account Number 0130053401, 0130053402, 0130053403 and 0130053404) to establish the Appellant's accurate tax status. The investigations established that:

i. The Appellant is a director and/or beneficiary of the following companies: Royal Star Energy Limited- P051571194H, Gulf Skytop Ltd- P051335168I, Coast Terminal East Africa Ltd- P051398900G, Highstar Food Industries Ltd- P051605934J, Skylink Oil Ltd- P051457579X and Desert Star Transporters Limited- P051242689J.
ii. The Appellant had filed returns for the period 2015, 2016, 2017 and 2018. However, he declared a nil return for the 2018 return period.

iii. During the period under consideration, it was established that the Appellant had met the threshold to have registered for VAT hence the Respondent invoked Section 34 of the Value Added Tax Act and registered the Appellant for the same.

iv. Upon analyzing the bank accounts, it was evident that the Appellant received huge deposits from customers and also made several payments to suppliers. Furthermore, the Appellant had a turnover of more than Kshs. 5,000,000 and the resultant income were brought to charge by the Respondent.

83. The Respondent submitted that having concluded the investigations, it issued the Appellant with tax assessments on 29th October 2019 clearly stating the basis of the finding. The Appellant was granted from 29th October 2019 to 30th June 2020, which is a period of over 8 Months, to provide documents to support the objection.

84. That the Appellant blames COVID-19 for failing to provide the documents however the first COVID-19 case in the country was only reported on 3rd March 2020.

85. The Respondent submitted that through the Appellant's outline of 13 issues in his submissions for determination by the Tribunal. The Respondent is of the considered view that the said issues can be consolidated to come up with the following main issues for determination:

i. Whether the Appellant's Objection dated 27th November 2019 was valid within **Section 51(3)** of the TPA.

ii. Whether the Appellant's Objection dated 27th November 2019 was allowed by dint of **Section 51(11)** of the TPA.

iii. Whether the Appellant was arbitrarily denied the opportunity to provide documents to support the objection.

iv. Whether the Respondent could rely on the information in its possession to issue an assessment or a demand.

v. Whether the assessment met the threshold of Section 29 and 30 with regard for failure of containing schedule or computation to support the assessment/demand; and

vi. Whether the Respondent could issue VAT Assessment to the Appellant; and

vii. Whether the respondent can be faulted for not issue a Notice of Intention to Audit.

Whether the appellant's objection dated 27th November 2019 was valid within Section 51(3) of the TPA.

86. The Respondent submitted that on 30th June 2020 it informed the Appellant that the objection made on 27th November 2020 was not in compliance with Section 51 (3) of the Tax Procedures Act. **Section 51 (3)** of the Tax Procedures Act provides that:

> *"(3) A notice of objection shall be treated as validly lodged by a taxpayer under*
>
> *subsection (2) if—*
>
> *(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments.*
>
> *(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under Section 33(1); and*
>
> *(c) all the relevant documents relating to the objection have been submitted."*

87. The Respondent contended that Sub-Section (a) provides that an objection should have three things; ground of objection, the amendment required and the reasons for the amendment. It argued that the analysis of the Appellant's objection in line with subsection (a) revealed as follows:

i. **Ground of objection:** Appellants states;

1. that the Respondent's "letter *dated 30th October 2019 does not in any way portray a true statement of our business, our company buys and sells thus it has operational costs that should be factored or considered when preparing our books of accounts".*
2. *That not all bank credits as used by the Commissioner are business incomes, thus we request for 90 days as the burden of prove is on us.*

ii. **Amendment required to be made to correct:** the Appellants letter does not state the amendments required.

iii. **The reasons for the amendment:** The Appellants letter states that the Respondents demand letter "..... *has operational costs that should be factored or considered when preparing our books of accounts. That not all bank credits as used by the Commissioner are business incomes, this we request for 90 days as the burden of prove is on us."*

88. The Respondent avers that it informed the Appellant through the Objection Decision dated 30th June 2020, that the objection made on 27th November 2020 was not in compliance with Section 51 (3) of the Tax Procedures Act. Furthermore, despite being granted over 8-month time to provide documents to support its objection, the Appellant never provided the documents. That even at this Appeal, no documents have been availed to support the objection or the amendment sought.

89. The Respondent relied on the case of *COMMISSIONER OF INLAND REVENUE THE DUKE OF WESTMINISTER [1986] AC I*, at page *24 where Lord Russel* addressed some of the points covered above, as follows: -

> ***"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed, if in accordance with the court's view of what it considers the substance of the transaction, the court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy but only by plain words of a statute applicable to the facts and circumstances of the case. As Lord Cairns said many years ago in PARTINGTON v ATTORNEY GENERAL "As I understand the principle of fiscal legislation it is this, if the person sought comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot, bring the subject within the letter of the law, the subject is free however apparently within the spirit of the law the case ought otherwise appear to be ..."***

90. The Respondent submits that from the foregoing, taxing statutes must be strictly interpreted. That the Appellant's objection failed to meet the threshold provided under Section 51 (3) and it therefore follows that the Objection decision was not properly on record and the same was properly disallowed.

Whether the Appellant's objection dated 27th November 2019 was allowed by dint of Section 51(11) of the TPA.

91. The Respondent submitted that the Objection of 27th November 2020 only stated that the letter of 29th October 2019 was not reflective of the true status. It did not state the amendment the Appellant wanted the Commissioner to make, nor did it provide the documents to support their ***alleged true status of his business.*** It in real sense only requested for time to provide documents.

92. That the Respondent indulged the Appellant on several opportunities to make good the objection. The Appellant failed to take advantage and after 8 months the Respondent proceeded to disallow the objection fully as not being proper.

93. The Respondent cited **Section 51 (11)** which states as follows:

> ***"The Commissioner shall make the objection decision within sixty days from the date of receipt of—***
> ***(a) the notice of objection; or***
> ***(b) any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed."***

94. It contended that from the foregoing, **sub- Section (b)** is clear that the Appellant was required to provide the documents to support the objection so that the timeline would start running. Having failed to provide the documents, the objection stands disallowed.

95. The Respondent observed that the other question that this Tribunal should ask itself is even if the timeline was to be said to have been running, the

Appellant did not state what amendment he wanted from the Respondent hence the Tribunal has nothing to allow. This ground therefore also fails.

Whether the Appellant arbitrarily denied the opportunity to provide documents to support the objection.

96. The Respondent submitted that the Appellant had on 27th November 2019 stated as follows: "letter *dated 30th October 2019 does not in any way portray a true statement of our business, our company buys and sells thus it has operational costs that should be factored or considered when preparing our books of accounts..... That not all bank credits as used by the Commissioner are business incomes,* ***this we request for 90 days as the burden of prove is on us.*** That the Respondent went further and indulged the Appellant, subsequently after 8 months, the Respondent disallowed the objection as no documents had been provided.

97. The Respondent argued that it is not in dispute that the first COVID-19 case and Government restrictions started on 14th March 2020 which was over 4 months from the date of the assessment which was on 29th October 2020, hence the same cannot be an excuse for not providing the documents. That it is further judicial knowledge that the service of documents was made electronic, and the Appellant could have utilized the electronic platforms. That he was able to file the Appeal it's really shocking that he could not provide documents to support the Objection.

98. The Respondent contends that it indulged the Appellant on several opportunities to make good the objection. The Appellant failed to take advantage and after 8 months the Respondent proceeded to disallow the objection fully as not being proper. That the Respondent having indulged the Appellant for over eight (8) months the same cannot be said to be arbitral in any manner.

Whether the Respondent could rely on the information in its possession to issue an assessment or a demand.

99. The Respondent contended that the Appellant wants the Tribunal to find fault that the Respondent primarily relied on the information available on the *iTax* System and further requested for other third parties' information from Gulf Bank to make the assessment. It cited **Sections 29** and **31** of the TPA which states as follows:

Section 29 (1) "***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 (referred to as a "default assessment")***"

Section 31 (1) ***"Subject to this Section, 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 judgement, to the original assessment of a taxpayer for a reporting period to ensure that—...."***

100. The Respondent argued that the Appellant wants the Respondent to be faulted for using banking analysis to come up with the income. The Respondent relies on the case of **Bachmann v. The Queen, 2015 TCC 51** where the court stated that: ***"This Court has recognized that in an appropriate case a bank deposit analysis is an acceptable method to compute income."***

101. The Respondent further submits that indirect methods like the use of bank deposits involve the determination of tax liabilities through an analysis of a taxpayer's financial affairs utilizing information from a range of sources beyond the taxpayer's declaration and formal books and records. Assessments are often based on circumstantial evidence indicating a reasonable estimate of the taxpayer's correct liability.

102. The Respondent submitted that Bank deposits method is based on the premise that money received must either be deposited or spent. This approach is particularly useful if an analysis of bank accounts and a taxpayer's cash expenditure indicates a likelihood of undeclared income and the taxpayer makes regular payments into bank accounts that appear to be from a taxable source.

103. The Respondent submitted that a detailed analysis of all the bank deposits into accounts established several deposits from the customers of the Appellant and payments to the suppliers, clearly showing a person in trade. It further submitted that the Tribunal has accepted the position that banking analysis can be used to come with income for tax purpose as was in the case of Digital **Box Limited –vs- Commissioner of Domestic Taxes, TAT Appeal No. 115 of 2017.**

104. The Respondent further argued that the Appellant had during the Objection acknowledged that the burden to prove that the assessment was not proper lied on him and it was for him to provide documentary evidence for the Respondent to amend or vacate the assessment. The burden is further recognized by **Section 56 (1)** of the Tax Procedures Act. It is not in dispute that documents were never provided despite the Appellant being given over **eight (8) months** to avail the said documents.

105. The Respondent observed that it is worth noting that under **Section 23** of the Tax Procedures Act taxpayer has an obligation to maintain documents and records which would enable the ascertainment of his tax status. **Section 23** provides as follows.

> ***"(1) A person shall—***
>
> ***(a) maintain any document required under a tax law, in either of the official languages.***

(b) maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained; and

(c) subject to subsection (3), retain the document for a period of five years from the end of the reporting period to which it relates, or such shorter period as may be specified in a tax law."

106. The Respondent stated that the Appellant having failed to provide documents even at this Appeal to explain the deposits which would have enabled the Respondent determine the Appellant tax status, the Respondent was justified to rely on the information in its possession including banking to make the assessment.

Whether the assessment met the threshold of Section 29 and 30 with regard for failure of containing schedule or computation to support the assessment/demand

107. The Respondent submitted that the Assessment herein were issued under Section 29 and 31 of the Tax Procedures Act and not Section 30 of the Act as submitted by the Taxpayer. It argues that the Appellant want the Tribunal to find fault in the assessment as the said assessment was not accompanied with ***a schedule of the computation to support the Computation.*** The Respondent states that the tax demand of 29th October 2019 which was given to the taxpayer clearly showed the following.

i. The amount of tax due and the tax head and how they have been arrived at.
ii. The period under consideration.
iii. The objection method; and
iv. Finally invited the Appellant to approach the Respondent with a view of making arrangements to pay the taxes.

108. The Respondent argued that the Tax Demand fully explained how the amounts were reached and further it did not at any point require the Appellant to make ***the immediate payment of tax, it only invited the Appellant to immediately engage the Respondent with a view of coming up with an acceptable arrangement for the payment of the taxes.*** Thus the Appellant having opted to object, instead of approaching the Respondent to arrive at an arrangement, it is not in dispute that the Respondent respected his right to object and never demanded for the payment of the taxes until after the Objection decision, which was made **eight (8) months** later.

109. The Respondent further submitted that an assessment cannot be a subject of a case, where the Appellant has exercised its right of objection and an Objection decision has been made. It is the objection decision which is the subject of the Appeal and it is what the Tribunal should make a finding on whether the same is validly made and not the Assessment.

Whether the Respondent could issue the appellant with VAT assessment

110. The Appellant submitted that it is not in-dispute that the Respondent issued the Appellant with VAT assessment despite not being registered for VAT. The Respondent having established that the Appellant had met the threshold for registration under **Section 34** of the Tax Procedures Act and determined the amount of taxes due from the undeclared transactions, proceeded to issue the Appellant with the assessment to enable him respond to the finding. The Appellant objected to the findings and the taxes, therefore the issue of whether the threshold for registration was met remain contested until the dispute is heard and determined.

111. That it is therefore only after the Tribunal determine that the taxes were properly assessed that the Respondent can proceed and register the Appellant for VAT and backdate the taxes as provided under **Section 34 (6)** of the Tax Procedures Act which states as follows:

> ***"(6) If the Commissioner is satisfied that a person eligible to apply for registration has not done so within the time limit specified in subsection (1), the Commissioner shall register the person."***

112. The Respondent averred that Section **34 (7)** allows the Respondent to backdate the demand to the period when the taxpayer become liable to pay the tax, in the following terms:

> ***"(7) The registration of a person under subsection (1) or (6) shall take effect from the beginning of the first tax period after the person is required to apply for registration, or such later period as may be specified in the person's tax registration certificate."***

113. The Respondent observed that the VAT Act does not require that the forced registration to be undertaken before a demand can be issued. It further observed that it is important to note that if the registration is effected before a determination is made whether the Appellant met the threshold for registration, the Appellant will arbitrary be incurring non-filing penalties for subsequent period and the period during the hearing before the Tribunal hence it is only reasonable that the registration is only affected in the system once it is clear the taxes are due and payable.

Whether the Respondent can be faulted for not issuing notice of intention to audit

114. The Respondent submitted that it never subjected the Appellant to an audit but was subjected to an investigation to establish whether he was involved in tax evasion. The investigation revealed that he had not complied with

several Sections of the Tax Procedures Act and the actions were criminal in nature. The Respondent proceeded to register criminal charges against the Appellant.

115. The Respondent argued that it is not in dispute that there is no law that require the Respondent to issue the Appellant with a Notice of intention to audit during criminal investigation as was in the case herein, this may actually defeat the purpose of the investigations. Hence the Appellant only comes to be aware of the process once the preliminary findings are made and he is invited to provide documents and explanation to prove otherwise. It therefore follows that the ground that he ought to have been given notice of intention to audit was ill advised as this was a case of criminal tax investigations and not an audit.

116. The Respondent contends that having used the Appellant's bank statements to raise the assessment, the burden of proof shifted to the Appellant to explain which of the deposits included in the assessments was not from a taxable source, was already taxed or was not income. The Respondent further contends that it was correct to bring to charge all the bank deposits from which the Appellant had not demonstrated to be from sources from which tax is not chargeable or that the taxes had already been levied upon for the 2013-2017 assessment period.

Respondent's Prayers

117. The Respondent prayed that this Honorable Tribunal: -

i. Upholds the Objection Decision dated 30th June 2019 as the same was proper as provided under the Income Tax Act and the Tax Procedures Act, 2015 and the taxes demanded therein are due and payable; and

ii. That this Appeal be dismissed with costs to the Respondent as the same is without merit.

Issues for determination

118. The Tribunal observed that the issues for determination could be summarized as follows: -

i. Whether the Appellant's Objection dated 27th November 2019 was valid within Section 51(3) of the TPA.

ii. Whether the Appeal was allowed by dint of Section 51(11) of the TPA

iii. Whether the Respondent could lift the Corporate veil and demand taxes from the Appellant.

iv. Whether the Respondent could rely on bank analysis to issue an assessment or a demand.

v. Whether the assessment met the threshold of Sections 29 and 30 of the TPA.

vi. Whether the Respondent could issue VAT Assessment to a non-registered person.

Analysis and determination

i) Whether the Appellant's Objection dated 27th November 2019 was valid within Section 51(3) of the TPA.

119. The genesis of this Appeal was an investigation conducted by the Respondent to determine the tax status of the Appellant. The investigation revealed that the Appellant was a director of various companies and although he had filed returns for the period 2015 to 2018, in 2018 he filed a nil return.

120. The investigation showed that the Appellant had received deposits from customers in excess Kshs 5,000,000.00 and therefore the Respondent invoked Section 34 of the VAT Act to register the Appellant for VAT.

121. The Respondent also brought to charge the resultant income to both Income tax and VAT. Following the investigation, the Respondent raised an assessment for Kshs 787,471,892.00 being Income Tax and VAT.

122. The tax assessments were issued on 29th October 2019 wherein the Respondent stated the basis of the finding. The Appellant filed a Notice of Objection on 27th November 2019 contesting the Respondent's assessment. The Respondent on 29th November 2019 wrote to the Appellant informing him that he had not filed a valid objection and that he should provide documents to support the objections.

123. The Appellant vide the letter dated 27th November 2019 equally sought for 90 days to provide documents to support the objection and stated that he was willing to engage in ADR.

124. The Appellant on 5th December 2019 wrote to the Respondent requesting for four months. The Respondent on 7th January 2020 wrote to the Appellant extending his time to file an objection by a further 60 days. The Appellant on 24th March 2020 wrote to the Respondent requesting for a further 120 days to provide the documents. The Respondent on 14th April 2020 wrote to the Applicant granting him a further 60 days and informing him that he had over six months to provide the documents. The Appellant further on 12th June 2020 wrote to the Respondent requesting for 120 days to provide the documents. The Respondent confirmed the assessment 30th June 2020 following which the Appellant initiated this Appeal.

125. It was the Respondent's submission that the Appeal should be disallowed because there was no valid objection by the Appellant. It argued that the objection by the Appellant failed the criteria set out in Section 51(3) of the TPA. The Appellant on the other hand urged the Tribunal to admit its Appeal as validly lodged.

126. Hon Justice Odunga in **Nairobi High Court Judicial Review Application No. 599 of 2017, Republic -v- Kenya Revenue Authority, ex parte M-Kopa Kenya Limited**; stated as follows as regards a validly lodged objection: -

> *"106. In my view since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the taxpayer is seeking further particulars or indulgence to enable it pay the taxes demanded."*

127. While there is no guideline on format, Section 51 prescribes the ingredients of a validly lodged objection as thus:

i. It must be in writing.
ii. It must be lodged before proceeding under any other written law.
iii. It must be lodged within thirty days of notification of the decision.
iv. *It must state precisely the grounds of objection,*
v. *it must state the amendments required to be made to correct the decision,*
vi. *it must state the reasons for the amendments.*

128. The Tribunal examined the bundles attached by the parties to support the pleadings and found the Objection letter dated 27th November 2019 and subsequent correspondence from the Appellant where the Appellant argues that "the letter of 30th October did not portray the true position of the Appellants business" and that "not all bank credits by the commissioner were business income". The Objection also pointed out that the Respondent had not taken into account operational costs while using the bank balances to assess taxable income.

129. The Tribunal took note of the fact that the Appellant did not refuse to provide documents requested as requested on the part of the Respondent to enable it to adjust its tax prior to issuing an objection decision. In his various correspondence the Appellant asked for more time to provide the required documents.

130. The Tribunal equally took judicial notice of the fact that during the period, there was a general uncertainty and anxiety caused by an ongoing COVID-!9 pandemic leading to a lockdown, during which business activities and human interactions were curtailed in Nairobi, Mombasa and greater part of the country between April 2020 and July 2020 during such unprecedented period that the Appellant was seeking for 120 days to file supporting documents. The Tribunal finds that it was not unreasonable for the Appellant to seek for more time to collect and collate the documents as demanded by the Respondent.

131. That said, demand for documents of the kind demanded by the Respondent ought to have preceded the tax assessment so as to separate the audit process from the investigation process. Indeed, it appeared to the Tribunal that the Respondent had just cast out its net aside with anticipation and raised its demand without first conducting a comprehensive investigation.

There was nothing preventing the Respondent from demanding for the documents prior to raising the tax assessment.

132. Going by the decision of Justice Odunga in **Nairobi High Court Judicial Review Application No. 599 of 2017, Republic -v- Kenya Revenue Authority, ex parte M-Kopa Kenya Limited**;(*Suppra*), the Tribunal found that the Appellant's letter of objection dated 27th November 2019 met the criteria set out under Section 51(3) of the TPA and was to that extent validly lodged.

ii) Whether the Appeal was allowed by dint of Section 51(11) of the TPA

133. The Appellant argued that in the present Appeal, the Respondent was bound to render the Objection Decision within sixty (60) days of the date of receipt of the Objection dated the 27th November, 2019 that is on or before **26th January 2020.** The Appellant invited the Tribunal to note that the Respondent's Objection Decision/Confirmation Notice dated 30th June 2020, was received one hundred and fifty-six (156) days_out of time. The Respondent argues that in view of the fact that it had communicated the decision that the Objection had not been validly lodged, there was nothing to issue an objection decision against and equally nothing is available for the Tribunal to determine and confirm under Section 51(11) of the TPA.

134. Section 51(11) of the TPA provides that:

> *"Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed."*

135. In its letter dated 29th November 2019, the Respondent acknowledged the Appellant's objection and stated, inter alia, the following:

> *"First in the letter you have disputed to the assessment issued on 29th October, 2019 but failed to provide the supporting documents pursuant to Section 51 (3) of the Tax Procedures Act.*
> *Further, without exhausting the provisions of Section 51 of the TPA and allowing the Commissioner to make objection decision on your case you have proceeded to the Tribunal and asked for Alternative Dispute Resolution (ADR). Even though this is in good faith, we wish to advise you together with your tax agent the provisions of Section 51(1) of the TPA reproduced herein for ease of reference.....*
> *.....*
> *.....*
> *To enable the Commissioner, make an objection decision, kindly provide the supporting documents either for your objection if you wish to object or (Section 51(7) of the TPA for the extension of 90 days' extra time to file an objection.*
> *TAKE NOTE if no response with supporting documents is receive within Seven (7) days from the date of this letter, the assessment SHALL, with immediate effect stand CONFIRMED and objection be REJECTED on 6th December, 2019."*

136. What came to the gaze of the Tribunal was the fact that the Respondent was not specific on what "supporting documents" would be sufficient to enable the Respondent to make an objection decision and whether the absence of supporting documents would bar the Respondent from issuing an objection decision within the prescribed time.

137. The Tribunal was of the view that the term "supporting documents" was too broad and would have left the Appellant guessing what exactly was needed. The Appellant had no way of knowing whether the documents it would produce would be sufficient or even relevant at all. Moreover, what if the Appellant was satisfied that its objection was eloquent enough and that there was no need to attach any supporting documents. What if relevant supporting documents did not exist? Would for instance a mere affidavit restating the position in the objection suffice?

138. The Tribunal was of the view that the Respondent ought to have been more specific on what documents it actually required from the Appellant to sufficiently address the tax concerns under investigation.

139. On whether the absence of supporting documents would bar the Respondent from issuing an objection decision, the Tribunal took note that Section 51 does not make it a condition precedent for issuance of an objection decision. Furthermore, the Respondent still went ahead and ultimately issued its objection decision without the supply of supporting documents it had asked for thus relegating the importance of the documents as a condition precedent for making an objection decision.

140. In its letter dated 14th April 2020 the Respondent in response to the Appellants letters of 9th and 24th March 2020 granted to the Appellant what it indicated was an extension of time for 60 days to file an objection. It is instructive to note that at no time did the Appellant apply for an extension of time to file an objection. The letters in question sought for extension of time to furnish "supporting documents".

141. The objection decision was issued on 30th June (2020). Although the letter was dated 30th June 2019, the Tribunal was of the view that the dating was due to an inadvertent error. In any event the Appellant did not raise this in

its Appeal as an issue and as such it is deemed to have equally been extended to have been a mistake.

142. Certainly, there was an unexplained delay on the part of the Respondent in issuing the objection decision. The objection decision was issued way after expiry of the 60 days' timeline set out under Section 51(11) of the TPA. The Tribunal was of the view that the Respondent could not purport to extent the timeline set in the legislation by granting extension of time to file an objection as it did vide its letter dated 14th April 2020. As was held in ***Head of Department, Department of Education, Free State Province v Welkom High School***, 2014 (2) SA 228 (CC), "*The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.*" Furthermore, even as at that date the timeline had already expired as it was already more than 60 days after the Appellant's notice of objection.

143. The Tribunal finds that *the* Respondent was required to make a decision within sixty (60) days of the Appellant's objection under Section 51(11) of the Tax Procedures Act. As the Respondent defaulted in making a decision within the prescribed time, the said objection was deemed to have been allowed. The Tribunal is guided by a similar finding made in **Nairobi High Court Judicial Review Application No. 599 of 2017, Republic -v- Kenya Revenue Authority, ex parte M-Kopa Kenya Limited eKLR;**

144. Having found that the objection has been allowed by operation of the law, the Tribunal determined that discussing other issues would be unnecessary and entirely most.

145. It will however re remiss on the part of the Tribunal to fail to paint out some general irregularities relating to the proper identity of the Appellant

and the entire investigation as carried out by the Respondent as was manifest when the matter came up for hearing on the 2nd day of March, 2021 to take the evidence of the Respondent's witness.

146. The Tribunal upon taking of the evidence of Asenath Obaga directed the Respondent to, inter-alia, file the Appellant's National Identity Card and the two (2) Pin number cards registered issued to the Appellant.

147. A perusal of the documents as filed by the Respondent in compliance with the directive of the Tribunal vide the Further Bundle of Documents dated 9th day of March, 2021 is quite confounding as to the proper tax records for the Appellant. Abdi Gedi Amin of National Identity Card Number 11224164 was on the 6th July, 2007 issued with PIN Number A002557439D. The same PIN Number was in the 17th June, 2019 issued to Abdi Ibrahim Ahmed.

148. It would appear it is in the absolute interests of the Respondent whilst bringing it to bear on the Appellant in the discharge of his civil duty of paying any taxes falling due to have the Appellant's identity and tax recorded harmonised on the iTax platform using the identified National Identity Number 11224764 strangely results in the tax payer identity for both Abdi Ibrahim Ahmed and Abdi Gedi Amin with however two different Pin Numbers.

149. In appreciation of the fact that the Appellant has a duty to pay his taxes it may be expedient in the circumstances of this matter for the Respondent to revisit and undertake a more in-depth and focused tax audit and assessment.

ORDERS

150. In view of the foregoing findings, the Tribunal makes the following Orders:-

i. The Appeal succeeds.

ii. The Objection Decision dated the 30th June, 2020 is hereby struck out.

iii. The Respondent shall be at liberty to undertake any tax audit and assessment on the affairs of the appropriate Appellant.

iv. Each party to bear its own costs.

DATED and **DELIVERED** at **NAIROBI** on this **13th** day of **May, 2021**.

.....
ERIC N. WAFULA
CHAIRMAN

.....
CATHERINE N. MUTAVA
MEMBER

.....
GABRIEL M. KITENGA
MEMBER

.....
ABRAHAM K. KIPROTICH
MEMBER