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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**TAX APPEAL NO. 323 OF 2024**

**RONIAM CONSTRUCTION LIMITED .....**  
**APPELLANT**

**VERSUS**

**THE COMMISSIONER**  
**LEGAL SERVICES & BOARD COORDINATION.....**  
**.....RESPONDENT**

*(Being an appeal against the judgement of the Tax Appeals Tribunal; delivered at Nairobi on 21<sup>st</sup> November 2024 in TAT No. E019 of 2024)*

**BETWEEN**

**RONIAM CONSTRUCTION LIMITED .....**  
**APPELLANT**

**VERSUS**

**THE COMMISSIONER**  
**LEGAL SERVICES & BOARD COORDINATION.....**  
**....RESPONDENT**

**JUDGEMENT**

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1. This Appeal arises from the judgment of the Tax Appeals Tribunal delivered at Nairobi on 21<sup>st</sup> November 2024. It is in respect to Tax Appeals Tribunal Appeal No. E019 of 2024.

**Background Facts**

2. The Appellant was the unsuccessful Appellant before the Tax Appeals Tribunal. It is also the tax payer. The Respondent was the Respondent before the Tax Tribunal and it is the Tax authority.
3. The Respondent is said to have carried out an audit into the Appellant's state of affairs. It came up with an assessment of VAT of Kshs. 15,678,398.80 for period 2018 to 2021.
4. The Appellant objected to the assessment vide a letter dated 27.09.2023.
5. The Respondent issued an Objection Decision vide a letter dated 22<sup>nd</sup> November, 2023. It confirmed the tax assessment in the sum of Ksh.47,206,160,71. This prompted the Appellant to appeal to the Tax Appeals

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Tribunal. It confirmed the earlier VAT assessment by the Respondent.

6. This led to the Appellant filing an Appeal to the Tax Appeals Tribunal.
7. The Tax Appeals Tribunal considered the Appeal and was not persuaded of its merits. It rendered a final decision as follows;

*“FINAL DECISION*

*62. The upshot to the Tribunal’s findings is that the Appeal lacks merit and consequently, the Tribunal makes the following Orders:*

*(a) The Appeal be and is hereby dismissed.*

*(b) The objection decision dated 22nd November 2023 be and is hereby upheld.*

*(c) Each party to bear its own cost.*

*63. It is so ordered.”*

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8. The Appellant dissatisfied with the above decision has now appealed to this Court. In its Memorandum of Appeal dated 17.12.2024, the Appellant raises the following six (6) grounds;

- 1.) *The Honourable Tribunal erred in fact and law by upholding the Objection decision of the Respondent, on the basis that the Appellant allegedly failed to discharge its burden of proof pursuant to Section 56(1) of the Tax Procedures Act.*
- 2.) *The Honourable Tribunal erred in law and fact by failing to interrogate whether the documents requested by the Respondent were relevant in the process of determining if the VAT and Income tax assessments raised were due and payable.*
- 3.) *The Honourable Tribunal erred in failing to consider that the Appellant had delivered the documents in its possession and those relevant to the assessment to the Respondent together with its Notice of Objection.*

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- 4.) *The Honourable Tribunal erred in erroneously finding that the Appellant had not dislodged their duty to prove that the objection decision was incorrect despite the Appellant having delivered the documents in its possession and those relevant to the assessment in question together with its Notice of Objection.*
  - 5.) *The Honourable Tribunal erred in law by disregarding the fact that the burden of proof had shifted to the Respondent to discharge after the Appellant had provided the requisite documents at the Objection stage.*
  - 6.) *The Honourable Tribunal erred in law and fact by failing to consider all the material facts, evidence and legal arguments presented by the Appellant and ultimately arrived at an erroneous decision.*
9. The reliefs sought in the Appeal are as follows:
- a) *This appeal be allowed with costs to the Appellant;*
  - b) *The Judgment of the Tax Appeals Tribunal dated 21<sup>st</sup> November 2024 be set aside;*

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c) *Any other Orders that this Honourable Court may deem fit to grant.*

10. The Respondent opposed the Appeal. In its Statement of Facts dated 23<sup>rd</sup> April, 2025, it raises the following grounds in opposition,

*The respondent reiterates the decision of the Tribunal and its position as stated in the objection decision communicated to the Appellant and responds to the Memorandum of Appeal and statement of facts as follows*

1.) *At the objection stage, the Appellant only provided partial records which were reviewed and were not enough to disprove the assessment.*

2.) *Several other documents requested from the appellant were not provided and particulars of the documents not provided are laid out in the objection decision issued to the appellant.*

3.) *The appellant did not adduce any document before the Tribunal to demonstrate how the*

*Respondent misapplied the analysis of the documents before it or how the objection decision was incorrect.*

*4.) The Respondent further states that the Appellant failed to provide requested documents necessary to disprove the basis of the assessment and therefore did not discharge its burden of proof as required by law.*

*5.) The Appellant only submitted partial records. No ledgers or breakdown of the cost of sales and other expenses, invoices, contracts and other primary documents were submitted in support of the cost of sales and expenses indicated in the Appellant's financial statements & tax Computation for the period for review and verification to enable determination of allowability of the same.*

*6.) Further, no positive evidence was provided to disprove the of the Respondent's assessments or the Respondent's*

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*misapplication of the banking methodology in issuance of the assessment.*

7.) *It is the Respondent's position that the Appellant failure to discharge its burden of proof as per the provisions of Section 56 (1) of the Tax Procedures Act, left the Respondent with no option but to uphold the assessment since there was no evidence produced by the Appellant to disprove the assessment.*

*The Respondent thus prays that the Appeal be dismissed entirely with costs to the Respondent.*

### **Issues for Determination**

11. The Court has considered the Record of Appeal, the Supplementary Record of Appeal, the submissions filed by Counsel for the parties as well as the oral highlights of the submissions. The Court frames the following single issue for determination.

(a) *Whether the Tribunal erred in upholding the objection decision dated 22.11.2023.*

**Analysis**

12. An Appeal to this Court is circumscribed by **Section 56(2) of the Tax Procedures Act** as follows:

**(2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.**

**(3) In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds**

**(a) Whether the Tribunal erred in upholding the objection decision dated 22.11.2023.**

13. The Appellant submits that the Tribunal erred in not interrogating whether the documents requested by the

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Respondent were relevant or considered in the process of determining the impugned taxes.

14. The Respondent having relied on the Bank Statements provided; the Appellant accused them of cherry picking. This was on apparent variances between estimated turn overs derived from bank deposits and the actual turn overs. That it was unfair for the Respondent to disregard the actual turn over in the Appellant's financial statements and books of accounts, but subject the Appellant to a Bank Analysis Method.
15. It was submitted that the Banking Analysis Test was wrongly applied. This led to unfair and prejudicial increase in taxes. That the Tribunal ought to have appreciated and applied the Banking Analysis Test by taking into account inter-bank transfers, loans, contra entries, bounced cheques and capital injection. That not every deposit should have been treated as income. The Court was referred to **Section 3(2) of The Income Tax Act.**

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16. The Court was referred to the decisions in **Anti Counterfeit Agency v Mwanja t/a TonerMart Technologies & another [2024] KEHC 1725 (KLR)**. This is on the duty of the Court to re-evaluate evidence, assess it and make or arrive at its own conclusions.
17. The Appellant made reference to **Bachmann -vs- The Queen 2015 TCC, Hole -vs- The Queen, 2016 TCC 55** on application of the Banking Analysis test. The case of **Van Boeckel v C & E QB Dec 1980, [1981] STC 290 Woolf J.** This is an application of how the Tax authority Commissioners are to utilize materials placed before them to arrive at the best of their judgement in assessing the taxes due.
18. It was submitted that the burden of proof is a swinging pendulum. Initially the Tax payer bears the burden, but when it supplies all the documentation and materials, the pendulum swings to the tax authority. The Court was referred to **Commissioner of Domestic Taxes v Trical and Hard Limited [2022] KEHC 9927 (KLR)**.
19. The Appellant maintains that failure by the Tribunal to consider material facts presented by the party challenging

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the assessment, amounted to abuse of legislative provisions. The Court was referred to **Nizaba International Trading Company Limited v Kenya Revenue Authority [2000] KEHC 559 (KLR)**.

20. The Court invited to interpret tax statutes strictly as was held in **Cape Brandy Syndicate V Inland Revenue Commissioner (1921) 1 KB 64** and **Kenya Revenue Authority v Republic (ex-parte Fintel Ltd) NRB CA Civil Appeal No. 311 of 2013[2019] eKLR**.
21. The Court was therefore urged to uphold the Appeal.
22. The Respondent's submissions were that the Appellant's complaint was that its income giving rise to the tax assessment was overstated. That it was taxed on bank credits that were not revenue in nature but were loans and capital injections. The short answer was that no such evidence was provided before the Tribunal. The Appellant is said to further complain without proof that deductible expenses were not considered or that documents and information provided during the application stage were totally ignored.
23. The Respondent maintains that no such information by way of documentation was tendered before the Tribunal. It did not place the Bank Statements before the Tribunal so as to demonstrate of the errors or over reach that it now complains of. Even on the issue of the expenses not allowed,

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no evidence was placed before the Tribunal to support this assertion.

24. The Court refers to **Section 56(1) of the Tax Procedure Act** which states as follows:

**56. General provisions relating to objections and appeals'**

**(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect**

25. The Court also refers to **Section 30 of the Tax Appeals Tribunal Act** which states as follows:

**30. Burden of proof**

**In a proceeding before the Tribunal, the appellant has the burden of proving—**

**(a) where an appeal relates to an assessment, that the assessment is excessive; or**

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

26. On the issue of burden of proof, the Court refers to **Hole - vs- The Queen, 2016 TCC 55.**

27. The Tribunal framed a single issue for determination as follows:

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*“Whether the appellant discharged its burden of proof pursuant to Section 56(1) of the Tax Procedures Act”*

28. The Tribunal ruled that the Appellant did not file documentary evidence before the Tribunal. This was to enable it examine whether the Appellant actually incurred expenses or whether the Respondent erred in examining the expenses and arriving at an erroneous conclusion. That for this reason, the Appellant failed to discharge its burden of proof, proving that the objection decision by the Respondent was wrong.
29. The Court makes reference to **Section 13(2)(b) of The Tax Appeals Tribunal Act**. This is on the requirement by the Appellant to file the statements of facts, as follows:

**13. Procedure for appeal**

**(1) A notice of appeal to the Tribunal shall—**

**(a) be in writing or through electronic means;**

**(b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner.**

**(2) The appellant shall, within fourteen days from the date of filing the notice of appeal, submit enough copies, as may be advised by the Tribunal, of—**

**(a) a memorandum of appeal;**

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**(b) statements of facts; and**

**(c) the appealable decision; and**

**(d) such other documents as may be necessary to enable the Tribunal to make a decision on the appeal.**

30. **Rule 5 of the Tax Appeals Tribunal (Procedure) Rules 2015** states as follows:

**5. Statement of facts of appellant**

**(1) Statement of fact signed by the appellant shall set out precisely all the facts on which the appeal is based and shall refer specifically to documentary evidence or other evidence which it is proposed to adduce at the hearing of the appeal.**

**(2) The documentary evidence referred to in paragraph (1) shall be annexed to the statement of fact.**

31. In this particular case, no documentary evidence was attached to the Statements of Facts. The Tribunal had no materials to work with in support of the complaint by the Appellant.

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32. The Court refers to the case of **Tumaini Distributors Company (K) Ltd -v- Commissioner of Domestic Taxes (2020) eKLR**, on burden of proof.

*“It is not in dispute that when the Commissioner made the assessments in February and April 2017, the Company had not made the application for amendment of the self-assessment dated 18th July 2017 hence the Commissioner’s decision cannot be judged on the basis of an application that was to be made in the future. Further, the grounds of amendment of the self-assessment, being a future application, could not have been the basis for the objection. The Commissioner clearly explained that it based its decision the statement of accounts and returns the Company had filed. The Tribunal appreciated this fact when it concluded that it was the duty of the Company to provide all the documents and that the Commissioner was entitled to rely on the self-assessments and returns lodged by the Company in the absence of any other documents.”*

33. The Court also refers to **Digital Box Limited v Commissioner of Investigations and Enforcement (2020) eKLR**; on the issue of the application of the Banking Analysis Method.

*“A reading of Section 24(2) of the Tax Procedures Act shows that the Commissioner has powers to assess a taxpayer even where the taxpayer has filed its return. The Section goes to allow the Commissioner to use any information available to it. In this case, the Respondent used the documents it collected during a raid and search conducted at the Appellant’s business premises and the residence of the Directors on 21st February 2017.*

*According to its letter dated 23rd February 2017, the Respondent held a meeting with the Appellant and requested the Appellant to provide additional documentation. Minute. 5 of the minutes of the meeting between the Appellant and Respondent’s representatives held on 22<sup>nd</sup> February 2017 states:*

*“Records required “The taxpayer requested time to bring documents covering the period under investigation 2012 to 2016 from the auditors including:*

- 1. Copies of Audited accounts for the years 2012, 2013, 2014, 2015, 2016*
- 2. Sales invoices and ETR reports*
- 3. Purchase invoices*

4. *Copy of Audit report of findings for the prior audit by KRA*

5. *Bank statements for the company and directors.”*

*“The Appellant did not furnish the Tribunal with evidence that it had provided the requested documentation.....”*

*“.....Further, the courts have in the past held that the banking analysis test (also known as bank deposit analysis) is an acceptable method of arriving at an assessment. This was held to be so in 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.”*

*Once it is established that the method is allowed, the question is whether the method was applied in arriving at a reasonable assessment in the case at hand. The Tribunal is guided by the test set out in CA McCourtie LON/92/191 where it was stated:*

*“In addition to the conclusions drawn by Woolf J in Van Boeckel earlier tribunal decisions identified*

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*three further propositions of relevance in determining whether an assessment is reasonable. These are, first that the facts should be objectively gathered and intelligently interpreted; secondly, that the calculations should be arithmetically sound; and, finally, that any sampling technique should be representative and free from bias.”*

34. Without any evidence by way of documents or other materials including the bank statements the subject of the complaint, the Tribunal could not arrive at a different decision. The Respondent cannot be faulted for having applied the Banking Analysis Test. The Respondent having done so, it fell upon the Appellant to demonstrate before the Tax Appeals Tribunal that the Banking Analysis Test was incorrectly applied. Without placing the bank statements before the Tribunal, the Appellant could not discharge and did not discharge this burden. The Court is not persuaded that it would have arrived at a decision different from that of the Tribunal. The objection decision is upheld.
35. As to costs, the Court orders that each party bears its own costs.

### **Determination**

36. The Appeal is dismissed in its entirety as lacking in merits and the Objection decision dated 22.11.2023 is upheld.
37. Each party to bear its own costs.

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38. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS  
12<sup>TH</sup> DAY OF MARCH, 2026.**

**NJOROGE BENJAMIN K.**

**JUDGE**

In the presence of:

N/A for Mr. Wairegi for the Appellant.

Mr. Nyapara for the Respondent.

Peter Wabwire - Court Assistant.