REPUBLIC OF KENYA

IN THE TAX APPEALS TRIBUNAL

APPEAL NO. E025 OF 2025

HAVAS MEDIA KENYA LIMITED...APPELLANT

VERSUS

COMMISSIONER OF LEGAL SERVICES AND BOARD COORDINATION

.... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a private company duly incorporated in Kenya under the Companies Act. The Appellant specialises in advertising, media planning, brand strategy, public relations, media relations, digital marketing and digital strategy.

2. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 Laws of Kenya (KRA

Act). Under Section 5

(1) of the Act, KRA is an agency of the Government for the collection and receipt of all revenue. For the performance of its function under Subsection (1), the Authority is mandated under Section 5(2) of the Act to administer and enforce all provisions of the written laws as set out in Parts I and II of the First Schedule to the KRA Act to assess, collect, and account for all revenues under those laws.

3. In a letter dated 13th December 2023, the Respondent notified the Appellant of its intention to verify its tax declarations following revenue and discrepancies that it had established.

4. Subsequent this, there were correspondences between the Appellant and the Respondent which resulted in the Respondent's issuance of a letter of preliminary findings, followed by a tax demand notice of Pay As You Earn (PAYE) tax and Corporation tax dated 11th September 2024.

5. The Appellant conceded the PAYE additional assessment and lodged an Objection against the Corporation tax additional assessments in a letter dated 11th October 2024.

6. The Respondent issued an Objection decision on 9th December 2024, partially allowing the Objection and confirming the

remainder of the Corporation tax additional assessment.

7. The Appellant being dissatisfied with the Respondent's Objection decision, filed its Notice of Appeal dated 8th January 2025 and filed on even date.

THE APPEAL

8. The Appeal is premised on the Memorandum of Appeal dated 22nd January 2025 and filed on the same date which raised the following grounds: -

a) That the Respondent erred in charging corporate tax on the variance in the Appellant's revenue as per its VAT returns and IT2C which is attributable to the Appellant's reimbursement of costs/disbursements to its suppliers.

b) That the Respondent erred in law in failing to hold that the Appellant's reimbursement of costs/disbursements to its suppliers do not qualify as income or gains or profits from business chargeable to corporate tax under Section 3(1)(a)(i) as read together with Section 15 of the Income Tax Act.

c) That the Respondent erroneously charged the Appellant corporate tax on the Appellant's variance between its revenue as per VAT returns and IT2C which is attributable to reversals of accrued income.

d) That the Respondent misdirected itself in failing to find that the Appellant's

reversals of accrued income do not result in any under-declaration of income or Corporation tax by the Appellant as the reversal of accrued income is matched by accruals claimed in the prior years and the Appellant also pays Corporation tax on the accrued income in the year in which it was accrued and VAT in the year in which the invoice is raised.

e) That the Respondent erred and misdirected itself in its finding that the variance of the Appellant's revenue as per VAT returns and IT2C attributable to zero-rated sales, foreign exchange gains and differential VAT rates will increase the variance chargeable to Corporation tax and should be assessed separately,

f) That the Respondent erred and misdirected itself in its workings by comparing the Appellant's expenses as per its IT2C return and expenses as per its VAT3 return without considering the timing differences occasioned by the 6-month period after a supply that a taxpayer is entitled to claim its VAT purchases under Section 17 of the VAT Act and other difference that could lead to the expenses not being the same.

g) That the Respondent misdirected itself in failing to find that the Appellant has completely reconciled the variance in its IT2C return and VAT3 return showing that there is no under-declaration of with Corporation tax or Value Added Tax and there is no tax payable by the Appellant.

h) That the Respondent erred in failing to consider the Appellant's explanations, evidence and supporting documentation and coming to the correct position that the assessment is erroneous. That there is no Corporation tax payable by the Appellant.

THE APPELLANT'S CASE

9. The Appellant's case is premised on the following documents filed before the Tribunal: -

    a) The Appellant's Statement of Facts dated 22nd January 2025 and filed on the same date, and the documents attached thereto; and

    b) Its Written Submissions dated and filed on 11th November 2025.

10. The Appellant stated that it is a media advertising agency that provides strategic communications in advertising and media planning. That it specialises in advertising, media planning, brand strategy, public relations, media relations, digital marketing and digital strategy.

11. The Appellant explained that it buys airtime from mainstream and alternative media on behalf of its clients. That the media

companies invoice the Appellant for the airtime as if the Appellant is the consumer of the service. The Appellant then bills their clients for the airtime at the same cost. That the Appellant charges its clients' agency fees for this service, and recovers the cost of the airtime as a disbursement, the Appellant does not make any profit in this. The Appellant asserted that this arrangement is similar and common business practice in agency companies.

12. The Appellant stated that the Respondent issued the Appellant a notice of intention to verify its tax declarations for the periods 2018 to 2022 on 13th December 2023. That in the notice, the Respondent queried turnover declarations in VAT returns versus Income tax returns, and requested supporting documentation. Following correspondences between the Appellant and the Respondent, the Respondent issued a letter of its preliminary findings (erroneously) dated 12th February 2023.

13. That the Appellant through its tax agents responded through a letter dated 11th March 2024 providing reconciliations, explanations and supporting documentation. That subsequently the Respondent issued its demand dated 11th September 2024 for PAYE and Corporation tax.

14. The Appellant stated that it partially objected to the demand notice on 11th October 2024, and conceded to the Respondent's PAYE demand and made payment of the principal PAYE demand of

Kshs. 912.554.

15. That in the Objection the Appellant maintained its earlier explanations and provided reconciliations on the turnover variance, indicating that the variance was due to:

a. Zero rated exported sales, disbursements/reimbursement costs to media companies and reversals of accrued income.

b. Foreign exchange gains realised that were recognised as income in the Income tax returns but not included in the VAT return as they are not subject to VAT.

c. The differential VAT rates of 16% and 14% in the year 2020 following the enactment of the Tax Laws (Amendment) Act, 2020.

16. That the Respondent communicated its decision on 9th December 2024 partially allowing the Objection and upholding principal Corporation tax of Kshs. 43,293.433, totaling Kshs. 70.437,323 inclusive of penalties and interest.

17. That the Appellant aggrieved by the Objection decision initiated this Appeal by filing the Notice of Appeal on 8th January 2025.

18. The Appellant averred that the Respondent's assessment, Corporation tax demand and Objection decision are erroneous. It asserted that it has not underdeclared any Corporation tax and

has fully explained and reconciled

with supporting documentation the variance between its turnover in its VAT returns and Income tax returns (IT2C).

19. The Appellant reiterated that the variance between its VAT returns and Income tax returns is attributable to media reimbursement of costs and reversals of accrued income, zero rated exported sales, foreign exchange, differential VAT rate as summarised below:

Particulars	2019	2020	2022
Sales as per VAT return	584,958,868	384,408,472	371,203,830
Add: Revenue not Included in VAT3 returns			
Zero rated Sales Not declared in VAT3 returns	73,611,829	20,553,972	940,858
Exchange rate difference	309,000	14,572	
Differential VAT rates on Airtel credit note		1,915,286	
Differential VAT rates on April 2020 invoices		2,095,610	
Erroneous posting	3,078		

Total (A)	658,882,775	408,987,911	371,144,688
Reversal of prior accrued income	(14,152,000)	(31,527,000)	(4,921,308)
Media reimbursement cost	(586,193,000)	(352,315,000)	(338,018,050)
Credit notes erroneously declared as invoices	(1,145,000)		
Overstated sales in VAT returns (Sept & Oct)			
Total (B)	(601,490,000)	(383,842,000)	(342,939,358)
C = A + B	57,392,775	25,145,911	29,205,330
Sales as per IT2C	57,392,000	25,146,000	29,205,000
Variance (C – Sales as per IT2C)	775	(89)	330

20. The Appellant argued each explanation variance as follows:

a) Reimbursement of Costs

21. The Appellant stated that it is contracted by its clients to provide online and offline media buying services. That its remuneration is an agency

commission/fees which is usually a percentage of the client's media expenditure.

22. The Appellant further stated that to satisfy its contractual obligations, it buys media advertising space from its suppliers, which are mainstream and alternative media companies such as Royal Media Services and Standard Group, on behalf of its clients. That the suppliers, the media companies, invoice the Appellant for the advertising space, that is, the invoice is in the Appellant's name.

23. That for the purposes of VAT and in accordance with the law, the Appellant invoices its clients by cumulating the media invoices from the suppliers for the particular client and adding its percentage agency fee as per the contract/agreement.

24. That however, for financial reporting and consequently Income tax purposes, the Appellant recognises revenue in accordance with International Financial Reporting Standards (IFRS) / International Accounting Standards (IAS). That IFRS 15 (Revenue from Contracts with Customers) requires that if an entity acts as an agent in a transaction (facilitating a service on behalf of another party), the entity should recognise only its commission or fee as revenue, not the total transaction amount.

25. That expenses incurred by an entity on behalf of a customer such as travel expenses or third-party service costs are not part of revenue if the entity is merely recovering these amounts.

26. That in accordance with IFRS 15, for financial reporting and Income tax purposes, the Appellant's revenue/income is only its percentage agency fee, while the media agency costs are its disbursements incurred on behalf of its customers.

27. The Appellant stated that the media buying costs/disbursements do not feature in its Income tax returns as revenue and equally do not feature among the expenses. That the Respondent therefore erroneously charged the Appellant Corporate tax on the discrepancy between its revenue as per VAT returns and 1T2C which is attributable to the Appellant's reimbursement of costs/disbursements to its suppliers, which does not qualify as income/gains and profits from business chargeable to corporate tax under Section 3(1)(a)(i) as read together with Section 15 of the Income Tax Act.

28. The Appellant provided an extract of its media reimbursement cost ledgers for 2019, 2020 and 2022 to support the media reimbursement costs of Kshs. 586,193,000 in the year 2019. Kshs. 352,315,000 in the year 2020 and Kshs. 338,018,050 in the year

2022.

29. The Appellant supported its argument by referring to the case of Mahindra & Mahindra ltd v DCITCIR (ITAT) 2009 where the Indian Tax Appeals Tribunal stated that if any remittances were purely reimbursement of expenses with no element of income embedded in such payments and these were expenses of the payer which was incurred by the payee, then they were consequently not subject to tax as they could not be qualified as revenue.

30. The Appellant asserted that contrary to the Respondent’s allegation in the Objection decision, the reimbursement cost ledgers represent the actual supplier invoice amounts that are cumulated in the Appellant’s profit and loss account.

b) Accrued Income

31. The Appellant averred that it operates a revenue accrual system where it plans and creates a monthly work plan for each client’s advertising project and estimates its income.

32. The Appellant asserted that it accrues its estimated income in its accounts in accordance with IFRS prior to invoicing in its accrued income ledger. That once the Appellant invoices the client, it reverses its accrued income and recognises the actual income in its accounts.

33. The Appellant stated that it makes reversals of the accrued income monthly on the basis of the actual invoices issued in the month.

34. That however, there are instances where the accrual of the income and reversal of the accrued income happen in different years where, for example, income was accrued in 2019 but the invoice was issued in 2020. That in this instance the Appellant would not have a reversal of the accrued income in the financial year 2019 and the accrued income would be recognised as income and Corporation tax paid on the accrued income in 2019. That since the invoice will not have been issued, no VAT declaration will have been made. That consequently, the corporate tax turnover will exceed the VAT turnover.

35. The Appellant stated that in 2020, if the invoice is issued the actual income as per the invoice is posted and the accrued income reversed in the 2020 financial year. That the net effect on the corporate tax turnover for 2020 will be nil where the accrued amount and the invoice amount are the same as there is a posting and reversal of the same amount. That the invoice issued will be declared in the VAT return in the appropriate month in 2020 in accordance with the VAT Act. That consequently' the VAT turnover

will exceed the corporate tax turnover.

36. The Appellant further explained that there are instances where the amount accrued is more than or less than the amount invoiced creating another variance across years.

37. That overall, the correct turnover is recognised for both VAT and Corporate tax but in different years. That therefore, the differences are merely timing differences.

38. That therefore, there is a variance between the Appellant's VAT returns and IT2C returns of Kshs. 14,152,000 in 2019, Kshs. 31,527,000 in 2020 and Kshs. 4,921,308 in 2022 attributable to reversal of accrued income that was accrued in the prior years, due to the timing difference of the reversals.

39. The Appellant contended that there is no under declaration of Corporation tax income by the Appellant by the reversals as the reversal of accrued income is matched by accruals claimed in the prior years. The Appellant stated that it pays Corporation tax on the accrued income in the year in which it was accrued and VAT in the year in which the invoice is raised.

40. That contrary to the Respondent's allegation in the Objection decision, the VAT return consists of actual invoices issued in each month, and consequently each year and there is no instance

where the Appellant adjusts the VAT returns for any reversals. That the reversals are only in the Income tax accounts and returns for the adjustment of accrued income.

41. The Appellant relied on the decision in the case of W H Lategan v CIR. 1926 CPD 203, 2 SA TC 16 by the Supreme Court of South Africa. which defined accrued income by stating the following: -

> *"Accrued to or in favour of*" means "*to become entitled to*". *Amounts in respect of which a taxpayer has obtained a right to claim payment in a future year of assessment have, accordingly, become vested or accrued during that year of assessment. Such accrued amounts must be included in gross income In the year of assessment during which the right was so obtained This means that if a taxpayer has the right to receive money, even if the payment will happen In the future, the income is considered to have accrued In the year the right was obtained Thereafter, the taxpayer must include that amount in their gross income for that year."*

42. The Appellant submitted that the Respondent therefore erroneously charged the Appellant Corporate tax on the Appellant's variance between its revenue as per VAT returns and IT2C which is attributable to reversals of prior years' accrued income.

c) Zero Rated Exported Sales, Foreign Exchange Gain and Differential VAT Rates

i. Zero rated Sales Not declared in VAT3 Returns

43. The Appellant stated that in the period under review provided services to non- residents. That exported services in the periods 2019, 2020 and 2022 were classified as zero rated, therefore VAT was at a rate of 0%.

44. The Appellant further stated that inadvertently omitted its zero-rated sales in its VAT returns.

45. The Appellant asserted that in its reconciliations of its IT2C return and its VAT returns, it included the zero-rated sales to the local sales and the Respondent's workings to ensure that the reconciliation captures the correct sales position of the financial years under review.

46. That the Appellant added the zero-rated sales of Kshs. 73,611,829 in 2019, Kshs. 20,553.972 in 2020 and Kshs. 940,858 in the year 2022 to the VAT sales as per the returns to ensure that the reconciliation captures the correct total sales so that the Income tax turnover is compared with the correct VAT turnover.

ii. Foreign Exchange Gain

47. The Appellant contended that foreign exchange gain is subject to Corporation tax but is not subject to VAT. That these amounts would therefore be included in the IT2C returns but not the VAT3 returns.

48. The Appellant stated that in its reconciliation it added foreign exchange gains of Kshs. 309,000 and Kshs. 14,572 in the years 2019 and 2020 respectively.

iii. Differential VAT Rates

49. The Appellant stated that it had in the first quarter of 2020 raised invoices at the VAT rate of 16% and declared them in its VAT returns. That following the enactment of Tax Laws (Amendment) Act, 2020, the VAT rate changed to 14%. That subsequently. it raised credit notes for some of the invoices.

50. The Appellant stated that the Respondent's VAT return template does not allow a taxpayer to change the rate and at the time of declaring the credit notes in the VAT return. That the Respondent had changed the rate in the return to 14%, which caused the VAT return to understate the output VAT reduction when the credit notes were declared in the VAT return. The Appellant averred that the only way to ensure the correct output VAT reduction in the VAT

return was to adjust the taxable value upwards.

51. The Appellant argued that since the effect of the credit notes was to reduce the VAT sales and output VAT, the VAT turnover was reduced by a higher amount

than was declared in the VAT return at the time of issuing the invoices. That the Income tax records were unaffected as the reduction in sales was based on the credit notes themselves.

52. The Appellant stated that in its reconciliation added the variance of Kshs.

1,915,286 and Kshs. 2,095,610 to the sales recorded in the VAT returns in 2020 stating that this variance reduced sales reported in the VAT3 returns.

53. The Appellant reiterated that in its reconciliation of its IT2C return and its VAT returns included the variance attributed to zero rated / exported sales, foreign exchange gain and differential VAT rates to completely and correctly reconcile the variances raised by the Respondent.

54. The Appellant asserted that it has completely reconciled the variance in its IT2C return and VAT3 returns showing that there is no under-declaration of either Corporation Tax or VAT.

55. That the Respondent therefore misdirected itself in its finding that the variance of the Appellant's revenue as per VAT returns and IT2C attributable to zero rated sales, foreign exchange gains and differential VAT rates will increase the variance chargeable to Corporation tax and in finding that there is an unreconciled

variance resulting in Corporation tax liability of Kshs. 70,437,323 inclusive of penalties and interest.

56. The Appellant noted that the Respondent in its workings, erroneously made a comparison of the Appellant's expenses as per its IT2C returns and expenses as per VAT3 returns. That this comparison does not take into account that the Appellant claims its expenses in its IT2C return upon service delivery in accordance with the law, while it has a 6-month window under the VAT Act to claim input VAT on its purchases, creating a timing difference. That thus, an expense could be in the IT2C return for one year and the VAT3 returns of the next year.

57. The Appellant concluded by submitting that it has established its case and discharged its burden of proof by the production of documentation, while the Respondent has not given any further evidence to support its assumptions. The Appellant submitted that it established a *prima facie* case and the Appellant has discharged its burden of proof under Section 56 of the Tax Procedures Act.

58. The Appellant relied in the case of Shreeji Enterprises (K) Limited vs Commissioner of Investigations & Enforcement TAT No. 58 and 186 of 2019 where the Tribunal held that the taxpayer's burden of proof is satisfied where the Appellant makes out a *prima facie* case demolishing the Respondent's assumptions. That once the assumptions are demolished the burden shifts to the Respondent

to rebut the Appellant and prove its assumptions, and where the Respondent fails to adduce any evidence whatsoever the taxpayer is entitle to succeed.

59. The Appellant maintained that the Respondent erred in law and facts by charging Corporation tax on the variance between the sales in the VAT return and the IT2C and failed to take into account the explanations and reconciliations provided by the Appellant.

Appellant's prayers

60. The Appellant prayed that the Tribunal finds:

a) That the Appeal is allowed.

b) That there is no under declaration of revenue and no additional Corporation tax or Value Added Tax payable by the Appellant in the years 2019 to 2022.

c) That the Respondent's Objection decision dated 9th December 2024 and additional assessment and demand dated 11th September 2024 be set aside.

d) That the costs of Appeal be awarded to the Appellant.

THE RESPONDENT’S CASE

61. The Respondent’s case is premised on its Statement of Facts dated 21st February 2025 and filed on even date. The Respondent did not file submissions.

62. The Respondent' stated that the Objection decision related to the objection applications dated 11th October 2024 in response to the Respondent’s additional assessments issued on 11th September 2024 in relation to PAYE and Corporation tax for the years 2019 to 2022.

63. That the Respondent conducted a tax verification exercise in relation to PAYE and Corporation Tax and assessed the Appellant principal tax of Kshs. 912,554 and Kshs. 43,636,933 respectively plus penalty and interest.

64. The Respondent asserted that the assessment details were explained in the Respondent’s assessment notice and the various engagements held with the Respondent before the assessments were issued.

65. That the Appellant objected and contested the Respondent’s assessments based

on the grounds outlined in the letter of objection dated 11th October 2024.

66. The Respondent refuted all the contentions advanced by the Appellant in its Memorandum of Appeal dated 22nd January 2025 and averred as follows:

67. The Respondent averred that the Appellant has introduced issues that were not raised at the Objection stage.

68. The Respondent stated that a review of the documents established that the Appellant develops media plans (budget estimates) based on its clients' requirements. The Respondent established that on approval by the Appellant's client the Appellant posts the same as an expense by debiting/crediting the reimbursement ledger Dr. (ODGEN) and Cr. (ODGEX).

69. The Respondent further stated that it sampled the media plans against the ledger and found out as follows:

70. That in the period of August 2019 the media plan for ION Kenya (MYDAWA PROPOSED PLAN) the estimate budget for campaign Kshs. 1,240,910 comprising Media Net Cost, Media Fixed Fee (10%), Taxes (VAT, others) at Kshs. 972,500, Kshs. 97,250 and Kshs. 171,160 respectively.

71. That in the period August 2019 the media plan for L'oreal - Maybelline dated 29-August, 2019 contained 2 entries with description of Video Placement multiple with an estimated cost total cost of Kshs. 1,365,320.00 comprising the Amount Excl VAT, 2% hub fees, 5% Agency fees, Amount Incl VAT. That the same

was posted in the media reimbursement ledger on (31/07/2019 Kshs.

561,000.00) and (28/08/2019 Kshs. 561,000.00) expensed ODGEN ODGEN JUL’19 L’OREAL OOH AUG’19 L’OREAL OOH.

72. That in the period 2020 the media plan for Reckitt Benckiser contained Media Budget/estimated cost of Kshs. 1,200,000. That a review of media reimbursement ledger indicates that *vide* entry (31/03/2020 ODGEN MAR RB DIG MAR) the Appellant expensed the amount.

73. The Respondent further stated that it also noted instances where the Appellant posted costs and reversed the whole amounts. That no explanations were provided for the reasoning behind the reversals, and some reversal entries did not have corresponding accrual costs.

74. The Respondent referred to Section 15(1) of the Income Tax Act provides that:

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> *“For the purpose of ascertaining the total income of a person for a year of income there shall, subject to section 16, be deducted all expenditure incurred in that year of income which is expenditure wholly and exclusively incurred by him in the production of that income”*

75. It was the Respondent’s finding that the media reimbursements ledger represents the estimated expensed for the campaigns and not the actual cost that were incurred in the generation of income.

76. In response to the Appellant’s averment that the Respondent did not adjust for reversal of prior accrued income, the Respondent asserted that in arriving at the Appellant’s income did not rely on the Appellant’s ledger but rather the VAT returns.

77. The Respondent stated that a review of the Appellant’s VAT return showed the credits which were incorporated in establishing the Appellant’s incomes for the period. It was the Respondent’s finding that the reversal had already been adjusted for in arriving at the Appellant’s taxable income. That consequently, the Appellant’s ground of objection was rejected.

78. The Respondent argued that pursuant to Section 59(1) of the Tax Procedures Act, the Respondent is empowered to request for documents from the Appellant for purposes determination of their true tax liabilities.

79. That additionally in Section 24(2) of the Tax Procedures Act, the Respondent is not bound by a tax return or information provided by, or on behalf of, a taxpayer and may assess a taxpayer's tax liability using any information available to him.

80. The Respondent submitted that under Section 31 of the Tax Procedures Act, the Respondent is allowed to use available

information to amend any assessment based on the Respondent's best judgement.

81. That further, it was the responsibility of the Appellant to maintain records, including declaring the correct income tax returns for the year to accurately ascertain the tax position. That Section 23 of the Tax Procedures Act states 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."

82. That the law allowed the Respondent to analyse the information in its possession which established a variance, and the burden was on the Appellant to explain the variance.

83. The Respondent relied on Section 56(1) of the Tax Procedures Act which provides that: -

"In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect."

84. The Respondent submitted that the Appellant bears the burden to prove that the Respondent's assessments are incorrect through documentation. It averred that the Appellant has failed to discharge this burden. That it is on this basis that the Appellant's Objection application was rejected and the taxes confirmed as per the impugned Objection decision.

85. The Respondent maintained that it was proper in law to disregard the

    Appellant's application, and prays that this learned Tribunal upholds the same.

86. It was the Respondent's case that the Appellant's contention as laid out in its Memorandum of Appeal unless where in agreement by the Respondent are unfounded in law and not supported by evidence.

Respondent's prayers

87. The Respondent prayed that the Tribunal finds:

    a) That the Respondent's decision dated 9th December 2024 was merited and hereby be upheld.

b) That the Appeal be dismissed with costs to the Respondent as the same lacks merit.

ISSUE FOR DETERMINATION

88. The Tribunal has considered the pleadings and submissions made by the Parties, and considers the issue for determination as follows: Whether the Respondent was justified in confirming the Corporation tax assessment.

ANALYSIS AND FINDINGS

89. Having identified the issue for determination, the Tribunal proceeds to analyse the same as hereunder.

90. The Respondent conducted a turnover variance analysis by comparing the Appellant's turnover declarations as per the VAT returns and as per the Corporation tax return and established that the higher declared turnover, which was the turnover as per the VAT returns, is the correct turnover.

91. The Respondent thereafter deducted from the established turnover, the purchases claimed by the Appellant in its VAT returns stating that the purchases comprised purchases not claimed in the Corporation tax returns. The Respondent the applied a corporation tax rate of 30% on the resultant amount for the years 2019, 2020 and 2022 and issued the Appellant an additional Corporation tax assessment for these years, being

principal tax of Kshs. 43,636,933 plus penalties and interest.

92. Following the Appellant's Objection to the additional Corporation tax assessment, the Respondent issued its Objection decision where it partially allowed the Objection after it was satisfied that the Appellant had erroneously declared credit notes of Kshs. 1,145,000 as invoices in the year 2019. The Respondent then confirmed the remainder of the additional assessment, being principal tax of Kshs. 43,293,433.20 plus penalties and interest as it was not persuaded by the Appellant's other grounds of Objection.

93. The Respondent averred that the Appellant has introduced issues that were not raised at the Objection stage. The Tribunal, however, notes that the Respondent failed to demonstrate this averment, therefore, the Tribunal reviewed the Appellant's case based on the documents on record.

94. The Appellant appealed the Respondent's Objection decision that confirmed the additional assessment of principal Corporation tax of Kshs. 43,293,433.20 plus penalties and interest.

95. The Appellant argued its position by preparing a reconciliation starting from sales as per its VAT returns and explaining the sales turnover variances under the following limbs:

a) That the Appellant omitted certain revenue items from its VAT returns including zero-rated sales, exchange rate difference, and the differential

VAT rates on Airtel credit note and April 2020 invoices. The Appellant added these items to the sales as per VAT returns in its reconciliation.

b) That Kshs. 14,152,000, Kshs. 31,527,000 and Kshs. 4,921,308 of the variances in 2019, 2020 and 2022 respectively related to reversal of prior year accrued income. The Appellant deducted these items to the sales as per VAT returns in its reconciliation.

c) That Kshs. 586,193,000, Kshs. 352,315,000 and Kshs. 338,018,050 of the variances in 2019, 2020 and 2022 respectively related to media reimbursement cost which was declared as turnovers in its VAT returns. The Appellant deducted these items to the sales as per VAT returns in its reconciliation.

Revenue items omitted from VAT returns

96. The Appellant asserted that it omitted certain revenue items from its VAT returns including zero-rated sales, exchange rate difference, and the differential VAT rates on Airtel credit note and April 2020 invoices. The Appellant added these items to the sales as per VAT returns in its reconciliation.

97. The Respondent in its Statement of Findings at paragraph 11 of its

Objection decision stated that it acknowledges that it did not incorporate zero rated/exported sales, foreign exchange gain and differential VAT rates as part of the assessment workings. The Respondent acknowledged in its Statement of Findings that it received the supporting documents for these explanations.

98. The Respondent further stated that incorporating the same at the Objection stage will increase the variance chargeable to tax. The Respondent stated that it shall advise the Commissioner of DTD to consider assessing the same separately.

99. It is not in dispute that in arriving at its Objection decision, the Respondent did not consider the information and documents provided by the Appellant explaining the turnover variances arising from revenue items that the Appellant omitted from its VAT returns. The Tribunal is not persuaded by the Respondent's reason for the failure to consider the Appellant's explanations and documentary evidence. The Tribunal finds that the Respondent's reason is avoidant as it failed to address the Appellant's ground of Objection.

100. The Respondent's failure to consider the Appellant's explanations and documentary evidence prejudiced the Appellant and contravened Section 51(8) of the Tax Procedures Act which provides as follows: -

"Where a notice of objection has been validly lodged within time, the

Commissioner shall consider the objection and decide either to allow the *objection in whole or in part, or disallow it, and Commissioner's decision*

shall be referred to as an "objection decision"."

101. The Tribunal, taking into consideration the foregoing, determines that this part of the dispute be referred back to the Respondent to consider the information provided by the Appellant to decide on the Objection according to Section 51(8) of the Tax Procedures Act.

102. Based on the foregoing, the Respondent was not justified in confirming the Corporation tax assessment without considering the above grounds of Objection and relevant documents presented to it during the Objection stage.

<u>Reversal of accrued income</u>

103. The Appellant explained that part of the sales turnover variance between the Appellant's VAT returns and IT2C returns amounting to Kshs. 14,152,000 in 2019, Kshs. 31,527,000 in 2020 and Kshs. 4,921,308 in 2022 is attributable to reversals of income that was accrued in prior years. The Appellant asserted that overall, the correct turnover is recognised for both VAT and Corporate tax but in different years.

104. The Appellant averred that it operates a revenue accrual system where it plans and creates a monthly work plan for each client's advertising project and estimates its income in its accounts in accordance with IFRS prior to invoicing

in its accrued income ledger. That once the Appellant invoices the client, it reverses its accrued income and recognises the actual income in its accounts.

105. The Appellant explained that the variances arise in instances where the accrual of the income and reversal of the accrued income happen in different years. That since the invoice will not have been issued in the year of accrual, no VAT declaration will have been made. That consequently, the Corporation tax turnover will exceed the VAT turnover. The Appellant further explained that there are instances where the amount accrued is more than or less than the amount invoiced creating further variances across years.

106. The Appellant stated that it pays Corporation tax on the accrued income in the year in which it was accrued and VAT in the year in which the invoice is raised. The Appellant asserted that the VAT return consists of actual invoices issued in each month, and consequently each year, and there is no instance where the Appellant adjusts the VAT returns for any reversals. That the reversals are only in the Income tax accounts and returns for the adjustment of accrued income.

107. In response to the Appellant's averment that the Respondent did not adjust for reversal of prior accrued income, the Respondent

asserted that in arriving at the Appellant's income did not rely on the Appellant's ledger but rather the

VAT returns. The Respondent stated that a review of the Appellant’s VAT return showed the credits which were incorporated in establishing the Appellant’s incomes for the period. It was the Respondent’s finding that the reversal had already been adjusted for in arriving at the Appellant’s taxable income, resulting in the Respondent rejecting this ground of objection.

108. The Tribunal notes that the Appellant presented the work plans from which it estimates its earned revenue and the accrued income ledgers for the years 2019, 2020 and 2022 where it records its estimates of earned revenue prior to invoicing its clients.

109. The Tribunal refers to Section 19(1) of the VAT Act which provides that tax shall be due and payable at the time of supply. The Tribunal takes note that the Appellant misapprehended the tax point of VAT provided in Section 12(1) of the VAT Act as follows: -

“12. (1) Subject to subsection (3), the time of supply, including a supply of

imported services, shall be the earlier of—

(a) the date on which the goods are delivered or services performed;

(b) the date a certificate is issued by an architect, surveyor or any other person acting as a consultant in a supervisory capacity;

(c) the date on which the invoice for the supply is issued; or

(d) the date on which payment for the supply is received, in whole or in part."

110. Based on the work plans and accrued income ledgers presented by the Appellant, and the Appellant's explanation that its VAT return consists of actual invoices issued in each month, and consequently each year, and that there is no instance where the Appellant adjusts the VAT returns for any reversals, the Appellant's correct tax point, according to Section 12(1)(a) of the VAT Act, is the date on which the services are performed, that is, the date it accrues income, and not the date of the invoices.

111. It is the Tribunal's considered view that the variances from reversals of accrued income arose due to the Appellant's failure to apply the correct tax point in its VAT declarations, and instead applying the dates of invoices.

112. Therefore, the Tribunal finds that the Respondent's assertion that the Appellant reversals of accrued income had already been adjusted for in arriving at the Appellant's taxable income in its VAT return is factually inaccurate as the Appellant did not adjust accrued income in its VAT returns as it declared in its VAT only

actual invoices, and not accrued incomes.

113. It is anchored in law that the onus of proving that a tax decision is wrong, excessive or incorrect lies upon a taxpayer. Section 56(1) of the Tax Procedures Act and Section 30 of the Tax Appeals Tribunal Act. It was the onus of the Appellant to persuade the Tribunal that the Respondent erred in rejecting this ground of objection which resulted in the charging Corporation tax on the variance.

114. The Tribunal is guided by the holding in the case of Digital Box Limited versus Commissioner of Investigations and Enforcement [2020] where the Tribunal held: -

> *"…in this case, the Appellant is the one seized of the desire to prove that the Respondent used extraneous information in arriving at its assessment. Thus, according to the provisions of the Evidence Act, the Tax Procedures Act and the Tax Appeals Tribunal Act, the burden of proof falls upon the Appellant."*

115. Consequently, the Tribunal finds that the Appellant discharged its burden of proof as it sufficiently explained the variances relating to reversals of accrued income amounting to Kshs. 14,152,000, Kshs. 31,527,000 and Kshs. 4,921,308 of the variances in 2019, 2020 and 2022, and that the Respondent was not justified in failing to adjust the same in its workings.

Media reimbursement costs

116. The Appellant explained that part of the sales turnover variance between the Appellant's VAT returns and IT2C returns amounting to Kshs. 586,193,000 in the year 2019. Kshs. 352,315,000 in the year 2020 and Kshs. 338,018,050 in the year 2022 is attributable to media reimbursement costs which it recovers from its clients.

117. The Appellant stated that it is contracted by its clients to provide online and offline media buying services. That its remuneration is an agency commission/fees which is usually a percentage of the client's media expenditure. That to satisfy its contractual obligations, it buys media advertising space from its suppliers, which are mainstream and alternative media companies, on behalf of its clients.

118. The Appellant further stated that it invoices its clients by cumulating the media invoices from the suppliers for the particular client and adding its percentage agency fee as per the contract/agreement. That however, for financial reporting and consequently Income tax purposes, the Appellant recognises revenue in accordance with International Financial Reporting Standards (IFRS)/International Accounting Standards (IAS) which requires that if an entity acts as an agent in a transaction

(facilitating a service on behalf of another party), the entity should recognise only its commission or fee as revenue, not the total transaction amount if the entity is merely recovering expenses incurred by an entity on behalf of a customer.

119. The Appellant stated that the media buying costs/disbursements do not feature in the its Income tax returns as revenue and equally do not feature among the expenses. That the Respondent therefore erroneously charged the Appellant Corporate tax on the discrepancy between its revenue as per VAT returns and 1T2C which is attributable to the Appellant's reimbursement of costs/disbursements to its suppliers, which does not qualify as income/gains and profits from business chargeable to corporate tax under Section 3(1)(a)(i) as read together with Section 15 of the Income Tax Act.

120. In response to this ground, the Respondent stated that a review of the documents established that the Appellant develops media plans (budget estimates) based on its clients' requirements. The Respondent established that on approval by the Appellant's client the Appellant posts the same as an expense by debiting/crediting the media reimbursement ledger which represents the estimated expensed for the campaigns and not the actual cost that were incurred in the generation of income. The Respondent further

stated that it also noted instances where the Appellant posted costs and reversed the whole amounts. That no explanations were provided for the reasoning behind the reversals, and some reversal entries did not have corresponding accrual costs.

121. The Tribunal notes that the Appellant explained its ground of objection and appeal in detail and further provided an extract of its media reimbursement cost ledgers for 2019, 2020 and 2022, sample copies of its contracts with its clients and sample copies of its invoices to its clients linked to the reimbursements cost ledgers with corresponding invoices from the suppliers, which demonstrated that the Appellant was recovering the exact costs invoiced to it by the media providers.

122. Section 3(1) of the Income Tax Act provides as follows regarding the charge of income tax: -

> *"3. (1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya."*

123. It is the Tribunal's considered view that the Respondent's assertion that the media reimbursement costs are estimates and not actual costs thus are the Appellant's income is factually inaccurate as the Appellant has demonstrated through contracts with its clients,

invoices to the clients and the third-party invoices from the media service providers that its income comprises only the agency commissions, and not the media reimbursement costs. Therefore, the media reimbursements do not comprise the Appellant’s total income.

124. It is anchored in law that the onus of proving that a tax decision is wrong, excessive or incorrect lies upon a taxpayer. Section 56(1) of the Tax Procedures Act and Section 30 of the Tax Appeals Tribunal Act. It was the onus of the Appellant to persuade the Tribunal that the Respondent erred in rejecting this ground of objection which resulted in the charging Corporation tax on the variance.

125. Taking the above into account, the Tribunal finds that the Appellant discharged its burden of proof as it sufficiently demonstrated that the turnover variances relating to media reimbursement cost amounting to Kshs. 586,193,000, Kshs. 352,315,000 and Kshs. 338,018,050 of the variances in 2019, 2020 and 2022 respectively should be excluded from the computation of its total income under Corporation tax, and that the Respondent was not justified in failing to adjust the same in its workings.

126. The Tribunal notes that the Respondent deducted expenses

claimed in the VAT return not in the Corporation tax returns in its ascertainment of the Appellant’s taxable income. The Appellant has demonstrated that these expenses include media reimbursement costs which it incurs on behalf of its clients and subsequently recovers from its clients.

127. Having established that the media reimbursement costs do not comprise the Appellant's total income, the Tribunal likewise finds that the Respondent deducting the media reimbursement costs as an expense against the Appellant's revenue in its workings was incorrect as it contravenes Section 15(1) of the Income Tax Act which provides: -

> *"15. (1) For the purpose of ascertaining the total income of any person for a year of income there shall, subject to section 16 of this Act, be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of that income…"*

128. Accordingly, the Tribunal finds that the that the Appellant discharged its burden of proof as it sufficiently demonstrated that the Respondent's adjustments of deducting the entire costs of Kshs. 532,426,130 in 2019, Kshs. 337,589,289 in 2020 and Kshs. 305,919,612 in 2022 from the VAT returns in its workings is incorrect, and should be excluded from the computation of the Appellant's total income under Corporation tax, and that the Respondent was not justified in adjusting the same in its workings.

129. Based on the foregoing, the Tribunal finds that the Respondent was not justified in confirming the Corporation tax assessment for the years 2019, 2020 and 2021.

FINAL DECISION

130. The upshot of the foregoing is that the Tribunal finds that the Appeal is merited. The Tribunal accordingly proceeds to issue the following Orders:

a) The Appeal be and is hereby allowed.

b) The Objection decision dated 9th December 2024 be and is hereby set aside.

c) The Respondent shall consider the Appellant's explanations of variances for the years 2019, 2020 and 2022 relating to zero rated/export sales, exchange rate difference and differential VAT rates and corresponding supporting documents already issued to it by the Appellant during the Objection stage.

d) The Respondent shall issue a revised Objection decision in accordance with Section 51(8) and 51(11) of the Tax Procedures Act within 60 days of the date of delivery of this judgment.

e) Each party to bear its own costs.

131. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2026.

ROBERT M. MUTUMA

CHAIRMAN

GLORIA A. OGAGA

MEMBER

EUNICE N. NG'ANG'A

MEMBER

JIMMY M. MALLA

MEMBER