

REPUBLIC OF KENYA
TAX APPEALS TRIBUNAL
MISC. APP. 47 OF 2019

ZAYN AGRO INDUSTRIES LIMITED.....APPLICANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. The Applicant is a limited liability company incorporated under the Companies Act and whose principal activity is cotton ginning.
2. The Respondent is a principal officer appointed under the Kenya Revenue Act, Cap 469 of the Laws of Kenya and whose mandate includes investigation and general administration of tax revenue on behalf of the Government of Kenya.
3. The Respondent issued an additional assessment dated 7th November 2018 adducing Corporation Tax on gross revenue arising out of turnovers declared in its VAT returns.
4. The Applicant objected to the estimated tax assessment on 30th November 2018 with a commitment to submit audited accounts by 7th December 2018. Following various correspondence between the parties, the Respondent raised a demand notice on 28th October 2019.

5. The Applicant filed a Notice of Motion dated 3rd December 2019. seeking the following orders:
- i. That the Applicant be granted an extension of time with regard to the filing of a Notice of Appeal to this Honourable Tribunal.
 - ii. That the Applicant's Notice of Appeal dated 3rd December 2019 and filed on even date be admitted into the record of this Honourable Tribunal as having been found within time
 - iii. That the Applicant files and serves herewith all documents set out under Section 13(2) of the Tax Appeals Tribunal Act.
 - iv. Costs of this Application be in the Cause.
 - v. Any other Orders that this Honourable Tribunal may deem just and expedient to issue.
 - vi. That the Applicant be given leave to file the Notice of Appeal, Memorandum of Appeal and Statement of Facts.

Grounds for the Application

6. The Application, which is supported by the affidavit of Taherali Zeinuddin Zavery, is based on the following grounds:
- i. Due to factors beyond the control of the Applicant, the Applicant missed the statutory deadline for filing of the Notice of Appeal to this Honourable Tribunal. These factors were:

- a) On 7th November 2018, the Respondent filed a self-assessment return on a tax of one-shilling turnover on behalf of the Applicant. The Income Tax Act is clear on late filing penalties and the Respondent is not allowed to file a self-assessment on behalf of the Applicant.
- b) The Applicant received the assessment on 7th November 2018 and objected on time on 30th November 2018 .
- c) The Applicant on 13th December 2018 wrote a letter through its tax representative enclosing all documentary support as evidence for the objection.
- d) The Respondent on 17th of December 2018 sent an email stating that the objection needed to be supported by documents. The Respondent cited Section 84 of the Income Tax Act. The said section was repealed in 2015 vide the Finance Act.
- e) On 1st October 2019, the Applicant through its tax representative applied for a tax compliance certificate.
- f) On 2nd October 2019, the Applicant's tax representative received a phone call from the Respondent explaining that the tax compliance certificate could not be approved due to a confirmed assessment dated 20th March 2019.

g) On 2nd October 2019, the Applicant's tax representative engaged with the Applicant and this is when the Applicant found the email from the Respondent confirming the assessment in his junk email.

h) The Applicant through its tax representative further wrote a letter on 3rd October 2019 to the Respondent citing the Tax Procedures Act No. 29 of 2015 that states:

- *Where the Commissioner has not made an objection decision within 60 days from the date that the Taxpayer lodged the objection, the objection shall be allowed.*
- *An Objection Decision shall include a statement of findings on the material facts and the reasons for the decision.*

- i) The Respondent raised a demand notice on 23rd October 2019.
- ii. The Applicant avers that it approached this Honourable Tribunal at the earliest juncture and the failure to file the Notice of Appeal within time was as a result of justifiable opportunity factors beyond the control of the Applicant.
- iii. The Applicant has an arguable appeal with high probability of success, which appeal would be rendered nugatory unless the orders sought in this Notice of Motion Application are granted. The Applicant's substantive

issues with the Objection Decision is meritorious and should be canvassed at full hearing rather than being locked out unheard on the basis of time within which to file a Notice of Appeal.

- iv. The Respondent will not suffer any prejudice from the grant of the orders sought herein.
- v. The grant of the orders sought in this Notice of Motion Application will allow for the determination of the substantive tax dispute herein on its merits rather than on a procedural technicality.

Respondent's Grounds of Opposition

7. In its Grounds of Opposition dated the 11th day of December, 2020 in response to the Applicant's application for extension of time to file an appeal, the Respondent cited the following grounds of opposition:

- a. That the application by the Applicant offends/flaunts the statutory provisions of Section 13 of the Tax Appeals Tribunal Act 2015. The Act grants a party 30 days upon the decision of the Commissioner to lodge a Notice of Appeal as against the Objection Decision.
- b. That the Application is misconceived as the Applicant's Application does not meet the standards to warrant extension of time under Section 13(3) and (4) of the Tax Appeals Tribunal Act.

- c. That the Applicant has not satisfied the criteria for grant of extension of time and does not therefore warrant an extension under Section 10(3) of the Tribunal (procedure) Rules 2015.
- d. No reasonable circumstances have been demonstrated to warrant an order for the enlargement of time.
- e. THAT the Applicant has not demonstrated that it will suffer irreparable/irremediable harm if the application is granted.

Issues for Determination

- 8. Having carefully considered the application, its supporting affidavit and the grounds of opposition, the Tribunal determined that the issue for determination was whether the Applicant should be granted leave to appeal out of time.

ANALYSIS AND FINDINGS

- 9. The Applicant submitted that the delay in filing its Notice of Appeal was occasioned by the circumstances that were beyond its control. In particular, the Applicant averred that it did not receive the confirmed assessment on time as the same had gone to its junk email folder.

10. The Respondent in opposing the application argued that the Applicant's delay was not caused by extraneous circumstances and that the Applicant was merely being mischievous in its averments.
11. Section 13 of the Tax Appeals Tribunal Act in granting the Tribunal discretion to extend time provides that:

“(3) The Tribunal may, upon application in writing, extend the time for submitting the documents referred to in subsection (2)."

(4) An extension under subsection (3) may be granted owing to absence from Kenya, or sickness, or other reasonable cause that may have prevented the applicant from giving notice of appeal within the specified period."

Consequently, the Tribunal is required to determine the length and reason for the delay when determining the extension of time to appeal out of time. It is noted that the power to extend time is discretionary and unfettered but the same must be exercised judiciously.

12. The Tribunal was further guided by the court in **Joseph Ondiek Tumbo v Sony Sugar Co Ltd [2014] eKLR**, where it quoted Sir Thomas Bingham M R in **Costellow V Somerset County Council (1993)1 All ER 952** where he stated that:

“First, the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation must be observed. The prescribed time limits and are not targets to be

aimed at or expressions of pious hope but requirements to be met. Second, a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default unless the default cause prejudice to his opponent for which an award of costs cannot compensate.... Further, an extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judiciously in accordance with established principles of what is fair and reasonable.”

13. Exercise of discretion to extend time is a well beaten path. In **Wasike V Swala [1984] KLR 591** the court laid a hierarchy of factors to consider when it stated that

“an applicant must now show, in descending scale of importance, the following factors: - a) That there is merit in his appeal. b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and c) That the delay has not been inordinate.”

14. In **Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR** the Court held that:

“As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance - are all relevant but not exhaustive factors.”

15. Guided by the provisions of the Tax Appeals Tribunal Act as well as the above stated cases, the Tribunal used the following criteria to consider the application.

- a. Whether there is a reasonable reason for delay?
- b. Whether the Application for extension has been brought without undue delay?
- c. Whether there will be prejudice suffered by the Respondent if the extension is granted?
- d. The merits of the complained action.

a. Whether there are reasonable grounds for the delay?

16. The Applicant argued that the delay was occasioned by circumstances that were beyond its control. According to the Applicant, it did not see the confirmed assessment as the same was in its junk folder.

17. The Respondent on the other hand argued that the reason given by the Applicant was invalid and that the Applicant was being mischievous. It argued that the Applicant had been in correspondence with the Respondent using the same email address within a span of two months.
18. The Tribunal notes that electronic communication can be subject to technical challenges. The Tribunal cannot write off the possibility of an email being automatically sent to the junk folder. The Tribunal therefore finds that the Applicant had reasonable grounds for the delay.

b. Whether the Application for extension has been brought without undue delay?

19. The Applicant avers that it found out about the confirmed assessment that was in its junk folder on 2nd October 2019. It then engaged with the Respondent on the assessment and filed this application on the 3rd of December 2019. In light of the circumstances, the Tribunal found that the Application for extension had been brought without undue delay.

c. Whether there the Respondent will suffer prejudice if the extension is granted?

20. The Tribunal notes that the Applicant's recourse to justice lies in an appeal to the Tribunal. Thus, the Applicant would suffer extreme prejudice if it is not granted leave to file its appeal. The Tribunal finds that refusing the Applicant

to Appeal out time would leave the same without any way of remedying its cause.

21. On the other hand, the Respondent did not demonstrate how it would suffer prejudice if an extension of time were granted to the Applicant to file its Appeal before the Tribunal.
22. The Tribunal therefore finds that the Respondent will not suffer prejudice if the extension is granted.

d. The merits of the complained action

23. The Tribunal considered whether the matter under dispute was frivolous to the extent that it would be a waste of the Tribunal time, or it was material to the extent that it deserved its day in the Tribunal. The test is not whether the case is likely to succeed. Rather, it is whether the case is arguable. This was the finding in **Samuel Mwaura Muthumbi V Josephine Wanjiru Ngungi & Another (2018) eKLR** where the court stated that:

“Looking at the draft Memorandum of Appeal filed, I am unable to say that the intended Appeal is in arguable. Of course, all the Applicants have to show at this stage is arguability- not high probability of success. At this point the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the Appeal, a demonstration that the

Appellant has plausible grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.”

24. In the view of the Tribunal, the subject matter of the suit is a matter that would ordinarily merit a day at the Tribunal. What appears to be at issue is an assessment for Corporation Tax on gross revenue arising from turnovers declared in the VAT returns. The Tribunal finds that the dispute is not frivolous and should be heard on its merits.

ORDERS

25. In the circumstances, the Tribunal proceeds to make the following orders:
- a) The time for the commencement of the Appeal process on the part of the Appellant is hereby enlarged.
 - b) The Notice of Appeal dated the 3rd day of December, 2019 and filed on the same date is hereby deemed to be properly on record.
 - c) The Appellant to file and serve the Memorandum of Appeal, Statement of Facts and Tax decision within Fourteen (14) days of the date of this Ruling.
 - d) No orders as to cost.

DATED and DELIVERED at NAIROBI this 28th day of August, 2020.



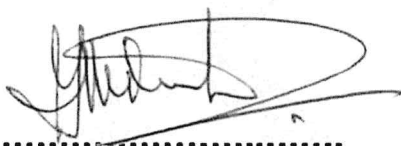
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ERIC NYONGESA
CHAIRMAN



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CATHERINE N. MUTAVA
MEMBER



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GABRIEL M. KITENGA
MEMBER



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WILFRED GICHUKI
MEMBER



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ABRAHAM KIPROTICH
MEMBER

