

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 119 OF 2020**

**GEYSER INTERNATIONAL ASSETS LIMITED..... ...APPELLANT**

**-VERSUS-**

**COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT**

**JUDGMENT**

**A. BACKGROUND**

1. The Appellant is a company registered in Kenya as a foreign company with certificate of compliance number CF/2015/184908 pursuant to the provisions of the Companies Act.
2. The Respondent is a principal officer with delegated powers and function of the Commissioner General, and acts for and on behalf of the Kenya Revenue Authority a body established under the provisions of the Kenya Revenue Authority Act, Act No. 2 of 1995 and is the principal agency charged with the responsibility of collection and administration of revenue taxes on behalf of the Government of Kenya.
3. On 11<sup>th</sup> April 2019 the Appellant received a letter from the Respondent demanding for payment of alleged tax arrears amounting to Kshs.177,223,159.00 comprising of Kshs.142,921,902.00 in principal taxes and Kshs.34,301,257.00 in interest for the year of income 2016.

4. The Appellant had not at any point in the past received any tax assessments or any correspondence from the Respondent relating to the alleged tax arrears set out in the demand notice. The first time the Appellant became aware of the alleged tax arrears for the year 2016 was on 11<sup>th</sup> April 2019 when it received the letter of Demand Notice from the Respondent.
5. The Appellant wrote a letter dated 17<sup>th</sup> April 2019 to the Respondent requesting for detailed information relating to the demand notice including, the nature of the income tax, the type of tax, the basis for the tax assessment and any correspondence which was pertinent to these tax arrears.
6. As the Appellant was desirous of obtaining information and responding to the Demand Notice, the Appellant sent a follow up letter to the Respondent dated 6<sup>th</sup> May 2019 reminding the Respondent to respond to the Appellants request for information. Despite the Appellant's incessant calls and several follow-ups for a response to the Appellant's letter, the Appellant's request remained unanswered.
7. Five months later, on 9<sup>th</sup> October 2019, the Appellant received a letter from the Respondent dated 4<sup>th</sup> October 2019, not in response to the Appellant's request for information, but demanding for payment of alleged tax arrears of the same amount and period as that in the Demand Notice. It was not clear what the intention of the letter was as the Appellant had received a similar letter in April 2019 which it had responded to.
8. On 14<sup>th</sup> October 2019, the Appellant in response to the Respondents' letter of 4<sup>th</sup> October 2019 once again requested the Respondent to furnish the Appellant with the requested information to enable the Appellant make an informed decision on how to respond to the Demand Notice.

9. The Appellant finally received a letter from the Respondent dated 18<sup>th</sup> December 2019 setting out the basis for the alleged tax assessment. The letter stated that the source of income that was assessed for tax under the Demand Notice was payment received by the Appellant in respect of compulsory acquisition of its property by the Government of Kenya, 2010 for the construction of the Standard Gauge Railway.
10. The Appellant now having knowledge of the basis for the tax demand and being dissatisfied with the same, made a decision to object to the Demand Notice and the taxes demanded therein through a letter dated 16<sup>th</sup> January 2020 (the Notice of Objection) setting out reasons for the Appellant's objection.
11. On 12<sup>th</sup> February 2020 the Appellant received an email from the Respondent acknowledging receipt of the Notice of Objection. The email further stated that the Appellant had not set out reasons as to why the objection was not lodged within thirty days of receipt of the assessment and advised the Appellant to lodge the late objection application on the iTax platform with reasons as required under Section 51(7) of the Tax Procedures Act, 2015 to enable the Respondent review the notice of objection.
12. The Appellant complied with the Respondent's directions and filed an objection on iTax platform setting out reasons for the late objection, which included the fact that the Appellant had not received an assessment or notification of the same before receiving the Demand Notice
13. While lodging the late objection on iTax as directed by the Respondent, the Appellant became aware of an iTax assessment which had allegedly been sent to the Appellant on 12<sup>th</sup> October 2018 for which the Appellant had received no notification

14. On 12<sup>th</sup> March 2020, the Appellant received a letter from the Respondent, rejecting the Appellants notice of objection on grounds that the Appellant had not responded to the Respondent's email dated 12<sup>th</sup> February 2020 and consequently the Respondent found that the notice of Objection was not validly lodged as the same had been lodged out of time without providing reasons for the late objection contrary to the provisions of Section 51(7) of the Tax Procedures Act.
15. The Appellant being dissatisfied with the decision of the Respondent contained in the letter dated 12<sup>th</sup> March 2020 filed the Appeal herein.

## **B. APPEAL**

16. The Appellant's Appeals to the Tribunal against the decision issued by the Respondent through a Memorandum of Appeal dated 31<sup>st</sup> March 2020. The grounds of Appeal are as follows;
  - a. The Respondent erred in fact and in law by rejecting the Appellant's late objection on the basis that the same had not been validly lodged as the Appellant had failed to provide reasons for late objection contrary to the provisions of Section 51(7) of the Tax Procedures Act.
  - b. The Respondent erred in fact and law by failing to consider the reasons for lodging a late objection provided by the Appellant in its iTax objection dated 17<sup>th</sup> February 2020 despite acknowledging the same
  - c. The Respondent erred in law and in fact by failing to accept and admit the Appellant's Notice of Objection on the sole basis that the same was filed late without providing reasons for a late objection contrary to Section 51(7) of the Tax Procedures Act

- d. The Respondent erred in law and in fact by failing to appreciate the circumstances in which the Respondent may allow a late objection under Section 51(7) of the Tax Producers Act, 2015.
  - e. The Respondent erred in law and in fact by failing to consider and acknowledge that the Appellant was prevented from lodging the notice of objection within the prescribed period because the Appellant did not receive any notification from the iTax system regarding the iTax assessment and the Appellant had no knowledge of any tax demand until 11<sup>th</sup> April 2019 when the Appellant received a letter from the Respondent in respect of the alleged tax arrears; and
  - f. The Respondent erred in law and in fact by failing to appreciate that the Appellant was prevented from lodging an objection within the prescribed period as the tax demand dated 11<sup>th</sup> April 2019 did not set out the basis for the alleged tax arrears contrary to Article 47 of the Constitution of Kenya, 2010.
17. The Appellant make the following prayers;
- a. That the decision of the Respondent contained in the letter dated 12<sup>th</sup> march 2020 be set aside.
  - b. The Respondent be directed to consider the Appellant's reasons for a late objection as set out by the Appellant in its late objection dated 17<sup>th</sup> February 2020 and acknowledged by the Respondent
  - c. In the alternative, the Respondent be directed to allow the Appellant's Notice of Objection as validly lodged pursuant to the provisions of Section 51(7) of the Tax Procedures Act
  - d. The Appeal be allowed with costs to the Appellant; and

- e. Any other remedies that the Honorable Tribunal deems just and reasonable.

### **C. RESPONSE TO THE APPEAL**

18. The Respondent responded to the grounds of Appeal in a Statement of Facts dated 14<sup>th</sup> May 2020 as follows:-
- a. The Respondent states that the Appellant received Kshs. 375,254,091.00 from the Kenyan Government for consideration of a parcel of land reference number MN/V1/3892 which was to be utilized for the construction of Standard Gauge Railway (SGR). The Respondent however, contended and assessed this pay-out as business revenue income and charged tax on it at the 30% Corporation tax, consequently raising the assessment of Kshs 142,921,902.00 in the iTax system being only principal amount exclusive of interest.
  - b. In response to the allegation that the Appellant was not notified of the assessment, the Respondent states that Section 74 of the Tax Procedures Act is clear. It provides for electronic service of documents. Since the Appellant had not changed its particulars (Section 9 of TPA), the Respondent therefore sent the assessment vide its legally provided registered address via iTax which is real time and the onus of checking and confirming its emails is upon the Appellant.
  - c. The Appellant failed to lodge its objection in time and its late objection failed to meet the threshold for consideration of a late objection application as set out in Section 51 (7) of the TPA which provides the grounds for grant of a late objection. The Appellant was accorded sufficient time to file its objection that would enable the Respondent to determine its tax liability and where documentation was availed, it was considered and the same impacted on the tax liability.

19. The Respondent prayed that the Tribunal consider this case and finds that;
- a. The confirmed amended assessments dated 12<sup>th</sup> October, 2018 and subsequent objection decision dated 10<sup>th</sup> March, 2020 are proper in law.
  - b. The confirmed assessments subject of the Appeal amounting to Kshs 177,223,159/- are due and payable by the Appellant.
  - c. That the Appeal herein be dismissed with costs to the Respondent.

#### **D. ISSUES FOR DETERMINATION**

20. In this Appeal the following issue fall for determination by the Honorable Tribunal, namely;
- a. *Whether the Respondent erred in rejecting the Appellant's late objection on the basis that the same was not validly lodged*

#### **E. ANALYSIS**

***Whether the Respondent erred in rejecting the Appellant's late objection on the basis that the same had not been validly lodged***

21. The Appellant submits that following receipt of the Respondent's demand notice which did not set out the basis for the alleged tax arrears, the Appellant wrote back to the Respondent requesting to know the basis for the demand to enable the Appellant respond appropriately. The Appellant took all reasonable steps and was diligent in following up with the Respondent for a response on its request to know the basis for the tax demand in order to respond appropriately.
22. The Appellant further submitted upon getting knowledge of the basis for the Respondent's tax demand and being dissatisfied with the same, the Appellant decided to object to the demand through a notice of objection dated 16<sup>th</sup> January



2020. Further, that in compliance with the Commissioner's email dated 12<sup>th</sup> February 2020 requiring the Appellant to lodge the late objection in iTax portal, the Appellant lodged its objection in the iTax portal providing reasons for late objection. The Appellant did not object to the assessment in time chiefly because it had not received a notification of the assessment before receiving the demand notice and additionally the Appellant's directors were out of the country. The Appellant submitted that in any event, even if the Appellant would have sighted the assessment before the demand notice, the Appellant would not have been in a position to respond to the assessment as it did not contain any reasons for the assessment.

23. It was submitted for the Appellant that Article 47 (1) of the Constitution of Kenya, 2010 as read with Section 4 (1) of the Fair Administrative Actions Act, 2015 provide that every person has the right to fair administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness is an integral component of the rules of natural justice, which is an inbuilt component of the justice delivery system and binding all bodies that make decisions that affect people's substantive rights or interest. In this regard, the Appellant placed reliance on the case of *Republic v Commissioner of Taxes ex parte Fleur Investment Limited [2020] eKLR*.
24. The Appellant further submitted that the Respondent made its objection decision with undue regard for the reasons set out by the Appellant explaining why it had filed its notice of objection out of time. That by the Respondent rejecting the late notice of objection without considering the reasons set out by the Appellant, the Appellant was denied the opportunity to be heard. In this regard, the Appellant relied on the case of *Republic vs County Director of Education, Nairobi & 4 Others ex parte Abdukadir Elmi Robleh [2018] eKLR* which cited with approval the Canadian Supreme Court case of *Baker v Canada (Minister of Citizenship & Immigration) 2 S.C R 817 6* where the elements of procedural fairness in the administrative law context were held to be;



*“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly and have decision affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision.”*

25. On his part, the Respondent submitted that the Appellant failed to satisfy any of the grounds set out under Section 51 (7) of the TPA, 2015 to warrant the grant of the application to enlarge time. The Respondent in exercising his discretion in determining whether to expand time or not, was guided by the law. In justifying the exercise of this discretion, the Respondent sought guidance from statute and the courts. Indeed the courts have in the past considered a number of factors in determining the issue of this issue of extension of time. In this regard, the Respondent relied on *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application Nairobi 251 of 1997* wherein it was held as thus:-

*“It is now settled that the decision whether to expand the time for Appealing is essentially discretionary. It is also well stated that in general that matters which this court take into account in deciding whether to grant an extension of time are, first the length of the delay, secondly, the reasons for the delay, thirdly (possibly) the chances of the Appeal succeeding if the application is granted and fourthly the degree of prejudice to the Respondent if the application is granted.”*

26. It was submitted for the Respondent that the assessments were sent to the Appellant’s known email address on 12<sup>th</sup> October 2018. The Appellant did not object to the assessment as provided for under Section 51 (2) of the TPA 2015. On 17<sup>th</sup> February 2020 the Appellant filed a late objection on the grounds that it did not receive the notification from itax system, its key personnel was out of the country and lastly that no reasons for the assessments were adduced. These in the eyes of the Respondent were not sufficient grounds as envisioned by statute on

allowing a late objection. A mere averment devoid of evidence is not enough. Further, failure by the Appellant to check its email address for any correspondence from the Commissioner cannot be a reasonable excuse for allowing an application for enlargement of time to lodge a notice of objection out of time. In this regard, the Commissioner relied on the case of *Barclays Bank of Kenya Ltd vs Commissioner General & Another (1998) eKLR*.

27. The Tribunal has carefully and with due attention perused the record and appraised its mind to the parties' opposing submissions on this issue for determination. In order to properly resolve the dispute in this regard, we deem it appropriate to answer the question whether there was a proper demand issued to the Appellant through the Commissioner's demand notice dated 11<sup>th</sup> April 2019. In this respect, it will be prudent for the Tribunal to reproduce the relevant part of the Respondent's demand notice dated 11<sup>th</sup> April 2019;

***"Records at this office show that to date you have not settled the above tax. Details of the tax are as guided below;  
Total taxes; Kshs. 177,233,159"***

28. It took the Appellant writing three different letters to the Commissioner, for the Respondent to disclose to the Appellant the basis of the tax demand. The demand as captured above did not in any way inform the tax payer of nature of the taxes being demanded neither did it make reference to any prior assessment in respect of which the demand was issued. Vide a letter dated 18<sup>th</sup> December 2019 the Respondent informed the Appellant of the basis of the tax demand as payment received by the Appellant as compensation for the compulsory acquisition of its land by the Standard Gauge Railway. The Appellant objected to the assessment through a letter dated 17<sup>th</sup> February 2020, receipt of which was acknowledged by the Respondent. This letter was accompanied by an online application lodged on the iTax system on the same day which underscored the reasons for the late objection

in line with the Commissioner's advice contained in the email dated 12<sup>th</sup> February 2020.

29. The Respondent on 12<sup>th</sup> March 2020 wrote to the Appellant informing it that its application has been rejected for being contrary to the provisions of Section 51 (7) of the Tax Procedures Act 2015. The relevant parts of the Respondent's letter read as follows;

*"...*

*We reviewed your application and requested for evidence but not response has been received to date refer to our email dated 12/02.2020.*

*Your application for objection was therefore not validly lodged as per the provisions of the above Section 51 (7) of the Tax Procedures Act 2015 and is therefore rejected.*

*..."*

30. In light of the above we were called upon to determine whether the Respondent erred in rejecting the Appellant's late objection. Section 51 (7) of the Tax Procedures Act 2015 espouses the framework for application for late objection and basis for enlarge of time. The Section provides as follows;

*"The Commissioner may allow an application for the extension of time to file a notice of objection if—*

*(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and*

*(b) The taxpayer did not unreasonably delay in lodging the notice of objection."*

31. In our understanding the above Section 51 (1) of the Tax Procedures Act is applies to instance where a tax payer lodges an objection out of the thirty-day statutory timeline. In such instance, the Commissioner may enlarge the time for lodging the objection notice subject to the tax payer availing reasons that occasioned the delay. Whatever reasons the tax payer provides so long as the same is in line with Section 51 (7) (a) of the Act must be weighed against the duration of the delay that is there mustn't be unreasonable delay. In the case before us, the Appellant provided the reasons for the late objection, inter alia, that it did not receive an alert from the iTax system of the existence of an assessment, that the Company's directors were out of the country at the relevant time and in any event the assessment did not disclose the basis of the demand.
32. In our view, the reasons proffered by the Appellant in respect of the late objection notice fall well within the parameters of the requirements of Section 51 (7) (a) of the TPA 2015. Additionally, the record before us indicates evidence in support of the reasons for the late objection, especially in respect of Appellant's director's being absent from the country. We therefore find it inconceivable for the Respondent herein to purport that the Appellant's objection notice offended the provisions of Section 51 (7) of the Act yet one the reasons fronted by the Appellant is purely attributable to the Respondent's failure to disclose the basis of the assessment.
33. Further, we find the Respondent is being dishonest and duplicitous insofar as he claims to have received no response to his request of 12<sup>th</sup> February 2020. If the Respondent had truly, at all considered the Appellant's application, then he would have realized that the only reasonable conclusion to the Appellant's reasons fall within the parameters of Section 51 (7) of the TPA, 2015.

34. Having so found, we turn to the question whether the Appellant's delay in lodging the objection was inordinate or unreasonable. We note that the issue of unreasonable delay is one to be measured on a case to case basis; in some instances even a one day delay could amount to an unreasonable delay. However, in the circumstance of this Appeal, and given the reasons tendered by the Appellant in respect of the said delay, we do not think the delay was unreasonable. Accordingly, it is our finding that the Respondent erred in failing to consider the reasons proffered by the Appellant.
35. In failing to consider the Appellant's application under Section 51 (7) of the TPA the Respondent acted in brazen breach of the Appellant's legitimate expectation. It is the Tribunal's finding that the evidence represented before us, which was at the Respondent's disposal at the time of the objection, is sufficient to allow the Respondent to enlarge the time for objection and eventually consider the Appellant's objection on its merits.

## **F. CONCLUSION**

36. The upshot of the foregoing analysis is that we find the Appellant's case is merited. We therefore conclude, on a balance of probabilities, that the Appellant has indeed put forth a solid case against the Respondent's failure to consider its application under Section 51 (7) of the TPA 2015.
37. Accordingly, in light of the totality of evidence on record and the foregoing analysis, the Tribunal makes the following Orders;
- a. The Respondent decision dated 12<sup>th</sup> March 2020 be and is hereby side aside.
  - b. The Respondent be and is hereby directed to reconsider the Appellant's reasons for a late objection as set out in the Appellant's late objection notice dated 17<sup>th</sup>

February 2020 and proceed to determine the Appellant's Notice of Objection on its merits under the relevant statutory provisions.


c. Each party to bear its own costs.

38. It is so ordered.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of June, 2021.**

  
.....  
**MAHAT SOMANE**  
**CHAIRPERSON**

  
.....  
**WILFRED GICHUKI**  
**MEMBER**

  
.....  
**ROSE WAMBUI NAMU**  
**MEMBER**

  
.....  
**JOHN KINYUA WANGARI**  
**MEMBER**

  
.....  
**TIMOTHY CHESIRE**  
**MEMBER**