

Tax Alert:

Factors that the Tax Appeals Tribunal will consider in determining whether to allow a tax appeal that is out of time

Background

This Alert brings to your attention the Tax Appeals Tribunal's ruling in Ison Technologies Kenya Limited -V- Commissioner of Domestic Taxes (Miscellaneous Application NO.117 of 2021).

The taxpayer filed an application at the Tribunal seeking extension of time to file the Notice of Appeal and Memorandum of Appeal.

Taxpayer's grounds

The taxpayer's application was based on the following grounds;

- i. The taxpayer missed on the statutory deadline for filing the Notice of Appeal and Memorandum of Appeal due to factors beyond their control. The factors were:
 - a. The taxpayer was unaware of the existence of the Objection Decision until 4 August 2021 when the taxpayer was applying for a Tax Compliance Certificate. It is on this date that KRA served the taxpayer with the Objection Decision dated 17 July 2020 in hard copy and informed the taxpayer that the advance decision had been sent via email;
 - b. The taxpayer was unaware of any email from the KRA. The taxpayer checked their emails and they did not find the email.
 - c. KRA did not attempt to find out whether the taxpayer had in fact received the Objection Decision.
- ii. The taxpayer had approached the Tribunal at the earliest juncture upon learning of the Objection Decision;
- iii. The intended appeal had very high chances of success;
- iv. The taxpayer would be highly prejudiced unless the application was heard on priority basis and the orders sought therein granted since the taxpayer was not in a position to pay for the assessed taxes which were excessive, estimated and already paid for;
- v. KRA would suffer no prejudice if the orders sought therein were granted; and
- vi. KRA's Objection Decision was issued over six months after the lapse of the 60 days statutory timeline provided under the Tax Procedures Act.

KRA's response

In opposing the taxpayer's application for extension of time, KRA argued that:

- i. The Objection Decision was issued on 17 July 2020 following a chain of correspondence with the taxpayer. The Objection Decision was sent to the taxpayer via the email provided in the iTax platform on the same date;
- ii. KRA was not under any further obligation to follow with the taxpayer on the receipt of the email;
- iii. The taxpayer's allegations that the Objection Decision was not received because its director was out of the country was not a sufficient reason since no evidence had been tabled to prove that the director was the only one with access to the company's iTax platform;
- iv. The taxpayer was guilty of inordinate delay in filing the application for extension of time having filed the same three months after receipt of the Objection Decision;
- v. The taxpayer had a duty to check whether an Objection Decision had been issued; and
- vi. KRA had established channels of communication and it behoved the taxpayer to contact KRA to track the status of the Objection Decision.



Analysis and findings

The Tribunal in allowing the application for extension to file appeal out of time, based their decision on the following considerations;

- i. The Tribunal has power to expand time for filing appeal under section 13(3) of the Tax Appeals Tribunal Act which provides that “ The Tribunal may, upon application in writing, extend the time for filing the Notice of Appeal and the documents referred to in subsection (2);
- ii. However, in determining whether to expand time, the Tribunal will consider a number of factors. The factors include:
 - a. The length of the delay – The taxpayer must show that there was no inordinate delay in filing the appeal. The taxpayer had proved that there was no inordinate delay in filing the appeal once they became aware of the Objection Decision.
 - b. The reasons for the delay – The taxpayer must have reasonable grounds for the delay. The fact that the taxpayer was unaware of the Objection Decision was a reasonable ground for the delay.
 - c. The chances of the appeal succeeding if the application is granted – There has to be merit in the appeal. The test is not whether the case is likely to succeed but whether the intended taxpayer has an arguable case. An arguable appeal is not one that must necessarily succeed but one which deserves its day in court; a prima facie case with a probability of success.
 - d. The degree of prejudice to KRA if the application is granted – The extension of time will not cause undue prejudice to the KRA. In any event KRA would still collect taxes inclusive of penalties and interests if due and payable.

Our Opinion

A taxpayer should file a notice of appeal within 30 days of receiving an objection decision from KRA. The taxpayer should thereafter file a memorandum of appeal and statement of facts within 14 days. Under the Tax Appeals Tribunal Act, the Tribunal can extend the time for filing the notice of appeal, memorandum of appeal and statement of facts owing to absence from Kenya, or sickness, or other reasonable cause.

The Tribunal in this decision has set out the factors that it would consider in determining whether to extend time. The four factors for determining whether a taxpayer qualifies for extension of time are meant to protect the taxpayer from procedural technicalities that would hinder a fair determination of their case. Taxpayers can gather courage from this decision to pursue their tax appeals on merit

The Tribunal’s decision affirms Article 159(2) (d) of the Kenyan Constitution which provides that justice should be delivered without undue regard to procedural technicalities. The overriding objective for both the taxpayer and KRA is to ensure a fair and just process that allows the taxpayer to pay and for KRA to collect taxes when due.

KPMG is happy to assist on any tax dispute resolution issue or tax advice arising from this decision.

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