

Tax Alert

High Court rules that KRA must issue an objection decision within 60 days



Summary

This alert brings to your attention the High Court's judgement of 17 July 2023 in the case of **Eastleigh Mall Limited vs Commissioner of Investigations & Enforcement Appeal No. E0686 of 2020**.

The Appeal arose from a dispute relating to corporation tax, Value Added Tax on commercial rent and Pay As You Earn.

The High Court at Nairobi rendered its decision allowing the appeal filed by Eastleigh Mall Limited (the Appellant). According to the court, the Kenya Revenue Authority's (the Respondent) failure to issue an objection decision within the stipulated 60 days meant that the objection by the Appellant had been allowed. The Tax Appeals Tribunal had therefore erred in dismissing the objection raised by the Appellant.

Background

On **16 June 2015**, the Respondent assessed the Appellant's withholding tax, PAYE, and corporation tax for the period 2008 to 2015. The Appellant objected to the assessment. The KRA did not respond until two years after the objection was lodged. On **28 April 2017**, the Respondent issued an objection decision confirming the assessment.

The Appellant lodged an appeal at the Tax Appeal Tribunal seeking to vacate the Respondent's objection decision on the basis that the objection decision was

time barred. On its part, the Respondent argued that the 60-day timeline was a technicality and urged the Tribunal not to look at technicalities. The Tribunal upheld the Respondent's objection decision and dismissed the appeal. According to the Tribunal, the 60 days requirement was a technicality that could be bypassed through discretion as discussions between the parties had the effect of extending time.

The Appellant being dissatisfied with the decision of the Tribunal, appealed to the High Court.

Appellant's grounds of appeal

The Appellant challenged the Tribunal decision on the following grounds:

- i. The Tribunal erred in law and fact in failing to consider the issues of evidence raised by the Appellant and employing the wrong analysis in coming up with its determination; and
- ii. The Tribunal erred in fact and in law in failing to consider the 60-day timeline set out under Section 51 of the Tax Procedures Act, 2015.

The Appellant prayed that the appeal be allowed with costs.

Respondent's arguments

While the Respondent admitted that the objection decision was issued beyond the 60-day timeline required of it under Section 51(11) of the Tax Procedures Act, it contended that the parties had been engaging in discussions on the subject matter and this therefore had the effect of extending time.

The Respondent invited the court to apply the overriding objective under Article 159 of the Constitution of Kenya 2010 and treat the failure to issue an objection decision within the 60-day timeline as a technicality.

Court's Determination

The High Court determined the matter in favour of the Appellant as follows:

On the issue on validity of the objection decision, the High Court held that the provisions of Section 51 (11) of the Tax Procedures Act **are mandatory**.



The learned judge observed that:

“if the commissioner is allowed to exercise his discretion and stay without limit before issuing an objection then the taxpayer would be unable to make crucial decisions and plan his/her business properly.”

Therefore, the Tribunal erred in dismissing the objection raised by the Appellant.

According to the Court, the failure to issue an objection decision within 60 days meant that the objection was allowed. Having made this finding, the Court did not delve into the other issues raised in the Appeal as the objection decision was given in contravention of the law.

Our Opinion

The decision by the High Court is a double-edged sword. It provides clarity that the Commissioner must issue an objection decision within 60 days. This decision equally signals the likelihood of a similar interpretation in cases where taxpayers fail to lodge an objection within 30 days from the date of the assessment on account of ongoing discussions with the Commissioner.

It is a reprieve for taxpayers who have had assessments hanging over their heads without an objection decision. On the same breath, it is important for taxpayers to ensure strict adherence to timelines even where discussions regarding an assessment are ongoing.

Based on this decision, where a taxpayer does not receive an objection decision within 60-days, the objection shall be deemed to be allowed in accordance with Section 51(11) of the TPA.

KPMG is happy to assist on any issues arising from this alert.

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