APPEALS AND STAY OF EXECUTION

What do taxpayers have to consider following unfavourable tribunal decisions

Legal Alert

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For most taxpayers who lose at the Tax Appeals Tribunal (TAT), the same means a beginning of another battle with the Kenya Revenue Authority (KRA) at a higher Court in a bid to validate its arguments as put forth at TAT. In most instances, especially in disputes relating to assessment of tax, the taxpayer is always at a disadvantaged position when they lose at the Tribunal and as such has to act not only meticulously but also with speed and within the laid down timelines.

Judging by the increased number of tax disputes being appealed at the High Court from the TAT, we hereby highlight some of the fundamental factors that a taxpayer intending to appeal should take into account. We outline key considerations that taxpayers who intend to appeal these decisions should take into considerations.

A. APPEALS TO THE HIGH COURT

The Tax Procedures Act, 2015 (TPA) provides that a taxpayer who is dissatisfied with the decision of the Tribunal can appeal to the High Court within 30 days of receiving the decision. The dissatisfied Party should file a Notice of Appeal at the High Court and to the other Party notifying them of its intention Appeal. Moreover, it should also request for the typed and certified proceedings of the suit together with the judgment and decree of the Tribunal.

Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading[1]. The appeal is deemed as duly filed once a Memorandum of Appeal (MOA) has been filed within 30 days of issuance of the decision of the TAT. The MOA should set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative. Such grounds are to be numbered consecutively.

At this point we wish to emphasize the need for observance of set timelines as stipulated in the Law. Of key is that where the taxpayer fails to file its Appeal within the 30 days' window, then should the Appellant wish to file its appeal, he must seek the leave of the High Court to do so giving reasons for the delay in filing the Appeal[2].

It should be noted however, that in most cases, there will be a delay in the issuance of the certified and typed proceedings, judgment and decree by the Tribunal to the extent that the same may exceed the stipulate 30 days. In such situations, courts have held that a Party can file its MOA within the stipulated time but the filing of the Order or the decree must follow at the earliest opportunity possible or within such time that the court may direct considering that without the order or the decree appealed against, the appeal is incomplete.

A party is always at liberty to request the Court's leave for more time to put in the typed proceedings and the certified decree once the MOA has been filed in instances where the delay was occasioned by none of its fault.

Once a Memorandum of Appeal has been filed, the same is presented to a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may reject the appeal summarily. However, if the Appeal is admitted, then the same shall proceed to hearing. [3]

Once the MOA is filed and admitted, the Appellant is then required to serve the same upon all the Respondent listed in the Appeal within 7 days of receipt of the notice of the Registrar.

Before an Appeal is heard, the judge has to ascertain that various documents are in order namely the MOA, the pleadings, notes of the trial magistrate, transcripts and notes made at the hearing, affidavits and the judgement/order or decree appealed from.[4] It is after such confirmation that the matter proceeds to the full hearing.

B. STAY OF EXECUTION

One of the critical aspects that an Appellant, especially in respect to tax disputes, should undertake is the stay of execution of decree issued by the Tribunal. This should be sought expediently at the High Court taking into account

[1] Rule 1 order 42, Civil procedure rules.

[2] Section 79G, Civil Procedure Act CAP 21.

[3] Section 79B, Civil Procedures Act CAP 21.

[4] Order 42 rule 12(4), Civil procedure rules.

the continued acts of KRA in immediately issuing Agency Notice as against Taxpayers accounts who lose at the Tribunal.

A stay of execution basically means that the successful party may not proceed to execute the decree as against the Appellant. Essentially, an Appeal does not act as a stay of execution of a decree issued by the Tribunal.[5]

The implication of the said provision is that a Party has to formally file an application with the High Court requesting for the stay of the decree at the Tribunal. In deed in ***Republic v Attorney General & another Ex parte James Alfred Koroso, High Court Judicial Review Miscellaneous Application No. 44 of 2012*** the Court noted as follows: -

> ***It follows that the mere fact that a party intends to appeal or has even appealed does not entitle him to an automatic stay. A party who needs protection from the Court ought to also apply for stay of execution or proceedings.***

Similarly, in the most recent case of ***Republic v Attorney General & Another; Ex Parte Applicant Mike Maina Kamau [2020] eKLR, Miscellanous Civil Application No. 222 of 2019,*** Justice Mativo noted as follows: -

> ***The law is that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court so orders. It is a known principle of law that an appeal of a judgment by the unsuccessful litigant does not prevent the successful party executing the judgment immediately. Ideally, the unsuccessful party should apply for a stay of execution after judgment is delivered from the court issuing the decree and if unsuccessful from the court to which the appeal is preferred.***

In terms of tax matters more so on an unsuccessful taxpayer, this requirement is very crucial considering that KRA will in most cases proceed to execute a decree immediately after its issuance. A good example is the recent case of Keroche Breweries where the Tribunal delivered its judgment in favor of KRA to the tune of Kshs. 9.1 billion and even before matter could be referred to the High Court, KRA had already issued Agency Notices as against the bank accounts of Keroche Breweries.

The implication of such acts by KRA is that Agency notices will operate to freeze the accounts of the losing taxpayer hence denying him access to its accounts. Moreover, and if no action is taken swiftly by the Taxpayer, the amounts in those accounts will be immediately transferred to KRA to cater for the decretal sum.

This in essence will place the Taxpayer at a disadvantaged position since the amount will already be in KRA's accounts and transferring the same to the Taxpayer's account will be another battle. As such, any Taxpayer who loses at the Tribunal and intends to Appeal to the High Court must swiftly apply for the stay of execution of the decree issued by the Tribunal before KRA proceeds to execute.

Another contentious issue relating to issuance of stay is on the provision of a security by the Taxpayer prior to grant of stay. Whereas, the Tribunal has in some cases held that the payment of security is not a precondition to grant of stay, in some cases Taxpayers have been required to furnish a security prior to grant of the stay.

[5] Order 42 rule 6(1), Civil procedure rules

In the case of ***Shop and Deliver Limited Vs Commissioner of Domestic Taxes, TAT Appeal 141 of 2019***, the court while refuting the need for issuance of security prior to grant of stay noted as follows: -

> ***Regarding whether a stay must be conditional, the Tribunal notes the Respondents request that should the Tribunal be inclined to issue orders of stay of collection of taxes, it should consider the Respondents' interest and safeguard the tax in dispute by either compelling the Applicant to provide a valid security of taxes as it shall deem fit and Appropriate. Tax laws in this country provide appropriate sanctions for non-compliance and the Tribunal finds no merit in demanding additional guarantees that the law will be complied with.***

In contrast however, in the recent tax appeal case of Keroche Breweries Limited, the High Court while granting the Appellant stay of execution directed it to deposit as security the sum of Kshs. 500 Million with KRA. This requirement for payment in the Keroche case can be argued as being based on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules which specifically notes as follows: -

> ***No order for stay of execution shall be made under Sub rule (1) unless-***
>
> ***a(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
>
> ***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant***.

In deed in the case of ***Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocate,*** Justice Gikonyo the Court stated that:

> ***"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor……Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."***

The difficulty however with the requirement to deposit security to a large extent is prejudicial to a Taxpayer especially where there is a high chance of the Appellant's case being successful. Moreover, by the mere fact that the Taxpayer has filed the Appeal, the same is indicative that it disputes the assessments and the judgment of the Tribunal and as such to require it to deposit the security is unwarranted.

In fact, at the stage of application for stay of execution, the High Court has not yet determined whether the Appellant is liable to pay the amount demanded by KRA.

Another worrying trend, are the high amounts required of Taxpayers to furnish as security for grant of stay. Take the example of Keroche Breweries for which it was required to furnish the security of Kshs. 500 Million. In all fairness and

practicability, the said amount is very high especially where the High Court has yet to hear and conclusively determine the Appeal.

Lastly, and as rightfully noted in the ***Shop and Deliver Case***, under the tax laws, there are various other appropriate sanctions that KRA can use to sanction for non – compliance by Taxpayer and which ought to be encouraged by our Court

C. CONCLUSION

Having analyzed the current trend relating to appeals from the TAT to the High Court, it follows that an unsuccessfully Taxpayer who intends to appeal to the High Court should act meticulously and expediently to avoid finding itself at a disadvantaged position with KRA. Further, the Taxpayer should adhere to the laid down procedures of filing appeals to the High Court while observing the laid down timelines to avoid being barred from presenting its appeal on grounds of technicalities.

Let's talk

For further information on how the proposed tax provisions will affect your business or assistance on any other matter kindly contact your regular Taxwise Africa analyst or the contacts below.

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