

**IN THE INCOME TAX COURT
(HELD AT MEGAWATT GAUTENG)**



(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
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DATE	SIGNATURE

CASE NO: 13635

In the matter between

AB CC

Appellant

and

**THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE**

Respondent

J U D G M E N T

MALI J:

[1] This is an appeal against the decision of the respondent not to condone the late filing of an objection by the appellant. The appeal relates to the 2008 to 2011 years of assessment in respect of pay-as-you-earn tax (PAYE tax.)

- [2] The appellant is AB CC, a close corporation duly registered in terms of the company laws of the Republic of South Africa. The appellant, at all relevant times, operated a grocery retailer named X in the Pretoria Area.
- [3] The respondent is the Commissioner of the South African Revenue Service (“the Commissioner”), responsible for administering the provisions of *inter alia* PAYE. The respondent’s principal place of business is situated at 299 Bronkhorst Street, Nieuw Muckleneuk, Pretoria.
- [4] On 7 March 2013 the appellant filed a notice of objection to the assessment issued on 18 September 2012. It thus filed its objection later than the prescribed period of 30 days from the date of assessment. On 28 March 2013 the respondent issued a notice of invalid objection. The respondent’s reasons are that the objection was not lodged within the prescribed timeframes and no reasonable grounds were provided for the delay; hence, this appeal.
- [5] The issue to be determined is whether the respondent should have condoned the late filing of an objection on assessment issued to the appellant.

[6] The condonation of the late filing of an objection is governed by section 104 (4) of the Tax Administration Act (“TAA”). Section 104 (4) of TAA provides;

“A Senior SARS official may extend the period prescribed in the ‘rules’ within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection”.

[7] Furthermore Section 104(5) of the TAA provides;

“The period for objection must not be so extended -

(a) for a period exceeding 21 business days, unless a Senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection;

(b) if more than three years have elapsed from the date of assessment or the decision; or

(c) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the decision.”

[8] The appellant’s case is that exceptional circumstances exist which gave rise to the delay in lodging the objection, because its auditors became aware of the letter of assessment dated 18 September on 4 December 2012. Thereafter, they engaged in an exchange of information with the respondent, the exercise of which resulted in the appellant’s auditors filing the objection on 7 March 2013. The appellant called four witnesses to testify on its behalf; Mr J; Mr K; Mr L and Mr M.

EVIDENCE OF MR J

[9] It transpired that Mr J (was employed by Y Entity at the beginning of 2011 and 2012 to attend to the hosting of Y Entity Auditors' ("Y Entity") server. Y Entity is the auditing firm tasked with handling the appellant's tax matters. Part of J's responsibilities was to set up laptop computers and backups on the files; cabling staff installation of wifi. On Friday, 28 September 2012, he attended to the upgrading of K's laptop computer, an exercise including changing K's email address from K@yacc.co.za to k@YEntityacc.co.za. His evidence was that a domain takes 24 hours to propagate over the internet, whereafter the said computer would be in a position to receive mail sent to it. He further stated that, if the change of domain was not successful, the server dealing with all emails in the country as well as the server at the offices of Y Entity would receive emails but would not forward the said emails to the recipients thereof.

[10] J stated that he was later instructed to look for emails which appeared on the server but where it was not clear to whom or where they were delivered. His findings were that the email was sent to Mr K by Ms S on 28 September 2012 from SARS to the address K@Ysa.co.za. It is his testimony that, at the time the email was sent by SARS, the Ysa.co.za domain was not working yet. Y Entity would have been unaware that it was not working. He referred to the email written by Ms T from account@co.za confirming that Ysa.co.za was registered on 10 March 2014 at 4:48 p.m.

- [11] J further explained, during re-examination, that it was possible for Ms S's email to register the Ysa.co.za domain despite the fact that Ms S addressed the email to k@YEntityacc.co.za because there was an alias account when k@YEntityacc.co.za was removed. He described the server as a "catch all account". This was not disputed by the respondent.
- [12] J's overall testimony was credible. He seemed to engage well with the technicalities of the information technology despite having testified that he was not a specialist as he had learnt on the job. From his evidence, it is reasonably probably true that K did not receive the email from SARS on 28 September 2012.

EVIDENCE OF K

- [13] Mr K testified that he is a Manager at Y Entity Accountants and Auditors. In July 2012, he had just completed his articles when the appellant was subjected to audit by the respondent. This he knows as he was handling the appellant's account. He further stated that, by the end of September, he had moved to another division within the same audit firm. The appellant's file was then handed over to Mr L. His testimony as to the reason that he did not receive the email addressed and sent to him on 28 September 2012 is because of technology challenges according to J. He testified that he remembers having received an email from Ms S of the respondent on 4 October 2012 but did not scroll down to the bottom of the email. During examination-in-chief, K testified that he only became aware of the letter of assessment regarding PAYE during November

2012. Despite having known about the letter of assessment he did not inform his colleague, Mr L, who was handling the matter at the moment.

EVIDENCE OF L

[14] Mr L testified that he worked for the appellant's auditors from 1 August 2011 to the end of February 2015. He was employed as a Team Leader. Amongst his tasks he handled Secondary Tax on Companies ("STC") and PAYE findings by SARS against the appellant from 1 November 2012.

[15] He states that, on 5 November 2012, he submitted an STC objection to SARS and, on 12 November 2012, he requested a meeting with SARS for 5 December 2012 to discuss the STC findings. He only became aware of the PAYE letter of assessment on 8 December 2012 from the meeting which was scheduled to discuss STC matters. Subsequent to this, he sought information required to prepare an objection as the IRP 5 were still outstanding and had to be reconstructed.

[16] He further testified that, on 12 November 2012, he sent an email to SARS requesting to resubmit EMP 501s and add casual workers for purposes of complying with the requirements for the respondent regarding employees. Subsequent to him being aware of the letter of assessment on 8 December 2012, he believed that the process was ongoing from 12 November 2012. He further testified that he was seeking information from SARS' employees in order to lodge an objection. During

cross-examination he did not dispute that the information he was looking for related to VAT and STC. It is logical that the information sought had no bearing on the PAYE objection and could not have prohibited L from lodging the objection at least during December 2012. Actually, one of his excuses for failing to lodge the objection in December of 2012 is that he had to go on holiday.

[17] I find it hard to accept L's version because he has stated that the request of 12 November 2012 had nothing to do with the objection. At that stage he was not aware of the final assessment. Once he became aware of the letter of assessment, which was already late by approximately 3 months, he did not do anything. This is in contrast to the person described as diligent by the appellant's counsel. If that has to be believed, he could have applied for an extension to file the objection. It is mindboggling that an experienced tax practitioner, who is a Team Leader of L's calibre, could have been unaware of the consequences of failing to lodge an objection within the prescribed period. This is made worse by the fact that they were already in trouble with the appellant's tax affairs due to server problems. It is expected that they could have been more careful. I am further amazed by the fact that L had to be guided on the process of lodging an objection. This appears from the email correspondence dated 20 February 2013 at page 3 of the respondent's trial bundle. Actually, on 20 February 2013 at 01.40 pm, he sent an email to the respondent entitled "intention to object" – with respect a baseless procedure – thereby causing unreasonable delays.

EVIDENCE OF M

[18] Mr M testified that he is a member of the appellant. He testified that the postal address that is reflected in the EMP 501 return (reconciliation) and the PAYE notices assessment are indeed correct. M stated that he received the original notices, which were issued in 2012, only in February 2015. Under cross-examination, M could not dispute the presumption that he received the notices in 2012. The notices of assessment advised the appellant about the requirements of lodging a valid objection and, despite this, he did nothing save for handing the notices to his representatives. M took no further action to either object to the assessments or to apply for an extension to lodge an objection.

[19] The respondent called Ms F to testify. Ms F is employed by D Entity, a company handling the respondent's mailing system. The totality of F's evidence is that the assessments in question were dispatched to the appellant's address on 22 September 2012. Having taken into account that M received the notices in 2012, it follows that F is to be believed. As to what happened subsequently is between Mr M and Y Entity. Having stated that; section 153(3) of the Tax Administration Act 28 of 2011 provides that the use of a tax practitioner does not absolve the taxpayer from any liability, responsibility or duty imposed under a tax Act by reason of the fact that the taxpayer's representative failed to perform his/her responsibilities or duties.

[20] Having regard to the above, I find that the appellant has not succeeded in proving that exceptional circumstances existed that gave rise to the delay in lodging the objection. The respondent's decision not to condone the appellant's objection is found to be correct.

[21] In the result, the appeal is dismissed.

21.1. There is no order as to costs

NP MALI
JUDGE OF THE HIGH COURT

Date of hearing:	9 February 2016
Reserved:	25 February 2016
Date of judgment:	13 May 2016