



[2019] JMRC 1

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE REVENUE COURT**

**REVENUE COURT APPEAL NO. 2 OF 2016**

<b>BETWEEN</b>	<b>MODERN VARIETY JAMAICA LIMITED</b>	<b>APPLICANT/ APPELLANT</b>
<b>AND</b>	<b>TAX ADMINISTRATION JAMAICA (TAJ)</b>	<b>RESPONDENT</b>

**IN CHAMBERS**

**Mrs. Yualande Christopher-Walker instructed by Yualande Christopher & Associates for the Applicant/Appellant**

**Mrs. Suesette Harriott-Rogers and Ms. Maxine Johnson for the Respondent**

**Heard: 19<sup>th</sup> October, 3<sup>rd</sup> November, 2016 & 8<sup>th</sup> January, 2019**

**Revenue Appeal—Time within which to file appeal in the Revenue Court has expired - Notice of Application for extension of time - Factors the Court should consider in granting an extension of time - Whether extension of time to file appeal should be granted.**

**Cor: Rattray, J.**

[1] The Applicant, Modern Variety Jamaica Limited, was assessed by the then Taxpayer Audit and Assessment Department (TAAD), now Tax Administration Jamaica (TAJ), for Income Tax for the year 2007, and found to have tax liabilities of Eleven Million Seven Hundred and Seventy-Seven Thousand Seven Hundred and Fifteen Dollars and Six Cents (\$11,777,715.06). The Applicant was notified of the assessment on the 8<sup>th</sup> March, 2010, and thereafter objected to the assessment by way of letter

dated the 20<sup>th</sup> August, 2010. Subsequently, an Objection Notice of Decision dated the 13<sup>th</sup> December, 2011, was issued to the Applicant, which advised it that the audit assessment made by the TAAD was confirmed, and also advised the Applicant of its legal right to appeal to the Taxpayer Appeals Department (TAD), now the Revenue Appeals Division (RAD).

[2] By way of letter dated the 5<sup>th</sup> January, 2012, the Applicant appealed to the TAD. That appeal was heard on the 2<sup>nd</sup> December, 2014, after which a Notice of Decision dated the 21<sup>st</sup> May, 2015, was delivered to the Applicant on or about the 5<sup>th</sup> June, 2015. The said Notice of Decision confirmed the Income Tax assessment made earlier by the TAAD, and also notified the Applicant that if it was dissatisfied with the decision of the Commissioner of the TAD, it had the right to a further appeal to the Revenue Court within thirty (30) days of receiving the Notice of Decision from the TAD.

[3] The Applicant on receiving the Notice of Decision from the TAD, did not file an appeal in the Revenue Court within the stipulated thirty (30) day period. However, on the 21<sup>st</sup> March, 2016, the Applicant filed the instant Notice of Application, seeking an extension of time within which to file an appeal in the Revenue Court. The Application was based on the following grounds: -

- a) The Applicant is dissatisfied with the decision of the Commissioner of the TAD;
- b) That pursuant to section 76(1) of the **Income Tax Act**, if the Applicant being dissatisfied with the said decision, it is entitled to appeal to the Revenue Court within thirty (30) days of receiving the notice or rules of Court;
- c) That relevant documentations that can be submitted into evidence are now available to the Applicant, it having just obtained them from its accountant. In particular, the Applicant's appeal will demonstrate that the taxes the Respondent imposed on the Applicant are excessive and without any evidential basis;

- d) That the decision made by the TAD is erroneous and impedes the viable operation of the Applicant. That further if the Applicant is not permitted to bring this appeal, it will not be given a Certificate of Compliance of the payment of its taxes, necessary for doing its business;
- e) Though the time for appeal has passed, there is no delay in seeking this extension which is being sought at the earliest possible time, the evidence of which is asserted in paragraph 7 of the Applicant's Affidavit in Support of this Application;
- f) That no prejudice will be caused to the Respondent by this appeal being heard.

**[4]** In support of its Application, the Applicant relied on the following Affidavits: -

- a) The Affidavit in Support of Application for extension of time to appeal filed on the 21<sup>st</sup> March, 2016;
- b) The Affidavit of Vanessa Lalasingh in Support of Application for extension of time to appeal filed on the 1<sup>st</sup> July, 2016;
- c) The 2<sup>nd</sup> Affidavit of Vinod Sharma in Support of Application for extension of time to appeal filed on the 13<sup>th</sup> July, 2016;
- d) The 2<sup>nd</sup> Affidavit of Vanessa Lalasingh in Support of Application for extension of time to appeal filed on the 19<sup>th</sup> September, 2016;
- e) The Affidavit of Desmond Palmer filed on the 19<sup>th</sup> September, 2016;
- f) The 3<sup>rd</sup> Affidavit of Vanessa Lalasingh in Support of Application for extension of time to appeal filed on the 29<sup>th</sup> September, 2016; and
- g) The 4<sup>th</sup> Affidavit of Vanessa Lalasingh in Support of Application for extension of time to appeal filed on the 30<sup>th</sup> September, 2016.

[5] The Respondent in its reply relied on the following Affidavits: -

- (i) The Affidavit Opposing the Appellant's Notice of Application for extension of time to appeal filed on the 15<sup>th</sup> June, 2016;
- (ii) The Affidavit in Response to the Appellant's Affidavit of Vanessa Lalasingh and 2<sup>nd</sup> Affidavit of Vinod Sharma filed on the 5<sup>th</sup> September, 2016; and
- (iii) The Affidavit of Maxine Johnson in Response to the Appellant's Affidavit of Desmond Palmer filed on the 23<sup>rd</sup> September, 2016.

[6] In an effort to assist the Court, the parties filed Skeleton Submissions as well as Authorities on which they intended to rely. These Submissions, Authorities and the respective Affidavits were examined and carefully considered by the Court and were of great assistance in coming to its decision in this matter.

[7] Brooks JA in the case of **The Attorney General of Jamaica, Western Regional Health Authority v Rashaka Brooks Jnr (A Minor) by Rashaka Brooks Snr (His father and next friend)** [2013] JMCA Civ. 16, underscored that the relevant factors the Court should consider on an Application for an extension of time are those outlined in the case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors** (All England Official Transcript (1997-2008) delivered 18<sup>th</sup> January, 2000). In that case Lightman J stated at paragraph 8 that: -

*“...The position, however, it seems to me, has been fundamentally changed, in this regard, as it has in so many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in Pt 1, namely to enable the court to deal with cases justly, and there are set out thereafter a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules. It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there are a number of other factors (some specified in the rules and some not) which must be taken into account. **In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are***

***there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties...***

[Emphasis supplied]

[8] Similarly, in the case of **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ. 21, the Court of Appeal again highlighted the principles to be considered on an Application for an extension of time. In that case McDonald-Bishop JA (Ag) (as she then was) at paragraph 44 outlined the principles as follows: -

*“Some of the relevant considerations that govern the question of whether an extension of time should be given to a party in default have been laid down in several cases from this court. These principles have been distilled and outlined as follows:*

*(i) Rules of court providing a timetable for the conduct of litigation must, prima facie, be obeyed.*

*(ii) Where there has been non-compliance with a timetable, the court has a discretion to extend time. The court enjoys a wide and unfettered discretion under CAR, rule 1.7(2)(b) of the CAR to do so.*

*(iii) The court, when asked to exercise its discretion under CAR, rule 1.7(2)(b), must be provided with sufficient material to enable it to make a sensible assessment of the merits of the application.*

*(iv) If there is non-compliance (other than of a minimal kind), that is something which has to be explained away. **Prima facie, if no excuse is offered, no indulgence should be granted.***

*(v) In exercising its discretion, the court will have regard to such matters as:*

*(a) the length of the period of delay;*

*(b) the reasons or explanation put forward by the applicant for the delay;*

*(c) the merits of the appeal, that is to say, whether there is an arguable case for an appeal; and*

*(d) the degree of prejudice to the other party if time is extended.*

*(vi) Notwithstanding the absence of a good reason for the delay, the court is not bound to reject an application for extension of time.*

*(vii) The overriding principle is that justice is done”*

[Emphasis supplied]

[9] The question of the grant of an extension of time is a matter for the discretion of the Court. In exercising its discretion, the Court must have regard to the principles set out by McDonald-Bishop JA (Ag) in the earlier mentioned case of **The Commissioner of Lands v Homeway Foods Limited**, and the focus ought properly to be on the particular circumstances of each case. In addition, the Court must also be engaged in a balancing exercise with regards to the rights of the respective parties.

[10] The first consideration for the Court is the length of the delay on the part of the Applicant. Its Counsel, Mrs. Christopher-Walker indicated to the Court that her client's Application for an extension of time was made promptly, after her client was able to source additional documents that would aid in its appeal. She submitted that the period of time taken by her client to file the Application should not be considered by the Court to amount to undue delay. Further, in her Written Submissions filed on the 19<sup>th</sup> September, 2016, Counsel frankly indicated that her client's Application was filed approximately ten (10) months after the statutory period within which to file an appeal in the Revenue Court.

[11] It must be emphasised that the delay alone on the part of the Applicant would not result in an automatic refusal of the request for an extension of time. The Court must consider the particular circumstances of the instant case, so as to determine whether or not it ought to exercise its discretion in favour of the Applicant. This was highlighted by this Court in the case of **Milton Brown t/a Karnack Hardware v The Commissioner General (formerly The Commissioner of Taxpayer Appeals)** [2015] JMRC 3, where at paragraph 12 it stated that: -

*"I am satisfied that on the material before me, the delay in making the application for an extension of time within which to appeal is inordinate, as conceded by the Appellant's counsel. **But that by itself is not enough to warrant the refusal of the grant of the Order sought. Any discretion to be exercised by the Court must be applied based on the particular circumstances of each case.**"*

[Emphasis supplied]

[12] Nevertheless, I feel compelled at this point to again reiterate the principle that time limits prescribed, whether by the Court, the **Civil Procedure Rules**, the **Revenue**

**Court Rules** or by legislation must be adhered to. They are not to be lightly ignored as they serve the purpose of enabling the Court to deal with matters justly and on a timely basis. As such, litigants and their Attorneys-at-Laws, must appreciate that there are sanctions for failing to abide by and comply with the prescribed time limits. This position was made clear by the dictum of Harris P (Ag) in the case of **Watersports Enterprises Limited v Jamaica Grande Limited and Others** [2012] JMCA App. 35, where at paragraph 35 she stated that: -

*“it has often been declared by this Court that where time limits are prescribed by the rules a litigant is duty bound to adhere to them.”*

[13] In like manner, Smith JA in the case of **Peter Haddad v Donald Silvera** SCCA No. 31/2003, Motion 1/2007, a judgment delivered on the 31<sup>st</sup> July, 2007, noted at page 11 that: -

*“...one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with the proper expedition’.”*

[14] The delay on the part of the Applicant for the filing of its appeal in the Revenue Court, was some ten (10) months after the expiration of the time stipulated by section 76 (1) of the **Income Tax Act**. That particular section provides that: -

*“Any person (hereafter in this Act referred to as the “objector”) who has disputed his assessment by notice of objection under section 75, and who is dissatisfied with the decision of the Commissioner of Taxpayer Appeals therein, may appeal to the Revenue Court within thirty days of the date of receiving the Commissioner’s decision made pursuant to subsection (6B) section 75 or within such longer period as may be permitted by or pursuant to rules of court.”*

[15] Moreover, section 14 (1) of the **Revenue Appeals Division Act**, also informs the Applicant of the time period within which an appeal should be filed in the Revenue Court, and reads: -

*“Subject to subsection (3), an appellant who is aggrieved with the decision of the Commissioner on an appeal may appeal to the Revenue Court within thirty days of the date of receiving that decision or within such longer period of time as may be permitted by or pursuant to rules of court.”*

[16] The next consideration for the Court is the reason or explanation put forward by the Applicant for the delay in filing its appeal. The explanation put forward for the

approximate ten (10) month delay in making the Application, can be gleaned from the Affidavit evidence of Mr. Vinod Sharma, the owner and operator of the Applicant. In his Affidavit in Support of Application for extension of time to appeal, he deponed in so far as is relevant: -

*“4. That the hearing by the Commissioner of the Taxpayer Appeals Department took place on the 2<sup>nd</sup> day of December 2014 and notice of the Commissioner’s decision was given to the Applicant on or about the 2<sup>nd</sup> day of December 2014. Exhibited herewith and marked “MV1” is a copy of the Notice of Decision for the assess Income Tax.*

*5. Since that time, I have with the assistance of the Appellant’s Accountants, identified and gathered information and documents pertinent for the filing of an Appeal of the Commissioner’s erroneous decision and have also retained the services of the Attorneys herein to file an appeal in this Honourable Court on our behalf.*

*6. I was duly advised of the period in which the said Notice of Appeal was to be filed but was unable to gather the relevant documentations to prove the claim within the specified period.”*

[17] Similarly, in the 2<sup>nd</sup> Affidavit of Vinod Sharma in Support of Application for extension of time to appeal, he indicated that: -

*“3. My brother Kishin Sharma (K Sharma) was a shareholder in the Applicant until he sold all his shares to me on December 30<sup>th</sup> 2006 due to our falling out and to start his own business, K Sharma Limited. The Applicant never paid for the transfer of these shares.*

*4. The Applicant was trading as duty free shops under the store name Gold Links at multiple locations, one of which was Soni’s Plaza.*

*5. Gold Link’s Soni’s Plaza went out of business so that K Sharma Limited could open its own duty free store in the same shop. K Sharma Limited appropriated all the stock already in the shop at Soni’s Plaza to use as its opening stock.*

*6. On or about the 2<sup>nd</sup> of October 2006, representatives from the Jamaica Customs Agency came to the Soni’s Plaza location to oversee the transfer of the stocks from the Applicant to K Sharma Limited. Both myself and K Sharma were present.*

*7. The stocks did not physically move since the shop itself in which they were contained was also being transferred to the recipient K Sharma Limited.*

*8. The Applicant was not involved in the transfer executed on that day as I understand it to be a technicality on the part of K Sharma Limited to record the location of the goods it already possessed in specie as being at Soni’s Plaza.*



...

17. *The Accountants received a Notice of Decision in the Appeal at the end of May 2015. The Accountant had expected to make further representations in the matter after submitting the C33A forms and wrote to the TAJ expressing that this was their expectation in the early June 2015. The TAJ advised them by letter dated the 12<sup>th</sup> of June 2015 that the Commissioner's decision was final and any further appeal must be made to the Revenue Court.*

18. *After receiving the Notice of Decision I made attempts to recover documents which could support or stand in place of those submitted to the Commissioner as fresh evidence in support of a further Appeal. I also retained Attorneys-at-Law on behalf of the Applicant (The Attorneys) for the matter on or about the 21<sup>st</sup> of July, 2015.*

**19. *The Attorneys advised me that the Court would go on break in approximately one week and would not reopen until December, 2015. I chose to wait until the Court reopened to file the Appeal so that I would be able to provide additional evidence in the matter.***

20. *The Notice of Decision stated the TAJ's position that the transfer of goods should have been counted as a sale by the Applicant because the goods were noted as a Purchase in the books of K Sharma Limited. They determined the transfer was a sale for consideration despite the insistence of the Applicant that it did not receive any income from the transfer, and that the goods were transferred as an act of goodwill to K Sharma after his separation from the Applicant.*

...

22. *Having determined that a sale did occur, the Commissioner turned to the question of value of the sale. The primary reason for the Commissioner's refusal to alter or discharge the assessment was questions as to the authenticity of the C33A's provided in support of the appeal.*

**23. *In light of this I was advised by my Attorneys-at-Law to get additional evidence of the proper accounting procedure in the circumstances as well as the C33A copies certified by the Customs Agency to support any further appeal. I made checks at the Customs Agency to acquire their copies of the C33A forms as well as the Inventory they made on the day of the transfer. I was advised that they no longer had any record of the day of transfer in 2006 because they do not keep records beyond 6 years.***

24. *K Sharma Limited has been and remains unwilling to turn over its own accounting information related to the transfer because they too were assessed and subjected to an increased tax liability due to the transfer. They do not wish to be involved and open themselves to further investigation.*

25. *While I made efforts with the Customs Agency and K Sharma, the Accountants simultaneously pursued the work of identifying other documents which taken together could show the inventory of goods appropriated by K Sharma Limited and their value.*

26. *These attempts included attempts to find the ledgers used by K Sharma Limited in 2006 to prepare the C33As. All the Applicant's Duty Free Stores were*

*closed by 2012 and so both myself and the Accountants had difficulty retrieving the said Ledgers.*

...

***28. In February 2016 the Ledgers were found and the Accountants were able to use them to compile various import records and purchases schedules which taken together can support this Appeal. The appeal was filed promptly in March 2016 once the Accountants advised me that they had enough documents to provide the Attorneys as evidence."***

[Emphasis supplied]

[18] Counsel Mrs. Christopher-Walker argued that the delay in filing the appeal was not intentional, and was as a result of her client trying to source new documents that would assist with the appeal, and which are now in her client's possession. She further argued that the thirty (30) day period within which to file the appeal, was not sufficient for her client to fully gather all the information needed for the appeal. She insisted that her client was at a disadvantage in filing its appeal before the expiration of the prescribed time, because the Jamaica Customs Agency could not provide her client with a copy of its records to substantiate her client's appeal, nor was Mr. Kishin Sharma, a former director of the Applicant, willing or prepared to provide any documentation to assist with the appeal.

[19] The explanation proffered on behalf of the Applicant for the delay seems to be twofold. It would appear firstly, that Vinod Sharma was unable to source the necessary documentations to aid with the appeal because his brother, Kishin Sharma, was unwilling to assist him with the necessary documentations, and the Jamaica Customs Agency could not provide the Applicant with the records. As a result, Vinod Sharma made attempts to identify other documents from other sources, which he insisted when taken together would help with the appeal. Secondly, Vinod Sharma indicated that he retained Attorneys-at-Law to act on behalf of the Applicant in this matter on or about the 21<sup>st</sup> July, 2015. He was purportedly advised by the Attorneys-at-Law that the Court would go on break in approximately one week and would not reopen until December, 2015. As a result, he chose to wait until the Court reopened to file the Appeal, so that he would be able to obtain and provide additional evidence.

**[20]** It cannot go without mention, that the Court closes for the summer break (Easter Term) on the 31<sup>st</sup> July, and reopens on the 16<sup>th</sup> September, (The Michaelmas Term), and not in December, as Vinod Sharma indicates that he was advised. This is a fact that all practising litigation Attorneys-at-Law are well aware of. During that break, the Court does not normally sit. However, the Registries of the Court are open, in particular the Revenue Registry, and so the appeal could have been filed during that time. It would appear from this explanation, that the Applicant is attempting to point the finger of blame for the ten (10) month delay in filing its Application, on its Attorneys-at-Law. However, no Affidavit has been filed by the Attorneys-at-Law on record for the Applicant confirming or denying such responsibility.

**[21]** The Applicant through evidence filed on its behalf indicated that all its Duty Free Stores were closed by 2012, and so it faced *difficulties* in locating the ledgers used to prepare the C33A Forms and other documents to aid the appeal. However, the Applicant has not highlighted or indicated the specific difficulties faced in locating its ledgers or the other relevant documents to assist with the appeal. The Applicant further indicated that attempts were made to locate the ledgers used by K Sharma Limited to prepare the C33A Forms. However, no mention is made concerning the whereabouts of the Applicant's own ledgers or the steps taken to locate them.

**[22]** In the 2<sup>nd</sup> Affidavit of Vinod Sharma in Support of Application for extension of time to appeal, he deponed as follows: -

*"10. The C33A forms were prepared by K Sharma Limited and its Accountants. Based on my experience as the owner of a chain of duty free shops, it is the standard procedure for C33A forms to be prepared for the Customs Agency when goods are being transferred between duty free shops. K Sharma Limited was the owner of the store where the goods were held and also the recipient of the goods.*

*11. I did not sign the C33A forms. I believe they were signed by the Customs Agency representatives in the "dispatcher" field and by a representative of K Sharma Limited in the "receiver" field. However, I was not involved in the procedure beyond being a bystander.*

*12. The Customs Agency did not give any copies of the documents related to the transfer to the Applicant.*

13. *The agents left with all the C33As and sometime later returned one copy of the forms to K Sharma and retained another copy for their use as well as the inventory they prepared. To the best of my knowledge and belief, they did not give a copy of the inventory they prepared to K Sharma Limited. No documents were given to the Applicant.*”

[23] In my view, if stocks originally belonging to the Applicant were in fact transferred to K Sharma Limited, then there ought to be some record of this transfer in the Applicant’s ledgers/books or some document in the Applicant’s possession relating to this transfer. Consequently, the Court is of the view that the Applicant would not have the need to rely on the records of Kishin Sharma or the Jamaica Customs Agency, if it had maintained its own books and records, a duty which the Applicant has pursuant to its obligation under section 89 of the **Income Tax Act**. That section provides as follows:

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*“(1) Every person engaged in any trade, profession or business shall keep in the English language proper books of account sufficient to record all transactions necessary in order to ascertain the gains and profits made or the loss incurred in each such trade, profession or business, and any such person who fails to comply with this provision shall be guilty of an offence, and shall be liable-*

a) *on summary conviction in a Resident Magistrate’s Court-*

(i) *in the case of a first offence, to a fine not exceeding two million dollars and, in default of payment thereof, to imprisonment for a term not exceeding one year; and*

(ii) *in the case of a second or subsequent offence, to a fine not exceeding five million dollars or to imprisonment for a term not exceeding five years or to both such fine and imprisonment; and*

b) *on conviction on indictment in a Circuit Court, to a fine and, in default of payment thereof, to imprisonment for a term not exceeding ten years.*

(2) *For the purposes of this section, a person shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, statements of annual stock takings, and accounts of all goods sold and purchased.”*

[24] Moreover, section 12 of the **Revenue Appeals Division Act** provides that: -

*“Every taxpayer who is appealing a decision of a Revenue Commissioner and every authorized representative of the taxpayer shall retain and maintain for a*

*period of not less than the duration of the appeal proceedings the books, records and other documents that are relevant to the revenue liability being appealed.”*

[25] It would appear from the evidence that the Applicant kept no proper records, and in particular, the requisite documents reflecting the transfer of stocks to Kishin Sharma. It therefore only has itself to blame for being unable to substantially prove its case on appeal before the Respondent. The apparent hands off attitude of Vinod Sharma, the owner and operator of the Applicant, is reflected in his comment on the day of the transfer of the stocks, where he stated that “*I was not involved in the procedure beyond being a bystander.*” It was also the Applicant’s evidence, through its representative Vinod Sharma, that it was not involved in the transfer of the stocks on that particular day. On the day of the transfer, Vinod Sharma apparently did not request any of the documents for the Applicant’s records. Further, he pointed out that no such documents were ever presented to him.

[26] The Court having considered the explanation proffered on behalf of the Applicant for the ten (10) month delay in making this Application, finds it to be woefully inadequate in the circumstances. It is therefore not prepared to accept the explanation for the delay.

[27] The merits of the appeal is another important factor to be considered by the Court, although not the determining factor in deciding whether or not an extension of time should be granted to the Applicant. This was expressed by McDonald-Bishop JA (Ag) in the earlier cited case of **The Commissioner of Lands v Homeway Foods Limited**, where she opined at paragraph 94 that: -

*“The merits of the appeal, to my mind, while an important and weighty consideration, cannot be the pivotal or determining one. It is but one of the important considerations to be weighed in the equation in determining what justice dictates at this time...”*

[28] That being said, it is well understood and appreciated that on an appeal to the Revenue Court, the burden of proof rests on the Applicant pursuant to section 76(2) of the **Income Tax Act**, which reads: -

*“The onus of proving that the assessment complained of is erroneous shall be on the objector.”*

[29] This position was highlighted in the recent case of **William Andrew Chang v The Commissioner of Taxpayer Appeals (Income Tax)** [2016] JMCA Civ. 16, where Morrison JA (as he then was), in delivering the judgment of the Court, in his usual lucid style stated at paragraph 78: -

*“In D R Holdings Ltd, this court held that the provisions of the ITA make “a clear and unequivocal allocation to the taxpayer of the burden of proving that the assessment is erroneous, both from the standpoint of liability and quantum” (per Morrison JA, at paragraph 28) ...”*

[Emphasis supplied]

[30] The question then for the Court, is whether the Affidavits filed on behalf of the Applicant contained sufficient information or material that would allow for an arguable case on appeal, were the extension of time to be granted. In the Affidavit of Vanessa Lalasingh in Support of Application for extension of time to appeal, she deponed at paragraph 9: -

*“C33A forms are prepared by the transferor of duty-free goods to the transferee, containing a list of all the items/goods being moved though not to a different warehouse and not sold. The forms contain a description of the goods, the quantity and the landed price of the goods. The C33A forms show the value of the goods appropriated by K Sharma Limited is \$9,831,523, which is significantly less than the \$33.6 million. The form also contains the signature of the Customs Agent in the “dispatcher” field. Exhibited hereto and marked “MV3” for identity are copies of the said forms which were submitted in the earlier Appeal and a final addition of their CIF value done by the Applicant’s Accountants, B.D. Holmes and Company (the Accountants).”*

[31] In the Affidavit in Support of Application for extension of time to appeal, Vinod Sharma deponed, in so far as is relevant that: -

*“9. The decision of the Taxpayer Appeals Department (TAD) that the Applicant owes Income Tax is wrong and arises from their belief that stock which was taken without the consent and approval of the Applicant by the Applicant’s former Director and Shareholder and is being treated as goods sold rather than appropriated. Accordingly, the TAD is calculating taxes on the estimated proceeds of sale of the goods although the goods have not been sold and the Applicant has received no consideration for same.*

*10. The Applicant provided proof of the goods appropriation by the said former Director, including his name – Mr. Kishin Sharma and I have declared to the TAD that the said goods were used by the former Director and Shareholder as opening stock for his newly incorporated company. As is clear from the facts above, the relationship between the 2 Shareholders and Directors ended abruptly*

*and acrimoniously and I was unable to secure all the documentation I would have liked to, in order to address all concerns of the TAD. I managed to have the said Kishin Sharma transfer his shares in the Applicant 9908042.*

*11. There is a real likelihood the Applicant will succeed if permitted to file its Appeal as it has submitted sufficient evidence to the Taxpayer Appeals Department that it did not benefit from the stock in issue and ought not properly be charged income tax thereon."*

**[32]** Mr. Desmond Palmer, Chartered Accountant of B.D. Holmes and Associates, in his Affidavit indicated in so far as is relevant: -

*"4. Hereto marked for identity and exhibited as "DP-1" is the audited financial statement for the Applicant for year ended February 28, 2006. This shows the total inventory value for that year and that there was not sufficient profit in 2006 to purchase any significant inventory in 2007.*

*5. The Applicant's audited financial statement for 2008 was accepted by the Respondent and its opening stock is the same as the closing stock in the audited Financial Statement for 2007. This shows that the inventory from 2007 was carried over into 2008 and not sold. The 2008 Audited financial statement was accepted by the Respondent without alteration. Hereto marked for identity and exhibited as "DP-2" is the Applicant's audited financial statement for the year ended February 28, 2008.*

*6. Hereto marked for identity and exhibited as "DP-3" is a schedule of purchases made by cheque by the Applicant in the year ended February 28, 2007. The schedule was prepared by BD Holmes and Associated for the Applicant and shows that a total of \$580,873.67 of purchases were made by cheque in that financial year.*

*7. In the closing conference with the representatives from the Respondent I stated that I did not agree that the transfer was a purchase and requested that they revisit that item. I further stated that K Sharma Limited needed to pay the Applicant for the in bond stock received. This was to underscore my point that no funds were passed in relation to the transfer. Hereto marked for identity and exhibited as "DP-4" is a copy of the closing conference memorandum and the audit report by the Respondents."*

**[33]** At paragraph 4 of the Affidavit of Maxine Johnson in Response to the Appellant's Affidavit of Desmond Palmer, she averred that: -

*"Exhibited hereto and marked "Exhibit 2MJ-1" is the said document which is a copy of the Respondent's Audit Report dated January 12, 2009 on the audit of the Applicant's 2007 accounting records. This document states what source records which were examined by the Respondent's Auditors including encashed cheques, purchases invoices and other records."*

**[34]** The Applicant in its evidence contained in the 2<sup>nd</sup> Affidavit of Vinod Sharma in Support of Application for extension of time to appeal, outlined that Kishin Sharma and

Vinod Sharma, were both shareholders and directors of the Applicant company. Kishin Sharma sold his shares in the company to his brother, Vinod Sharma, due to a falling out between the two, which allowed Kishin Sharma to separate from the company and to start his own business, K Sharma Limited. Vinod Sharma went on to state in his evidence that stocks were taken from the Applicant company by Kishin Sharma, without the consent and/or approval of the Applicant and no payment was ever made for the transfer of those stocks. These stocks (goods) according to Vinod Sharma were then used by Kishin Sharma as the opening stock for his newly incorporated company.

**[35]** The Respondent in its Affidavits filed on its behalf indicated that the Applicant provided no proof of any such appropriation of stocks by the former shareholder and director of the Applicant, Kishin Sharma. Neither has the Respondent been provided with any other document containing such proof. Furthermore, in a letter dated the 7<sup>th</sup> January, 2015, and addressed to the TAD, the Applicant indicated that the goods (stocks) which were transferred to Kishin Sharma “*were transferred in good faith to the owner (Kishin Sharma) of K Sharma Limited, who was a minor shareholder in Modern Variety Ltd.*”

**[36]** Vinod Sharma in his 2<sup>nd</sup> Affidavit stated that in February 2016, certain ledgers were found which were used by the Applicant’s accountants to compile import records and purchase schedules, which would assist the Applicant with its appeal. These ledgers, according to him constitute some of the new documents now in the Applicant’s possession. In addition, Desmond Palmer exhibited to his Affidavit as new documents, the Audited Financial Statements of the Applicant for the year ended 28<sup>th</sup> February, 2006, the Audited Financial Statement for the years ended 28<sup>th</sup> February, 2008, and the Applicant’s Schedule of Purchases made by cheque in the year ended February, 2007. All these documents, according to the Applicant, were just uncovered and would justify the need for an extension of time to file its appeal in the Revenue Court.

**[37]** Counsel Mrs. Christopher-Walker contended that the appropriation of the goods (stocks) by Kishin Sharma, was treated by the Respondent as goods sold, rather than appropriated. Accordingly, she argued that the Respondent calculated the taxes on the



estimated proceeds of the sale of the goods, although the goods had not been sold, and the Applicant received no consideration for same. Therefore, she argued that the belief that the Applicant owes Income Tax is wrong, and arises from the mistaken belief that the said stocks were in fact sold.

**[38]** Counsel further contended that her client was not possessed of certain documents, in particular the ledgers that were used to prepare the C33A Forms, which were necessary to successfully file an appeal before the expiration of the stipulated time. She further argued that her client is now in possession of the ledgers that would prove the authenticity of the C33A Forms that were submitted to the Commissioner of the TAD, and which would assist greatly in launching a meritorious appeal to this Court.

**[39]** The Court has properly examined and considered the C33A Forms, the Audited Financial Statements and the Schedule of Purchases all exhibited to the Applicant's Affidavits. The Applicant in the evidence filed on its behalf indicated that the ledgers used to prepare the C33A Forms were located, and were now in its possession. However, the ledgers to which references were made in the Applicant's Affidavits, have not been exhibited to any of the said Affidavits, and as such, are not before this Court for its consideration. Additionally, the Affidavits filed on behalf of the Applicant made mention, in very vague and general terms of documents that are now in the Applicant's possession. However, the Applicant has not provided any description of those documents, neither are they exhibited to any of the Affidavits filed on its behalf. Counsel Mrs. Christopher-Walker stated in her submissions that the ledgers would prove the authenticity of the C33A Forms, and would assist in launching a *meritorious appeal*. It would therefore appear that the merits of her client's appeal rests solely upon the ledgers, which as indicated earlier are not before the Court.

**[40]** The Applicant's ledgers or copies of the relevant pages from the ledgers in my view, would be of paramount importance to the Court, as they ought to be able to corroborate the figures in the C33A Forms, the Audited Financial Statements and the Schedule of Purchases. Without the benefit of the said ledgers, the Court would not be in a position to ascertain whether the figures outlined in the C33A Forms, the Audited

Financial Statements and the Schedule of Purchases are in fact accurate. The Court is well aware that this is not the trial of the substantive appeal. However, the Court must be satisfied on the information before it, that sufficient material, on the balance of probabilities, has been placed before it by the Applicant, to open the door for its participation with respect to the substantive issues.

**[41]** It is to be noted that the Audited Financial Statements and the Schedule of Purchases exhibited have not been signed by a Chartered Accountant, and so the veracity of those documents would also be an issue for the Court. Moreover, without the ledgers or copies of the relevant portions therefrom being placed before the Court, the Applicant in my view, cannot rely on the accuracy of the C33A Forms exhibited to its Affidavits, as according to Vinod Sharma's evidence, he was not involved in the preparation of the said Forms, and further the Applicant did not receive copies of them.

**[42]** In addition, it must also be noted that the C33A Forms exhibited do not bear the stamp of the Jamaica Customs Agency, so as to authenticate the Forms and to verify the transfer of the stocks to Kishin Sharma. Furthermore, the Applicant through, Vinod Sharma, indicated that on the day of the transfer, the Applicant did not receive copies of the C33A Forms, and that Kishin Sharma and the Jamaica Customs Agency did not provide it with copies of their C33A Forms. However, the Applicant was able to obtain and submit copies of the C33A Forms to the Respondent, as well as to exhibit them to its Affidavits filed before this Court.

**[43]** The Court is not satisfied that if the Applicant is granted an extension of time it will be able to prove on a balance of probabilities, that the disputed stocks were in fact appropriated by Kishin Sharma, and the actual value of the said stocks. It cannot go without mention, that it was the Applicant's own accountant, B.D Holmes & Co, in a letter dated the 2<sup>nd</sup> January, 2015 to the Commissioner of the TAD, who referred to the transfer of the stocks to Kishin Sharma as a *sale*.

**[44]** In light of the above, the Court is therefore of the view that, on the evidence before it, the Applicant is not likely to have an arguable case on appeal.

[45] The Court has an unfettered discretion to grant an extension of time, based on the evidence before it. However, it cannot and ought not to exercise its discretion in a party's favour, without sufficient material having been placed before the Court, for its consideration. Smith JA in the previously cited case of **Peter Haddad v Donald Silvera** indicated at page 8 that: -

*“...The Court has an untrammelled discretion. This discretion must be exercised judicially. There must be some material upon which the Court can exercise its discretion (see **Patrick v Walker**) ...”*

[46] Morrison JA in the case of **Gerville Williams and Ors v The Commissioner of the Independent Commission of Investigations and Ors** [2014] JMCA App. 7, commenting on the case of **Peter Haddad v Donald Silvera** (supra) stated at paragraph 24 that: -

*“**Haddad v Silvera** therefore makes it clear that, although the court enjoys a wide and unfettered discretion under rule 1.7(2)(b) to extend the time for compliance with the rules, it is still necessary for the party seeking to invoke that discretion to place sufficient material before the court to enable it to make a sensible assessment of the merits of the application...”*

[47] A further consideration for the Court is the prejudice caused by the delay on the part of the Applicant. At paragraph 8 of the Affidavit in Support of Application for extension of time to appeal, Vinod Sharma deponed: -

*“That the decision of the Taxpayer Appeals Department has had an adverse effect on the Appellant's affairs. The particular hardship the Applicant has suffered includes the withholding of its Tax Compliance Certificate by the Respondent and the inability to carry out its business efficiently and hassle free.”*

[48] At paragraph 11 of the Affidavit Opposing the Appellant's Notice of Application for extension of time to appeal, Ms. Maxine Johnson stated that: -

*“The Respondent is mandated by the Government of Jamaica (GOJ) to meet certain objectives in respect of tax collection to aid the GOJ in meeting its fiscal targets and when taxpayers fail to remit properly assessed sums to the Respondent within a reasonable time this has a negative impact on the GOJ's ability to carry out its mandate. The Respondent is therefore prejudiced by the undue delay caused by the Appellant who has failed to pay over the required taxes.”*

[49] Counsel Mrs. Christopher-Walker on behalf of the Applicant submitted that if the extension of time was not granted, the balance of disadvantage falls heavily on her client, as the payment will adversely affect her client's viability to operate. She argued that the hardship her client has faced so far included the withholding of its Tax Compliance Certificate, and the inability to carry out its business efficiently.

[50] While I agree with Counsel Mrs. Christopher-Walker that her client will be at a disadvantage if the extension of time is not granted, I am not convinced that the balance of disadvantage falls heavier on her client. The Respondent in my view, is similarly prejudiced by the delay caused by the Applicant, as the debt has been on the Respondent's book since the assessment was done from 2010. Further, the Respondent would not be able to meet its objectives in respect of tax collection and this would have a negative impact on public administration.

[51] Harris JA in the case of **Attorney General of Jamaica and Roshane Dixon v Attorney General of Jamaica and Sheldon Dockery** [2013] JMCA Civ. 23, expressed at paragraph 18 that: -

*"The court, in considering what is just and fair looks at the circumstances of the particular case. In an application for an extension of time, the delay and the reasons therefor are the distinctive characteristics to which the court's attention is initially drawn. It cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice. **It follows therefore, that in applying the overriding objective, the court must be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties.**"*

[Emphasis supplied]

[52] Ultimately, it is accepted that the aim of the Court is to do justice, bearing in mind the respective contentions of the parties, and the principles which guide the Court when faced with an Application of this nature. In the final analysis, after considering all the guiding factors, I am of the view that there was undue and unsatisfactory delay on the part of the Applicant, in circumstances where the Court does not accept as adequate, the explanation provided for the delay. Further, the Court is of the view that the Applicant has not placed sufficient material before the Court, so as to convince it, on the

balance of probabilities of the merits of a possible appeal. The Court is therefore of the view, that there is no adequate reason to justify granting the Applicant an extension of time within which to appeal the decision of the Respondent in the Revenue Court.

**[53]** In such circumstances, the Court refuses the Applicant's Application for an extension of time. Costs are awarded to the Respondent, such costs to be taxed if not agreed.