



[2024] JMRC 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

REVENUE COURT

APPEAL NO. 2023 RV 00006

BETWEEN	GREGORY CHUNG	RESPONDENT/ APPLICANT
AND	THE COMMISSIONER GENERAL (TAX ADMINISTRATION JAMAICA)	APPLICANT/ RESPONDENT

IN CHAMBERS

Maxine Johnson and Monique Russell, Attorneys-at-Law for the Commissioner General, Tax Administration Jamaica.

Karen O. Russell, Attorney-at-Law for Gregory Chung.

Heard: 3rd April and 28th May 2024

General Consumption Tax Act - Whether notice of objection determined pursuant to section 40(3) is a decision relating to an assessment and therefore subject to the appellate procedure at section 41 - Whether leave is required to appeal decision made in accordance with section 40(3) and for which the Revenue Appeals Division declined jurisdiction on an appeal filed to it - Considerations for applications to extend time to appeal to the Revenue Court.

C. BARNABY, J

INTRODUCTION AND SUMMARY CONCLUSION

[1] By Notice of Appeal filed 21st August 2023 against the Commissioner General, Tax Administration Jamaica (the Commissioner), Gregory Chung (the Taxpayer) applies to this court to

1. *“... be heard on the Decision of the Respondent [Commissioner] made on the 12th day of June 2017.*
2. *Whereby it was concluded: -*

(a) - that the amount levied by the Respondent (formerly Commissioner of Taxpayer Audit and Assessment Department) on the Appellant with respect to additional General Consumption Tax (hereinafter 'GCT') liability assessed in the amount of **Three Million Two Hundred and Forty-Nine Thousand Seven Hundred and Two Dollars (\$3,249,702)** for the period January to December 2011 and for which an objection was raised by the Appellant on or about the 3rd day of November 2016 and such objection was not considered by the Respondent was stipulated by section 40(2)(b) of the GCT Act and such assessment was found to be 'final and conclusive' by the Respondent. (sic)

3. ...

[2] The Taxpayer seeks several declaratory and other relief, which would see a determination by the court that the decision the subject of the appeal is null and void, and that the additional assessment to GCT which the Commissioner determined was final and conclusive should be set aside. The Taxpayer relies on several grounds which will be addressed further in these reasons for decision.

[3] By Notice of Application for Court Orders filed 20th September 2023, accompanied by *Affidavit in Support of Notice of Application for Court Orders* sworn by Maxine Johnson on 20th September 2023 (the Commissioner's Application), the Commissioner seeks orders that the Taxpayer's Appeal be dismissed on account that it is grossly out of time; the net adjustment raised for the period January to December 2011 for General Consumption Tax (GCT) is final and conclusive; costs and such other orders as the court deems fit. These orders are sought on the following grounds.

1. *That the notice of assessment is dated September 29, 2016 and the Appellant admits to having received this notice on October 6, 2016. This Appeal was filed on August 21, 2023. Seven (7) years after the decision that forms the basis of this appeal was made. (sic)*

2. *That further, the Appellant was again served notice of decision relating to the additional assessment of General Consumption Tax on 19th January 2017, by personal hand delivery.*
3. *That the Appellant has failed to file an application requesting an extension of time to file [his] Appeal.*
4. *That there is no likelihood of success of this appeal, as the Appellant has failed to demonstrate sufficient grounds to displace the liability.*

[4] Owing to the prior unavailability of the Taxpayer's Attorney-at-Law, the Commissioner's Application was fixed for hearing on 29th February 2024.

[5] On 22nd February 2024 the Taxpayer filed a Notice of Application for Court Orders (the Taxpayer's Application) seeking:

1. *An order that the time within which the Defendant shall file its Notice of Appeal is extended. (sic)*
2. *An order that Notice of Appeal dated the 16th day of August 2023 and filed in this Honourable Court on the 21st day of August 2023 shall stand as having been filed in time.*
3. *Such further or other relief this Honourable Court deems to be fit.*

[6] The grounds on which the application is pursued are that: (i) the delay was unintentional, (ii) the Taxpayer has a good chance of succeeding on the appeal, and (iii) the Commissioner will suffer no real prejudice if the time is extended. *The Affidavit of Gregory Chung in Support of Notice of Application for Court Orders and In Response to Respondent's Statement of Case* sworn on 21st February 2023 and the *Affidavit of Karen O. Russell in Support of Notice of Application for Court Orders* were also filed on 22nd February 2024.

[7] At the hearing scheduled for 29th February 2024, although the Taxpayer's Application had been served, Counsel who appeared for the Commissioner indicated that she had not had sight of it. In the circumstances, the following orders were made:

1. *The Case Management Conference at which the Notices of Application for Court Orders filed 20th September 2023 and 22nd February 2024 are to be heard is scheduled for 3rd April 2024 at 11:00 a.m. for one (1) hour.*
2. *The parties are to prepare, file and serve written submissions and authorities in support or opposition as appropriate, to the applications referred to in order 1, on or before 21st March 2024.*
3. *In preparing their submissions the parties are to include an address on the scope of the obligation on an objector to 'produce' within the meaning of section 40(2)(a) of the GCT Act in particular.*
4. *The Appellant's Attorneys-at-Law to prepare, file and serve this order.*
5. *No order as to costs.*

[8] The Commissioner's skeleton submissions and authorities were duly filed on 21st March 2024.

[9] The "Preliminary" submission of the Taxpayer in support of his application was filed on 2nd April 2024 and permitted to stand as filed. In consequence, the Commissioner was permitted to file and serve written submissions and authorities in response, on or before 19th April 2024. The Taxpayer was permitted a reply to any authorities referenced in that response on or before 2nd May 2024. The Commissioner complied with the order. Nothing further was received from the Taxpayer.

[10] On conclusion of oral presentations on 3rd April 2024, a decision on both applications was reserved. For reasons which appear below, I find that the permission of the court is required for the Taxpayer to pursue the proposed appeal against the decision of the Commissioner, but that the discretion reserved to the court to grant leave should not be exercised in his favour.

REASONS

[11] There is no dispute that this court has a discretion to extend the time within which an appeal against the decision of a relevant revenue commissioner may be filed. Central to both applications is whether that discretion is to be exercised in favour

of the Taxpayer. Ahead of addressing that issue however, consideration will be given to whether leave is required in the circumstances of this case.

Leave to extend the time for filing the appeal

- [12] It is submitted by Ms. Russell that an application for extension of time within which to file the Taxpayer's appeal is not required and that his application in that regard is therefore being made out of an abundance of caution. While caution might well be the motivation for the filing, the contention that leave of the court is not required to pursue the appeal is without merit.
- [13] Among other matters which are not immediately relevant, section 40(1) of the GCT Act provides that any person who disputes an assessment made upon him by the Commissioner, may, within thirty (30) days of the date of "service" of the notice of assessment apply to the Commissioner by notice of objection in writing, to review the assessment. It is sufficient to say here that there is no dispute that a notice of objection was submitted by the Taxpayer.
- [14] As demonstrated in the very first paragraph of the Notice of Appeal which was earlier reproduced, the appeal is in respect of the decision of the Commissioner communicated in correspondence dated 12th June 2017 which reads as follows.

We refer to your objection letter dated November 3, 2016 regarding the captioned matter.

*You have failed to comply with our request to provide evidence to support the grounds for your objection as per our correspondence dated April 12, 2017 and received by you on April 20, 2017. Following subsequent communication via email June 2, 2017 and letters received via email on June 6, 2017 and June 9, 2017 from your accountant, **a decision has been made in accordance with Section 40 (3) of the GCT Act, for your objection to ceased to have effect and the assessment as shown below is now final and conclusive.** (sic)*

<i>Period of Assessment</i>	<i>GCT Assessed (\$)</i>
<i>January – December 2011</i>	3,249,702

You are therefore required to make the necessary arrangements to settle your account with the Collector of Taxes at Tax Administration Jamaica.

[Emphasis added.]

- [15] Section 40(3) on which the Commissioner relied for the decision sought to be impugned on appeal states that

[w]here a person fails to comply with any requirement under subsection (2), the notice of objection served by that person shall cease to have effect and the assessment as made shall be final and conclusive.

Generally, section 40(2) of the Act - which will be addressed more fully later in these reasons - gives the Commissioner the power to require a taxpayer who has submitted a notice of objection to make returns, furnish records or particulars and/or to appear before him to answer any lawful questions that are relevant to the matters under consideration.

- [16] It is Mr. Chung's evidence that following receipt of the Commissioner's decision his

Accountant sought audience with the Commissioner General of Revenue Appeal Services, however, was advised that they were unable to hear this, citing jurisdictional issues. A copy of the correspondence is attached...

- [17] The attached correspondence is a letter from the Commissioner of the Revenue Appeals Division dated 18th July 2017 which reads:

*We have received your Notice of Appeal dated July 6, 2017. However, the Revenue Appeals Division is unable to hear the appeal because it is out of our jurisdiction. The fact that the Commissioner General's decision was issued under **section 40(3) of The General Consumption Tax Act**, makes the matter final and conclusive for the purposes of the said Act.*

Please take steps to settle the obligation with Tax Administration Jamaica or you may seek an alternative order from the Revenue Court.

[Emphasis in original]

[18] It is clear from the foregoing that upon receipt of the Taxpayer's notice of appeal the RAD decided that it did not have the jurisdiction to hear it. Equally clear is that the conclusion was arrived at on the basis that the decision of the Commissioner pursuant to section 40(3) of the Act caused the assessment raised against the Taxpayer to be final and conclusive.

[19] It is nevertheless contended by Ms. Russell that the Taxpayer does not require leave to appeal the decision of the Commissioner as the RAD had not decided on the Taxpayer's appeal in accordance with section 41(2) of the Act, which provides that

... upon an appeal under section (1) the Commissioner of Taxpayer Appeals [now the Revenue Appeals Division (RAD)] may confirm, reduce the amount under or vacate the decision complained of.

[20] She argues further that section 41(3) of the GCT Act was not activated in the circumstances to require the Taxpayer's appeal to the Revenue Court to be time bound. The referenced section states:

41(3) Subject to subsection (5) [which is not relevant to the instant enquiry] an appellant who is dissatisfied with the decision of the Commissioner of Taxpayer Appeals [now the Revenue Appeals Division (RAD)] 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.

[21] In response to Ms. Russell's submission, it is contended on behalf of the Commissioner that

... [he] did not hand down a decision on the assessment as [he] did not get an opportunity to execute the Objection review of the assessment due to the default of the Appellant.

[22] I am unable to agree with the submissions of either party for reasons which I will endeavour to demonstrate below.

[23] Appeals to this court against a decision of the Commissioner are generally triggered in two circumstances which appear in sections 40(7) and 41(1).

*40(7) Where any person is dissatisfied with a decision of the Commissioner (other than a decision **relating to an assessment** made on that person) that person may appeal to the Revenue Court within thirty days of the receipt of the decision and the Revenue Court may make such order as it thinks fit.*

[Emphasis added]

*41(1) A person who is dissatisfied with a decision of the Commissioner General, **relating to an assessment** made upon that person may appeal to the Commissioner of Taxpayer Appeals [now the Revenue Appeals Division (RAD)] within thirty days of the date of receiving the Commissioner's decision...*

[Emphasis added]

[24] Notwithstanding the positioning of each path to this Court within the arrangement of the statute, or the subheadings “*Objections*” and “*Appeals*” which appear ahead of sections 40 and section 41 respectively, the trigger for each path is not whether the Commissioner General's decision was the result of execution of the objection review process as contented on his behalf; or whether the RAD exercised the powers given to it to either confirm or reduce the amount of an assessment, or to vacate the decision of the Commissioner which is the subject of the appeal to it, as suggested on Ms. Russell's argument.

[25] The activation of either appellate procedure is dependent on an assessment and conclusion on whether the Commissioner's decision is a “**decision**” “**relating to an assessment**” made upon a person. That is clear from the words used in sections 40(7) and 41(1).

[26] While “assessment” must necessarily be accorded the meaning which it derives from the GCT Act, I can see no reason to depart from the ordinary meanings of the noun “*decision*” and the verb phrase “*relating to*” which appear at sections 40 and 41, which are “*a choice or judgment made after considering something*” and “*have to do with; concern*” respectively.¹ Accordingly, it is my view that where the Commissioner makes any choice or judgment after considering something which has to do with or concerns an assessment made upon a person under the GCT Act, the appropriate appellate procedure is that prescribed at section 41 of the Act. If the decision does not so qualify, the procedure at section 40(7) applies. In either event, appeals to the Revenue Court from a decision of the Commissioner are time bound.

[27] The evidence is that the Commissioner raised an assessment against the Taxpayer following an audit and that a notice of objection was submitted in respect of the assessment. The Taxpayer was advised that his objection was being examined and was thereafter accepted and assigned to an officer who would be in contact with him to settle the matter. Subsequently, the Taxpayer was required to provide evidence to support the grounds for his objection. It was thereafter, by letter dated 12th June 2017 that the Taxpayer was notified that in accordance with Section 40 (3) of the GCT Act his notice of objection ceased to have effect and the assessment raised on him was then final and conclusive. Such a position could only have been arrived at where it was determined that the Taxpayer had been required to make a return or furnish any particulars or produce books of account or documents which relate to the taxable supply, or to appear to answer any lawful questions which were relevant to matters under the consideration pursuant to section 40(2), and he failed to comply. In these circumstances there is no resiling from the fact that the Commissioner made a decision relating to the assessment upon the Taxpayer, following receipt of the notice of objection to the said assessment, to which the appellate process at section 41 of the GCT Act applies.

¹ *Oxford Paper Dictionary and Thesaurus*, 3rd Edn.

The submissions on behalf of the Taxpayer and the Commissioner to the contrary are unmeritorious.

[28] Also without merit is the contention of Ms. Russell that the RAD did not make a decision on the notice of appeal received by it. In declining jurisdiction on the basis that the Commissioner's decision was made pursuant to section 40(3) of the GCT ACT, making the assessment raised upon the Taxpayer final and conclusive, the RAD undoubtedly made a judgment on the notice of appeal which it received. That decision is not the subject of the proposed appeal and I accordingly express no view on its propriety.

[29] It is Mr. Chung's evidence that the decision of the Commissioner contained in the correspondence of 12th June 2017 was received by him "*sometime on or before the 13th day of June 2017*". The decision from the RAD is dated 18th July 2017, but there is no evidence of when it was received by the Taxpayer or his representative. This notwithstanding, I find it to be more probable than not that it was received on or about the said 18th July 2017.

[30] A decision having been made by the Commissioner relating to the assessment made upon the Taxpayer, and a decision having been made by the RAD which is confirmatory of it, the Taxpayer was required to file an appeal to this Court within thirty (30) days of receipt of the decision of the Commissioner of the RAD on 18th July 2017, or such longer period as may be permitted by or pursuant to the rules of court. The Notice of Appeal was only filed on 21st August 2023, some six (6) years later. Leave of the court is indeed required to file and pursue it. Ms. Russell's submission to the contrary is devoid of merit.

Whether the discretion to extend time for filing an appeal should be exercised in favour of the Taxpayer

[31] As earlier sated, there is no dispute that this court has a discretion to extend the time for filing an appeal which is being pursued outside of the period limited by the

GCT ACT. In approaching the exercise, the court finds assistance in the oft cited decision of **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (JMCA, 6 December 1999) where it was indicated that a person who seeks the favourable exercise of the discretion is required to satisfy the court of the following:

- (i) *that the length of the delay is not inordinate;*
- (ii) *there are good reasons for the delay;*
- (iii) *there is an arguable case for an appeal; and*
- (iv) *if the application is allowed, the degree of prejudice to the other parties is not oppressive.*

Length of delay and reasons for the delay

- [32] The decision of the Commissioner which is the subject of the Notice of Appeal file 21st August 2023 is contained in correspondence dated 12th June 2017, received by the Taxpayer “*sometime on or before the 13th day of June 2017*”; and the decision of the Commissioner of the RAD was made and found to have been received on 18th July 2017. A delay of six (6) years is inordinate by any measure.
- [33] Mr. Chung does not indicate a reason for the delay.
- [34] While Ms. Russell’s affidavit filed in support of the application on 22nd February 2024 bears a signature of the Justice of the Peace before whom it sworn, the full name of the officer, as required by CPR 30.4(1)(d) does not appear on the document. It is my view that the affidavit is inadmissible, accordingly no evidence as to the reason for the delay would be before the court to require further consideration of the application, for as observed in **Peter Haddad v Donald Silvera** (JMCA, 31 July 2007), the failure to give a reason for undue delay is fatal to an application to extend time.
- [35] Although **Haddad** was concerned with an application to discharge or vary a court order in circumstances where the rules of court did not specify a time limit to apply

but only required that such an application be made within a reasonable time, the rationale behind the conclusion reached applies with equal force to applications which are expressly required to be made within a prescribed time. As observed in that case, the just determination of an application for extension of time is not possible without knowing why the applicant failed to make the application within the period limited. The Taxpayer's application would accordingly be refused.

[36] Should Ms. Russell's affidavit be admitted however, it is my judgment that it does not disclose any good reason for the delay.

[37] It is Counsel's evidence that the delay in appealing the Commissioner's decision

5 ... was neither intentional nor meant to subvert any law but was based on an honest belief that the [Commissioner's] decision on the 12th day of June had no effect since based on Section 40(4)(b) of the GCT Act, the [Commissioner] did not provide a decision to the Appellant's objection within six (6) months from the time of receipt of the said objection. Further, there was also an honest belief that there was no need to apply for time to be extended as neither was this typical guidance provided in the communication to me dated the 18th day of July 2017...

8... That it is my honest belief that having served the letter of objection on the 4th day of November 2016, the [Commissioner] was to have issued a decision by the 3rd day of May 3 and by not doing so the assessment was null and void which made an appeal unnecessary.

9. That having taken a position as to the validity of the Respondent's decision and having filed an appeal to the Taxpayer Appeals Department there was no indication, whether from interpretation and/or from any directive given, that the matter was time sensitive...

12. That though I was convinced that the [Commissioner's] decision was null and void and no appeal was necessary and I advised the Appellant of this, the decision was subsequently taken to file an appeal sometime in

2023 when the Appellant was served with a summons dated the 3^d day of May 2023 for him to appear in the St. Ann's Bay Parish Court on the 8th of June 2023. (sic)

- [38] I would be inclined to accept that Ms. Russell's belief that no appeal was required was honestly held, were it not for the fact that the Taxpayer's evidence discloses that Ms. Russell was his account and that his accountant sought audience with the Commissioner General of Revenue Appeal Services, for which the correspondence from the RAD dated 18th July 2017 was exhibited in proof. That correspondence addressed to the Taxpayer shows that a notice of appeal dated 6th July 2017 was received by the RAD and that the Taxpayer was directed to ***"take steps to settle the obligation with Tax Administration Jamaica or [he] may seek an alternative order from the Revenue Court."*** As to the absence of an indication in the RAD's correspondence that the matter was time sensitive, had the decision and advice of the RAD been treated with due or any regard, a review of the GCT Act which expressly makes appeals against decisions of the Commissioner and of the Commissioner of the RAD to this court time sensitive, could reasonably have been discovered. These are not good reasons for the delay.
- [39] Where a taxpayer was incorrectly guided by his legal advisor, this will undoubtedly evoke some consideration. Where the legal advisor and the taxpayer have been advised by another revenue commissioner as is the case here - that the taxpayer should settle his tax liability or seek an alternative order from this court - and there is no evidence of any attempt being made to advise oneself of the merits or otherwise of that advice, the court finds it exceedingly difficult to regard the explanation for delay favourably. In fact, it is the court's view that this conduct alone should be sufficient to refuse the Taxpayer's application for an extension of the time within which to file an appeal against the Commissioner's decision.
- [40] My view notwithstanding, I am guided by the wealth of judicial authorities which say that the court is not bound to reject an application to extend time to appeal even in the absence of good reason for delay, because although the applicant's

conduct has been tardy, he nevertheless seeks the exercise of the discretion of the court. I am guided by Panton JA (as he then was) who stated at page 20 in **Leymon Strachan** that “*the overriding principle is that justice has to be done*” and will accordingly go on to consider the Taxpayer’s application further.

Whether there is an arguable case for appeal

[41] The decision of the Commissioner which the Taxpayer proposes to appeal is that his notice of objection to the additional assessment to GCT ceased to be valid and that the assessment raised against him was final and conclusive in consequence. To be granted leave to appeal that decision out of time, the Taxpayer is required to satisfy the court that the proposed appeal is arguable.

[42] In considering the question of arguability, as stated by Harrison J.A. in **Leymon Strachan** at page 20,

The court is ... mindful of the merits of the applicant’s case, because it would be futile to allow him to proceed, where it is apparent that his case is bound to fail ...

[43] The above consideration is undertaken in the further context that appeals to this court are by way of rehearing, and pursuant to section 41(4) of the GCT Act, “*the onus of proving that the assessment complained of is erroneous shall be on the appellant.*” A like provision appears in the **Income Tax Act** on which Morrisson J.A. (as he then was) aptly opines in **D.R. Holdings Ltd. v the Commissioner of Taxpayer Appeals** (JMCA, 31 October 2008), [28] thus:

... [it] makes 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.

[44] The grounds upon which the Taxpayer relies for the proposed appeal have been particularised by him thus:

- (a) *That the Respondent has, misdirected herself in fact and law in confirming the GCT assessment made on the Appellant and contained in her decision dated the 12th day of June 2017.*
- (b) *The Respondent was deliberate and 'scheming' in her mishandling of the Appellant's objection.*
- (c) *The Respondent has failed to deal with and to consider the Appellant objection of the 3^d day of November 2016 in the time stipulated by section 40(2) (b) of the GCT Act.*
- (d) *The Respondent's decision is null and void due to the effluxion of time.*
- (e) *The Respondent failed to review the Appellant's accounting records in support of his objection as contained in his letter of objection dated the 3^d day of November 2016.*
- (f) *The Respondent's decision was based on malice and unbecoming actions geared primarily at rectifying the tardy and inappropriate handling of the Appellant's objection. The Respondent purposely misrepresented dates and factual circumstances to justify the erroneous and unjustifiable decision made.*
- (g) *The additional GCT liability assessed and imposed on the Appellant by the Respondent is erroneous and not supported by the Appellant's trading activities and/or financial accounting records for the period January to December 2011.*
- (h) *The Respondent's assessment is based on her misunderstanding and/or intentional misrepresentation of the Appellant's information and records presented during the audit and assessment exercise.*

[45] Having regard to the decision which the Taxpayer seeks to challenge, these grounds may conveniently be summarised and addressed under three (3) broad heads.

- (i) Failure to consider the notice of objection on its merits - grounds (e), (g) and (h) in part.
- (ii) Unlawfulness - grounds (a), (c) and (d).
- (iii) The Commissioner's decision was the result of an improper motive - grounds (b), (f) and (h) in part.

The enquiry into these grounds appear subsequently.

(i) Failure to consider the notice of objection on its merits

[46] Section 40(3) of the GCT ACT on which the Commissioner relied for his decision provides that a notice of objection served by a person ceases to have effect and the assessment made on him shall be final and conclusive where the person fails to comply with any requirement under subsection (2) of section 40 of the Act which reads thus.

The Commissioner General may, on receipt of a notice of objection under subsection (1), require the person giving such notice -

- (a) Within such period (not being less than thirty days) as that Commissioner may specify, to make any return or furnish such particulars or produce such books of account or documents relating to the taxable supply as, in the opinion of that Commissioner, are affected by the notice of objection; and*
- (b) to appear before him to answer any lawful questions relevant to the matters under consideration.*

[47] The decision of the Commissioner was not the result of an enquiry into the merits or otherwise of the Taxpayer's notice of objection. That notwithstanding, challenges premised on this ground are bound to fail on appeal as a merit enquiry is not required for a decision made in accordance with section 40(3) of the GCT Act, which is based entirely on non-compliance with requests made by the Commissioner under section 40(2) of the Act.

[48] This conveniently takes the discussion to the challenges sought to be raised in respect of what I have termed unlawfulness, which are addressed together with those grounds which allege improper motive on the part of the Commissioner. By these grounds the Taxpayer alleges that the Commissioner misunderstood or misapplied the powers given to him by the GCT Act in making the decision which the Taxpayer proposes to appeal.

(ii) *Unlawfulness and (iii) Improper Motive*

[49] The provision at section 40(4) of the GCT Act is critical to the conclusion under these heads and is the basis upon which the Taxpayer contends that the decision of the Commissioner is null and void. It provides that:

Where a person has objected to an assessment made upon him -

(a) in the event of his agreeing with the Commissioner General as to the amount at which he is liable to be assessed, the assessment shall be confirmed or amended accordingly;

*(b) in any other event the Commissioner shall give notice in writing to that person in respect of the objection, so, however, that **where that Commissioner fails to hand down his decisions within six months of the receipt by him of the objection and the delay is not attributable to the person's omission or default, the assessment shall be null and void.***

[Emphasis added.]

[50] It suffices to say that a notice of objection dated 3rd November 2016 was submitted by the Taxpayer. It is his evidence which is unchallenged before me, that it was sent by his Accountant to the Commissioner through the Montego Bay office via facsimile and by registered post on 4th November 2016. I accept that evidence.

[51] The Commissioner's evidence is that the said notice was received on 16th December 2016 as reflected on an exhibited copy of the document. The Taxpayer and his Counsel make heavy weather of the date of the Commissioner's acknowledgment of receipt of the notice of objection, but I do not believe it to be particularly material, nor does it demonstrate that the Commissioner's decision was the result of any improper motive.

[52] I so conclude because although I have accepted the Taxpayer's evidence before me that the notice of objection dated 3rd November 2016 was sent to the Commissioner on the 4th November 2016 by facsimile and by registered post, the right which a taxpayer has to object to an assessment had not in fact arisen at the

date of preparation and service of the notice on the Commissioner. This appears on the face of the notice of objection itself where Ms. Russel writes:

*My client **objects to the Assessment out of an abundance of caution** as the **Notices of Assessment were not personally served**. He therefore reserves the right to argue this as his first point of objection. Please note that these **came to his attention** on the 6th day of October, 2016.*

[Emphasis added]

[53] Pursuant to section 40(1) of the GCT Act

*Subject to subsection (2), if any person disputes an assessment made upon him or any other decision of the Commissioner General, he may, **within thirty days of the date of service of the notice of the assessment** or other decision, as the case may be, apply to the Commissioner General by notice of objection in writing to review the assessment or other decision, as the case may be, stating precisely the grounds of his objection.*

[Emphasis added]

[54] From the foregoing provision service of a notice of assessment is a precursor to the filing of a notice of objection. Ms. Russell's letter makes it clear that the Taxpayer had not been served to give rise to the need for its filing. Service of the notice of objection was accordingly premature. As admitted, the Taxpayer made the objection out of an abundance of caution, the notices of assessment having come to his attention.

[55] While Ms. Jackson makes reference in her affidavit to the Taxpayer having admitted to receiving the notice of assessment to GCT in his letter dated 3rd November 2016, and refers to the said notice being reserved, there is in fact no evidence before this court of the Taxpayer being served with a notice of assessment in respect of GCT for the period 1st January to 31st December 2011 at any time before the 19th January 2017 when he was personally served. The evidence as to personal service is unchallenged and accepted.

[56] There is no evidence of a notice of objection having been submitted or received by the Commissioner from the Taxpayer in respect of the Notice of Assessment served on him on 19th January 2017. No issue appears to have been taken by the Commissioner to that failure however as subsequently, by correspondence dated 18th April 2017 which Mr. Chung admits to receiving, the Commissioner accepted the earlier premature notice of objection in respect of the assessment raised for GCT for the period 1st January to 31st December 2011.

*We refer to your letter of objection submitted on **December 16, 2016** in response to the assessments raised for **General Consumption Tax** for the period(s) January 01 to December 31, 2011.*

Based on the information contained in your letter, the objection has been accepted by the Department and the case is to be assigned to an officer who will contact you in an effort to settle the matter.

[Emphasis in the original]

[57] Having taken no issue with the Taxpayer's failure to file a notice of objection consequent on service of the notice of assessment on him, and in electing to accept the premature notice of objection, the obligation imposed on the Commissioner by section 40 (4)(b) of the GCT Act crystallised on 19th January 2017. A decision was returned by the Commissioner within six (6) months of that date on 12th June 2017 and received by the Taxpayer sometime on or before 13th June 2017. In these circumstances, I find that the complaint that the decision was made outside of the period prescribed at section 40(4)(b) of the Act and therefore null and void, is without merit.

[58] Also in evidence is a letter to the Commissioner under the hand of Ms. Russell dated 22nd May 2017 titled "*Notice to produce records/documents for Income Tax, GCT and Education Tax Objection for Gregory Chung - TRN ... Year of assessment 2011*" which is exhibited to Mr. Chung's affidavit. Ms. Russell refers to correspondence from the Commissioner dated 12th April 2017, and among other

things which are not immediately relevant, speaks to having received a “*Notice to Produce*” and references preparation for a proposed meeting.

- [59] Ms. Russell does not indicate the date on which the Commissioner’s correspondence dated 12th April 2017 was received and it has not been exhibited. Ms. Russell’s silence notwithstanding, in the decision letter from the Commissioner dated 12th June 2017 which is exhibited to Mr. Chung’s affidavit - among other content, which was earlier reproduced - the following appears:

We refer to your objection letter dated November 3, 2016 regarding the captioned matter.

You have failed to comply with our request to provide evidence to support the grounds for your objection as per our correspondence dated April 12, 2017 and received by you on April 20, 2017...

- [60] There is no averment in the affidavit evidence relied upon by the Taxpayer which challenges that he was requested to provide evidence in support of his grounds of objection pursuant to correspondence from the Commissioner dated 12th April 2017 or of his receipt of the request on 20th April 2017 as indicated in the letter. The stated date of receipt is accepted.

- [61] Ms. Russell having stated in the accepted notice of objection that “*the assessments are arbitrary, baseless and excessive and do not in any way reflect the trading activities of the taxpayer*” and that “*the records presented to the auditors were never reviewed and remain as such due to their arrogant and unrelenting approaches, even after the intervention of a personnel of an external department*” among other complaints, it was entirely appropriate and unsurprising that the Taxpayer was required by the Commissioner to produce evidence to support the grounds for his objection.

- [62] That the Taxpayer had not complied with the Commissioner’s request as of 22nd May 2017 is patent on Ms. Russell’s letter of the said date, which references the request and says:

... my client is not in a position to facilitate and/or entertain the review exercise at his premises and as such I ask if you are minded to attend upon my office for review. If not, please indicate where, bearing in mind:

- i. the volume of records and*
- ii. the taxpayer's unwillingness to be separated from these records.*

Please let me hear from you.

[63] In the decision letter from the Commissioner dated 12th June 2017, after indicating that the Taxpayer had failed to comply with the request to provide evidence in support of his grounds for objection, the Commissioner went on to state:

Following subsequent communication via email June 2, 2017 and letters received via email on June 6, 2017 and June 9, 2017 from your accountant, a decision has been made in accordance with Section 40 (3) of the GCT Act, for your objection to ceased (sic) to have effect and the assessment as shown below is now final and conclusive...

[64] Although the letter exhibited by the Taxpayer references email communication between the Taxpayers representative and the Commissioner subsequent to Ms. Russel's letter of 22nd May 2017, all of which occurred between the date of the request made of the Taxpayer and the date of the Commissioner's decision, the contents of those correspondences have not been disclosed. By these omissions, the Taxpayer has deprived the court of the opportunity to make its own assessment of his effort to comply with the request made of him by the Commissioner. While Ms. Russell's letter shows that an exercise of discretion in relation to the venue for the review exercise appears to have been sought, it is by itself, incapable of telling the entire picture as to the Taxpayer's effort or otherwise to comply.

[65] Further and particularly fatal however, is that the Taxpayer who bears the burden of proof in appeals to this court - which proceed by way of rehearing - has failed to supply any evidence which shows that he had complied with a reasonable request by the Commissioner for him to provide evidence to support his grounds of objection at the time of the Commissioner's decision almost two (2) months after

the request was made of him. The Taxpayer has presented nothing which demonstrates that the Commissioner erred in deciding that in accordance with section 40 (3) of the GCT Act, his objection ceased to have effect and that the assessment was then final and conclusive.

[66] In all these premises the Taxpayer has not demonstrated that the Commissioner has misdirected himself either in law or fact in arriving at the decision the subject of the proposed appeal; nor has he demonstrated that motive for the decision was improper, to satisfy the court that he has an arguable case on appeal.

Prejudice

[67] Although the conclusion on arguability disposes of the appeal, I will briefly address the matter of prejudice.

[68] It is contended on behalf of the Taxpayer that if leave to appeal is not granted, he will be prejudiced by having a significant financial burden. That may well be true, but this alone should be regarded as insufficient to compel a court to extend the time to appeal where the taxpayer fails to avail himself of the avenues for redress available to him in law, in a timely manner.

[69] In any event, the court must also be mindful of prejudice to the Commissioner and proper revenue administration generally, where appeals against assessments are not pursued timely and with due diligence.

[70] In the like manner that a litigant who is successful in a court below is entitled to regard a decision in his favour as being final, the Commissioner who has made and communicated to the Taxpayer his decision on the notice of assessment is entitled to rely on and seek to recover the sums assessed, where his decision remains unchallenged. In the instant case, the Commissioner has issued proceedings in the Parish Court to recover the GCT assessed against the Taxpayer. To grant leave to pursue an appeal over six (6) after the decision which enables him to do so, thereby further delaying recovery of the sums assessed is prejudicial to the Commissioner who has the responsibility under the GCT Act to

see to its due collection. The prejudice to the Commissioner is not sufficiently answered by saying that if the taxpayer is unsuccessful in his appeal, the Commissioner would still be able to pursue recovery of the monies. Recovery of an outstanding tax liability is not always assured and is itself time bound.

[71] Further, judicial notice may be taken of the purposes for which public revenue is raised, and the negative impact which delay in settling what may or may not be collectible by a relevant revenue authority may have on the provision of essential public services. When regard is so had, delays in pursuing revenue appeals, especially inordinate delay of the kind here must be regarded as inimical to good revenue administration generally and prejudicial to the Commissioner and should not be countenanced.

ORDER

1. The order sought by the Taxpayer Gregory Chung to extend the time to appeal the decision of the Commissioner General, Tax Administration Jamaica made on the 12th day of June 2017 is refused.
2. In consequence of order 1 herein, the Notice of Appeal dated the 16th day of August 2023 and filed on the 21st day of August 2023 is dismissed.
3. Costs of the notices of application for court orders filed on the 20th of September 2023 and the 22nd February 2024, to the Commissioner General, Tax Administration Jamaica, to be taxed if not sooner agreed.
4. The Attorney-at-Law for the Commissioner General, Tax Administration Jamaica is to prepare, file and serve this order.

Carole S. Barnaby
Puisne Judge