

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV2023-02965

In The Matter of the Judicial Review Act No. 60 Of 2000

Between

Southern Logistics Limited

Claimant

And

The Board of Inland Revenue

Defendant

Before the Honourable Madam Justice Donaldson-Honeywell

Delivered on: 17 May 2024

Appearances:

Mr. Kishore Maharaj and Mr. Ronald Dowlath, Attorneys-at-Law for the Claimant

Ms. Karuna Singh, Attorney-at-Law for the Defendant

JUDGMENT

A. Introduction

1. The Claimant Company, Southern Logistics Limited, is registered for Value Added Tax ["VAT"] under the provisions of the **VAT Act, Chapter 75:06**. This Judgment determines a judicial review Claim challenging the Defendant's procedural

handling of the Claimant's objection to audit assessments made and the delay in communicating such.

2. On 1 March, 2013, the Defendant communicated to the Claimant the commencement of an audit examination pertaining to its VAT returns spanning the periods 200701-200912. Subsequently, in 2013, the Defendant initiated an audit examination, resulting in the issuance of several notices of assessment to the Claimant over subsequent years. In response, the Claimant lodged an objection in January 2020, invoking **Sections 40(1) and (2) of the VAT Act, Chapter 75:06**, citing negligence by its accountant and personal challenges faced as reasons for the delay.
3. Contentions arose regarding the purported inclusion of requests for waivers in the objection letter and the Defendant's purported lack of response. Subsequently, the Tax Appeal Board rendered a decision in May 2023, acknowledging the Defendant's service of a rejection letter in response to the objection. The absence of a payment waiver request in the January 2020 objection letter was a finding of the Tax Appeal Board.
4. The Claimant contests the Defendant's rejection of its objection, asserting that it was not properly notified of the Defendant's rejection of the objection and maintaining that a request for payment waiver was included with January 2020 objection filing. Additionally, the Claimant submits that the Defendant failed to provide notice of payment requirements for the objection process. It contends that failure amounted to unfair treatment in breach of **Section 4(b) of the Constitution of Trinidad and Tobago** and breached the Claimant's legitimate expectations. Furthermore, the Claimant contends that the rejection of the objection letter, based solely on the length delay, was unreasonable, as the Defendant failed to consider the reasons provided for the delay.

5. Conversely, the Defendant argues that the Claim should fail due to the Claimant's late submission of the Notice of Objection, its failure to make any necessary payments, provide security for assessed liability or obtain a waiver for these requirements.

B. Legislative Framework

6. The relevant legislation is as follows:

“Value Added Tax Act Chap 75:06

39. (1) Where -

- (a) a person fails to furnish a return in accordance with this Act;
- (b) a person requests the Board, in writing, to amend a return that the person has furnished under this Act; or
- (c) the Board is not satisfied with a return made by any person or as to any matter on the basis of which the return is prepared,

the Board may assess the amount of tax that should, in the opinion of the Board, be payable by that person, or the refund that should, in the opinion of the Board, be due to that person, in respect of the tax period concerned and the amount so assessed is payable in lieu of the tax that would otherwise be payable by that person, or the refund that would otherwise be due to that person, in respect of that tax period.

40. (1) A person disputing an assessment, or the amendment of an assessment, under section 39 may apply to the Board by notice of objection in writing delivered to the Board to review and to revise the assessment and—

- (a) sections 86 and 97 of the Income Tax Act apply, with such modifications as are necessary and subject to subsections (2) and (3), for the purpose of enabling the application to be dealt with and the objection to be determined; and

(b) section 87 of the Income Tax Act and the provisions of the Tax Appeal Board Act apply, with such modifications as are necessary, for the purpose of enabling the making of, and the hearing and determination of, appeals from decisions of the Board upon objections under this section.

(2) Except with the leave of the Board an application under subsection (1) to review and to revise an assessment shall not be made unless any amount required by the assessment to be paid has been paid to the Board or such security has been given for the payment of that amount as is acceptable to the Board.

(3) Where, within six months after an application is made in accordance with subsection (2), the Board fails to determine the objection, the objection shall be deemed to have been determined in favour of the person disputing his assessment and the assessment shall be amended accordingly

Income Tax Act Chap 75:01

86. (1) The Board shall cause to be served on each person whose name appears on the assessment list a notice addressed to him at his usual place of abode or business stating the amount of his chargeable income and the amount of tax payable by him, and informing him of his rights under subsection (2).

(2) **If any person disputes the assessment he may apply to the Board** by notice of objection in writing delivered to the Board to review and to revise the assessment made upon him. Such application shall state precisely the grounds of his objections to the assessment and shall be made within fifteen days from the date of the service of the notice of assessment.

(3) An application under subsection (2) may be made out of time if the Board is satisfied that there was a reasonable excuse for not making the application within the time limited and that the application was made thereafter without unreasonable delay.

(4) Where the Board disallows an objection for the reason that it is not satisfied under subsection (3), an appeal shall lie to the Appeal Board from such a decision in accordance with section 87.

.....

87. Any person who has disputed his assessment by notice of objection under this Act and who is dissatisfied with the decision of the Board may appeal to the Appeal Board in accordance with the provisions of the Tax Appeal Board Act

Tax Appeal Board Act Chap 4:50

3. (1) An Appeal Board (to be known as the Tax Appeal Board) is hereby established for the purpose of exercising the jurisdiction conferred upon it by this Act or by any other written law.

....

(4) The Appeal Board shall have jurisdiction to hear and determine—

(a) **appeals** from the decision of the Board of Inland Revenue **upon objections to assessment** under the Income Tax Act;

(b) **appeals from such other decisions** of the Board of Inland Revenue or of any other person under the Income Tax Act **as may be prescribed** by or under that Act;

(c) such other matters as may be prescribed by or under this Act or any other written law.”

C. Chronology of Events

7. The Defendant, by letter dated 1 March 2013, informed the Claimant that an Audit examination was being conducted in respect of its 200705-200901 VAT Returns. Then, by letter dated 14 March 2013, the Defendant informed the Claimant that certain documents were needed to complete the audit.

8. Thereafter, the Defendant served a VAT audit report on the Claimant on 22 May 2013 with a stated liability of \$320,670.00. A Notice of Assessment was issued by the Defendant on 28 May 2013. The Notice informed the Claimant of a VAT liability of \$763,334.40.
9. The Notice of Assessment was not served on the Claimant until 25 January 2014. Over the course of several years, the Claimant was served with a number of other audits and multiple notices of assessment. Beginning in 2013, a Value Added Tax Audit report dated May 22 indicated a liability of \$320,670.00, followed by a Notice of Assessment on May 28, stating a liability of \$763,334.40, both received on 25 January 2014. Subsequently, on 26 July 2013, another Notice of Assessment informed the Claimant of a liability of \$501,198.83, also received on 25 January 2014.
10. Progressing to 2019 on June 27, a summary of Value Added Tax Liability totalling \$783,620.50 was served. Looking back, for the VAT period ending 30 September 2007, a report dated 26 July 2013, showed a liability of \$210,436.33, and a subsequent Notice of Assessment on 31 July 2013, indicated a liability of \$493,243.29, received on 25 February 2014.
11. Moving on to the subsequent year, for the VAT period ending 31 January 2008, an audit statement dated 11 September 2013, displayed a liability of \$396,036.65, with a subsequent Notice of Assessment on 16 September 2013, specifying a liability of \$1,512,859.60, also received on 25 January 2014.
12. This sequence of events continued until the VAT period ending 31 January 2009, where an audit statement indicated a liability of \$300,689.12, and a subsequent summary of Value Added Tax Liability on 27 June 2019, amounted to \$1,076,498.97. The Claimant's overall debt amounts to \$20,773,652.29.

13. By letter of objection dated 15 January 2020, the Claimant challenged the assessments received in 2013 for the VAT periods 200701 to 200912. The grounds of objection were that the company's accountant did not respond to the Audit, and all relevant information regarding the computation of input and output VAT was omitted/not considered in the preparation of the VAT returns.
14. The Claimant attached an Affidavit of its Managing Director, Mr. David Bhagwandass, to the objection letter. Neither party exhibited a copy of the January 2020 Objection letter or the January 2020 Managing Director's Affidavit in the instant judicial review proceedings.
15. In his sworn affidavit in support of judicial review herein, the Claimant's Managing Director asserts that, in his January 2020 affidavit in support of the objection, he requested that the payment requirements under **Section 40(2) of the VAT Act** be waived. This is not addressed in the affidavit evidence of the Defendant herein. The Defendant's sole deponent of an Affidavit is Karuna Singh, Attorney-at-Law, who also serves as counsel in this matter.
16. There is no denial in Ms. Karuna Singh's Affidavit of paragraph 59 of the Claimant's Managing Director's affidavit filed herein on 27 September 2023. At paragraph 59, he asserts that a request for waiver was included in the affidavit in support of the January 2020 objection letter. That point remained un-contradicted in any filed evidence by the Defendant.
17. However, in closing written submissions filed on 29 February 2024, in her capacity as counsel for the Defendant, Ms. Singh states that it was in a subsequent letter, dated 27 July 2020, that the Claimant requested the waiver of **Section 40(2)**. This contention is refuted in the Claimant's closing submission in Reply, filed on 12 March 2024.

18. There is no dispute that the January 2020 affidavit of the Claimant's Managing Director in support of the objection gave reasons for the late filing of the objection. Essentially, the reasons for the delay were the negligence of the Claimant's accountant and extremely dire personal difficulties faced by the Managing Director over a number of years.
19. The difficulties included that he had to make arrangements for his daughter's asylum in the United States after she escaped from an attempted kidnapping. Additionally, in 2012, his son was diagnosed with cancer of the bone and had to be admitted to a hospital in Florida. He underwent seven surgeries over the period from 2015 to 2021.
20. Based on these difficulties, the Managing Director was not in a proper frame of mind to address issues arising from the audits which he thought were being dealt with by the accountant. The accountant later informed the Managing Director that he had never responded to the impending audit despite assuring him that he would.
21. From the forgoing details of the contents of the objection letter and its supporting Affidavit, it is clear that, on the Claimant's case, the objection filed with the Defendant included requests for waivers/leave in two respects:
- i. Firstly, the Claimant sought leave pursuant to **Section 40(2) of the VAT Act** to seek revision of the assessments of its tax liability without paying the assessed amount in full or posting a bond. In other words, the Claimant sought a waiver of the requirement that payment of the assessed amount be made when filing the objection.
 - ii. Secondly, the Claimant sought leave pursuant to **Section 86(3) of the Income Tax Act** to file its objection outside the 15-day period after receiving the Notice of Assessment permitted at **Section 86(2) of the said Act**. That 15-day period from receipt of the Notices of Assessments

being challenged would have expired around February to March 2014.
The Objection was only filed in January 2020.

22. By letter dated 27 May 2020, alleged to have been dispatched on 2 June 2020, the Defendant responded to the objection letter refusing the objection. The sole reason cited was that *“There is a considerable time lapse between dates of the notice of assessments and your objection letter.”*
23. The Defendant’s affidavit for the instant proceedings underscores that the objection letters were filed some six years after the Claimant received the Notices of Assessment on 25 January 2014. On the other hand, the final closing submission of Counsel for the Claimant underscores, at paragraph 10, that there was no indication by the Defendant in the 27 May 2020 letter, that the reason for delay in the affidavit of Managing Director, Mr. David Bhagwandass, were considered in rejecting the objection based on lateness.
24. The Claimant’s Managing Director denies, at paragraph 80 of his Affidavit sworn herein on 9 August 2023, that any letter dated 27 May 2020 responding to the 15 January 2020 objection was ever received. On that basis, the Claimant included in its appeal to the Tax Appeal Board a claim that, there being no response from the Defendant to the objection, it must be deemed to be determined in favour of the Claimant pursuant to **Section 40(3)** of the **VAT Act**.
25. It is not in dispute that, by letter dated 27 July 2020, the Claimant issued a reminder about the objection but the Defendant did not respond. In closing submissions, the Defendant contends that it was in this letter, written after the objection was already refused, that the Claimant requested the waiver of **Section 40(2)**.
26. Neither side in the instant proceedings attached a copy of the 27 July 2020 letter to their affidavits. The Defendant, who in submissions relies on that letter to

contend that the request for waiver came after the objection, failed to even mention that letter in a sworn affidavit. Accordingly, the Claimant's version of events that the request for a waiver of **Section 40(2)** was made at the same time as the objection remains un-contradicted by any sworn testimony or documentary evidence.

27. On 19 March 2021, the Claimant filed Notices of Appeal to the Tax Appeal Board, against the Defendant's decisions regarding the various VAT periods. More specifically, what was being challenged was *inter alia* "the Respondent ought to have responded to the objection of the Appellant."

28. The Defendant applied, on 23 April 2021, to strike out the Claimant's Appeal. In support of its application, the Defendant contended that it had in fact responded to the objection by letter dated 27 May 2020 and therein, informed the Claimant that the objection was not accepted due to the considerable delay.

29. On 12 May 2023, the Tax Appeal Board delivered its decision. Neither side, herein, set out, in affidavit evidence, any details of the said decision. In closing submissions, Counsel for the Defendant summarises the decision as follows: "there were no valid objections made by the Claimant to the assessments for the Defendant to have made a determination. Therefore, the appeals were improperly before the Tax Appeal Board as they were not founded upon a decision of the Defendant within the jurisdiction of the Court as prescribed under the provisions of Section 3(4) of the Tax Appeal Board Act, Chap 4:50."

30. The Claimant purported to set out a lengthier extract of the Tax appeal Board Decision as part of its closing submissions. The said extract starts at page 4 and continues to page 11 of the Claimant's submissions. The extract provides some insight into evidence considered by the Tax Appeal Board, based on which there was a finding that the Defendant proved service on the Claimant of the 27 May 2020 rejection letter. The Defendant's "production of the relevant extracts from

its outgoing mail register and TTPost invoices register” were accepted as proof that the letter was posted.

31. The Tax Appeal Board further considered that the Claimant did not include a request for waiver in the January 2020 objection letter. Thus, per the Tax Appeal Board Ruling by 27 July 2020 when the Claimant did request a waiver in a letter issued to the Defendant, there was nothing for the Defendant to consider since it had already dispatched the rejection letter on 27 May 2020.

32. On 9 August 2023, the Claimant filed an Application for Leave to have judicial review of the following decisions made by the Defendant:

- i. Its refusal to follow the established practice of giving notice to the Claimant of the requirements under **Section 40(2) of the VAT Act** to post a bond or pay the full sum of VAT liability before the letter of objection was refused.
- ii. Its refusal to address the Claimant’s request for a waiver of the said requirements.
- iii. Failure to fulfil the legitimate expectation of the Claimant created by the Defendant.

33. Further, at paragraph 2 of the supporting affidavit by the Claimant’s Managing Director, the Claimant sought to challenge the Defendant’s refusal to consider/adequately consider the reasons for the Claimant’s late filing of the 15 January 2020 letter of objection. According to the Claimant, those reasons were stated in the Affidavit of Managing Director David Bhagwandass filed together with the objection letter on 15 January 2020. The Claimant contends that the Defendant did not consider the said affidavit.

34. On 7 September 2023, the Claimant’s leave application was granted by the Court. The Claimant was permitted to file a Fixed Date Claim seeking the following Judicial Review relief:

- i. A declaration that the decision was made in the absence of evidence on which a finding of fact could reasonably be based.
- ii. An order of certiorari quashing the decision.
- iii. An order of Mandamus that the Defendant follow its established procedure and invite the Claimant to satisfy the conditions of **S.40 of the Vat Act, Chapter 75:06**.
- iv. Declarations that the refusal frustrated the following legitimate expectations of the Claimant:
 - a. The Respondent would inform the Claimant of its requirement to post a bond or to pay the sum of the liability assessed by the Respondent in full.
 - b. To have the objection heard on its merit as the procedure to deny the Appellant was irrational and prejudicial.
 - c. The reasons, as contained in the accompanying affidavit of David Bhagwandass. For refusing to/not adequately considering the reasons for the late filing of the letter of objection be reviewed.
- v. A declaration that: The policy of not following its established procedure of giving notice to the Appellant to post a bond or to pay the full amount of the liability assessed is irrational.
- vi. Orders of certiorari quashing the decision to refuse the letter of objections.
- vii. The inconsistent policy to refuse persons in the Appellant's class of notification of the requirements for a VAT objection before it is refused.

35. On 27 September 2023, the Claimant filed its Fixed Date Claim supported by the affidavit of the Claimant's Managing Director. Thereafter, the Defendant filed an affidavit of Karuna Singh, State Counsel 1 of the Legal Unit of the Ministry of Finance - Inland Revenue Division, on 9 November 2023.

36. In accordance with directions issued at a case management conference held on 5 December 2023, parties filed written closing submissions concluding with the submission of the Claimant filed on 13 March 2024.

D. Issues

37. There is some obscurity in the way the Claimant's case is pleaded. The issues identified from the Application for Leave, the Fixed Date Claim and the affidavits filed on both sides case are as follows:

- a. Did the Claimant include in its objection letter dated 15 January 2020 any requests for waiver of the requirements for payment of the assessed liability in full or the posting of a bond?
- b. Did the Claimant receive any response from the Defendant to its objection filed on 15 January 2020?
- c. If the alleged response, dated 27 May 2020, was in fact delivered to the Claimant, was the rejection decision therein irrational and in breach of natural justice in that there was no indication that the Claimant's reasons for delay were considered?
- d. Did the Defendant breach a legitimate expectation of the Claimant that, before rejecting the objection, it would follow the established practice of issuing a notice of the need to pay in full or post a bond and/or was there an inequality of treatment of the Claimant as the Defendant followed the said practice with other objectors?

E. Legal Principles

38. The **Judicial Review Act, Chap. 7:08** governs the procedure for judicial review.

Section 5(1) provides:

5. (1) An application for judicial review of a decision of an inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall be made to the Court in accordance with this Act and in such manner as may be prescribed by Rules of Court.

(2) The Court may, on an application for judicial review, grant relief in accordance with this Act—

(a) to a person whose interests are adversely affected by a decision; or

(b) to a person or a group of persons if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case.

(3) The grounds upon which the Court may grant relief to a person who filed an application for judicial review, particularly in this case includes the following:

(c) failure to satisfy or observe conditions or procedures required by law;

(e) unreasonable, irregular or improper exercise of discretion;

(k) absence of evidence on which a finding or assumption of fact could reasonably be based;

(l) breach of or omission to perform a duty;

(m) deprivation of a legitimate expectation;

(o) an exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised the power.

(4) An applicant is not limited to the grounds set out in the application for judicial review but if the applicant wishes to rely on any other ground not so set out, the Court may, on such terms as it thinks fit, direct that the application be amended to specify such other ground.

Irrationality/Unreasonableness

39. The Court, in determining reasonableness, must first consider the test outlined in the landmark decision of Lord Greene, M.R in **Associated Provincial Picture Houses Ltd v. Wednesbury Corporation 1947 2 All ER 680**:

“The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.”

40. In **National Carnival Bands Association of Trinidad and Tobago v The Minister of Community Development, Culture and Arts CV2018-03359**, it was noted:

“53. The modern reformulation of the broad irrationality test is whether the decision fell within the range of reasonable responses.”

Absence of Evidence

41. In addressing the issue of whether the Defendant considered relevant evidence in deciding to reject the Claimant’s objection based on delay Lord Clyde’s articulation of the supervisory jurisdiction in **Reid v Secretary of State for Scotland [1999] 2 AC 512, 541F-542A**, is relevant, as follows:

"Judicial review involves a challenge to the legal validity of the decision. It does not allow the Court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed.

As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the Court may not set about forming its own preferred view of the evidence."

Legitimate expectation

42. The well-established concept of legitimate expectation is explained as follows in the case of **Council of Civil service Unions v Minister for the Civil service [1985] A.C. 374**

"A legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

43. For the Claimant to establish its claim in legitimate expectation, the relevant principles as summarized by Lord Neuberger in **United Policyholders Group v AGTT [2016] UKPC 17** apply:

"37. In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification", according to Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR*

1545, 1569, cited with approval by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, para 60.

38. Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty - see eg *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 636, per Lord Fraser of Tullybelton. Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement. This third point can often be elided with the second point, but it can go wider: for instance, if, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or a fortiori should, reasonably decide not to comply with the statement.

39. Quite apart from these points, like most widely expressed propositions, the broad statement set out at the beginning of para 37 above is subject to exceptions and qualifications. It is, for instance, clear that legitimate expectation can be invoked in relation to most, if not all, statements as to the procedure to be adopted in a particular context (see again *Ng Yuen Shiu* [1983] 2 AC 629, 636). However, it is unclear quite how far it can be applied in relation to statements as to substantive matters, for instance statements in relation to what Laws LJ called "the macro-political field" (in *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131), or indeed the macro-economic field. As the cases discussed by Lord Carnwath show, such issues have been considered by the Court of Appeal of England and Wales, perhaps most notably, in addition to *Begbie*, in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, and *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755, and also by

the Board in *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 A.C. 1.”

44. The Claimant has the burden of proving the legitimacy of its expectation. Once the Claimant has proven the relevant elements, the onus shifts to the Defendant to justify the frustration of the legitimate expectation. **Francis Paponette v AGTT [2010] UKPC 32** para 37:

“37. The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.”

45. For the principles surrounding legitimate expectation Counsel for the Claimant relies on the case of **Paponette v Attorney General (supra)** and **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935** where, at page 944, the Court states, “A legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the Claimant can reasonably expect to continue”.

46. On appeal to the Privy Council, **Francis Paponette and others v The Attorney General [2010] UKPC 32**, it was held that:

“In a case where the legitimate expectation is based on a promise or representation, a useful summary of the relevant principles was given by Lord

Hoffmann in **R (Bancourt) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61, [2009] AC 453**, at para 60:

“Page 9 “It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is ‘clear, unambiguous and devoid of relevant qualification’: see Bingham LJ in **R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569**. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called ‘the macropolitical field’: see **R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, 1131**.”

47. The most relevant precedent in this instance is, **Therml Impac Affordable Homes Company Limited v The Board of Inland Revenue CV2020-02592**. Paragraphs 56, 57 and 59 states:

“56. The claimant submitted that in this case the taxpayer has a legitimate expectation that the BIR will adhere to a certain procedure. It relied **on AG of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629** at 638 in which Lord Fraser explained; “When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.”

“ 57. It submitted that good administration by a public authority requires that the public who is served be dealt with straightforwardly and consistently according to Laws LJ at paragraph 68 of **R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363**. This encompasses not only the expectation that public authorities act fairly towards the public, but also where a public authority has issued a promise or adopted a practice which represents

the manner in which it deals with the public in a specific area, the law requires that the practice be honoured, unless there is good reason to not.”

“59. Independent of the statutory duty however, the court finds that by virtue of the **established procedure**, the claimant had a legitimate expectation that the BIR would follow its procedure and respond to the claimant to inform as to the nature and form of security. It appears on the evidence that this would not have been done at all times in writing. In relation to the 2010 objections, it was not done at all whether in writing or otherwise.”

48. Counsel for the Claimant further relied on the case of **ACS v The Board of Inland Revenue Tax Appeal Nos v7-10 of 2017**. Two matters are to be noted as discussed in **Therml Impac Affordable Homes Company Limited v The Board of Inland Revenue CV2020-02592** at paragraphs 43 and 44.

“43. Firstly, the imposition of the statutory duty on the Taxpayer is subject to the acceptance of the method of security to be decided by the BIR. So that it is equally the statutory duty of the BIR to make such a decision in the case where the sums assessed are not paid at the time the objection is lodged. It is not for the taxpayer to determine that which is acceptable for the Board. That decision can only be made by the Board and it is duty bound to so decide under the section. So that the duty lies on the taxpayer to fulfil the requirements under the section but he cannot so do unless he is informed by the Board as to that which is acceptable.”

“44. Secondly, where the taxpayer seeks a waiver however in whole or in part of the payments or the security requirements, the statutory duty lies on him to apply for same. In either case, the discretion remains with the Board. It is in this context that the court understands the decision in ACS and the court is of the view that both duties set out above are not incongruous.”

49. Additionally, the process and the importance of balancing the objector's needs and the deadlines required by the BIR was discussed. Paragraph 45 states:

"It may therefore be prudent in each case that an objection is lodged that the defendant write to the objector setting out the criteria that must be met for the objection to be determined. Such a notice should set out a deadline by which the requirement is to be met. That deadline should be a reasonable one that balances the time that would ordinarily be required by an objector to obtain the relevant security and information and the time after which it would be unreasonable for the BIR to continue to be subject to such objection."

The Right to Equality of Treatment

50. **S 4(d) of the Constitution of Trinidad and Tobago** is as follows:

4. It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely—

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;

51. In **Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago [2004] UKPC 21, Privy Council Appeal No. 45 of 2003 (Bhagwandeem)**, the Privy Council indicated what must be proved to establish infringement of **Section 4(d)** rights. At paragraph 18, it was stated:

"A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators."

F. Submissions

52. The Claimant submits that the Tax Appeal Board erroneously found that the 27 May 2020 letter was served on the Claimant and that only, thereafter, the Claimant included a request for waiver in a 27 July 2020 letter. According to the Claimant, the Tax Appeal Board ought not to have relied on evidence that the letter left Defendant's mail room as proof of service. Additionally, the Claimant says the Tax Appeal Board overlooked that there was a request for waiver in the Affidavit of the Managing Director filed with the objection letter in January 2020.
53. The Claimant's case is that the Defendant had a practice of giving persons filing objections notice that they needed to pay the full amount or post a bond but failed to give such notice to the Claimant. The proof of this practice is in an Affidavit by a Board of Inland Revenue (BIR) officer in another case, **Tax Appeal Nos V/7-10/2017**. Further the Claimant relies on the Judgment of Rahim J in **Therml Impac Affordable Homes Company Limited v The Board of Inland Revenue CV2020-02592**, which, he contends, affirmed the existence of the practice relied on and there is a legitimate expectation that it will be followed. According to the Claimant, the Defendant acted inconsistently and there was inequality of treatment in the Claimant's objection being rejected without the benefit of such a notice.
54. The Claimant further contends that the Defendant unreasonably rejected the objection based on the sole reason of inordinate delay. In the letter refusing to accept the objection, the only reason given was the considerable time lapse from the assessments to the objection letter. The Claimant's case is that, in making a decision to reject the objection based on delay, the Defendant gave no indication that the Managing Director's affidavit evidence of excuses for the delay was considered.
55. According to the Defendant, the 19 March 2021 application by the Claimant to review the assessment was invalid for two reasons:

- a. The application was made in relation to a refusal to address an objection application made on 15 January 2020, well beyond the 15-day permitted period. The Defendant admits that the application included reasons for delay.
- b. There was no prior leave from the Board or even a simultaneous application to the Board to make the application without paying the amount of the assessed liability. The Defendant says the application for waiver of the payment requirement came afterwards on 27 July 2020.

56. As indicated above, the Tax Appeal Board's ruling has already been made, accepting the Defendant's second point about there being no application for a waiver. Moreover, the Defendant's case as explained in the written closing submissions focusses primarily on the first point of delay. Counsel for the Defendant contends that *"for there to be a valid objection in relation to VAT assessments, firstly the objection must be made within statutory time frame of fifteen days or accepted as being out of time by the Respondent and secondly the payment or security requirements of section 40(2) must be fulfilled to activate the objection process. The Defendant submits that the Claimant did not pass the first hurdle."*

G. Analysis

57. There is divergence between the parties as to certain material facts in the case, as is clear from the affidavit evidence. The facts in dispute include whether, in the initial 15 January 2020 objection letter and supporting affidavit filed by the Claimant, there was a request for waiver of the requirement to pay the assessed liability in full. Additionally, there is a dispute as to whether in May or June 2020, the Defendant ever delivered to the Claimant a response to the Claimant's objection letter.

58. On a review of the affidavit evidence, taking into account the omission by parties to attach the actual documents referred to therein, the Claimant's account of the

material facts is more credible. The undisputed issuance by the Claimant of a reminder letter on 27 July 2020 tends to support the Claimant's case that the Defendant's alleged 27 May 2020 letter rejecting the objection was never received. This is so because if it had been received, there would be no need for the Claimant to send a reminder in July 2020.

59. The parties' summaries of the Claimant's appeal to the Tax Appeal Board, against the Defendant's decision on its objection provide information on the Tax Appeal Board's Ruling, from which it is clear that issues a and b identified above were already determined in that Ruling. The instant proceedings do not encompass a review of the Tax Appeal Board's findings.

60. Additionally, neither party tendered the documents that were before the Tax Appeal Board in the instant proceedings. Accordingly, there is no basis for the Court at this stage to alter the Tax Appeal Board's findings that the 27 May 2020 letter rejecting the objection was served, and only thereafter the Claimant sent the 27 July 2020 letter with a request for waiver of the liability payment requirements. To the extent that the Claimant herein contends that the Defendant did not respond to the objection, that aspect of the case fails.

61. As to whether the Claimant included a request for waiver of the requirement to pay the assessed liability in full when making the objection, the finding is that the Defendant failed to effectively deny that contention by any affidavit evidence. The Claimant's case that the objection letter was filed with an Affidavit that included a request for waiver of the **Section 40(2) VAT Act** requirements was unanswered.

62. However, once more, the parties both submit that the Tax Appeal Board has already made a finding that there was no request for waiver at the time of the May 2020 objection. There is no basis for interference with that finding. The Judicial Review, herein, concerns the decisions of the Defendant and not those of the Tax Appeal Board.

63. The remaining issues for determination concern the Defendant's decision to reject the objection. There is merit on all counts to the challenges made by the Claimant to the said decision.
64. The legislative framework setting the timeframe of 15 days for filing of an objection expressly includes a provision at **Section 86(3) of the Income Tax Act** for the Defendant to consider whether to entertain the delayed filing of an objection. The Defendant, once satisfied with certain factors, can waive the 15-day time limit. The factors are, first, that there was a **reasonable excuse** for not filing the objection within the 15-day timeframe and, second, that the objection was filed thereafter without unreasonable delay.
65. The Claimant correctly submits that there is no evidence that the Defendant considered the first factor in **Section 86(3)** before making a decision not to accept the objection. The rejection letter, issued on 27 May 2020, does not indicate that consideration was given as to whether the excuses given by the Claimant's Managing Director were considered at all and, if so, whether they were found to be unreasonable.
66. As such, the Defendant's decision failed to satisfy or observe conditions or procedures required by law. The decision was also irrational in that it was based on the length of delay *per se* without taking into account the Claimant's reasons for delay, which would be relevant information for such a decision.
67. The decision to reject the Claimant's objection without any evidence of considering the reasons for the delay in filing the objection also breached the Claimant's legitimate expectation that, based on the provisions of the **Income Tax Act**, the excuses would be considered.
68. The Claimant's case that the Defendant's established practice is to issue a notice to objectors upon the filing of an objection advising of the need to pay the

assessed liability in full is supported by evidence. It is also un-refuted by the Claimant.

69. The Claimant has proven there was a legitimate expectation that the established procedure would be followed. Furthermore, the Claimant correctly contends that, as there is evidence in an affidavit filed by the Defendant in other proceedings that the established practice is utilized, there is evident unequal treatment to the Claimant in not affording it the opportunity to receive the notice explaining payment requirements.

70. In circumstances where the Defendant did not consider the Claimant's excuses for delay before rejecting the objection, there was no fair basis for not following established procedure. Even if the Defendant believed that the Claimant did not apply for a waiver at the time of filing of the objection letter, the Defendant has not proven any reasonable basis for not issuing a notice to the Defendant to pay the assessed liability or post a bond. The issuing of such a notice would have provided the Claimant with an opportunity to reduce any likely prejudice from the delayed objection by paying or posting a bond.

H. Conclusion

71. The Claimant's challenge to the Defendant's decision is well-founded. The Defendant has failed to present a viable Defence to the allegations of unfairness, irrationality, unreasonableness, breach of legitimate expectations and inequality of treatment in the decision made to reject the Claimant's objection.

72. IT IS HEREBY ORDERED:

- a. A Declaration that the Defendant's decision to reject the Claimant's objection was irrational as it was made without considering factors prescribed at **Section 86(3) of the Income Tax Act** and without any indication of considering any evidence on which a finding of fact could reasonably be based.

- b. A Declaration that the Defendant, in making the said decision, breached the Claimant's legitimate expectations that the Defendant would:
 - i. Consider the reasons for the late filing of the objection as set out in the affidavit of its Managing Director filed with the objection.
 - ii. Inform the Claimant of its requirement to post a bond or to pay the sum of the liability assessed by the Respondent in full.
- c. An Order of Certiorari quashing the decision to refuse or reject the Claimant's objection letter.
- d. An order of Mandamus that the Defendant duly considers the Claimant's excuses for delay before deciding whether to accept the late filing of the objection and, if the excuse is found to be reasonable, follow its established procedure by notifying the Claimant to satisfy the conditions of **S.40 of the Vat Act, Chapter 75:06**.
- e. The Defendant is to pay the Claimant's costs of the Claim in an amount to be assessed by a Registrar if not agreed.

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Eleanor Joye Donaldson-Honeywell
Judge