REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL No.27 of 2017

EQUITY GROUP HOLDINGS LIMITED ....APPELLANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES ....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant, Equity Group Holdings Limited ("EGHL"), (formerly Equity Bank Limited), is a limited liability company incorporated in Kenya under the Companies Act. The Appellant is duly licensed by the Central Bank of Kenya ("CBK") as a Non-Operating Holding Company under Section 13(1) (e) of the Banking Act (Cap 488) Laws of Kenya.

2. The Respondent is a statutory office created by Section 3 of the Kenya Revenue Authority Act and is empowered by Section 5 of the same Act to assess and collect tax revenue for the government and to administer the various tax laws of Kenya.

3. In January 2013, the Banking Act (Cap 488) Laws of Kenya was amended to recognize non-operating holding companies and banking groups. Pursuant to the said amendments and more specifically Sections 9 and 13 of the Banking Act, and as part of the Appellant's group reorganisation strategy, the Equity Group opted to set up a non-operating holding company.

   Section 9 of the Banking Act states;

(1)No amalgamation or arrangement which involves an institution as one of theprincipal parties to the relevant transaction, and no arrangement for the transfer of all or any part of the assets and liabilities of an institution to another person, shall have legal force except with the prior written approval of the Cabinet Secretary.

(2)The Cabinet Secretary may grant his approval under subsection (1) if—

(a) *he is satisfied that the transaction in question will not be detrimental to the public interest;*

(b) *in the case of an amalgamation, the amalgamation is of institutions only; or*

(c) *in the case of a transfer of assets and liabilities which entails the transfer by the transferor institution of the whole or any part of its business as an institution, such transfer is effected to another institution approved by the Cabinet Secretary for the purpose of the said transfer.*

Section 13 (1)(e) thereof provides;

(1) *No person other than—*

(e) *a non-operating holding company approved by the Central Bank; shall hold, directly or indirectly, or otherwise have a beneficial interest in, more than twenty-five per cent of the share capital of any institution:*

Provided that a non-operating holding company shall obtain prior written approval from the Central Bank before acquiring or holding more than twenty-five per cent of the share capital of an institution.

4. In furtherance of this, the Appellant (then Equity Bank Limited) ("EBL") wrote to the CBK, the Capital Markets Authority ("CMA") and the Competition Authority of Kenya (CAK)seeking approvals on the proposals to undertake an internal restructuring with a view to creating a non-operating holding company, which restructuring transaction would entail; the incorporation by EBL of a wholly-owned Subsidiary company (the Subsidiary) and the transfer of the Kenyan banking business and certain assets and liabilities of EBL to the Subsidiary pursuant to Section 9 of the Banking Act.The Appellant's letters addressed to the said competent authorities are dated 14th November, 2014, 8th October, 2014 and 14th November, 2014 respectively.

5. In addition, on 24thNovember, 2014, EBL held a shareholders' meeting at Kenyatta International Convention Centre when it was resolved and declared that:

   i. Equity Bank (Kenya) Limited ("EBKL"), be incorporated as a wholly-owned subsidiary of the Appellant, and ratified that the EBL be authorised to acquire additional 29,999,900 shares in the share capital of EBKL.

   ii. EBL be authorised to transfer the banking business, assets and liabilities (excluding the excluded assets and liabilities) to EBKL subject to obtaining all required regulatory and tax approvals and/or exemptions in terms acceptable to the Directors.

   iii. The Memorandum and Articles of Association of EBL be amended to read:

a) *"To carry on the business of a non-operating holding company as defined under the Banking Act (Cap. 488, Laws of Kenya)"*

b) *"To co-ordinate the administration of and to provide advisory, administrative, management and other services in connection with the activities of any companies which are for the time being subsidiaries of the Company"*

iv. Subject to Completion of transfer of the banking business, assets and liabilities (excluding the excluded assets and liabilities) from EBL to EBKL, the change of name of the Company from "Equity Bank Limited" to "Equity Group Holdings Limited" be approved and confirmed to take effect from the date of Completion.

6. Accordingly, on 24th November, 2014, EBL and EBKL executed a Business Transfer Agreement (the "Agreement") relating to the banking business of EBL, where EBL agreed to transfer the banking business as a going concern to the EBKL pursuant to section 9 of the Banking Act with the aim to achieve greater operational efficiency for the EBL Group.The completion date was defined in the Definitions and Interpretation clause of the Agreement to ***"mean the effective date of the transfer of the banking business as published by CBK pursuant to section 9(5) of the Banking Act."*** The consideration for the sale of banking business by EBL to EBKL under and pursuant to the Agreement was the Consideration Shares which were to be issued and allotted to EBL on the completion date.

7. The salient conditions precedent to the completion of the transfer of banking business by EBL to EBKL were enumerated under Schedule 2 of the Agreement as:

i. *the approval of the CBK and the Cabinet Secretary of the National Treasury of Kenya of the transfer of the Banking Business to the Transferee (EBKL) in terms of and pursuant to Section 9 of the Banking Act;*

ii. *the approval of EBL as a non-operating holding company by the Central Bank of Kenya in terms of and pursuant to Section 13 of the Banking Act;*

iii. *the issuance of a letter of no objection by the CAK in respect of transactions contemplated under the Agreement;*

iv. *approval of the transactions contemplated under the terms of the Agreement by EBL to the Transferee by the shareholders of EBL in a general meeting;*

v. *approval of the transactions contemplated under the terms of the Agreement by the board of EBL;*

vi. *approval of the transactions contemplated under the terms of this Agreement by the shareholders and the board of the Transferee;*

vii. *if the Completion is to take place after 31st December 2014, an exemption granted by the Cabinet Secretary to the Treasury under the provisions of Section 13(1) of the Eighth Schedule to the Income Tax Act (Cap 470), Laws of Kenya in relation to any payment of Capital Gains Tax.*

8. These conditions were subsequently effectuated between the months of October, 2014 and December, 2014 in the following timelines;

i. EBL obtained approval from CMA to incorporate EBKL on 15th October, 2014;

ii. EBKL, the new subsidiary company was incorporated on 18th November 2014;

iii. The shareholders of the Appellant granted the approval for the Transaction on 24th November, 2014;

iv. The approval by CAK, of the transaction, was received on 28th November 2014;

v. The CBK approvals were as follows;

a) the CBK issued a letter on 29th December 2014, and published a notice in the Kenya *Gazette* on 30th December 2014 (*GazetteNotice No. 9292*of 2014) confirming the issuance of a new banking licence to EBKL, which was effective from 23rd December 2014;

b) the CBK in a letter dated 30th December 2014 approved for EBL to form a non-operating holding company; and

c) the CBK published a notice in the Kenya *Gazette* on 30th December 2014 (*Gazette Notice No. 9294*of 2014) notifying the public of the Restructuring Transaction which in part stated *"..the transfer and acquisition is to take effect on 31st December 2014 at 2359 hours"*

9. Following the completion of the restructuring exercise,the Respondent conducted a review of the Appellant's business re-organization transaction falling within the period 2014 – 2015 and determined that Capital Gains Tax ("CGT") arose from the transaction. The

Respondent subsequently issued a tax demand to the Appellant through its letter dated 10th October 2016 for payment of CGT relating to the transfer of net banking assets from EBL to EBKL amounting to Kshs. 330,858,696/= inclusive of penalties and interest.

10. The Appellant sought to resolve the matter through a meeting with the Respondent held on 2nd November, 2016. The matter was unresolved and on 9thNovember, 2016, the Appellant filed a Notice of Objectionwith the Respondent objecting to the entire assessment of Kshs. 330,858,696/=.

11. The Respondent reviewed the Appellant's objection and adjusted the tax demand to Kshs. 820,406,196/= which was confirmed vide the Respondent's letter dated 9th January 2017 being the Objection Decision. Being aggrieved with the Objection decision, the Appellant filed an Appeal with the Tribunal against the CGT assessment of **Kshs. 820,406,196/=**.

THE APPEAL

12. The grounds upon which the Appeal is premised are that;
    i. That the Objection Decision issued by the Respondent is invalid for the reason that it was not made and communicated within 60 days of a valid objection having been lodged by the Appellant contrary to Section 51(11) of the Tax Procedures Act;
    ii. That the effect of failing to respond to the Objection lodged by the Appellant within 60 days, resulted in the Objection being allowed pursuant to Section 51(11) of the Tax Procedures Act;
    iii. That the Respondent erred both in fact and in law, in failing to find that the Appellant transferred the Banking Net Assets to Equity Bank (Kenya) Limited on 31st December 2014;

iv. That the Respondent erred in finding that the Appellant realized a gain from the transfer of Banking Net Assets to EBKL and that the Appellant is liable to pay Capital Gains Tax;

v. That the Respondent erred by failing to appreciate the distinction between what constitutes a transfer of property under the applicable laws and administrative procedures of effecting payment for the transfer;

vi. That the Respondent failed to appreciate the distinction between post completion procedures of the reorganization transaction and the transfer of assets transaction undertaken by the Appellant;

vii. That the Respondent erred by misreading and misapprehending a clause in the Appellant's annual report on the basis of which it arrived at an absurd conclusion;

viii. That the Respondent erred by failing to take into account all information, documents and explanations provided by the Appellant in order to appreciate the relevant considerations in determining the applicability of Capital Gains Tax to the transaction and thereby arrived at an assessment that had no basis and was otherwise ill-conceived, vexatious, unreasonable, flawed and biased; and

ix. That the Respondent erred in law by failing to fairly and objectively consider the Objection raised by the Appellant and predisposed his mind to a position in favour of a finding that the Appellant owed the amount demanded in the Assessment.

13.The Appellant prayed that this Tribunal allows its appeal and:

i. upholds the Objection filed by the Appellant;

ii. sets aside and annuls the Objection Decision by the Respondent;

iii. orders that the Respondent pays the costs of this Appeal; and

iv. makes such other orders that it may deem appropriate.

14. In reply, the Respondent prayed that its Objection decision be upheld on grounds that;

i. The objection decision was communicated vide its letter dated 9th January 2017 which was delivered and date stamped at the Appellant's offices located at Equity Centre (Upper Hill) and a copy served to Ernest & Young, the tax consultant's offices on 9th January 2017. In the premises, the objection decision was not time barred.

ii. The Transfer of Banking Net Assets by EBL to EBKL did not occur on 31stDecember 2014 as stated by the Appellant but rather took place on 14th January 2015 when the Statement of Nominal capital was duly registered at the Registrar of Companies.

iii. TheAppellant realized a gain in the sale of its banking net assets to EBKL and that since the Transfer of Banking Net Assets by EBL to EBKL was completed on 14th January 2015, the said gain is then subject to CGT under the provisions of section 3(2)(f) of the Income tax Act.

iv. The Respondent's calculation of CGT due on the re-organization transaction was guided by the formulas contained inthe Business Transfer Agreement which prescribed how to calculate the Book value of the Banking Net Assets transferred to EBKL at Completion.

v. Its decision in the matter herein was purely based on the facts and documentary evidence presented by the Appellant during audit and the law and consequently, there was no bias in the decision.

15. The Respondent prays that the Tribunal considers the case and finds that;

i. The Respondent's objection decision of 9th January 2017 meets the provisions of Section 51 of the Tax Procedures Act, 2015.

ii. The Respondent's decision to charge tax amounting to **Kshs. 820,406,196.00** inclusive of interest under Section 38 of the Tax Procedures Act, 2015 is valid.

iii. The Appeal be dismissed with costs.

ISSUES FOR DETERMINATION

16. Each party submitted a list of its own issues to be determined by the Tribunal but the Tribunal after hearing both parties and considering the rival submissions, isolated the following as the issues for determination:

i. Whether the Respondent's Objection Decision dated 9th January 2017 was made within the time prescribed by Section 51(11) of the Tax Procedures Act, 2015 Laws of Kenya.

ii. When was the transfer of Banking Net Assets from EBL to EBKL completed.

iii. Whether the Appellant's reorganization transaction attracted capital gains tax.

THE ARGUMENTS

ISSUE NO. 1 :Whether the Respondent's Objection Decision dated 9th January 2017 was made within the time prescribed by Section 51(11) of the Tax Procedures Act, 2015 Laws of Kenya.

17. The Appellant argued that: -

i. Section 51(11) of the Tax Procedures Act, 2015 ("TPA")required the Respondent to provide the Appellant with an objection decision within 60 days of the Objection having been lodged, failure to which the Appellant's Objection would automatically be allowed. The Appellant reproduced the provisions of Section 51(11) of the TPA as follows:

> *"Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed."*

ii. It was contended by the Appellant that its notice of objection was lodged on 9th November 2016 and therefore the Respondent was required to issue an Objection decision on or before Sunday 8thJanuary, 2017 which was 60 days from the date when the notice of objection was lodged. The Appellant argued that since 8th January 2017 fell on a Sunday, the provisions of Section 77 of the TPA, 2015 were applicable. The Appellant quoted the provisions of Section 77 of the TPA as follows:

> *"if the date for.....taking any other action under a tax law falls on a Saturday, Sunday, or public holiday in Kenya, the due date shall be the previous working day."*

Accordingly, the Appellant was of the view that the due date for communicating the Objection decision was Friday 6th January 2017 and not Monday 9th January 2017. The Appellant contended that the Respondent's attempt to communicate its Objection decision on 9th January 2017 was in complete

disregard to the express provisions of Section 77 and Section 51 (11) of the TPA and therefore the Objection decision was invalid.

iii. The Appellant relied on the finding of the Court in***Ceanest Air – vs- Kenya Shell Limited* (2002) 2 EA 364**, where the Court of Appeal held it was a mandatory requirement for the Respondent to make his Objection decision within 60 days of the notice of objection. That failure to have done so, rendered the impugned objection decision he issued after the said 60 days invalid and of no effect.

iv. The Appellant further relied on the case of ***Republic –vs- Commissioner of Customs Service ex-parte Uniliver Kenya Limited (2012) eKLR***where Honourable W.K. Korir stated that:

> *"My understanding of the above quoted section is that once a taxpayer lodges an application for review, the Commissioner of Customs who is the respondent in this case has 30 days within which to make and communicate a decision to the taxpayer. If the respondent does not communicate a decision within 30 days, then the respondent "shall be deemed to have made a decision to allow the application." The law is so clear that it can only be interpreted in one way..........The implication of the respondent's non communication within the statutory period of 30 days is that the ex-parte applicant did not owe the taxes demanded by the demand notice of 9th February, 2011."*

v. The Appellant submitted that the Respondent's failure to issue the Objection decision within the timelines set by statute is not only inexplicable and irrational but also

contravened the Appellant's rights under Article 47 of the Constitution as read with Section 4(1) of the Fair Administrative Action Act. The Appellant reproduced the provisions of Article 47 (1) of the Constitution which provides that:

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"

vi. The Appellant thus prayed that the Tribunal exercises its discretion in its favour.

18. In response to the Appellant's submission that Section 51(11) of the TPA, 2015 required the Respondent to provide the Appellant with an objection decision within 60 days of the Objection having been lodged and failure to do so, the Appellant's Objection would automatically be allowed, the Respondent implored the Tribunal to adopt a purposive interpretation of the provision and dispense justice in the matter rather than mete out technicalities to dispense of the matter. The Respondent relied on the case of ***Kaaya L. Enterprises Limited vs. Commissioner of Customs & Excise & 3 Others Commercial Suit No. 193 of 2012 (unreported)*** where the High Court held,

"To this Court the interpretation to be given to the provision (Section 42 of the East African Community Customs Management Act, 2004) must be purposive one. It must ask the question why the need to publish the notice demanding removal of the goods. To the Court, the answer is to be found within the provision. It is so that the owner of the goods may remove them lest they be

deemed abandoned and thus subject to sale by public auction.........."

19. Finally, the Respondent submitted that there was no inordinate delay from itself in service of its Objection decision to the Appellant on 9th January 2017 and neither was the same prejudicial. The Respondent invited the Tribunal to consider the decision of the Court in ***Utalii Transport Company Limited & 3 others v Nic Bank Limited & another [2014] eKLR,*** where the Court opined that with regard to inordinate delay that:

    "Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word "inordinate" in its dictionary meaning, but in the sense of excessive as compared to normality."

20. The Respondent called upon the Tribunal to look at the merits in dispute and guided by Article 159 (2) (d) of the Constitution of Kenya 2010, administer justice in the case without undue regard to procedural technicalities.

ISSUE NO. 2: When was the transfer of Banking Net Assets from EBL to EBKL completed.

23. The Appellant submitted that the transfer of Banking Net Assets was completed on 31st December 2014 supported by the following events:

a) the Appellant's subsidiary, EBKL, processed customer transactions as from 0000hrs on 1st January 2015 which could not have been possible had the banking net assets, including customer deposits, banking software and equipment not been transferred to it by the Appellant on 31st December 2014.
b) the financial statements of the Appellant and EBKL as at 31st December 2014, which were audited by the Appellant's tax consultants show that the Banking Net Assets had been transferred by the Appellant to EBKL.
c) through a public announcement published in the newspapers on 1st January 2015, and pursuant to The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations 2002, the Appellant disclosed to the public that it had transferred its banking business, assets and liabilities to EBKL and that the transfer was effected on 31st December 2014 at 2359hrs.
d) the Appellant's license was withdrawn with effect from 1st January 2015 and was prohibited by Section 16 of the Banking Act, Cap 488 from holding customer deposits.

24. The Appellant also submitted that the Respondent erred and misdirected himself in failing to take into account that the allocation of shares issued by EBKL to the Appellant was the consideration paid by EBKL to the Appellant, which is an entirely separate event from the transfer of the Banking Net Assets by the Appellant. To buttress this position, the Appellant relied on the provisions of Sections 19 and 20 of the Sale of Goods Act, Cap 31 which answer the question when property in a sale of goods transaction is transferred. The Appellant reproduced the provisions of Section 19 and 20 of Cap 31.

Section 19 of the Act provides that:

> *"Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred...For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case."*

Section 20 of the Act further provides that:

> *"where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed".*

25. The Appellant further submitted that Section 65 of the Repealed Companies Act (Cap. 486) (which was in effect at the time of the transaction) provides that,

> "*where a company having a share capital...has increased its share capital beyond the registered capital, it shall within 30 days after the passing of the resolution authorizing the increase, give to the registrar notice of the increase, and the Registrar shall record the increase.*"

26. The Appellant was of the view that the notice of increase of share capital merely acts to notify the Registrar and cannot be used for purposes of determining the transfer date as alleged by the Respondent.The Appellant opined that if the intention of the law was that an increase of capital would only take place upon giving of notice

to the Registrar, then nothing would have been easier than for such requirement to be included in the Act.

27. The Respondent on its part argued that the Appellant's business reorganization was completed in January 2015 and not 31st December 2014 as submitted by the Appellant. The Respondent's submissions are as follows: -

a) that according to Section 9(8) of the Banking Act, Cap 488 (*Amalgamations and transfers of assets and liabilities*) the Appellant was required to comply with other provisions of the law as applicable to the reorganization in issue in addition to the provisions of the Banking Act.
b) that according to Section 65 of the Companies Act, Cap 486 (Repealed) (which law was in effect at the time) a company undertaking a transaction resulting in increase in its share capital was required to notify the Registrar of Companies of the said increase.
c) that though the Appellant was able to operate as at 1st January 2015 using the approvals obtained as at 31st December 2014, all laws were equally important and the Appellant still had to comply with the said laws.
d) that out of the documents provided during audit, the Respondent averred that the Appellant provided a statement of increase of Nominal Capital and Special Resolution dated 2nd January 2015, and endorsed by the Registrar on 14th January 2015. This fact was evidence that the whole restructuring process was not completed on 31st December 2014 as claimed by the Appellant but in January 2015.

28. The Respondent submitted that the Business Transfer Agreement dated 24th November 2019 by parties expressed the intention of parties and in effect transferred some assets such as tax recoverable, funds et cetera. However, some assets even though the effective date of transfer is

provided for in the agreement had to undergo separate registration processes at either the office of Registrar of Lands or the Registrar of Companies. That among the assets listed in the Pro Forma Statement at Schedule 6 of the Transfer Agreement are property and equipment (paragraph 15); and investment properties (paragraph 14) which must be transferred on their own account. The transfers concerning these assets were never provided during audit.

29. According to the Respondent, until the transfer of all assets has been completed and all laws complied with, the transaction was not complete. That in so far as the Companies Act is concerned, the Appellant complied with its legal requirements in January 2015 and not 31st December 2014 as alleged.

30. The Respondent observed that this is where the tax point lies and this is the reason why the Respondent stated that the Transaction was subject to CGT.

ISSUE NO. 3: Whether the Appellant's reorganization transaction attracted capital gains tax.

31. The Appellant argues that no gain was realized in the Transfer of the Banking Assets from EBL to EBKL by deducting Total Liabilities including cash from the Net Assets as shown below:

	KES	KES
Consideration paid by EBKL to EGHL		
KES Consideration paid by EBKL to EGHL Shares 29,999,900 @ 1000 (+100 shares issued on incorporation)	30,000,000,000.00	
Share premium	9,732,343,615.00	
Sub-total consideration in form of shares allotted	39,732,343,615.00	
Minimum cash paid to EBKL	6,780,216,500.00	

Additional cash paid to EBKL	1,637,778,640.00	
Total Consideration		**48,150,338,755.00**
Net Banking Assets that EBKL received from EGHL		
Net Banking Assets that EBKL received from EGHL	276,115,727,044.00	
Total Liabilities including cash	- 228,766,383,429.00	
EBKL assumed		**48,150,338,755.00**
Capital gain to EGHL		NIL

32. The Respondent on the other hand, computed the Value of the Assets Transferred by relying on the formula provided for in the Appellant's Business Transfer Agreement as below:

Total Assets to be transferred	276,115,727,044.00
Less: Minimum Cash credited to EBK account in accordance with clause 5.3.4	(6,780,216,500.00)
Less: Additional Cash to be credited to EBK as per Additional Cash Statement	1,637,778,500.00
Less: Liabilities assumed by EBKL	(236,382,383,429.00)
Book Value of Banking Net Assets transferred to EBKL at Completion	**34,590,905,615.00**

ANALYSIS AND FINDINGS

ISSUE NO. 1: Whether the Respondent's Objection Decision dated 9th January 2017 was made within the time prescribed by Section 51(11) of the Tax Procedures Act, 2015 Laws of Kenya.

33. In order for the Tribunal to establish whether the Objection decision by the Respondent is in compliance with Section 51(11) of the TPA,

2015, it is imperative for it to have an appreciation of the specific wording of Section 51(11) of the TPA and its effect on the Respondent's decision issued in the letter of 9th January, 2017.

34. Section 51(11) of the TPA provides that:

> "***(11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.***"

35. The wording of the above section is clear that the Commissioner is to make an objection decision within 60 days from the date that the taxpayer (in this case the Appellant) lodged a notice of objection to a tax demand. It is not in dispute that the Respondent issued its objection decision vide a letter dated 9th January 2017. Indeed, the Appellant avers at paragraph 11 of its Statement of Facts that the Respondent was required by law to make an Objection decision and communicate the same before 9th January 2017, which is within the 60 day period contemplated by Section 51(11) of the TPA, 2015. The issue in dispute as we understand it to be is when was the Objection decision received by the Appellant.

36. The Tribunal has had the benefit of looking at the Respondent's disputed Objection Decision dated 9th January 2017 addressed to the Appellant. The Tribunal notes that while the Respondent's Objection decision is dated 9th January 2017, the Appellant's tax consultants, Ernst & Young LLP, acknowledge receipt of the same on **10th January 2017.** Evidence of this fact is demonstrated by the Appellant's tax consultants stamp appearing on the face of the letter.

37. Section 77 of the TPA, in the relevant part states as follows:

if the date for ....taking any other action under a tax law falls on a Saturday, Sunday, or public holiday in Kenya, the due date shall be the previous working day.

38. The Objection decision was received by the Appellant three (3) days after the statutory period. The 60th day was 8th January, 2017 which fell on a Sunday, the Respondent's Objection decision should have been issued and delivered latest Friday 6th January, 2017.

    What effect then did this have on the Appellant's notice of Objection filed on 9th November 2016?

39. Though the wording in Sections 51(11) and 77 of the TPA are framed in mandatory terms, the Tribunal invokes the provisions of Article 159 of the Constitution of Kenya 2010 in order not to shut out the Respondent on this technical ground and admits the Objection decision.

40. The Tribunal also considers that the Respondent's delay in the circumstances is not inordinately late to conclude that a reasonable man in the shoes of the Appellant would have suffered great prejudice.

41. The fact that it came a short while later is not a serious affront of the Appellant's right to fair administrative action protected by Article 47 of the Constitution of Kenya. The Tribunal concurs with the decision of the Court in ***Utalii Transport Company Limited & 3 others v Nic Bank Limited & another [2014] eKLR, (supra)*** where the Court opined that *inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.* The delay by the Respondent though late is not inordinate and/or inexcusable.

ISSUE NO. 2: ***When was the transfer of Banking Net Assets from EBL to EBKL completed.***

42. The Tribunal has considered the issue of when the transfer of the Banking Net Assets from EBL to EBKL was completed.

43. The Appellant referred to the provisions of Section 19 and 20 of the Sale of Goods Act as the law applicable to the date of transfer of the Banking Net Assets while the Respondent referred to Section 65 of the Companies Act (Cap. 486) (now repealed) as the applicable law.

44. With respect both the Appellant and the Respondent were wrong in reliance on these statutes. Dealings in assets of banking entities as happened in this case are ground under the Banking Act.

45. The Respondent correctly quoted the Banking Act as the law applicable on re-organization and transfer of assets and liabilities but has relied on Section 9(8) thereof.

46. Section 9(1) of the Banking Act (Cap 488) renders any amalgamation or arrangement for transfer of all or any part of assets or liabilities as the case may be of no legal force without the written approval of the Cabinet Secretary. The said section reads as follows:

> Section 9(1): *(1)No amalgamation or arrangement which involves an institution as one of theprincipal parties to the relevant transaction, <u>and no arrangement for the transfer of all or any part of the assets and liabilities of an institution to another person, shall have legal force except with the prior written approval of the Cabinet Secretary</u>.*

47. Neither the Appellant nor Respondent referred to subsection (1) of Section 9 yet this is the part that prescribes when the transfer takes effect or has legal force.

48. So to speak, there can be no transfer of any assets or liabilities between EBL and EBKL without the sanction of the Cabinet Secretary. The date appearing on the written approval of the Cabinet Secretary in that respect will be the date of transfer and none else. As stated hereinbefore, neither the Sale of Goods Act nor the Companies Act (Cap 486) (now repealed) are applicable in determining the date of transfer.

49. Section 9(8) of the Banking Act provides as follows:

> *The Registrar of Companies and the Registrar of Titles, and every officer or person in charge of a deed registry or any other relevant office shall, if in his office or in any register under his control—*
>
> (a) *there is registered any title to property belonging to, or any bond or other right in favour of, or any appointment of or by; or*
>
> (b) *there is registered any share, stock, debenture or other marketable security in favour of; or*
>
> (c) *there has been issued any licence to or in favour of, any amalgamating or transferor institution, and if satisfied—*
>
> > i *that the Cabinet Secretary has approved the amalgamation or transfer pursuant to subsection (1); and*
> >
> > ii *that such amalgamation or transfer has been duly effected, and upon production to him of any relevant deed, bond, share, stock, debenture, certificate, letter of appointment, licence or other document, make such endorsements thereon and effect such alterations in his*

registers as may be necessary to record the transfer of the relevant property, bond or other right, share, stock, debenture, marketable security, letter of appointment or licence and of any rights thereunder to the resulting institution or, as the case may be, to the receiving institution.

50. The provisions of Section 9(8) of the Banking Act relied upon by the Respondent, in the Tribunal's view, only serve to state that the Registrar of Companies being satisfied that the Appellant has been granted the necessary approvals by the Cabinet Secretary in charge of National Treasury is obliged to carry out the endorsement of change of records in the register. The Registrar's role is simply limited to that alone, carry out the endorsement.

51. The Tribunal was not shown any written approval by the Cabinet Secretary if one was issued in order to determine the date of the transfer.

52. In further determining the date of the transfer of the Banking Net Assets, the Respondent correctly pointed out that the Business Transfer Agreement dated 24th November, 2014 at Clause 2.1 provides as follows:

> *"Subject to the terms and conditions of this Agreement, EBL shall as of the Completion Date sell, convey, assign, transfer and deliver to the Transferee and the Transferee shall, with a view to carrying on the Banking Business as going concern, purchase, acquire and accept the right, title and interest of EBL in the Banking Business as at and with effect from the Completion Date taking the benefit of the statutory rights and subject to the statutory rights and subject to the statutory obligations under Section 9 of the Banking Act…"*

53. By dint of this clause, the Appellant bound itself to a completion date which was subject to Section 9 of the Banking Act.

54. After all is said and done, if the Cabinet Secretary did not issue any written approval or a statutory exemption obtained the registration effected on 14th January 2015 would be rendered null and void *ab initio.*

ISSUE NO. 3: Whether the Appellant's reorganization transaction attracted capital gains tax.

55. The Appellant argues that no gain was realized in the Transfer of the Banking Assets from EBL to EBKL by deducting Total Liabilities including cash from the Net Assets as shown on paragraph 48 of their final submissions:

	KES	KES
Consideration paid by EBKL to EGHL		
KES Consideration paid by EBKL to EGHL Shares 29,999,900 @ 1000 (+100 shares issued on incorporation)	30,000,000,000.00	
Share premium	9,732,343,615.00	
Sub-total consideration in form of shares allotted	39,732,343,615.00	
Minimum cash paid to EBKL	6,780,216,500.00	
Additional cash paid to EBKL	1,637,778,640.00	
Total Consideration		**48,150,338,755.00**
Net Banking Assets that EBKL received from EGHL		
Net Banking Assets that EBKL received from EGHL	276,115,727,044.00	
Total Liabilities including cash	- 228,766,383,429.00	
EBKL assumed		**48,150,338,755.00**
Capital gain to EGHL		NIL

56. The Tribunal noted that the above computation carries an arithmetical error in the computation of the Net Banking Assets received from EBL, the net value resulting from the deducting the Net Liabilities from Assets is wrongly stated.

57. The Respondent on the other hand, computed the Value of the Assets Transferred by relying on the formula provided for in the Appellant's Business Transfer Agreement as shown on paragraph 65 – 68 of their submissions as follows:

	KSHS
Total Assets to be transferred	276,115,727,044.00
Less: Minimum Cash credited to EBK account in accordance with clause 5.3.4	(6,780,216,500.00)
Less: Additional Cash to be credited to EBK as per Additional Cash Statement	1,637,778,500.00
Less: Liabilities assumed by EBKL	(236,382,383,429.00)
Book Value of Banking Net Assets transferred to EBKL at Completion	**34,590,905,615.00**

58. The Tribunal noted, as did the Appellant, the above computation contained an error. The additional cash of KES1,637,778,500 has clearly been marked to be "Less" but instead was added.

59. Paragraph 4 of the Eighth Schedule to the Income Tax Act provides for the determination of gains as follows:-

"4. (1) the gain which accrues to a person on the transfer of property is the amount by which the transfer value of the property exceeds the adjusted cost of the property.

60. The parties agree that the transfer value is KES.48,150,338,755.00 given as follows:

	KES	KES
Consideration paid by EBKL to EGHL		
KESKES Consideration paid by EBKL to EGHL Shares 29,999,900 @ 1000 (+100 shares issued on incorporation)	30,000,000,000.00	
Share premium	9,732,343,615.00	
Sub-total consideration in form of shares allotted	39,732,343,615.00	
Minimum cash paid to EBKL	6,780,216,500.00	
Additional cash paid to EBKL	1,637,778,640.00	
Total Consideration		**48,150,338,755.00**

61. However, the parties differ as to the adjusted cost of the property, in this case the Net Banking Assets transferred to EBKL.

62. The dispute arises from whether the amounts payable, Minimum Cash and Additional Cash, are additional Liabilities to the initial Liabilities and if so, what impact does recognizing this Liability have on the Net Banking Assets.

63. The Respondent has attempted to add this Liability by crediting the Liabilities but with no corresponding debit as is normally the case.

64. The Appellant credited the Liabilities and debited the Share Premium.

65. In the view of the Tribunal, an increase in Liability would of necessity result in an increase in Asset having a nil effect.

66. It is therefore not possible that in this transaction, where no 3rd party is involved, that an increase in Liabilities of EBKL would at the same time result in a gain in Net Worth of EBKL, this change would be reflected in shareholders' wealth, in this case the Share Premium account.

DETERMINATION

67. In light of the foregoing, and having made the above findings, it is therefore our judgment that the Appeal is allowed and the Respondent's Capital Gains Tax Assessment amounting to **Kshs. 820,406,196** inclusive of penalties and interest is set aside.

68. The Appellant shall have the costs of the Appeal.

69. Orders accordingly.

DATED and DELIVERED at NAIROBI this 26th day of February 2020

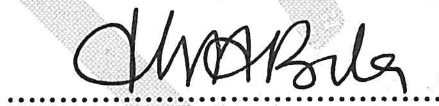
In the presence of:-

Samuel Gehara for Samuel Langat for the Appellant

M/s Diana Almadi for the Respondent

PATRICK LUTTA

CHAIRMAN



HELLEN BILA

MEMBER

ELI NJERU

MEMBER