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Emerging Issues In Tax/Customs Dispute Resolution Process: Kenya's Case Scenario

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Abstract

Kenya Revenue Authority is the sole revenue collection agency for the government with the principle mandate established under its enabling Act, Kenya Revenue Authority Act, No. 2 of 1995. In the discharge of its mandate, the Authority is confronted with various disputes which arise between itself and the large body of taxpayers. These disputes tie in huge amount of revenue which ultimately affect government ability to perform its functions. In this regard, governance of the disputes has become a key focus within the Authority and various reforms have been implemented in recent years. The general approach is to use cost effective, reliable and objective means of disputes resolution. This paper brings out some of these mechanisms to tax/ customs disputes resolution which are intended to have far reaching effects on the management of the disputes.

1.0 Introduction

Tax or customs disputes have been a concern for many countries. In some, a huge backlog of tax or custom cases threaten revenue collection. In this regard, the management of tax or custom disputes in Kenya has been a subject of both internal and external conversations. Until recently when Kenya Revenue Authority (“KRA”, “Authority”) adopted the trust through facilitation approach, taxpayers were concerned of certain processes within the Authority, among them the handling of tax and customs disputes. From the year 2015 to date, many reforms have been adopted aimed at the resolution of disputes in a transparent, efficient and cost effective way. The purpose of this paper therefore is to highlight some of the recent reforms in the tax and customs dispute resolution process within KRA.

1.1 Definition of tax/custom disputes

Black's law dictionary 9th edition defines a dispute as a *contest, conflict or controversy or disagreement concerning a lawful existence of a duty or right or liability by extent or type claimed by the injured party for a breach of such duty or right.*

A tax dispute is not defined under the Kenyan revenue laws. However, in South Africa, the South African Tax Administration Act, 2011 defines a tax dispute as a disagreement or controversy which arises between the taxpayer and the revenue authority relating either to the interpretation of law or the facts or both during the collection of tax.

In the Kenyan context therefore, tax or customs disputes arise from tax or customs decisions or omissions (also known as assessments), as well as appealable decisions. There is a conceptual difference between the two terms.

In the context of the Tax Procedures Act (TPA) a tax decision is defined in section 2 as:

- (a) an assessment under Sections 29, 30 & 31 i.e. default, advance or amended assessment

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- (b) a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;
- (c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under sections 15, 17, and 18;
- (d) a decision on an application by a self-assessment taxpayer under section 31(2);
- (e) a refund decision;
- (f) a decision under section 48 requiring repayment of a refund; or
- (g) a demand for a penalty

Tax decisions thus can arise out of an interpretation of law or facts or a combination of both. For example, interpretation relating to a default, advance or amended assessment under section 29,30 or 31 of the TPA or an interpretation relating to a demand for a penalty, refund decision or any other categories of tax decisions as stated under section 2 of the TPA.

With regards to the East African Community Customs Management Act 2004 (EACCMA), a customs dispute is deemed to have arisen when the taxpayer lodges an application for review of the Commissioner's decision or omission under S. 229 of EACCMA.

In both instances above, and with a tax or customs dispute having arisen, the taxpayer is expected to either object or apply for a review of the Commissioner's decision or omission within thirty days of receipt of the said decision as dictated by section 51(2) of the TPA or section 229(1) of EACCMA. However, a tax or custom dispute at this stage does not crystallize to an appealable decision until such a time as the Commissioner considers the objection and makes the objection/appealable decision within 60 days and 30 days pursuant to section 51(11) of the TPA and section 229 of (EACCMA) respectively. At this point, a person who is dissatisfied with the decision of the Commissioner has the option of appealing against this decision to the Tax Appeals Tribunal (TAT). In the case of TPA, the aggrieved party is expected to give a notice of intention to appeal to the Commissioner within 30 days and thereafter lodge the appeal documents with the TAT within 14 days. In the case of EACCMA, the aggrieved party is expected to lodge an appeal within 45 days of receipt of the decision.

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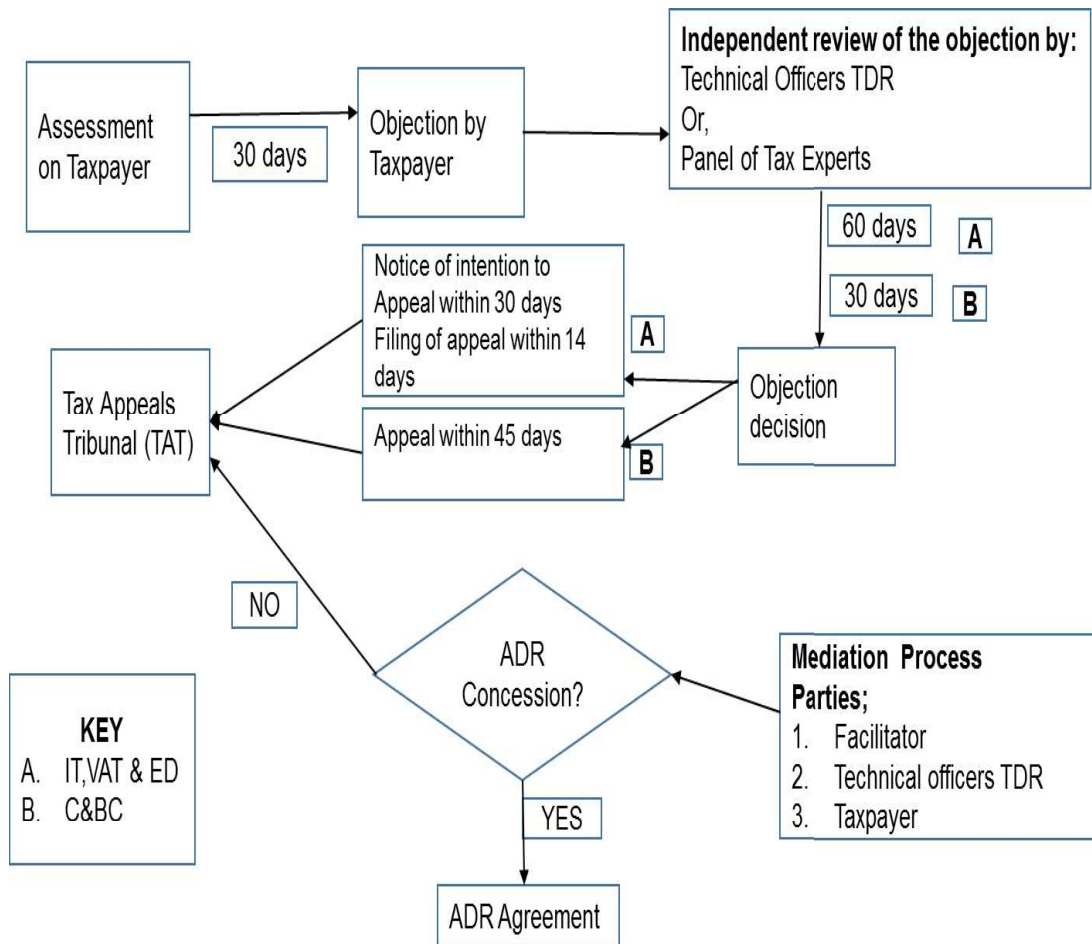
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2.0 Understanding the current framework/ design of tax and custom dispute resolution process

The diagram below provides an overview at a glance of the appeal process within KRA, and the timelines for filing such appeals or objections.



2.1 Dealing with Objections- The Use of Independent Review of Objections Model

There is a paradigm shift in the management of the objection process. Historically, tax or customs disputes post objections were handled by Business Heads of Departments, a process which failed to create the expected level of professionalism, efficiency and transparency as per the recommendations of the International Monetary Fund's (IMF) Tax Administration Diagnostic Assessment Tool (TADAT).

To harmonize, centralize and ensure objectivity in tax and customs dispute resolution processes, the Commissioner General has delegated powers and functions relating to post assessment disputes to the Commissioner responsible for Tax Dispute Resolution thereby separating tax and customs processes up to the assessment issuance level and post assessment dispute resolution processes. This approach is in line with best practice adopted in many other jurisdictions like Australia,

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United Kingdom and Canada. It is also adopted as part of the recommendation of IMF's TADAT. Using this approach, dispute resolution process has undergone further transformation in line with good practice which includes having a simple, transparent, and graduated dispute resolution mechanism comprising the following stages:

i. First stage

Involves the independent review by the tax administration (i.e., reviews are undertaken by designated review officers independent of the audit department). In this regard, the assessor/auditor is not the reviewer of the objection. This ensures that objective decisions are achieved and that the escalation of disputes arising purely from administrative actions are minimized.

ii. Second stage

Entails the review by an independent external specialist tax tribunal, where the taxpayer is dissatisfied with the outcome of an internal administrative review.

iii. Final stage

Involves the review by a higher appellate court to resolve the remaining disputes caused by differences in legal interpretation.

2.2 Using the Alternative Dispute Resolution (ADR) Process

In general terms, ADR has been defined as the use of other procedures, such as arbitration and mediation to settle disputes (*Blacks' s Law Dictionary, 9th Edition*). Used in the context of tax or custom administration, ADR refers to an alternative method of handling disputes outside the judicial or quasi-judicial process. It is thus a mechanism that opens up channels for taxpayers to collaborate with revenue authorities, and to resolve controversies relating to their tax or customs affairs without resorting to litigation.

In Kenya the use of ADR as a means of dispute resolution is viewed from the perspective of the Constitution of Kenya 2010. Article 159 of the Constitution provides that courts and tribunals shall be guided by a number of principles in the exercise of judicial authority. Key among these principles is that alternative forms of dispute resolution including arbitration and mediation shall be promoted and that justice shall be administered without undue regard to procedural technicalities. From a governance perspective, article 10 of the Constitution provides for national values and principles of good governance which binds all persons whenever they apply or interpret the Constitution, the law or public policy decisions. These principles include among others, accountability and transparency and they are imperative considerations when reaching any settlement on tax or customs disputes. The Constitutionalization of ADR is seen as a paradigm shift in the policy of resolution of disputes by use of ADR as opposed to the conventional and formal dispute resolution mechanisms in Kenya.

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Section 28 of the Tax Appeals Tribunal Act (TATA), 2013 provides room for the parties, to apply to the Tribunal, at any stage of the proceedings to be allowed to settle the dispute out of the tribunal on such terms as the tribunal may impose. Section 55 of the TPA also provides for the settlement of disputes out of court or tribunal. Where the court or tribunal permits the parties to settle the disputes as such, the settlement shall be made within 90 days.

Where tax or customs disputes arise and are referred for resolution through the ADR mechanism, it is important for the parties to have proper and effective representation before the ADR facilitator, and that all key facts, arguments, supporting evidence and relevant documentation are put forth in a comprehensive manner. It is imperative to note that the ADR process deals with substantive aspects of tax and customs disputes which is basically questions of fact and not questions of law. Where technical questions of law arise, parties are encouraged to refer these to other appellate bodies for determination.

The use of ADR is a rather flexible process and routinely permits the introduction of additional evidence that the Commissioner would consider pertinent or material to the resolution of the dispute. This is not the case when the dispute is referred to the TAT or the court process. However, there should be timely compliance with laid down procedures and follow up to ensure speedy resolution of the disputes.

Each dispute must be considered, heard and resolved on its own merit, and not as part of an overall 'package'. As such, no precedent is created with reference to the cases even though attempt is made to ensure that consistency and certainty is upheld in the resolution of the disputes.

Conclusion

The tax and customs dispute resolution process has undergone positive reforms in recent years. In these reforms, it is clear that the emphasis is placed on avoiding or managing disputes at the earliest possible stage and resolving as many disputes as possible at the administrative level. This is not only consistent with TADAT's recommendations but also significantly improves Kenya's rating on efficient resolution of tax disputes within KRA.

References

1. The Constitution of Kenya, 2010
2. The Tax Procedure Act, 2015
3. Tax Appeals Tribunal Act, 2013
4. The East African Community Customs Management Act, 2004
5. The Kenya Revenue Authority ADR Framework
6. The Kenya Revenue Authority Tax Dispute Resolution Procedure Manual
7. Bryan A. Garner, Black's Law Dictionary (9th Edition, 2009)

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