

The Alternative Dispute Resolution (ADR) Framework for Tax Dispute Resolution in Kenya

By: Kariuki Muigua*

Background

Since the promulgation of the Constitution of Kenya, 2010 incorporating Article 159 which enjoins the Courts to promote use of Alternative Dispute Resolution (ADR), the application of ADR in resolving disputes in Kenya has gone from general usage as a voluntary private arrangement of parties to incorporate use in resolving specialized disputes as part of administrative and quasi-judicial arrangement by public institution. The best example of the incorporation of ADR as a mechanism of resolving disputes in the administrative structure of a public entity is Kenya Revenue Authority (KRA). In June 2015, KRA developed its pioneering Alternative Dispute Resolution (ADR) Framework to guide stakeholders on using ADR in tax dispute resolution in Kenya.² In June 2020, the National Treasury enacted the Tax Procedures (Settlement of Disputes Out of Court or Tribunal) Regulations, 2020 to buttress the KRA ADR Framework and guide the use of ADR in the settlement of tax disputes out of the Courts or Tax Appeals Tribunal.³

The phrase alternative dispute resolution refers to all dispute resolution mechanisms and processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. It has, however, been argued that the term “alternative dispute resolution” is a misnomer as it may be

* *PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law*

² Rispah Simiyu, “Tax Dispute Resolution Mechanisms in Kenya,” Presentation to Stakeholders by KRA Tax Dispute Resolution Division (TDRD), on 22nd August 2019, Available at: https://www2.deloitte.com/content/dam/Deloitte/ke/Documents/tax/TDR_KRA_Presentation.pdf (accessed on 25/01/2022).

³ Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020, Legal Notice No. 123, Kenya Gazette Supplement No. 114, 9th July 2020, Available at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN123_2020.pdf (accessed on 25/01/2022).

understood to imply that these mechanisms are second-best to litigation which is not true.⁴ Article 33 of the Charter of the United Nations outlines these conflict management mechanisms and is considered the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties whether States or individuals.⁵ It provides that the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

This article discusses the legal framework for use of ADR in tax dispute resolution in Kenya with South Africa as a case study. It starts with a review of the constitutional basis for use of ADR in tax disputes in Kenya and the relevant provisions of the Civil Procedure Code relevant to use of ADR in resolving commercial disputes (including tax disputes) out of Court. The next section explores the methods of resolving tax disputes in Kenya as outlined by the Tax Procedures Act, 2015, the Tax Appeals Tribunal Act, 2013, the Tax Procedures (Settlement of Disputes Out of Court or Tribunal) Regulations, 2020 and the Revised KRA Alternative Dispute Resolution (ADR) Framework. This is followed by a review of the legal framework for Alternative Dispute Resolution of Tax Disputes to serve as a case study for the critique of the Kenyan Tax ADR framework. Finally, the author undertakes a critique of the framework for ADR of tax disputes in Kenya incorporating assessment of the successes, challenges and limitation.

2.0 The Constitution and Alternative Dispute Resolution of Tax Disputes

Alternative Dispute Resolution (ADR) is now recognized in the Kenyan legal framework including under the Constitution which has elevated status of ADR from being merely a convenient private arrangement for resolving disputes between parties to an access to

⁴ P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CI Arb, London, 2002), pp. 50-52.

⁵ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (Chapter VI: Pacific Settlement of Disputes).

justice mechanism with applicability to a wide array of disputes including tax dispute resolution.

2.1 Promotion of Alternative Dispute Resolution

Article 159(2) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted,...”⁶ In essence, article 159 of the Constitution makes promotion of ADR a key principle of exercise of judicial authority in Kenya. In turn, courts and tribunals are called upon to promote the use alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.⁷

Further, the scope for the application of ADR has also been extensively widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These are the key provisions that form the constitutional basis for the application of ADR in dispute resolution in Kenya.⁸ The import of these provisions is that ADR can apply to all disputes and enjoys broad applicability now more than ever. It is also a clear manifestation of the acceptance of ADR as a means of conflict resolution in all disputes.

2.2 Public Finance and No Taxation without Legislation

The principles of public finance under the constitution include “openness and accountability” and the need to “promote an equitable society, and in particular ensure

⁶ Article 159, Constitution of Kenya, 2010.

⁷ Muigua, K., “Alternative Dispute Resolution and Article 159 of the Constitution,” Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf> (accessed on 25/01/2022).

⁸ Article 189, Constitution of Kenya, 2010.

“the burden of taxation shall be shared fairly.”⁹ In turn, the Constitution gives the National Government power to impose taxes and charges which include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax.¹⁰ In addition, parliament may enact laws authorizing the national government to impose any other tax or duty.¹¹ On its part, the county may impose property rates, entertainment taxes and any other tax that is authorize by an Act of Parliament.¹² Important for tax dispute resolution, Article 210(1) of the Constitution on imposition of tax provides that “no tax or licensing fee may be imposed, waived or varied except as provided by legislation.”¹³ This means that any resolution or settlement of tax disputes which has the effect of imposing, waiving or varying taxes must be pursuant to provision of legislation to be valid.

2.3 Fair Administrative Action and Access to Justice

In addition to the provisions of the Constitution on authority and principles of public finance, the right to fair administrative action and access to justice are also relevant to tax dispute resolution given that some aspects of it are administrative in nature such as objection decision and the decision by KRA officials to accept request to refer disputes to ADR or request for settlement out of court or tribunal. In that regard, taxpayers enjoy the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.¹⁴ Given that most of tax administrative decisions affect the right or fundamental freedom of a person including right to property, taxpayers have the right to be given written reasons for the action.¹⁵

⁹ Article 201 (a) and (b), Constitution of Kenya, 2010.

¹⁰ Article 209(1), Constitution of Kenya, 2010.

¹¹ Article 209(1), Constitution of Kenya, 2010.

¹² Article 209(3), Constitution of Kenya, 2010.

¹³ Article 210(1), Constitution of Kenya, 2010.

¹⁴ Article 47(1), Constitution of Kenya, 2010.

¹⁵ Article 47(2), Constitution of Kenya, 2010.

Further, the right to fair administrative action is the basis for review of KRA decisions by Court or impartial tribunal.¹⁶ The question that begs is, can the Court refer for settlement an application for review of administrative action of KRA referred to it by a taxpayer to an ADR Facilitator who is a KRA employee given the requirement of “independent and impartial tribunal”? Further, the State is enjoined to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.¹⁷ This raises the question, whether requiring where taxpayer opts for an Independent ADR facilitator who is not an employee of KRA that they pay for them may be considered an impediment to access to justice. In any case, the Tax Procedures (Settlement Out of Court or Tribunal) Regulations, 2020 have to be considered from the perspective that they are offering an alternative to Court-Annexed Mediation which allows parties access to an Independent Mediator.

3.0 The Civil Procedure Act and Alternative Dispute Resolution of Tax Disputes

There are numerous provisions under the Civil Procedure Act, Cap. 21, Laws of Kenya, on the use of Alternative Dispute Resolution (ADR) in conflict management and are relevant to the resolution of tax disputes. In July 2009, Parliament passed a raft of proposals for amendment to the Civil Procedure Act to introduce ADR. Essentially, these were proposed amendments to sections 1 and 81 of the Civil Procedure Act which have so far been enacted into law.¹⁸ For starters, the amendment introduced section 1A (1) of the Civil Procedure Act which outlined the overriding objective of the Act as to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

The Civil Procedure Act enjoins the Judiciary to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective above. In effect, this implies that the court in its interpretation of laws and issuance of orders will ensure that

¹⁶ Article 47(3), Constitution of Kenya, 2010.

¹⁷ Article 48, Constitution of Kenya, 2010.

¹⁸ Section 1A (1) and section 81 (2) (ff) of Civil Procedure Act, Revised Edition 2010(2008), Government Printer, Nairobi.

the civil procedure shall, as far as possible, not be used to inflict injustice or delay the proceedings and thus minimize the litigation costs for the parties.¹⁹ This provision also serves as a basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective.

Section 14 of the Tax Appeals Tribunal Act, exempts the provisions of Cap. 21. In particular, the Act provides that the provisions of the Civil Procedure Act (Cap. 21) shall not apply to the proceedings of the Tribunal.²⁰ On the other hand, section 32 of the Act clearly states that the High Court shall hear appeals from the Tribunal in accordance with rules set out by the Chief Justice.²¹ However, the Tax Procedures Act does not exempt the Civil Procedure Act and tax appeals to High Court are similar to other Civil Disputes that are referred to High Court and therefore subject to Civil Procedure. Therefore, the provisions of Civil Procedure Act and Civil Procedure Rules on ADR are applicable to tax disputes.

3.1 Court annexed arbitration

Court-annexed arbitration can arise as a result of the application of the Arbitration Act (as Amended in 2009) and also under supervision of the court under the Civil Procedure Act. Under the Civil Procedure Act, the courts involvement in the arbitral process is specifically provided for in Section 59 and Order 46 of the Civil Procedure Rules, 2010. Section 59 of the Act provides for references of issues to arbitration, which references are to be governed in a manner provided for by the rules. Order 46 rule 1 provides that; “Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.”

¹⁹ Section 1A (2) of Civil Procedure Act, op. cit.

²⁰ Tax Appeals Tribunal Act, No. 40 of 2013, Laws of Kenya, Government Printer, Nairobi.

²¹ Section 32, Tax Procedures Act, No. 29 of 25, Laws of Kenya, Government Printer, Nairobi.

Under Order 46 Rule 2, the arbitrator is to be appointed in a manner that the parties have agreed upon. However, where no arbitrator or umpire (under rule 4) has been appointed the court under rule 5 may, on application by the party who gave the notice to the other to appoint, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration and in such case the court shall proceed with the suit. Where an award has been made pursuant to arbitration under the Rules, rule 10 requires that that the persons who made it shall sign it, date it and cause it to be filed in court within 14 days together with any depositions and documents which have been taken and proved before them.

A court has the power to modify or correct an award under rule 14 if it is imperfect or contains an obvious error, if a part of the award is upon a matter not referred to arbitration or if it contains a clerical mistake or error from an accidental slip or omission. The court also has power to remit an award for reconsideration by the arbitrator under rule 15. Rule 18 provides that the court shall, upon due notice to the other parties, enter judgment according to the award and upon such that judgment a decree shall follow thereof. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

Order 46 Rule 20 of the Civil Procedure Rules provides that; “Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.” Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. Under Order 46 rule 20 (2) it is provided that a court may adopt any ADR mechanism for the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be adeptly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the

particular mechanism and that will lead to the attainment of the overriding objective under sections 1A and 1B of the Act.

3.2 Mediation and other ADR Mechanisms

The clamor to introduce court-annexed mediation led to the enactment of section 81 (2) (ff) of the Civil Procedure Act, as amended by the Statute Law (Miscellaneous Amendment) Act.²² Section 81 (2) (ff) provides for the selection of mediators and the hearing of matters referred to mediation under the Act. Parties who have presented their cases to court now are able to have their matter referred to mediation by the court for resolution.

The Statute Law (Miscellaneous Amendments) Act amended sections 2 and 59 of the Civil Procedure Act to provide for mediation of disputes. Section 2 of the Civil Procedure Act has been amended to define mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings.²³ Section 59 of the Civil Procedure Act has also been amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process. This includes the establishment of a Mediation Accreditation Committee appointed by the Chief Justice to determine and apply the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.²⁴

The law now requires the court either at the request of the parties, where it deems appropriate to do so or where the law provides so, to refer a dispute presented before it to mediation. Where a dispute is referred to mediation, the parties are enjoined to select for that purpose a mediator whose name appears in the mediation register maintained

²² No. 6 of 2009, Government Printer, Nairobi, 2012, whose date of commencement is 12th July 2012.

²³ Section 2 of the Civil Procedure Act.

²⁴ Section 59A of the Civil Procedure Act.

by the Mediation Accreditation Committee. Such reference should, however, be conducted in accordance with the mediation rules. Section 59B (4) provides that an agreement between the parties to a dispute as a result of mediation be recorded in writing and registered with the court and is enforceable as if it were a judgment of that court. No appeal lies against such agreement.

Under Section 59C, a suit may be referred to any other method of dispute resolution where the parties agree or where the court considers the case suitable for referral. Under Section 59C (2), any such other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order. Any settlement arising from a suit referred to any such other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court and no appeal shall lie in respect of such judgment. Further, all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court. Pursuant to Order 46 rule 20 (3) it is only after a court-mandated mediation fails that the court shall set the matter down for hearing and determination.

Clearly, these provisions of the Civil Procedure Act are not, in my view, really introducing mediation per se, but merely setting up a legal process where a court can coerce parties to mediate and the outcome of the mediation taken back to court for ratification. These amendments have introduced a mediation process which is formal and annexed to the procedures governing the conduct of cases in the High Court. Informal mediation which may not require the use of writing is not provided for. Hence, it can be said that the codification of mediation rules in the Civil Procedure Act merely reflect the concept of mediation as viewed from the Western perspective and not in the traditional, political and informal perspective where it could lead to a resolution of the conflict.

4.0 The Methods of Tax Dispute Resolution in Kenya

The tax law in Kenya envisages four approaches and levels of resolving tax disputes, namely, the administrative decision, quasi-judicial process involving Tax Appeals Tribunal (TAT), formal judicial process involving High Court as court of first instance or appeal from the Tribunal and appeal to Court of Appeal and alternative dispute resolution on agreement of parties at administrative level or as an out of tribunal/court dispute settlement procedure. The relevant laws are the Tax Procedures Act,²⁵ Tax Appeals Tribunal Act²⁶ and the relevant Tax Laws in Kenya. Parties can opt for Alternative Dispute Resolution of tax disputes at any level of the dispute under KRA Alternative Dispute Resolution (ADR) Framework.²⁷

4.1 Tax Objection and Objection Decision

The Tax Procedures Act requires that a taxpayer who wishes to dispute a tax decision at first instance lodges an objection with Commissioner against the tax decision within 30 days of notification under section 51 before proceeding to take any steps envisaged under any other written law. Any such notice of objection must state the precise grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments. Further, the tax payer must confirm payment of the entire amount of tax due under the assessment that is not in dispute. If the Commissioner concludes that these conditions have not been met, she is to immediately notify the taxpayer in writing that the objection has not been validly lodged. The Commissioner has sixty (60) days to make an objection decision from the date the taxpayer lodged the notice of the objection failing which the objection is considered to be allowed.²⁸

The taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection. The Commissioner has discretion to allow an application for the

²⁵ Tax Procedures Act, Act, No. 29 of 2015, Laws of Kenya, Government Printer, Nairobi.

²⁶ Tax Appeals Tribunal Act, Act No. 40 of the 2013, Laws of Kenya, Government Printer, Nairobi.

²⁷ KRA Tax Dispute Resolution Division, KRA Alternative Dispute Resolution (ADR) Framework, Revised on 27th June 2019, available at: <https://kra.go.ke/images/publications/ADR-FRAMEWORK.pdf> (accessed on 25/01/2022).

²⁸ Section 51 of the Tax Procedures Act, 2015.

extension of time to file a notice of objection if the taxpayer was prevented from lodging the notice of objection within the prescribed period because of an absence from Kenya, sickness or other reasonable cause and the taxpayer did not unreasonably delay in lodging the notice of objection. Once a notice of objection has been validly lodged within time, the Commissioner is bound to consider the objection and decide either to allow the objection in whole or in part, or disallow it. The Commissioner's decision is referred to as an "objection decision" and includes a statement of findings on the material facts and the reasons for the decision. In any case, the Commissioner is required to notify in writing the taxpayer of the objection decision and take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.²⁹

4.2 Appeal to the Tax Appeals Tribunal

Section 52 of the Tax Procedures Act gives a person who is dissatisfied with an appealable decision the discretion to appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013. As per the Tax Appeals Tribunal Act, whether or not a decision is appealable to the tax tribunal depends on the relevant tax law on case to case basis. In turn, a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may upon giving notice in writing to the Commissioner, appeal to the Tribunal.³⁰ However, a notice of appeal to the Tribunal relating to an assessment is only valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice. Further, the person appealing is required to pay a non-refundable fee of twenty thousand shillings to the tribunal.³¹

As a matter of fact, while the proceedings of the Tribunal are of a judicial nature, the Civil Procedure rules have been specifically excluded. The provisions of the Civil Procedure

²⁹ Section 51 of the Tax Procedures Act, 2015.

³⁰ Section 12 of the Tax Appeals Tribunal Act, 2013.

³¹ Proviso to Section 12 of the Tax Appeals Tribunal Act, 2013.

Act (Cap. 21) are expressly excluded from application to the proceedings of the Tribunal meaning aspects such as Court-Annexed Mediation are not allowable.³² However, the Act allows parties to an appeal before the Tribunal to apply, in writing, to the Tribunal to settle the dispute out of the Tribunal.³³ In such a case, the time taken to resolve or conclude the settlement out of the Tribunal is to be excluded when calculating the period contemplated for resolution of Appeals under the Act. In particular, the Tribunal is bound to hear and determine an appeal within ninety days from the date the appeal is filed with the Tribunal.³⁴

4.3 Appeal to the High Court

If a party to proceedings before the Tribunal is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, they are entitled within thirty days of being notified of the decision or within such further period as the High Court may allow, to appeal the decision to the High Court³⁵ in accordance with the provisions of the Tax Appeals Tribunal Act, 2013.³⁶ The High Court is to hear such appeals in accordance with rules to be issued by the Chief Justice.

Essentially, appeal to the High Court marks the formal start of tax litigation in Kenya and tax cases usually take three forms, namely, appeals from decisions of the Tax Appeals Tribunal (TAT), judicial review cases challenging abuse of process or other administrative excesses by the Kenya Revenue Authority (KRA) and constitution petitions by aggrieved tax payer(s) alleging infringement of constitutional rights.³⁷ In an appeal by a taxpayer to the Tribunal, High Court (or Court of Appeal) in relation to an appealable decision, the taxpayer is only permitted to rely on the grounds stated in the

³² Section 14 of the Tax Appeals Tribunal Act, 2013.

³³ Section 13(8) of the Tax Appeals Tribunal Act.

³⁴ Section 13(7) of the Tax Appeals Tribunal Act.

³⁵ Section 53 of the Tax Procedures Act, 2015.

³⁶ Section 32 of the Tax Appeals Tribunal Act.

³⁷ Taxbaddy, Tax Litigation in Kenya, Available at: https://www.taxbaddy.com/applications/academy/litigation/litigation_intro_ke.php (accessed on 25/01/2022).

objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.³⁸

4.4 Appeals to Court of Appeal

In event any party to tax litigation proceedings before the High Court is dissatisfied with the decision of the High Court in relation to an appealable decision, they may in thirty (30) days of being notified of the decision or within such further period as the Court of Appeal may allow, appeal the decision to the Court of Appeal.³⁹ Both KRA and tax payers have resorted to appeals to Court of Appeal to challenge several decisions of the High Court. The Tax Procedures Act is clear that any appeal to the decision of the Tax Tribunal to the High Court or to decision of the High Court to the Court of Appeal shall be on a question of law only.⁴⁰

5.0 Alternative Dispute Resolution of Tax Disputes out of Court or Tribunal

The law provides that where a Court or the Tribunal permits the parties to settle a dispute out of Court or the Tribunal, as the case may be, the parties are to make the settlement within ninety days from the date the Court or the Tribunal permits the settlement. In that regard, if the parties fail to settle the dispute within that period, the dispute is to be referred back to the Court or the Tribunal that permitted the settlement. This provision of the Tax Procedures Act in allowing for settlement of tax disputes vide Alternative Dispute Resolution along with Article 159 of the Constitution are the basis for use of ADR in tax disputes resolution in Kenya.⁴¹ The provision is activated by the Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020 and KRA Alternative Dispute Resolution (ADR) Framework both of which provide the procedures for parties to refer disputes to Alternative Dispute Resolution before or in lieu of referring them to the Tribunal or appealing to the Court and for settlement out of court or tribunal.

³⁸ Section 56(3) of the Tax Procedure Act, 2015.

³⁹ Section 54 of the Tax Procedures Act, 2015.

⁴⁰ Section 56(2) of the Tax Procedures Act, 2015.

⁴¹ Section 55 of the Tax Procedure Act, 2015.

5.1 Settlement of Tax Disputes Out of Court or Tribunal Regulations, 2020

The Cabinet Secretary for the National Treasury and Planning on 17th June 2020, pursuant to section 112 of Tax Procedures Act, 2015 (the Act), enacted The Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020 (which were gazetted on 9th July 2020) to make provision for Alternative Dispute Resolution after tax appeal has been lodged either with the Tax Appeals Tribunal (TAT) or Court of Law whether High Court or Court of Appeal.⁴² The regulations apply where a tax dispute has been permitted to be settled out of court or tribunal in accordance with section 55 of the Act and section 28 of the Tax Appeals Tribunal providing for out of Court and out of Tribunal settlement.

The regulations provide that a party to a tax dispute may apply to the court or tribunal to settle the tax dispute out of court or tribunal as the case may be. However, the parties to a tax dispute have to agree voluntarily to settle the dispute out of court or tribunal and the party seeking to settle the dispute out of court or tribunal has to obtain the consent of the other party as proof before applying to the court or tribunal. In any case, the parties must be committed to the settlement process.⁴³ Even where parties agree, there are tax disputes that cannot be settled out of court or tribunal. These include disputes whose settlement would be contrary to the Constitution, the tax law or any other written law; tax dispute involving the interpretation of the law or where there is evidence that the taxpayer has committed fraud in relation to tax.⁴⁴

Further, if the parties to the tax dispute have previously fail to settle the dispute out of court or tribunal, the matter cannot be referred to out of court settlement again.⁴⁵ In essence, this provision appears to limit the discretion of the Court or Tribunal to allow

⁴² Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020, Legal Notice No. 123, Kenya Gazette Supplement No. 114, 9th July 2020, Available at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2020/LN123_2020.pdf (accessed on 25/01/2022).

⁴³ Regulation 3, Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁴⁴ Regulation 4, Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁴⁵ Ibid.

referral of disputes that had previously failed to reach settlement under ADR process. This is key given that the parties to a tax dispute are required to conclude the settlement process within ninety days from the date the court or tribunal grants permission to settle the dispute out of court or tribunal as stipulated under the Tax Procedures Act.⁴⁶ Thus, if the parties do not reach a settlement agreement within the stipulated 90 days, the tax dispute shall be referred back to the court or tribunal and it is not possible for parties to agree to extend the time for settlement except with the permission of the court or the tribunal to extend the time.⁴⁷

Once the court or tribunal has permitted the parties to a tax dispute to settle the dispute out of court or tribunal, a facilitator is to be nominated, with the consent of the other party to the dispute. In this regard, the Commissioner may recommend a facilitator from amongst the staff of the Authority or the taxpayer may propose one from a list of mediators accredited by an institution recognized in Kenya.⁴⁸ Clearly, this means a taxpayer is not bound to choose a Court Accredited Mediator as is the case in the Court Mandated Mediation. The nomination of a facilitator has to be done within fourteen days after the court or tribunal has granted the parties to a tax dispute permission to settle the dispute. The facilitator is to be notified in writing of the nomination by the Commissioner.⁴⁹

In the interest of impartiality and neutrality, a facilitator must not have been involved in any way in the matter which is the subject to the tax dispute or be a practicing tax agent or represent or have represented the taxpayer in any matter or have any interest in the tax dispute.⁵⁰ Further, the facilitator has to disclose in writing to the parties to the tax dispute any conflict of interest which may arise before the commencement of the proceedings for the settlement of the tax dispute or which may arise during the

⁴⁶ Section 55 of the Tax Procedures Act, 2015.

⁴⁷ Regulation 3(5), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁴⁸ Regulation 5(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁴⁹ Ibid.

⁵⁰ Regulation 5(5), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

proceedings.⁵¹ In that regard, upon the disclosure of a conflict of interest by a facilitator, the facilitator is required to immediately recuse himself or herself from dealing with the tax dispute and another facilitator shall be nominated.⁵² This is needlessly too stringent and may lead to undue delays in settlement of tax disputes. The best option would have been to allow both parties to decide whether to continue with the facilitator or press for recusal.

In facilitating the resolution of a tax dispute, the Facilitator is bound to hold such number of meetings as may be appropriate, guide the parties to the tax dispute in the settlement of the dispute, promote and protect the integrity, confidentiality, fairness and efficiency of the process; act independently and avoid circumstances that may result in a conflict of interest; and employ the procedures necessary for the expeditious resolution of the dispute.⁵³ At the same time, the facilitator has to convene the first meeting between the parties to the tax dispute within fourteen days of being notified of nomination.⁵⁴ At the first meeting, the parties identify the issues for settlement; agree on a schedule of meetings; decide on the service of documentary material relevant to the tax dispute; agree on the conduct of the meetings; and agree on any other issues necessary to facilitate the settlement of the tax dispute.⁵⁵

Once the settlement meetings commence, the parties to the tax dispute or the parties' appointed representatives are forbidden from communicating with the facilitator in the absence of the other party and any communication with the facilitator shall only be in relation to the tax dispute.⁵⁶ During meetings convened by the facilitator, the parties or their appointed representatives are required to maintain confidentiality and uphold decorum; uphold integrity and fairness; make full disclosure of material facts and

⁵¹ Regulation 5(7), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁵² Regulation 5(8), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁵³ Regulation 5(6), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁵⁴ Regulation 5(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁵⁵ Regulation 6(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁵⁶ Regulation 6(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

documents relevant to the tax dispute; and strictly adhere to the agreed timelines.⁵⁷ If a party to a tax dispute is unable to meet any timelines agreed upon at a meeting convened by the facilitator, that party has to notify the facilitator and the other party in writing of the inability and specify the reasons for the inability.⁵⁸ In event of failure by a party or their representative without justifiable cause to attend a meeting convened by the facilitator, the facilitator may appoint another date for the meeting or terminate the process.⁵⁹

The regulations provide for the reasons for termination of settlement proceedings which include where a party to the tax dispute opts to terminate the proceedings and notifies the other party, the court or tribunal in writing of the intention to terminate the proceedings or where both parties to the tax dispute mutually agree to terminate the proceedings and notify the court or tribunal in writing. Further, the settlement proceedings may terminate where a party fails to attend three consecutive meetings convened by the facilitator without any justifiable cause or where the ninety days' timeline required to resolve the dispute has lapsed and an extension of time by the court or the tribunal has not been granted.⁶⁰ Upon the termination of settlement proceedings, the facilitator is to send a notice of termination in writing to the parties and the matter stands referred back to the court or the tribunal.⁶¹

The settlement agreement constitutes the decision between the parties and has to be dated and signed by the parties or their appointed representatives and witnessed by the facilitator. It forms the basis for preparation of tax a dispute resolution consent for filing before the court or tribunal and is binding to both parties.⁶² Such agreement is considered to be the full and final settlement of the dispute save where the parties have expressly

⁵⁷ Regulation 6(3), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁵⁸ Regulation 6(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁵⁹ Regulation 6(5), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁶⁰ Regulation 7(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁶¹ Regulation 7(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁶² Regulation 8(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

specified otherwise in the Agreement. The agreement is also confidential and entered into on a “without prejudice” basis and does not form the basis for judicial precedent.⁶³ If the parties fail to reach a settlement agreement, the tax dispute shall be referred back to the court or tribunal, as the case may be, for determination.⁶⁴

In case a tax dispute is settled wholly or partially a consent agreement between the parties to a tax dispute setting down the terms of the settlement agreement shall be filed with the court or tribunal, as the case may be.⁶⁵ Such consent agreement between parties to a tax dispute shall be recorded by the court or tribunal as an order of the court or tribunal.⁶⁶ Where a party to a tax dispute violates the terms of a settlement agreement between the parties, the other party may apply to the court or the tribunal for enforcement of the agreement.⁶⁷ Each party is to bear its own costs for the settlement of the tax dispute out of court or the tribunal and pay any expert witness they call.⁶⁸ Where a taxpayer nominated a facilitator, they shall bear any cost that may be payable to the facilitator.⁶⁹ The Commissioner provides a venue for the meetings but where the other party prefers a different venue, that party shall bear the costs of that different venue.⁷⁰

5.2 KRA Alternative Dispute Resolution (ADR) Framework

The KRA Alternative Dispute Resolution (ADR) Framework “for the general guidance of the Stakeholders who wish to engage in Alternative Dispute Resolution (ADR) to resolve their tax disputes.”⁷¹ In essence, this means that the ADR Framework is not binding on the parties except until the parties agree to refer to their dispute to ADR. Even then, the ADR Framework serves as a guidance allowing the ADR Facilitator the discretion to do

⁶³ Regulation 8(3), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁶⁴ Regulation 8(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁶⁵ Regulation 9(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁶⁶ Regulation 9(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁶⁷ Regulation 10, Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁶⁸ Regulation 11(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁶⁹ Regulation 11(3), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁷⁰ Regulation 11(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

⁷¹ KRA Tax Dispute Resolution Division, “Alternative Dispute Resolution (ADR) Framework,” p. 3, Available at: <https://kra.go.ke/images/publications/adr-framework.pdf> (Accessed on 25/01/2022).

what is necessary to resolve the dispute. Indeed, KRA has attempted to Tax Procedures (Alternative Dispute Resolution) Regulations 2019 which have been described as seeking to “to anchor the existing ADR Framework in law” and to govern the alternative tax dispute resolution (ADR) process.⁷² Eventually, the Cabinet Secretary for National Treasury on 17th June 2020 enacted the revised regulations as Tax Procedures (Settlement of Tax Disputes out of Court or Tribunal) Regulations, 2020 which appear to be limited to settlement of tax disputes already instituted in court or tribunal.

The KRA ADR Framework was launched in June 2015 and revised in June 2019 to provide an internal process for KRA to amicably resolve and settle tax disputes outside the judicial process. The ADR Framework aimed at complementing the judicial and quasi-judicial mechanisms for resolving tax disputes in the tax laws “by introducing ADR as an additional and/or alternative means of resolving tax disputes.”⁷³ The ADR framework has in the first five (5) years of its existence provided a useful “reference point for the alternative tax dispute resolution process.”⁷⁴ Importantly, the ADR Framework helped to achieve alternative dispute resolution of tax disputes as envisaged and proposed under Article 159 (2) (c) of the Constitution of Kenya, 2010, section 28 of the Tax Appeals Tribunal Act, 2013 and section 55 of the Tax Procedures Act, 2015.

However, with the enactment of the Tax Procedures (Settlement of Tax Disputes out of Court or Tribunal) Regulations, 2020, the place of the KRA ADR Framework is now exclusively guiding alternative dispute resolution (ADR) under the KRA Internal Dispute Resolution Mechanism (IDRM) before or in lieu of referral to the tribunal or the court. The Framework acknowledges that it seeks to provide flexibility and eliminate “the limitations imposed by judicial and quasi-judicial processes and the complexity of technical procedures and high costs of litigation.” The ADR envisaged under the

⁷² Ngummy, D. and Mwaniki, W., Settling Tax Disputes: A Closer Look at the Draft Tax Procedures (Alternative Dispute Resolution) Regulations, 2019, Anjarwalla & Khanna Legal Alert, Available at: <https://www.africalegalnetwork.com/kenya/news/settling-tax-disputes/> (Accessed on 25/01/2022).

⁷³ KRA ADR Framework, p. 7.

⁷⁴ Ngummy and Mwaniki, *Ibid.*

framework is a voluntary, participatory and facilitated discussion of a tax dispute between a tax payer and the commissioner.⁷⁵

Further, the KRA ADR Framework clarifies that it is in the form of facilitated mediation and not arbitration as envisaged by the Arbitration Act (Cap 49 of Laws of Kenya). This is because the Facilitator of the ADR has no power to impose any decision regarding the outcome of the tax dispute. Under the Framework, “the parties are facilitated to find a solution to the dispute.”⁷⁶ This form of ADR is favoured over litigation because it gives parties autonomy to achieve settlement of their tax disputes on their terms. The approach taken in the Framework has benefited from benchmarking against the experiences of many Tax Dispute Resolution Frameworks from the World.⁷⁷

According to KRA, ADR is preferable for resolving tax disputes in that it shifts focus from enforcement to trust and facilitation, avoids inordinate delays before conclusion of cases before courts and tribunals, is cost-effective and confidential especially where tax litigation has the possibility of having adverse impact on the business relations of the tax payer or may attract negative publicity for KRA. In addition, ADR is without prejudice in that if it does not succeed the discussions under its framework cannot be used against any party without express agreement. ADR also helps to preserve relationships between KRA and tax payers and also ensures higher compliance levels as parties are more likely to abide by the negotiated outcome. It also removes the specter of uncertainty associated with tax litigation over the outcome of a tax case for both KRA & the taxpayer. Alternative Dispute Resolution (ADR) of tax disputes is also encouraged in compliance with the constitution principle promoting negotiated settlement of appropriate disputes.⁷⁸

The ADR Framework expressly states that it does not negate the legal right of either party to appeal to the Tax Appeals Tribunal or the Court of Law. Thus, an aggrieved party must

⁷⁵ KRA ADR Framework, p. 7.

⁷⁶ KRA ADR Framework, p. 7.

⁷⁷ KRA ADR Framework, p. 7.

⁷⁸ KRA, “Why Alternative Dispute Resolution?” Available at: <https://kra.go.ke/en/individual/alt-dispute-resolution-adr/learn-about-adr/benefits-of-adr> (accessed on 25/01/2022).

file appeal within the time stipulated under the law under the tax Procedures Act. This creates a dilemma in that while parties are pursuing ADR under the framework, the time is ticking and the party has a duty to comply with the stipulated timelines for filing appeal. The end result most tax payers would rather file their Tax Appeal and then seek out of court or tribunal settlement that take the risk of pursuing ADR within the framework even as the clock ticks against them.

The Commissioner is entitled to give taxpayer opportunity to engage ADR before issuing objection decision in case of a decision to amend assessment partially or decline to amend an assessment. In that regard, the timelines of the ADR are restricted to the time remaining in the time imposed by the Tax Procedures Act (of 60 days for Commissioner to make Objection Decision) and 30 days for Commissioner to make a review decision under the East African Community Customs Management Act (EACCMA) 2004.

The parties may engage a tax agent or legal advisor to assist in the implementation of the framework. On the other hand, an ADR Facilitator provides guidance to the discussion and need not be an expert in tax or law. They convene and chair the ADR meetings, attest the signing of ADR agreements and generally guide the parties towards arriving at amicable agreement. ADR Facilitators although they are usually KRA employees are expected to maintain independence and must not have been involved in the tax audit or investigation. In event of conflict of interest, they are expected to make full disclosure and parties may request appointment of a new facilitator where necessary in such event.⁷⁹

The facilitators are bound to keep the process as simple and flexible as possible and as far as possible make it easy for each party to participate freely in the ADR discussions and adhere to the timelines. At the same time, they must remain neutral and maintain confidentiality of the process.⁸⁰ The duty of the Facilitators is to seek fair, equitable and legal resolution of the tax dispute, promote and protect integrity, fairness and efficiency

⁷⁹ KRA ADR Framework, p. 12.

⁸⁰ KRA ADR Framework, p. 13.

of the process. Facilitators must also act independently, impartially and avoid conflict of interest and bring the dispute to expeditious resolution.⁸¹

In addition, the ADR Framework addresses issues of procedure during discussions. In this regard, it provides for adjournments, documentation of the dispute in ADR, management and procedure of ADR sittings, termination of ADR discussions and the signing of ADR Agreement and the prerequisites for validity of such agreement. The Framework also provides for reservation of rights by providing that discussions be held on without prejudice basis. Finally, the ADR Framework lays down the suitability test of tax disputes for ADR which limits the scope of the disputes that may be referred to the process to purely factual disputes.

6.0 Alternative Dispute Resolution (ADR) of Tax Disputes in South Africa

The South Africa Revenue Service (SARS) has established an Internal Administrative Appeal (IAA) mechanism which allows anyone does not agree with the decision of tax officer and has approached the officer's immediate supervisor to clarify the decision in question and resolve any uncertainties but the matter remains unresolved to institute a formal internal administrative appeal. In such cases, the client(s) not satisfied with any decision taken by officers in terms of the relevant tax law, have a right to appeal that decision to the relevant appeal committee. Once the appeal is lodged in the prescribed form to the office that communicated the decision. The Appeal has to be made within thirty (30) days from the date the client became aware of the decision or received reasons for the decision. An extension of twenty (20) days may be granted, if such extension is applied before the expiry of the 30-days period but if that is exceeded, the IAA process cannot be followed and the applicant's only recourse will then lie in litigation.⁸²

⁸¹ KRA ADR Framework, p. 13.

⁸² South Africa Revenue Service (SARS), "What is Internal Administrative Appeal and How does it Work?", Available at: <https://www.sars.gov.za/customs-and-excise/offences-penalties-and-disputes/appeals/> (accessed on 25/01/2022).

In the event of successful appeal, the Appeal Committee has to provide a decision and reasons for the decision in writing within forty-five (45) days from the date of acknowledgement of receipt of the Appeal. If the taxpayer is unhappy with the decision of any appeal committee, their recourse is to lodge an application for Alternative Dispute Resolution (ADR) with that relevant appeal committee which made the decision. In that case, the committee will add its comments thereto and forward the application to the ADR Unit for attention. The ADR process is used as recourse against the final decision made under the IAA process and may be initiated by either the aggrieved person or SARS but the final decision on whether a matter is suitable for ADR vests with SARS.

To apply for ADR, a properly completed prescribed form together with the relevant supporting documents, must be submitted to the chairperson of the appeal committee who informed the client of the decision within 30 days of the date of the letter. The Commissioner may agree to extend the period for submission of the application for ADR. The Commissioner is required within 20 days to decide and inform the applicant whether the matter is appropriate for ADR or not and that it may be resolved by way of the procedures contemplated in the rules. The SAR Alternative Dispute Resolution (ADR) External Policy provides the standard approach to be followed by stakeholders when a dispute is referred to Alternative Dispute Resolution (ADR), as provided for in Section 77I of the Customs and Excise Act (Act No. 91 of 1964).⁸³

ADR can also be used as an alternative to judicial tax proceedings in South Africa. In that regard, the Commissioner must within ten days after receipt of a notice in terms of Section 96(1) of the Act inform the person delivering such notice that he is of the opinion that the matter is appropriate for ADR. Within ten days after the date of the above notice by the Commissioner such person must deliver a duly completed prescribed form for Application for ADR to the Commissioner should he or she agree to the ADR process. If

⁸³ SARS, "Dispute Resolution," Available at: https://www.sars.gov.za/customs-and-excise/offences-penalties-and-disputes/dispute-resolution/#elementor-toc__heading-anchor-1 (accessed on 25/01/2022).

the party does not complete the application for ADR within ten days after the date of the notice by the Commissioner, the matter may not be dealt with through ADR.⁸⁴

The ADR must be concluded within 90 days, or such further period as SARS may agree to. The period within which the ADR proceedings are conducted commences either 20 days after date of notice by the Commissioner of suitability of the matter for resolution by ADR or on receipt of an application for ADR by the Commissioner after communication a matter suitable for ADR as alternative to judicial proceedings. The period ends on the date of termination of proceedings in the manner provided for in the terms governing the ADR procedures. SARS is entitled to appoint a facilitator, who may be an appropriately qualified officer of SARS within 15 days and the Commissioner must inform the aggrieved person of the appointment of the facilitator. The role of the facilitator is to seek a fair, equitable and legal resolution of the dispute between an aggrieved person and SARS.

The procedure to be adopted, the time place and date and requirements as to the furnishing of submissions and documentation, are determined by the facilitator after consultation with the aggrieved person and the officer(s) or appeal committee of SARS. The aggrieved person must be personally present during the ADR proceedings but may however be accompanied by any representative of their choice. But the facilitator may, in exceptional circumstances, allow the aggrieved person to be represented in their absence by a duly authorized representative of their choice. With agreement of the facilitator, the parties may to lead or bring witnesses in the ADR process. The facilitator may also require either party to produce a witness to give evidence. At the conclusion of the meeting, either at the instance of the facilitator or by mutual agreement, the facilitator must record all issues which were resolved and issues upon which no agreement or settlement could

⁸⁴ SARS, Alternative Dispute Resolution (ADR) External Policy, Available at: <https://www.sars.gov.za/wp-content/uploads/Ops/Policies/SC-CC-26-Alternative-Dispute-Resolution-External-Policy.pdf> (accessed on 25/01/2022).

be reached and the facilitator must deliver a report to the parties within ten days of the conclusion of the ADR process.⁸⁵

The ADR proceedings are envisaged to be without prejudice and not one of record, and any representation made or document tendered in the course of the proceedings may not be tendered in any subsequent proceedings as evidence by any other party, unless: it is used with the knowledge and consent of the party who made the representation or tendered the document during the proceedings or the representation/document is already known to, or in possession of, that party or where it was obtained by that party otherwise than in terms of the ADR proceedings. Further, no person may subpoena any person involved in the ADR process (including the facilitator), in whatever capacity, to compel disclosure of any representation made or document tendered in the course of the proceedings.⁸⁶

A dispute may either be resolved by agreement whereby either SARS or the aggrieved person accepts, either in whole or in part, the other party's interpretation of the facts or the law applicable to those facts or both. However, such agreement must be reduced to writing and signed by both parties. If the parties fail to resolve the dispute, the parties may attempt to settle the matter as set out in the Act. In any case, once a dispute is resolved either by agreement or settlement SARS must give effect to that agreement or settlement within a period of 60 days after conclusion. If the dispute is not resolved by either agreement or settlement or the proceedings are terminated, SARS must inform the aggrieved person within 10 days inform the aggrieved party of their right to institute judicial proceedings. Any agreement or settlement reached through the ADR process has no binding effect in respect of any other matters relating to that aggrieved person not actually covered by the agreement or settlement or any other person.⁸⁷

⁸⁵ Clause 5:10 of the SARS Alternative Dispute Resolution (ADR) External Policy.

⁸⁶ Clause 5:11 of the SARS Alternative Dispute Resolution (ADR) External Policy on "Reservation of Rights."

⁸⁷ Clause 5:12 of the SARS Alternative Dispute Resolution (ADR) External Policy on "Agreement or Settlement."

The Tax Law gives SARS the power to settle a dispute which is to the benefit of the State. A dispute may be settled at any time as the settlement provisions are not limited for use only during the ADR process. However, the ADR is noted as a process to resolve disputes one ideal situation where the settlement provisions may be applied in an attempt to settle the matter. The settlement provisions in the South African law may only be applied if the circumstances of the matter comply with these regulations. The settlement procedures provide guidelines as to the circumstances when it would be appropriate and when it would be inappropriate to settle.⁸⁸

Circumstances where it is inappropriate to settle include where, if in the opinion of SARS: the action of the aggrieved person constitute intentional tax evasion or fraud or where the settlement would be contrary to the law or a clearly established practice of the Commissioner on the matter, and no exceptional circumstances exist to justify a departure from the law or practice. Further, it is not appropriate to settle where it is in the public interest to have judicial clarification of the issue or pursuit of the matter through the courts will significantly promote compliance of the tax laws or the person concerned has not complied with the provisions of any Act administered by SARS and SARS is of the opinion that the non-compliance is of a serious nature.⁸⁹

On the other hand, where it is to the best advantage of the State, SARS may settle a dispute, in whole or in part, on a basis that is fair and equitable to both the person concerned and SARS. SARS is enjoined when contemplating the settling of a matter, to have regard to a number of factors including: whether that settlement would be in the interest of good management of the tax system, overall fairness and the best use of SARS' resources; the cost of litigation in comparison to the possible benefits, whether there are any complex factual or quantum issues in contention or evidentiary difficulties which are sufficient to make the case problematic in outcome or unsuitable for resolution through

⁸⁸ Clause 5:12.1 of the SARS Alternative Dispute Resolution (ADR) External Policy on "Settlements."

⁸⁹ Clause 5:12.2 of the SARS Alternative Dispute Resolution (ADR) External Policy on "Circumstances where Inappropriate to Settle."

the ADR process or the courts. Settlement is also to be embraced where the settlement of the dispute will promote compliance of the tax laws by the person concerned or a group of taxpayers or a section of the public in a cost-effective way.⁹⁰

The tax law provides for reporting requirements in terms of which SARS must report on an annual basis to the Minister of Finance and the Commissioner on settlements reached. This report must be in such format as does not disclose the identity of the person concerned and contain details of the number of disputes settled or part settled, the amounts of revenue foregone and estimated amount of savings in costs of litigation, which must be reflected in respect of main classes of taxpayers.⁹¹ In the end, ADR as contemplated in South African law is “a form of dispute resolution other than litigation, or adjudication through the courts.” It is less formal, less cumbersome and less adversarial and a more cost-effective and speedier process of resolving a dispute with SARS.

7.0 Critique of the Alternative Dispute Resolution (ADR) of Tax Disputes in Kenya

The adverse impact of resolving disputes through litigation including high cost, delays, loss of trust and relationship is what has driven Kenya to incorporate alternative dispute resolution (ADR) as one of the mechanism of resolving tax disputes in the country. There is no question that the application of ADR Framework has enabled KRA to register numerous successes which would not have been possible using the judicial and quasi-judicial processes stipulated under the law. Kenya Revenue Authority (KRA) reported collecting over KShs 21 billion through the Alternative Disputes Resolution (ADR) mechanism by resolving 393 cases vide ADR in the period between July 2020 to March

⁹⁰ Clause 5:12.3 of the SARS Alternative Dispute Resolution (ADR) External Policy on “Circumstances where Appropriate to Settle.”

⁹¹ Clause 5:13 of the SARS Alternative Dispute Resolution (ADR) External Policy on “Reporting Requirements.”

2021. That was 109% growth in number of cases and 389% growth in revenue when compared to a similar period last financial year 2019/2020.⁹²

One of the positive aspects of the KRA ADR Scheme is that many taxpayers have embraced it as evidenced by the increasing number of ADR applications being received by KRA. For instance, in the above period, KRA recorded a 56% growth in the number of ADR applications from 425 received in the financial year 2019/2020 to 661 despite the current Covid-19 pandemic related challenges. As a matter of fact, resolution of disputes through ADR remained unhampered as meetings were conducted virtually. This has further reduced the time within which the meetings are held. ADR of tax disputes is now preferred because it ensures that disputes are resolved in an expeditious and timeous manner with resolution of cases under ADR being achieved in a much shorter time span. Indeed, the speed of tax ADR in Kenya has improved tremendously and average time taken to resolve ADR cases stood at 42 days in the current financial year 2020/2021, more than half the stipulated 90 days.⁹³

The ADR of tax disputes in Kenya is also acknowledged in that unlike other dispute resolution mechanisms, it is more pocket friendly as it does not require payment of any filing fees. It is also a mediation process in which a taxpayer can opt to represent himself without the need for an Advocate or a tax representative hence saving costs. The ADR process has also proved effective in preserving the relationship between the taxpayer and the Authority. The mediator ensures that parties are not antagonized and maintain cordial relationships. The process provides a win-win outcome for the parties which leaves both parties happy with the outcome and prevents further escalation of disputes.⁹⁴ The ADR mechanism also allows reservation of rights meaning the record of the ADR

⁹² KRA, "KRA collects KShs 21B from Alternative Disputes Resolution," Press Release Dated 16th April 2021, Available at: <https://www.kra.go.ke/en/media-center/press-release/1168-kra-collects-kshs-21b-from-alternative-disputes-resolution> (accessed on 25/01/2022).

⁹³ Ibid.

⁹⁴ KRA, "Why Alternative Dispute Resolution (ADR)?," Available at: <https://kra.go.ke/en/individual/alt-dispute-resolution-adr/learn-about-adr/benefits-of-adr>(accessed on 25/01/2022).

discussions cannot be used in a court of law without agreement of parties. In addition, given the relaxed procedures, a taxpayer can be allowed to present documents for verification under the ADR process which would otherwise be rejected in a Tribunal or Court hearing in strict adherence to the law governing admission of evidence.⁹⁵

7.1 Challenges of Use of Alternative Dispute Resolution in Tax Disputes in Kenya

The KRA Alternative Dispute Resolution (ADR) Framework and the Tax Procedures (Settlement Out of the Tribunal or Court) Regulations as they are currently framed have created challenges that bedevil ADR of Tax Disputes in Kenya. These include lack of independence of the ADR mechanism from KRA, time constraints, lack of clarity on the circumstances to settle or not to settle, need for tribunal or court permission to pursue out of court settlement, conflict of interest challenges because of the use of KRA employees as ADR facilitators and potential conflict between the ADR mechanism for out of court or tribunal settlement as envisaged under the tax laws and regulations and the existing court annexed ADR mechanisms.

7.1.1 The Overreaching Role of KRA in the ADR Mechanism

The role of KRA as envisaged under the KRA ADR Framework and the Settlement Out of Court or Tribunal Regulations is overreaching in that not only does KRA decide whether a matter is fit for ADR resolution but also appoints and pays the ADR Facilitator who is its employee. The decision to appoint the ADR Facilitator is communicated both to the facilitator and the taxpayer by the Commissioner. It would have been better to create an independent Dispute Resolution Unit which is not directly answerable to KRA. However, the Kenyan system is similar to what exists in South Africa where the Facilitators are staff of South Africa Revenue Authority (SARS). Further, thus far no significant complaints have arisen as to adverse effect of use of KRA paid facilitators but in the interest of fairness, in future the role of KRA as investigator, prosecutor and

⁹⁵ KRA ADR Framework.

facilitator of ADR may need to be revisited in the interest of enhancing integrity of the ADR process.

7.1.2 Time Constraints of the ADR Process

There is no clarity as to the time allocated for ADR Process under the KRA Alternative Dispute Resolution (ADR) Mechanism as when the process commences depends on when the application for ADR but the time allocated for it is restricted to the time remaining within the 60 days the Commissioner is required to issue the Objection Decision when KRA issues and communicates their decision. This puts pressure on the parties, especially the taxpayer, to choose between ADR and pursuing quasi-judicial process and judicial process and opting for ADR or waiting to opt for out of court settlement after the matter has been lodged with the tribunal or court. In any case, the time to lodge an appeal does not freeze against the party who has lodged an ADR process meaning they have to choose between filling an appeal and pursuing ADR only or pursuing ADR and filling an appeal at the same time. There is need to amend the law clearly stipulate the time for ADR to the scenario of parties wasting resources to first file a needless appeal and then opt for out of court or tribunal settlement just to overcome the limitations imposed by the rules as they currently are.

7.1.3 Lack of clarity on circumstances to settle or not to settle

There are no clear provisions in the regulations and the ADR Framework on the circumstances when to settle or when not to settle tax dispute as stipulated under the relevant tax law and the Alternative Dispute Resolution External Policy of South Africa. The assumption is that any matter that is suitable for ADR is suitable for settlement. In South Africa, it is clear that SARS has power to settle any tax dispute where doing so to the benefit of the State and such settlement may be entered at any time and not necessarily under the ADR process as part of out of court or tribunal settlement. The danger of the current arrangement is that KRA officials involved in a dispute may have to go through

motions for lack of clarity on whether to settle or while waiting for bureaucratic decision to come from the top on whether to settle.

7.1.4 Need for Permission of Court for Out of Court Settlement

The ADR mechanism for settlement of tax disputes out of court or tribunal has been complicated further by the requirement that the Court or the Tribunal gives permission for the parties to commence the process. This removes the element of spontaneity of the agreement of parties to engage in ADR after filling of the Appeal as now a formal application has to be made to commence the process. The Court permission is required in addition to the administrative constraints that require that the taxpayer obtains the permission or at least mutual agreement of KRA to opt for out of Court or Tribunal Settlement. It is proposed that the regulations be amended to allow parties upon agreement to merely give notice to the Court or Tribunal for adjournment to pursue settlement without need for formal permission which calls for application.

7.1.5 Aligning the Law on ADR and Out of Court or Tribunal Settlement

There is no clarity in the tax law, in particular section 55 of the Tax Procedures Act and section 28 of the Tax Appeals Tribunal Act render clarity on the ADR procedure before referral to Appeal. There is thus need to reform the law to clearly accommodate ADR and settlement before the tax dispute is referred to the Tribunal or Court. Further, there is no clarity how the ADR process and especially the out of court or tribunal settlement integrates with the existing Court Mandated ADR which has been provided and which runs parallel to proposed ADR for tax disputes. This is necessary to extricate the out of court or tribunal settlement process from KRA control in the interest of the perception of independence and impartiality of the ADR facilitators.

8.0 Conclusion

The use of ADR in resolution of tax disputes has inspired other sectors into embracing ADR as the mode of resolution of disputes. For instance, Cabinet Secretary for ICT and

Youth recently enacted the Data Protection (Complaints Handling and Enforcement Procedures) Regulations, 2021 which include provision for mediation, negotiation and conciliation of data protection disputes in Kenya.⁹⁶ Last year, the Office of the Data Commissioner with the help of the UNDP has also engaged a consultant for the development of Alternative Dispute Resolution Framework similar to the KRA Alternative Dispute Resolution (ADR) Framework.⁹⁷ This points to the need to ensure the KRA ADR Framework is perfected to avoid other public entities taking up ADR from inheriting the inefficiencies and challenges inherent in it even as they seek to adopt the positive aspects of it. In particular, there is need to revise the law anchoring the KRA ADR Framework to sufficiently accommodate ADR in in the tax dispute resolution timeline. The KRA ADR Framework should also be revised to reconcile it fully with the provisions of the Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020. There is also need to expand the place and role of Independent ADR Practitioners in alternative dispute resolution of tax disputes in Kenya.

⁹⁶ ODPC, “New Regulations to Guide Data Protection,” Available at: <https://www.standardmedia.co.ke/branding-voice/article/2001435848/new-regulations-to-guide-data-protection>(accessed on 25/01/2022).

⁹⁷ UNDP, Request for Proposal (RFP): Consultancy Services -Development of Alternative Disputes Resolution (ADR) Framework, Available at: https://procurement-notices.undp.org/view_file.cfm?doc_id=262351 (accessed on 25/01/2022).