

AN OVERVIEW OF ALTERNATIVE TAX DISPUTE RESOLUTION FRAMEWORK

INTRODUCTION

The Kenya Revenue Authority launched the Alternative Dispute Resolution Framework on 17th June 2015 and it became effective on 1st July 2015. The Framework has been undergoing revision with the last being approved on 09th July 2019.

The Framework is meant to provide general guidance to the stakeholders who would wish to engage in ADR to resolve their tax disputes.

The framework avails ADR as an addition or alternative to the already existing Internal Disputes Resolution Mechanisms (IDRM) provided in the Tax Procedures Act No. 29 of 2015 (TPA) being; Lodging objections to the Commissioner upon being issued with a notice of assessment (Section 51 TPA), Appealing to the Tax Appeals Tribunal (Section 52 TPA), Appealing to the High Court (Section 53 TPA) and Appealing to the Court of Appeal (Section 54 TPA). All these being judicial and quasi-judicial processes.

ADR is a voluntary, participatory and facilitated discussion over a tax dispute between the tax payer and the Commissioner. It is in the form of a facilitated mediation and not an arbitration. As opposed to arbitration, a mediator or facilitator has no power to impose a decision regarding the outcome of the tax dispute. The parties are facilitated to find a solution to the dispute.

What is a Tax Dispute?

A tax dispute commences with an objection of a tax decision made by the Commissioner or to an Appealable decision under the Tax Procedures Act No. 29 of 2015.

Tax Decisions

The tax decisions made by the Commissioner are provided at Section 3 of the TPA 2015-

- (a) Assessments-Advance assessment, default assessment, amended assessments. A self-assessment is made voluntarily by the tax payer and it is the one that gives rise to amended assessments by the commissioner.
- (b) Determinations by the Commissioner under Section 15, 17 and 18 on appointed persons-
 - (i) Tax payer's tax representative
 - (ii) Administrators, personal representatives, executors of a will, trustees in bankruptcy, receivers, or liquidators.
- (c) Tax refund decisions-income tax refund, VAT refunds
- (d) Demand for penalty

Legal Backing of ADR

ADR negotiations and settlements must have a legal basis within the Tax Laws. ADR is backed by:-

- (a) Constitution of Kenya 2010 at Article 159(2) (c)-It mandated judicial and quasi-judicial bodies to allow parties alternative forms of dispute resolution such as mediation, reconciliation, arbitration and traditional dispute resolution.
- (b) Tax Procedures Act No. 29 of 2015 at Section 55-Settlement of disputes of court or tribunal. It allows the parties a time frame of 90 days to have settled the dispute.
- (c) Tax Appeals Tribunal Act No. 40 of 2013 at Section 28-It allows the parties at any stage during proceedings at the Tribunal to be allowed to settle the matter out of the tribunal. The parties shall report to the Tribunal of the outcome of settlement.
- (d) Section 59 C of the Civil Procedure Act Cap 21-Provides for use of arbitration and mediation.

ADR Agreement

This is executed by the parties and witnessed by the facilitator upon the conclusion of the ADR process and upon the parties reaching a settlement on the dispute. Each party retains a copy and the same shall be in full and final settlement and binding to both parties. It will form the basis for preparation and filing of a consent before the TAT or Court.

The ADR Agreement terms shall set out

- (a) The background of the dispute and issues in contention
- (b) The agreed upon and non-agreed upon issues
- (c) The processes and specific exercises undertaken during the ADR process
- (d) Any working meetings held between the parties
- (e) Taxes payable and justifications thereto
- (f) Terms of settlement
- (g) Undertakings given by each party if any
- (h) Payment plans where applicable.

Facilitator

This is the person who mediates by engaging the parties in a tax or customs dispute and provides indirect or unobtrusive assistance, guidance or supervision for the parties to reach an agreement. He must be independent. His role is as such:-

- (a) Convene the ADR meetings
- (b) Chair the ADR sittings and manage the meetings and provide administrative guidance
- (c) Attest to the signing of the ADR Agreement
- (d) Generally guide the parties in the discussions towards reaching an amicable agreement.

Benefits of ADR in Tax Disputes

- (a) Expedition resolution of disputes
- (b) Less expensive as compared to litigation.
- (c) Enhances and manages cordial relationships between the taxpayer and KRA.

- (d) Improves service delivery to the tax payer, tax consultant and legal advisors
- (e) Addresses customer concerns and improves tax compliance.
- (f) Enhances/ensures confidentiality

Initiating the ADR process

- The process is voluntary and may be initiated by either the tax payer or the Commissioner.
- The parties may request to be given an opportunity to engage in ADR before issuance of an objection decision or after an objection decision is communicated to the tax payer.

Before the issuance of an objection decision

- Upon receipt of a tax assessment/tax decision by a tax payer, if he wishes to dispute it then he lodges an objection to the Commissioner (Section 51 (1) TPA 2015). This has to be lodged within 30 days of being notified of the decision.
- The Commissioner In-Charge of Tax Disputes Resolution is mandated to make a decision on the objection lodged within 60 days of receipt of the objection. Failure of a written decision, the objection shall be allowed. (Sections 51 (8), (9) and (11) TPA)
- The Commissioner in receipt of an objection may deal with in three ways:-
 - (a) Amend the assessment in accordance with the objection;
 - (b) Amend the assessment in light of the objection according to the best of his judgement
 - (c) Decline to amend the assessment.
- If the Commissioner's decision is to amend the assessment partially in light of the objection according to his judgement or if his decision is to decline the amendment, he may give the tax payer an opportunity for ADR if the tax payer so wishes before issuing an objection decision.

ADR in cases pending before the TAT and Courts

- Any party to a dispute pending before the TAT or court may at any stage request for ADR with the consent of the other party.
- The court or TAT will allow the parties to engage in ADR within timelines as specified in the Law-Section 55 TPA 2015.
- Parties will be required to revert back to the TAT or Court within 90 days with the terms of agreement and where no agreement will be reached the matter may proceed.
- The Courts may also direct or dictate specific timelines within which a dispute before it may be negotiated under ADR.

ADR Stakeholders

- The Tax payer
- The Commissioner
- Tax Agents and Legal Advisors-Assist in initiating the ADR process and provision of necessary documentation, submitting their client's case, assisting the parties to

identify the contentious and non-contentious issues in dispute, assist parties to narrow down issues

- The courts and the TAT
- Professional Bodies
- Government Agencies-AG, ODPP, Commission for Administrative Justice

Suitability of disputes for ADR

A suitability test will be carried out to determine disputes that can be admitted to ADR.

Disputes not suitable to ADR include:-

- (a) The settlement would be contrary to the Constitution, Revenue Laws or other laws
- (b) The matter borders on technical interpretation of the law
- (c) It is in the public interest to have judicial clarification of issues
- (d) Pursuit of the matters in court will significantly promote compliance
- (e) Parties have not complied with the provisions of any Act and the non-compliance is consistent or deliberate.
- (f) One party is unwilling to engage in ADR

Lodging of ADR applications and procedures

- Applications and requests for ADR shall be addressed to the Tax Disputes Resolution Division and copied to the relevant Commissioner.
- Applications are made through the online portal on the KRA website in the prescribed form and should be accompanied by all the relevant documents as guided by the checklist in the application form
- The applicant shall receive an acknowledgement through e-mail
- The Dispute for which the ADR has been applied will be allocated to a case manager and undergo a suitability test
- The relevant parties will be invited to the preliminary ADR meeting through written letters, e-mail or phone calls.