ALTERNATIVE DISPUTE RESOLUTION

A. INTRODUCTION

In keeping with the spirit of the Constitution as enshrined in Article 159 (2) (c), the KRA, Tax Appeals Tribunal (TAT) and the Courts encourage alternative forms of dispute resolution where cases can be resolved amicably. The prominence given to the Alternative Dispute Resolution ("ADR") has resulted in the Kenya Revenue Authority ("KRA") setting up the Corporate Tax Dispute Resolution Division ("CTDRD") who oversee the implementation of the ADR Framework in tax disputes. The division is meant to promote the overriding objectives of dispute resolution mechanisms by facilitating a process that is just, expeditious, proportionate, and affordable.

It is in line with these objectives that a taxpayer has the chance to engage the KRA through ADR before the confirmation of an assessment, before filing of a case at the TAT or Court and when a case is pending/ongoing before the TAT or a Court of law.

The ADR process may be initiated by either of the parties as it is considered a voluntary process. The process should be completed within ninety days from commencement of the ADR process.

B. PROCESS FLOW

When the taxpayer initiates the process, the summarized flow of events would be as follows:

- Taxpayer notifies KRA of intention to engage ADR. Copies CTDRD;

a) KRA notifies taxpayer of rejection and provides reasons for the same. At which stage parties exercise their statutory rights i.e., the dispute process continues; or

(b) KRA notifies taxpayer of their acceptance. Copies CTDRD

- CTDRD appoints Facilitator/Facilitation Panel and communicates to parties;
- Facilitator calls first meeting and subsequent hearings;
- If an agreement is reached, the ADR agreement is drafted by the CTDRD, both parties review and execute. If the case is at TAT or the Courts, a consent is filed, and the matter is marked as settled. The taxpayer will normally have been given a period to clear the principal tax (mostly six months although can negotiate for longer period depending on the principal tax amounts) and thereafter the taxpayer will exercise their right to lodge for waiver of penalties and interest; and
- If no agreement within ninety days from the day of commencing the ADR process, parties exercise their statutory rights.

C. KEY FACTORS

1.Time
The ADR should be concluded within 90 days or else the case will be reverted to the Tribunal or Court. However, depending on the circumstances, an extension can be applied for.

2.Cost
The ADR process facilitated by the CTDRD is free to institute. Other costs are representation costs charged by the Tax Agent to taxpayer.

3.Satisfactory resolution of dispute
From our experience, KRA may take hardline positions which will make the process difficult to resolve. They may also raise other issues that were not part of the initial dispute. This is expected as the KRA defend their position. However, the taxpayer has a greater chance to convince the KRA of the gravamen of the case as ADR can be structured as a reasonable discussion.

4.Flexibility
The ADR process is open and available to the taxpayer from the point the assessment is raised by KRA.
The process is based on the rules of engagement as may be set out by the parties. The CTDRD requires that such rules be within the CTDRD-ADR Framework. This framework is not a hindrance to the ADR process.
The process is without prejudice to the taxpayer's statutory right of appeal before the TAT or court of law.

5.Neutrality
The ADR process is not affected by outside forces and interests. It is purely based on the agreement between the two parties i.e., the taxpayer and the tax authorities.

6.Control
The taxpayer has more control over the process as they have a say in determining the timelines, rules, and other aspects of the process. Taxpayer may take advantage of this to tailor-make the process to their benefit

7.Confidentiality
The process is strictly between the taxpayer, KRA and the CTDRD. There is less chance of confidential information getting out.

8.Settlement
The ADR process is structured as the "mediation" process envisaged by Arbitration Act, CAP 49 of the Laws of Kenya. As such, the facilitator has no power to impose decisions regarding the outcome of the dispute. Their role is simply to facilitate the process. The settlement reached by parties in the ADR discussions shall only be applicable to that dispute and shall not be used as precedent for any other dispute.

9.Contentious Matters Amicable Resolution
The process further gives taxpayers and the tax authority a way to resolve otherwise contentious cases. The cases could be brought about, by several factors including; defective tax amendments with incomplete definitions, scope and having ambiguity, incomplete reconciliations leading to assessment because of time pressure during the audit as well as adverse tax rulings. Examples of cases that can be resolved under ADR include;

- Various tax assessments that involve reconciliation and provision of supporting documents;
- Withholding tax on demurrage for the shipping industry;
- The initial introduction of Excise Duties on other fees for financial institutions;
- Taxation of non-resident contractors' Kenyan permanent establishments undertaking turnkey projects in Kenya;
- Accumulated tax overpayments and tax credits utilization against current & future tax credits;
- VAT refunds matters;
- Ledger reconciliation;
- Among others.

D. ADVANTAGES

The key advantage of the process is for the taxpayer to be able to resolve expeditiously in a controlled environment tax cases that would otherwise have taken longer, would be costly (cost benefit analysis when look at the tax advisors and legal fees), ensures a flexible payment plan as well as certainty of the outcome (as opposed to the dispute process which may result in the disputed taxes still being payable). Furthermore, the taxpayer can still exercise their right for penalties and interest waiver application and processing.
The certainty provided ensures the taxpayers cashflows are manageable.

E. CHALLENGES

In our experience, the key challenge faced by ADR is the actual implementation of the ADR agreement from the KRA debt department. To give a bit of background, once a taxpayer is issued with a tax demand, the KRA audit team will raise the assessments on the taxpayers ITAX ledger. The assessments become a tax liability that is under dispute.

Once the ADR agreement has been executed, consent filed with the TAT or the Courts, the KRA audit team and the KRA debt teams should update the taxpayer's ledgers to capture the ADR agreement amounts. In our experience, this otherwise simple reconciliation drags for so long. In one case the simple reconciliation took over two years to complete. The situation is worsened in cases where an agency notice had been issued by the KRA leading to the taxpayer's banks or clients making direct payments without a payment registration number (PRN).
To counter the sluggish implementation of the ADR agreement, timelines should be stated in the ADR agreement as well as involvement of the KRA debt team for a quick implementation.

F. CONCLUSION

Overall, the ADR process remains a vital tool for both taxpayers and the tax authority for the speedy resolution of the tax cases. It presents the parties with a win win solution; the taxpayer can agree to a manageable tax payment plan and the tax authority is able to collect taxes now.
Should you have any case that you may be considering for ADR, kindly do reach out to us and we will assist you with resolution of the case.

Let's talk

For further information on these amendments and how they will affect your business or are in need of assistance on any other legal and tax matter kindly contact your regular Taxwise Africa Analyst through the contacts below.

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