

IS KRA ALTERNATIVE DISPUTE RESOLUTION A VIABLE OPTION FOR YOU?

In the last financial year KRA credited implementation of Alternative Dispute Resolution (ADR), launched to ensure, faster, objective and efficient resolution of tax disputes, as having helped unlock Kshs. 31.435 Billion in taxes out of 552 cases resolved during the FY 2020/2021. As a result, KRA surpassed its revenue target as reflected in the 2021 Budget Policy Statement of Kshs. 1.652 Trillion with a surplus of Kshs. 16.808 Billion. This was a strong performance coming on the back of the adverse effects of the economic downturn brought about by COVID pandemic which led to a shortfall of revenue in 2019/2020 financial year of Kshs 186 Billion.

The **Alternative Dispute Resolution (ADR)** framework was launched by KRA in June 2015 with a promise to restore transparency and efficiency in tax audit and investigations. This followed the passing of the Tax Procedures Act, No 29 of 2015 (TPA), which provides for an elaborate Internal Dispute Resolution Mechanism (IDRM). This article explores the extent to which the ADR process achieved the objectives.

According to the KRA website ADR is a voluntary, participatory and facilitated discussion over a tax dispute between a taxpayer and the Commissioner. It is in the form of facilitated mediation and not arbitration as envisaged in the Arbitration Act, (Chapter 49 Laws of Kenya), as the facilitator has no power to impose any decisions regarding the outcome of the tax dispute. Instead, the parties are facilitated to find a solution to the dispute.

Tax disputes are inevitable in the realm of tax administration. A tax dispute usually commences with an objection by the taxpayer to a tax decision made by the Commissioner or to an appealable decision as stipulated under the Tax Procedure Act, 2015 (TPA). Upon appeal, a dispute may be heard up to the Tax Appeals Tribunal or at the High Court in some instances. Tax disputes may also arise from interpretation of statute where a difference in the legal position taken by the revenue authority and the taxpayer results in a dispute. Regardless of the character of tax disputes, a common factor is that tax disputes often involve huge sums of money and are therefore of significance to both the taxpayer and the tax authority.

The use of ADR in tax dispute resolution has emerged as best practice in different parts of the world in recent years as a means to curtail lengthy delays and costs of litigation with resultant improved service delivery and maintaining cordial relationships that promote overall voluntary tax compliance. ADR also provides flexibility and expedition in dispute management without the limitations imposed by judicial and quasi-judicial processes. It also overcomes challenges such as technical procedures, untimely decisions and rising costs of court processes.

As at 2021, 552 disputes arising from tax assessments by the Kenya Revenue Authority were successfully resolved through ADR, which doubles the previously reported 284 cases reported in June 2020. It is therefore evident that more taxpayers see value in opting for the ADR process. The process entails filling an ADR application form and submit the completed form and attachments to the KRA Tax Dispute Resolution office.

While looking at the advantages that ADR presents in tax disputes, we must point out that there are opportunities to improve the existing framework in order to fully maximize the benefits arising from ADR in tax industry.

The ADR framework references the relevant provisions of the law empowering the implementation of ADR namely article 159 (2) of the Constitution, Section 55 of the Tax Procedures Act (TPA), section 28 of the Tax Appeal Tribunal Act (TATA) and Section 59C of the Civil Procedure Act which allow parties to resolve their disputes through ADR and provide the respective timelines for resolving such disputes.

The TPA provides a time limit of ninety days from when a Court or the Tribunal permits the parties to settle a dispute out of Court or the Tribunal, as the case may be, to make a settlement. Where no settlement is reached the matter must be referred back to the Court or Tribunal.

Whereas this facilitates expeditious and certainty in resolution, the law is silent on whether there is room to extend the term for ADR in special circumstances.



The ADR framework asserts that ADR can be entered into during the objection stage before the delivery of an objection decision. It is uncertain under what circumstances a taxpayer would trigger ADR during the objection stage leading to overlapping processes.

Parties to the ADR process are not expected to provide the Court or the Tribunal with written basis for their settlement in the same manner that the Court or Tribunal is expected to do. This reduces the transparency of the outcome and limits the reliability of such settlements as a precedent against which the taxpayer or public can rely on as tax jurisprudence when similar circumstances arise in future.

The ADR regime introduced by the TPA takes the form of facilitated mediation but does not specifically set out the qualifications or experience of the facilitator and how he/she is to be sourced by the parties. Rather than making recommendations or imposing a decision, the facilitator

encourages disputants to reach their own voluntary solution and is not expected to take sides, which may not always be the case depending on the circumstances of each case.

The Framework only identifies facilitated mediation as the form of ADR to be used in tax disputes. This rules out other forms of ADR such as binding arbitration which may be suitable for different parties as per the circumstances of their dispute. The taxpayer is required to make full disclosure of material facts relevant to the dispute which would be highly prejudicial if no agreement is reached given the non-binding nature of the mediation.

Going forward, as KRA and the public engage in ADR it is important that the process is properly entrenched in law with the ADR framework formalised as subsidiary legislation/ regulations which provide certainty, clarity and transparency.

