



INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA

**ICPAK COMMENTS ON KRA ALTERNATIVE DISPUTE
RESOLUTION MECHANISM**

[Public Policy & Governance Department]

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INTRODUCTION

The prolonged nature of resolving tax disputes has occasioned a serious backlog of tax cases, which if remain unresolved threatens revenue collection for the Kenya Revenue Authority. The ADR mechanism comes as a welcomed move by the Authority in a bid to fast track the resolution of tax disputes. It however needs to be considered with due regard to the principles of equality in Taxation and in line with the existing legislation and statutory provisions available for the resolution of Tax disputes. This submission will first highlight the key principles that should guide the implementation of an ADR mechanism and thereafter make specific proposals to the draft framework in a bid to strengthen the order to strengthen the administration of tax procedures in the country.

Traditionally tax disputes have been settled either by litigation or, in the majority of cases, by out-of-court agreement following discussions between the two parties. The essence of ADR is that a third party is brought in with the agreement of both parties, either to determine the dispute (arbitration) or to facilitate bilateral agreement (through mediation). The primary motivation for the Revenue Authority to utilize ADR, is to deal with a heavy caseload of appeals that significantly compromise the effective collection of tax.

GENERAL OBSERVATIONS ON THE DRAFT FRAMEWORK

- This mechanism to dispute resolution in an internal mechanism, that the KRA seeks to utilize in resolving Tax disputes. It provides a limited scope to ADR in general. While we appreciate that this is the KRA's response to resolving tax disputes internally, prior to seeking statutory avenues such as the tribunal, the policy is implemented in its current form will see a limited uptake by tax payers.
- The draft framework does not reflect the intention of the KRA to approach tax dispute resolution on a level playing field.

THE UNITED KINGDOM – HER MAJESTY'S REVENUE AND CUSTOMS (HMRC)

SYNOPSIS

ADR in the United Kingdom is executed by the HMRC as a means resolving tax disputes outside the litigation path. A facilitator is appointed from within HMRC who, up till now, has had no input to the enquiry. The facilitator will not take over responsibility for the enquiry, but will speak to both sides of the dispute, the taxpayer and HMRC, and try to get those two parties to come to an agreement.

This model is similar to the proposed approach by the KRA, however, the facilitation is carried out by HMRC staff accredited by the uses Centre for Effective Dispute Resolution (CEDR) accredited HMRC staff to facilitate discussion as a mediator. The process therefore falls under the MEDIATION categorization of ADR mechanisms. This approach safeguards the independence concern that would otherwise be raised by the tax payer throughout the ADR process.

The Ministry of Justice and Attorney General in the UK launched the Dispute Resolution Commitment and associated guidance in May 2011. HMRC's approach is a cost effective means to resolving tax disputes and ADR where appropriate, is fully consistent with the Government-wide Dispute Resolution Commitment.

TYPES OF ADR HMRC ENGAGES

1. 'Facilitated discussion

A HMRC externally trained and accredited mediator facilitates bringing the parties together but offers no opinion on the merits of the arguments being advanced. The HMRC facilitator may or may not be a specialist in the subject matter of the dispute but will not have had any prior involvement in working on the case as part of the case team.

The main difference between facilitated discussion and facilitative mediation is that the people brought in to help the disputing parties are not independent of the disputing parties, but will work neutrally.

2. Facilitative mediation

An independent external mediator is jointly engaged by HMRC and the customer to try to bring the parties together but offers no opinion on the merits of the arguments being advanced.

The mediator may challenge each side as to how their dispute may play out in front of the Tribunal. A facilitative mediator may or may not be a specialist in the subject matter of the dispute but will have no connection with either party.

3. Evaluative mediation

The mediator will try to bring the parties together in exactly the same way as in facilitative mediation, but also providing his/her view of the matter as a specialist in the subject matter of the dispute.

It is possible to have a combination of the two approaches in which facilitative mediation is attempted first, with evaluative mediation following if the initial approach is not successful. However, HMRC would only see this approach as suitable in limited tax cases where the issue isn't tax related but determination of the issue has tax consequences, if both parties are willing to consider the strength of their case in the light of the expert's view.

4. Non-binding Neutral Evaluation

This approach uses a neutral third party who is an expert in a particular field to provide a non-binding opinion.

This may be suitable in limited tax cases where the issue isn't tax related but determination of the issue has tax consequences, if both parties are willing to consider the strength of their case in light of the expert's view.

For HMRC (and the customer) there are additional costs associated with everything but the first option.

UK SUCCESS RATES

- SME and individuals' scheme: Resolved 80 % of the 600 cases put through since the pilot began in September 2013.
- Large and complex scheme: Resolved 71% of the 70 cases in inception.
- Outstanding tax revenues achieved just under £80m.

On average, HMRC spends just 15 hours resolving disputes through ADR – compared with up to 250 hours if a case goes to First-Tier Tribunal. This is particularly significant when you consider the average age of a direct tax dispute entering the SMEi pilot scheme was 23 months.

AUSTRALIA – AUSTRALIAN TAX OFFICE (ATO)

SYNOPSIS

The ATO defines ADR is an umbrella term for processes, other than judicial or tribunal determination, in which **an impartial person** assists those in a dispute to resolve or narrow the issues between them. In 2012, the National Alternative Dispute Resolution Advisory Council (NADRAC) published a document to guide Australians in managing and resolving disputes, including information about alternative dispute resolution (ADR). NADRAC is an independent body that gives policy advice to the Australian Attorney-General about developing ADR and promotes the use of ADR. The ADR process is housed within the mandate of the tribunal, anchored on the Administrative Appeals Tribunal Act, 1975, Sec 2A.

TYPES OF ADR THE ATO ENGAGES

a. Facilitative processes

An ADR practitioner assists the parties to identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement about some issues or the whole of the dispute. Mediation and facilitation are types of facilitative processes.

b. Advisory processes

An ADR practitioner considers and appraises the dispute and provides advice on some or all of the facts of the dispute, the law, and possible or desirable outcomes. Neutral evaluation and case appraisal are examples of advisory processes.

c. Determinative processes

ADR practitioner evaluates the dispute and makes a determination.

Arbitration and expert determination are examples of determinative processes. Determinative processes, such as arbitration, are not generally appropriate for ATO disputes and, accordingly, are not addressed further.

In blended dispute resolution processes, the ADR practitioner plays multiple roles – for example, in conciliation and conferencing, the ADR practitioner may facilitate discussions as well as provide advice on the merits of the dispute.

d. Blends of Dispute Resolution Processes and ADR

a. Conciliation

Process where the participants negotiate with the assistance of an ADR practitioner as conciliator who helps the parties identify the issues in dispute, develop options, consider alternatives, and attempt to reach an agreement. The conciliator often has qualifications in the area of the dispute.

Unlike in facilitative processes, a conciliator may give expert advice to the parties on possible options for resolving the dispute and actively encourage the participants to reach an agreement.

Conciliation is often used by the Administrative Appeals Tribunal (AAT)

b. Conferencing

Conducted by a Tribunal member or officer of the Tribunal (conference convener) with the parties and/or their representatives. Conferences provide an opportunity for the Tribunal and the parties to: discuss and define the issues in dispute; identify further evidence that needs to be gathered; explore whether the matter can be settled; and discuss the future conduct of the matter, including referral to further ADR processes or progress to a hearing, where settlement is not possible.

Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.

c. Neutral Evaluation

This is an advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their knowledge of the subject matter, assists the parties to resolve the dispute by providing a non-binding opinion on the likely outcomes. Neutral Evaluation is used when the resolution of the conflict requires an evaluation of both the **facts and the law**. The opinion may be the subject of a written report which may be admissible at the hearing.

d. Case appraisal

This is also an advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their knowledge of the subject matter, assists the parties to resolve the dispute by providing a non-binding opinion on the facts and the likely outcomes. The opinion is an assessment of **facts** in dispute. The opinion may be the subject of a written report which may be admissible at the hearing.

REPUBLIC OF SOUTH AFRICA (RSA) – SOUTH AFRICAN REVENUE SERVICE (SARS)

The Dispute Resolution Mechanism is anchored in sec 103 of the Tax administration Act (TAA), 2011. By mutual agreement, SARS and the taxpayer making the appeal may attempt to resolve the dispute through ADR under procedures specified in the rules provided in the TAA -Sec 107 (5).

The ADR model implemented in RSA may involve a facilitator, where if requested by both parties, facilitates the discussions between the taxpayer and SARS. The parties may first try to reach an agreement whereby either SARS or the taxpayer accepts, either in whole or in part, the other party's interpretation of the facts or the law applicable to those facts or both. SARS evaluates the cases based on predetermined criteria to establish if the case is suitable to ADR.

SUMMARY TABLE OF PROVISIONS FROM GLOBAL PRACTICE THAT THE KRA SHOULD UTILIZE

JURUSDICTION	MODEL	ICPAK OPINION ON RELEVANCE TO KRA MODEL
THE UNITED KINGDOM	<ul style="list-style-type: none"> • ADR Housed within the Revenue Authority • Relies on the Mediation approach • Provides options for approaches to be used in the ADR • Requires certification of facilitators 	<ul style="list-style-type: none"> • We propose that the facilitators identified for the purpose of ADR undergo a internal certification course with the KRA, that would train and thereafter bind then to a professional code of conduct to regulate their execution of this mandate. • Borrowing from this model, the KRA approach should aim to align itself to the Kenya's Dispute Resolution policy or consult the office of the Attorney General on the proposed structure. • The KRA could also adopt a multi faceted approach to ADR, providing the above options guided on a case to case basis
AUSTRALIA	<ul style="list-style-type: none"> • The Australian model is housed within the framework of the tribunal, guided by the Administrative appeals tribunal, external to the revenue Authority 	<ul style="list-style-type: none"> • This model does not meet the objective of Internal Dispute Resolution envisaged by the KRA. We therefore would not recommend the use of this model in general. • However, the various ADR approaches utilized by the tribunal in ADR are helpful guides for the KRA to review in providing the alternatives for the Internal ADR mechanism. •

JURUSDICTION	MODEL	ICPAK OPINION ON RELEVANCE TO KRA MODEL
SOUTH AFRICA	<ul style="list-style-type: none"> • ADR is anchored on the Tax administration Act • The Dispute Resolution guide provides for a predetermined list of facilitators who are identified by a senior official in the SARS, as well as provides clear criteria for selection, which includes professionals in Tax, legal, arbitration, mediation and accounting • the SARS guideline provides that such a person will be regarded as an SARS official, for purposes of the confidentiality provisions under Chapter 6 of the TA Act. This includes the signing of an oath or solemn declaration of secrecy. • The Facilitator is only appointed if both parties agree to use a facilitator; however the parties may decide not to use a facilitator and conduct the ADR proceedings on a party-to-party negotiation basis • Where an agreement or a settlement is concluded, SARS must issue an assessment to give effect to that agreement or settlement, as the case may be, within a period of 45 days after the date of the last signature of the settlement 	<ul style="list-style-type: none"> • The KRA should anchor this process on the Tax Procedures Act /Bill. • . The KRA should aim to establish a criteria for the identification of facilitators and provide for the inclusion of professionals such as accountants in the list of facilitators. • On the issue of confidentiality of the external facilitator, The KRA should borrow from the South African Model, on regarding the facilitator as a KRA official for purposes of the confidentiality provisions of the revenue statutes. • . The KRA's ADR should borrow from this model, and include a provision for the mutual agreement to engage a facilitator or not, for ADR. • . The KRA should also include a provision for the issuance of an assessment after an agreement is reached to give it the legibility required.

PROPOSALS FOR AMMENDMENT OF SPECIFIC PROVISIONS

CLAUSE	PROPOSAL FOR AMMENDMENT	JUSTIFICATION
2.2	ADR shall be anchored in the Tax Procedures Act to give legal backing to the Dispute Resolution processes and agreements provided in Revenue Statutes and the Tax Appeals Tribunal Act (TATA).	The will provide a legal backing for the inclusion of ADR processes and agreements in the IDRM mechanism.
6.0	The Taxpayer may request for ADR after filing an objection and/or after the Commissioner has made a determination on the objection but before filing an appeal.	This allows for the initiation of ADR prior to a confirmation or after a confirmation.
8.0 (c)	c. Removal of the facilitation panel and substitute with (e.)the commissioner's technical experts.	The role of the facilitation panel is not clear, and in the case of the ADR model envisaged by the KRA, this process is a mediation, which would only require the Facilitator.
8.0 (d)	<p>Delete this section and Insert section 8.1 titled facilitator with the provisions below;</p> <p>8.1 Facilitator</p> <ol style="list-style-type: none"> a. A facilitator shall be appointed by the CTDR Division of the KRA. b. the Head of the CTDR Division shall establish a list of facilitators of alternative dispute resolution proceedings c. person included on the list- <ul style="list-style-type: none"> • may be a KRA official or external to the Authority; • must be a person of good standing of the tax, legal, arbitration, mediation or accounting profession with appropriate experience in such fields; and • must comply with the code of conduct provided within this framework d. A facilitator shall only facilitate the proceedings upon the mutual agreement of the parties 	The facilitator as the mediator is fulcrum of the ADR process. It is therefore imperative that the structures instituted to ensure independence, perceived or otherwise is safe guarded in the interest of both parties.

	<p>e. Where the parties agree to use a facilitator, the CTDR Division shall appoint a person from the list of facilitators, 15 days prior to the commencement date of the proceedings</p> <p>f. The CTDR shall not remove the facilitator appointed for the proceedings once the facilitator has commenced with the proceedings, unless;</p> <ul style="list-style-type: none"> • Requested by the Facilitator • By agreement between the parties; • If requested by a party and upon satisfaction that there has been misconduct, incapacity, incompetence or non-compliance with the duties prescribed in this policy. <p>g. Conduct of facilitator</p> <p>A person appointed to facilitate the proceedings shall fulfill their duty to;</p> <ul style="list-style-type: none"> • Seek a fair, equitable and legal resolution of the dispute between the parties. • Promote and protect the integrity, fairness and efficacy of the alternative dispute resolution process; • act independently and impartially; • Attempt to bring the dispute to an expeditious conclusion. <p>e. A facilitator will not be regarded as having a personal interest or a conflict of interest in proceedings in which he or she is appointed to facilitate.</p>	
23.0	<p>Insert a section 23.4 to read as follows;</p> <p>Where an agreement has been concluded, the KRA shall issue an assessment to give effect to the agreement within 45 days after the date on the signed agreement.</p>	This clause will reinforce the legal basis of the agreement and strengthen the confidence of both parties in the ADR process.
Other Provisions	<p>Include a section providing the practiced options of ADR to guide the Facilitator and the CTDR Division on the approach to explore in mediating the dispute.</p>	This is the practice globally and it facilitates the consideration of the various merits and demerits of different ADR approaches.



REFERENCES

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