



SUBMISSIONS ON TAX PROCEDURE BILL, 2014

POSITION PAPER ON TAX PROCEDURES BILL 2014

Introduction

There are various tax laws that are currently in place and operational in the current tax administration. The Institute takes cognizant of the fact that operationalisation as well as administration of these laws has posed challenges to tax payers and tax practitioners. Owing to complexity and inconsistency of some provisions of the tax laws, the Institute welcomes the development of the Kenya Tax Procedure Bill 2014 which largely brings consistency and harmonization of the various legislations.

Objective

The objective of this position paper is to review and make proposals on the Tax Procedures Bill 2014 (hereinafter referred to as the Bill) that was prepared by the National Treasury and to propose further recommendations on the implementation of this key document. The Bill will in due course be tabled on the floor of the National Assembly.

The understanding of the Institute is that the main objective is to provide uniform procedures for administering the tax laws for the promotion of consistency and efficiency and to enhance compliance. In this regard, we propose the following amendments:

SECTION	ISSUE	IMPLICATION/RECOMMENDATIONS	PROPOSED AMENDMENTS
<p>Part III: Section 18, 19 & 21</p>	<p><u>Licensing and Cancellation of tax agents licensing</u></p> <p>Under Section 19 and 21 of the Bill, the licencing process for Tax Agents is under mandate of Commissioner General (KRA).</p> <p>The tax system in Kenya has various players each with unique needs, obligations and responsibilities. A regulatory framework for tax agent services should indeed recognise the various players in the tax system. As noted above and as stipulated under the current Tax Agents regulations, the Tax Agents Committee will be anchored in the Kenya Revenue Authority (KRA). As such, KRA being a critical player in the administration of tax has had, on many instances, to contend with legal battles initiated by tax agents on behalf of tax payers. It is imperative for a regulator of tax agency services, to reflect a high degree of independence for the institution to</p>	<p>This provision is likely to be challenged on a constitutional basis as it is impossible to shake off the threat of "partiality" (or more accurately, the lack thereof) particularly in disciplinary and licensing procedures / hearings. For Example, the South African Tax Administrators Act, 2012 refers disciplinary/ licensing issues to the respective professional bodies and does not sit in such matters. This is what we need in Kenya. It is our considered view that in the interim, the KRA should cause the Tax Agents Committee, envisaged by the regulations, to operate within acceptable boundaries of independence. In the long term, we must work at putting in place a structure that is autonomous and with complete independent of the KRA. We must start thinking of developing a profession or a specialty for tax administrators. In this regard, we wish to argue that we need to think in future to establish an independent board within ICPAK To oversee the development, certification regulation of tax</p>	<p>Amend sec 18(1) to read <i>An individual, a partnership, a company may apply to the Institute of Certified Public Accountants of Kenya for a licence as a tax agent.</i></p> <p>Include a clause: <i>Tax agents shall be members of the Institute of Certified Public Accountants of Kenya as defined by the Accountants Act, No. 15 of 2008.</i></p> <p>Include a new definition of a tax agent: <i>"Tax agent" means a person licensed for purposes of advising a taxpayer on matters envisaged under Section 19 of this Act, providing tax services and for purposes connected or ancillary thereto</i></p>

	<p>attract the level of confidence required to execute its mandate. The Tax Agents Committee should ensure adequate representation of critical players in the tax services sector including professional bodies, tax administrators, government agencies and taxpayer representatives. Section 47 of the Constitution enshrines the right to a fair hearing in any judicial or quasi-judicial forum. Common law principles require such a judicial/quasi-judicial body to not only be independent but also comply with principles of natural justice. One such principle is <i>nemo judex in re causa</i> ó one cannot be a judge in one's own case.</p>	<p>agents in Kenya. ICPAK which currently regulates accountants majority of whom are the tax agents by virtue of their training and experience needs to be the body authorized to license tax agents. This can be done under an independent Board anchored under the Accountants Act. The Board will provide the necessary legal framework to ensure a higher level of independence in the execution of its regulatory role. This will also ensure that the organ is empowered as a neutral platform for all players in the tax administration system to receive fair administration of justice in the event of a conflict or discord.</p>	
<p>Part V: Section 23</p>	<p><u>Tax Returns</u></p> <p>Under Section 23 of the Bill, a licensed tax agent who prepares or assists in the preparation of tax return of a tax payer shall provide the tax payer with a certificate.</p> <p>We presume this clause adds to the complexity of return filing process</p>	<p>The requirement to furnish a tax payer with a certificate should thus be deleted in the Bill.</p> <p>This requirement is superfluous in view of the iTax platform which requires a tax agent's tax registration particulars when submitting the tax returns online.</p>	<p>Delete Sec. 23 (3)</p>

	<p>and is not necessary. The checks and balances in relation to licensing of a tax agents would ordinarily bestow a tax agent with duty of professional care on each tax work executed on behalf of his/ her client and any negligence should be dealt with as per the Tax Agents Regulations.</p>		
<p>Part VII: Section 45</p>	<p><u>Transfer of Tax Liabilities</u></p> <p>Under Section 45 of the Bill, when a taxpayer (referred to as the ðtransferorö) has a tax liability in relation to a business carried on by the taxpayer and the taxpayer has transferred all or some of the assets of the business to a related person (referred to as the ðtransfereeö), the transferee shall be liable for the tax liability (referred to as the ðtransferred liabilityö) of the transferor.</p> <p>This clause is one-sided since it looks at tax liabilities only rather than the entire transactional spectrum that includes tax assets. In this regard, a tax asset includes tax refunds and tax losses.</p>	<p>It is our considered view that this clause should address both tax liabilities and tax assets so that the tax law is seen to be balanced, certain and fair to both tax payers and revenue administrators (KRA).</p> <p>In addition, Section 45 (2) provides that, “<i>despite subsection (1), the Commissioner may recover the whole or part of the transferred liability from the transferor</i>”. This clause should be deleted since it negates the very basic canon of taxation referred to as ðcertaintyö. In its current form, it is not clear whether the Commissioner will recover tax from transferor or transferee.</p>	<p>Proposed new reading of Section 45(1):</p> <p><i>When a taxpayer (referred to as the “transferor”) has a tax liability or tax asset, including tax losses in relation to a business carried on by the taxpayer and the taxpayer has transferred all or some of the assets and or liabilities of the business to a related person (referred to as the “transferee”), the transferee shall be liable for the tax liability (referred to as the “transferred liability”) of the transferor and the transferor shall have the benefit of the tax assets, including tax losses so transferred”</i></p>

Part VII: Section 46

Tax Refunds

Under Section 46 of the Bill, when a taxpayer has overpaid a tax under a tax law, the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within two years of the date on which the tax was paid.

This clause does not address the taxpayer's main concern in relation to delayed tax refunds by KRA. We have experienced tax refunds delayed for very long periods hence contributing to Kenya's dismal performance in attracting Foreign Direct Investment (FDI) vis-à-vis the regional counterparts.

We are of the view that this clause should be amended in light of Section 105 of the Income Tax Act (ITA) as follows:

- In terms of application for refund, the period of two years is too short. Section 105 of ITA gave tax payers a grace period of 7 years and we are of the view that this should be maintained in the Bill.
- The Bill should provide the requirement for KRA to refund the tax due with interest at a rate of 2% per month after the expiry of the first six months from the approval of such a refund. This is a deterrent charge to address undue delays in tax refund process.

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- Proposed re-wording of Section 46(4): *Provided that:*

- ii) *The Commissioner shall notify the taxpayer of the refund due within ninety days of the taxpayer filing the claim for refund;*
- iii) *The Commissioner shall pay the taxpayers refund claim within ninety days after the date he notifies the taxpayer of the tax refund due under (i) above; and*
- iv) *Where the Commissioner does not pay the tax refund within ninety days as provided for in (ii) above, the Commissioner shall pay the taxpayer interest on such outstanding refunds such interest to be based on the Kenya Bankers Reference Rate as published from time to*

			<p><i>time and to accrue from the sixth month after the taxpayer filed the tax refund claim until the claim is paid.”</i></p>
<p>Part VII: Section 47</p>	<p><u>Erroneous refund of tax</u></p> <p>Under Section 47 of the Bill, where the Commissioner has refunded a tax under a tax law in error, the person to whom the refund has been erroneously made shall, on demand by the Commissioner, repay the amount erroneously refunded together with late payment interest accruing from the date that the refund was erroneously paid.</p> <p>This clause is one-sided since it looks at erroneous tax refunds only rather than the entire spectrum that includes erroneous tax payments made by the tax payer.</p>	<p>It is our considered view that this clause should address both erroneous tax refunds and erroneous tax payments made by the taxpayer to KRA so that the tax law is seen to be balanced, certain and fair to both tax payers and revenue administrators (KRA).</p>	<p>Proposed amendment to Section 47:</p> <p>Section 47(5): <i>“Where a taxpayer has made an erroneous tax payment that results in a tax overpayment, the Commissioner shall, on the application in writing by the taxpayer, refund such erroneous overpayment to the taxpayer within a reasonable time provided that such reasonable time does not exceed thirty days from the date of the taxpayers application for refund of overpaid tax.”</i></p> <p><i>“For purposes of this section, an</i></p>

			<p><i>erroneous tax payment that results in a tax overpayment is one which on the face of it, patently erroneous and in excess of the tax that ought to have been paid, taking into consideration the tax return supporting the tax payment and the average tax paid in the preceding period or periods.”</i></p>
<p>Part VIII: Section 51 (2)</p>	<p><u>Appeal of appealable decision to the Tribunal</u></p> <p>Under Section 51 (2) of the Bill, a notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid thirty per cent of the tax in dispute under the assessment at the time of lodging the notice.</p> <p>This clause adjudges a person guilty before he/she is heard.</p>	<p>This clause conflicts the rules of natural justice where a person is innocent until proved otherwise. The taxpayer should not pay a penny in relation to tax in dispute until all avenues of justice are exhausted. This clause should therefore be deleted.</p>	<p>Delete Section 51(2)</p>

<p>Part IX: Section 55 (2)</p>	<p><u>Enforcement: Production of records</u></p> <p>Section 55 (2) of the Bill has included some confidentiality causes for Financial Institutions based on the nature of their activities/ business. Unfortunately, this clause has failed to define the phrase “financial institutions”.</p>	<p>It is our considered view that the phrase “Financial Institutions” should be defined as the organizations listed under the Fourth Schedule to the Income Tax Act.</p>	<p>Under definitions, define “Financial Institutions” as the organizations listed under the Fourth Schedule to the Income Tax Act</p>
<p>Part XII: Section 79 (4)</p>	<p><u>Tax shortfall penalty: Voluntary disclosure</u></p> <p>Section 79 (4) of the Bill stipulates that the amount of a tax shortfall penalty imposed on tax shortfall shall be reduced by ten percentage points when that person voluntarily discloses to the Commissioner the statement or omission to which the section applies.</p> <p>Introduction of voluntary disclosure under this section is a great move and encourages compliance. We are however quick to point out that the Voluntary Disclosure Programme (VDP) should be enshrined in the entire tax legislation since it</p>	<p>We propose that the Bill should be amended to initiate a VDP process in all facets of compliance. The amendment should be designed in such a way that the Kenya Revenue Authority (KRA) is in a position to accord penalty treatment for first time voluntary disclosures. This VDP should be enshrined in Rules that clarify the procedure of making a voluntary disclosure and the penalty waiver that a taxpayer is entitled to following a voluntary disclosure.</p> <p>The proposal will:</p> <ul style="list-style-type: none"> • enhance compliance; and 	<p>Proposal</p> <p><i>This VDP should be enshrined in Rules that clarify the procedure of making a voluntary disclosure and the penalty waiver that a taxpayer is entitled to following a voluntary disclosure.</i></p>

	<p>communicates the government's position of enhancing tax compliance.</p> <p>On 8 March 2009, Singapore through Inland Revenue Authority of Singapore (IRAS) issued an e-Tax Guide on its VDP. The programme has recorded a huge success by enhancing tax compliance and improving revenue collection to government.</p>	<ul style="list-style-type: none"> • Increase revenue to government. 	
<p>General</p>	<p><u>Timelines/ recourse for response by KRA on application, queries, et al by the tax payers</u></p> <p>In general, the Bill has provided clear deadlines on which applications, returns, payments, et al, must be made by the tax payers and the consequences thereof. To this end, this is a good move since it ensures compliance in tax collection. However, in terms of fair administration of justice, the Bill scores poorly since the KRA, in most circumstances, has not been given timelines under which officials will</p>	<p>A robust tax system should clearly state the taxpayers responsibilities under each clause and at the same time categorically state the revenue authorities' responsibilities.</p>	<p>Proposal</p> <p><i>We propose that under each clause a tax payer is required to act, the Bill should clearly states KRA's recourse accompanied by proper timelines. Some of examples where this has not been addressed include: Sections 24 (3), 32 (3), 41 (2), 46 (3), et al.</i></p>

	respond to application, queries, etc from the tax payers and the consequences thereof. As tax professionals, we have seen many instances where a tax payer is not addressed and when addressed, it is after a spirited fight since the tax payer has no recourse under the existing regulations.		
	OTHER PROPOSALS FOR INCLUSION	RATIONALE	
Offset of tax credits refunds against tax payables	<p style="text-align: center;">Current position</p> <p>The only tax receivable that can be offset automatically without prior approval from the revenue authority is accumulated loss against future taxable income.</p>	<p>Tax procedure code should include clear provisions on the tax offset possibilities available to the tax payer. The tax procedure should bestow a definitive right to offset and remove this discretion from the tax administrators,</p>	<p>Proposal <i>Include a clause to read'' a tax payer will be allowed to offset any tax overpayments credit against a tax obligation from any tax head''</i></p>
Interest on tax refunds pending from the tax administrator	<ul style="list-style-type: none"> The revenue authority does not pay any interest on tax refunds that have been audited and approved for payments but are yet to be remitted to the tax payer. The tax payers face a situation where they are not 	<p style="text-align: center;">Proposal</p> <p>The tax procedure code should clearly stipulate the timeline within which a claim for refund of tax should be validated and approved for payment by the tax administratorThe code should also introduce an interest charge payable by the tax administrator in respect of tax refunds that are not paid within a particular</p>	

	compensated for the time value lost amount of time when their monies are held up at KRA.		
Time barring	<p>Current position</p> <p>The revenue authority does not pay any particular heed to the hardship involved in locating documentation that is beyond the statutory limit for retaining of documents, Thus the revenue authority has been known to ask for documents relating to period over 20 years prior. The clause in the current laws allows the tax administrator to not abide by the statutory time limits where fraud is suspected and this clause is susceptible to abuse,</p>	<p>The tax procedure code should clearly stipulate the timeline within which the tax administrator is allowed to carry out an audit of a period. It should also clearly render null and void any demand by the revenue authority to audit a period after a certain period of time and empower the tax payer to avoid being penalized by KRA(for instance by refusal to issue a tax compliance certificate) for being unable to produce documentation relating to periods beyond a stipulated period of time.</p>	<p>Proposal</p> <p><i>The time limit should be aligned to Section 79 provisions of the Income Tax Act, Chapter 470 of the Laws of Kenya.</i></p>
Interest and penalties pending appeal	<p>Current position</p> <p>The revenue authority has to stand over the taxes in dispute for a matter to be referred to the tax tribunals. This practice contravenes all known civil procedure principles. Kenyan courts are reluctant to make any meaningful ruling on the application of interest and penalties while a matter is pending before the courts.</p>	<p>The end result of a matter before a judicial body does not guarantee any relief against penalties and interest no matter how long it takes. The delay can be costly to the tax payer which is occasioned by factors beyond tax payers control.</p>	<p>Proposals</p> <p>The tax procedure code should include provisions to:</p> <p>a) <i>The court should be permitted to determine the deposit and security that a taxpayer should provide when lodging an appeal. Such security and deposit always taking cognizance of the provisions of Article</i></p>

			<p><i>47 of the Constitution.</i></p> <p><i>b) Clearly determine whether the lodging of an appeal should automatically suspend the application of late payment interest during the subsistence of the appeal before the tax tribunals.</i></p> <p><i>c) Clearly stipulate the extent to which a tax payer should pay late payment interest where the tax payer has lost an appeal - it is unfair that a tax payer should pay late payment interest where an appeal has been lost but the appeal was not ruled frivolous or an abuse of the court process.</i></p>
Infringement of limited liability provisions	S. 17 - Appears to infringe upon the principle of limited liability as envisaged under the companies Act. This should only be done where criminal liability (such as tax evasion) arises and should not be used to penalize inability to pay tax by virtue of genuine and sincere business losses or corporate mistakes.	<i>The liability of principal officers of the company should attach following a lifting of the veil of incorporation as envisaged under the Companies Act.</i>	
Amendment of returns	The tax procedure bill is not clear on the implications of amended returns especially where the amended returns are such that the	-----	<i>The tax procedure bill should be clearer about how a tax payer can amend his returns and the obligations of the tax administrator where a tax payer</i>

	position of the tax payers is materially altered, for instance, where the position moves from a tax payable to a tax receivable and vice versa.		<i>files amended returns</i>
Statement of account	The tax procedure bill should address the issue of statement of accounts. The practice at the moment is that the statement of accounts is received as late as 15 years after the period to which they relate. This is a huge inconvenience on the tax payer and makes the reconciliation of the tax payable or receivable an onerous task	In view of iTax and online tax filings, the Statement of accounts ought to be up to date at any one time.	Proposal <i>The Commissioner should not query matters beyond seven years from the year of income in question since ITA provides for 7 years as the maximum period for which tax documents should be kept..</i>
Section 14(2)(d)	This provision is blank	Provision should be deleted and subsequent sub-paragraphs renumbered accordingly	Proposal <i>Delete Section 14(2)(d)</i>
General	Does this Bill/Act cover East Africa Community Customs Management Act, (EACCMA)? Would conflicting provisions in the Bill/Act and EACCMA amount to a unilateral amendment of EACCMA and related provisions?		Proposal <i>There is need to harmonise the provisions of this Bill and the EACCMA Act to eliminate any contradicting clauses.</i>