252157

Tax Dispute Resolution Mechanism
Presentation by:

Stanley Ngundi
Tax Manager, Ernst and Young LLP

Equity in Taxation

- The **principle of equity in Taxation** which is now anchored in the Kenya Constitution 2010 underscores that e**very taxable citizen must pay taxes** and that **everyone must pay their fair share of the taxes**.

- Article 201 (a) (i) **"The burden of taxation must be shared *fairly*."**

- Mathew 22:21 **"So give back to Caesar what is Caesar's, and to God what is God's."**

Tax decisions by Commissioner

The Tax Procedures Act 2015 (TPA) – effective 19th January 2016 is to guide administration of taxes – Section 2(2).

Tax disputes arise from Tax decisions**. Tax decisions that may be made by the Commissioner under The Tax Procedures Act including:**

- **Assessments** – Sections 29, 30 & 31- Default, Advance or Amended assessment
- **Refund decision**
- **Demand for penalty**

Dispute Process

Tax Decision – Section 2 & 50 TPA

Objection by Taxpayer – Section 51(1) TPA- within 30 days

Objection decision – Section 51(8) to (11) TPA– Within 60 days

Appeal to Tax Appeals Tribunal– Section 52 TPA

Appeal to High Court / Court of Appeal – Section 53 &54 TPA

Dispute Process

1. Tax decision
2. Objection
3. Objection decision
4. Notice of Intention to Appeal
5. Filing appeal to TAT
6. Filing appeal High Court

Valid Objection

1. Are lodged under Section 51(1) of the TPA before proceeding to any other written law
2. Timeliness - **Lodged within 30 days** – Section 51(2) TPA
3. **Precisely states objection grounds – Section 51(3)(a)TPA**
4. **States amendments required to correct decision and reasons for amendments- Section 51(3)(a) TPA**
5. **Entire amount not in dispute paid in full – Section 51(3)(b) TPA**

Taxpayer to be notified in writing where an objection is not valid – Section 51(4) TPA

Tax Appeal Procedure

GUIDED BY TAX APPEALS TRIBUNAL ACT, 2013

If the tax payer is still in contention with the KRA's objection decision he should;

- Give ***Notice of Intention to Appeal*** in writing to the Commissioner
- Pay a non-refundable fee of ***KES 20,000*** to the Tax Appeals Tribunal on filing the Notice
- Serve a notice of Intention appeal to the Tribunal in writing within ***30 days*** upon receipt of the objection decision of the Commissioner

Tax Appeal Procedure

- Within 14 days from the date of filing the notice of appeal, submit of a ***memorandum of appeal and statements of facts***

  "enough copies, as may be advised by the Clerk"

- For the appeal to be valid Appellant to **pay tax not in dispute**

- The decision of the Tribunal will be **given within 90 days** from the date the appeal is filed.

Tribunal Procedure

- The secretary to the Tribunal shall advise all parties of the time and place of the hearing <u>at least **14 days** before the hearing</u>
- Evidence may be given **<u>orally or through affidavits</u>** or any other manner as directed by the Tribunal
- The appellant may appear **<u>in person</u>** or be represented **<u>by a tax agent</u>**

Tribunal Procedure

Options during appeal;

- A party may **withdraw** the appeal in writing;
- Tribunal dismisses **the appeal for lack of prosecution**;
- **Tribunal dismisses the appeal** when the appellant fails to heed its direction;
- Tribunal **upholds the appeal** if respondent fails to make appearance;
- The parties **may reach an agreement, which they will report to the Tribunal**.

Constitution of Tribunal Panel

- The Tribunal consist of a **Chairperson** and **fifteen to twenty other members**

- Not more than **five members of the Tribunal should be advocates** of the High Court of Kenya.

- A person qualifies to be the **Chairperson** of the Tribunal if they is qualify to be appointed as a **Judge of the High Court;**

Constitution of Tribunal Panel

Qualifications to be a member of tax tribunal;

i. **High moral character** and integrity in accordance with Chapter six of the Constitution;
ii. Hold a **degree in law, business, finance, public finance, economics, insurance or related discipline** from a university recognised in Kenya or any other relevant qualification from an institution recognised in Kenya;
iii. Has at least **ten years' experience** in matters
iv. Is **not a public officer or an employee of Kenya Revenue Authority or a tax agent**;
v. Has **met his tax obligations**;
vi. Has not been **convicted of an offence under any law**; and
vii. Has not been **adjudged bankrupt by a Court of Law**

Next step after TAT

- If a party is **dissatisfied** by the decision of the tribunal, should **appeal to the High Court** within **thirty days** of being notified the decision

- If a party is **dissatisfied** by the decision of **the high court**, should appeal to the **Court of Appeal within thirty days** of being notified the decision

Dispute Process RECAP

1. Tax decision
2. Objection
3. Objection decision
4. Notice of Intention to Appeal
5. Filling appeal to TAT
6. Filling appeal High Court

There is an Alternative now . . .

ADR Basics

The ADR Framework is a document which governs the Alternative Dispute Resolution process in KRA.

Quick facts about the Framework;

- Launched on 17th June 2015
- Effective from 1st July 2015
- Applies to Tax Disputes
- Users of the Framework include internal and external stakeholders, i.e. Taxpayers and the Commissioner.
- Available on the KRA website *www.kra.go.ke*

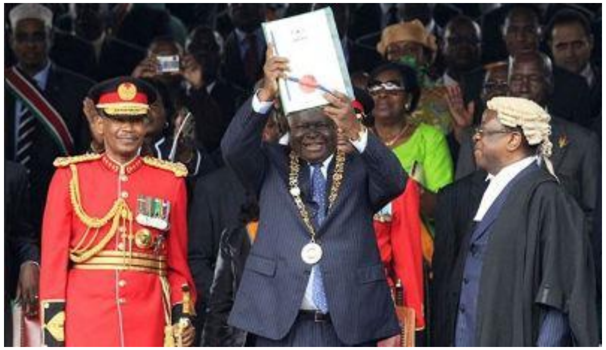
Objectives of ADR

To provide;

- A **taxpayer focused approach** to dispute resolution.
- Internal structures to support tax dispute resolution through **oversight, monitoring and management** of the ADR processes.
- Support for creation of a central database on tax disputes handled in **ADR to guide future dispute resolution for consistency**.
- **Guidelines for the parties** during the ADR discussions.
- Timelines for resolving tax disputes so as to bring e**fficiency to the process.**
- An **additional approach** for dispute management & resolution of tax disputes

Is ADR backed by Law?

- ✓ Constitution of Kenya, 2010 Article 159 (2) (c)
- ✓ Revenue Statutes
- ✓ The Tax Appeal Tribunal Act - TATA (Sec. 28)
- ✓ Tax Procedure Act (Sec. 55)



ADR Framework

- ***Suitability Test-*** The Framework provides for factors to consider in assessing suitability of Cases for ADR. Not all disputes may be settled under ADR e.g , illegalities.
- ***Conduct*** **-** ADR Discussions must be held within an environment of decorum, flexibility and parties must subscribe to standards of conduct and rules.
- ***Timelines*** **- 90 days** as in Clause 55 of Tax Procedure Bill (Section 55 TPC Act).

Tribunal Court initiated ADR - dependent on Court deadlines given

- ***Documentation-****ADR discussions* must be supported by relevant documentation.
- ***Termination of Discussions-*** Upon lack of co-operation by either party, conduct unbecoming of ADR discussions, mutual agreement to terminate.

ADR Agreement

Where parties to the dispute
have agreed on terms;

- ✓ Agreement terms must be put into **writing, signed by both parties/their representatives and witnessed by the Facilitator**.
- ✓ Each party is to retain a copy of the signed agreement
- ✓ Signed agreement shall be in full & final settlement and shall be **binding** to both parties.
- ✓ Agreement can be adduced as evidence.

Improving ADR

- KRA’s ADR Framework is a living document and shall be reviewed from time to time to reflect changes in Law, Policy and other Regulatory Frameworks, as well as to enhance service deli

- Strategic and Innovative interventions are key in ensuring the growth of the framework into a dependable and efficient document, which will address the needs of both our internal and external customers.

Initiating ADR

- The **process begins after an objection decision is communicated** to the taxpayer.
- The taxpayer or tax representative make a **formal appeal to the Tax Appeal Tribunal first before requesting for the ADR process**
- A formal application is then made to the **Tax Appeals Tribunal and forwarded to Corporate Tax Dispute Resolution Division (CTDR)** . CTDR is the office charged with the responsibility of facilitating the ADR process between the Taxpayer and the Commissioner
- Settlement of the dispute within **90 days of date the Tribunal/Court permits the settlement** - Section 55(1) of the TPA or it shall be referred back to the Tribunal/ Court - Section 55(2) TPA.

Questions

Contacts

CPA Ngundi Mutua
Manager – Taxation Services
Stanley.Ngundi@ke.ey.com
Mobile: +254 720291561

Tax Reporting and Strategy Presentation by:

Stanley Ngundi
Tax Manager, Ernst and Young LLP

Feeling Tax Secure

1) Introduction

2) Tax risk management

3) Tax planning

4)Tax planning measures
    Direct taxes
    Indirect taxes

5) Q&A

Tax Risk Management

- It is the process of *identifying* and *avoiding* or *managing* tax risks through appropriate processes and procedures

Managing Tax Risks

Tax Control framework is a system/process to identify, mitigate, control and report tax risks

- Awareness and alignment
- Assess and manage
- Communicate and report

Tax Risk Management and Planning

- Understand overall strategy to avoid taking on additional risks with no contribution to strategic direction of the organisation

- Current approach to tax risks *ignores the money lost* and looks at opportunities for tax optimization and where there could be *reputational damage*

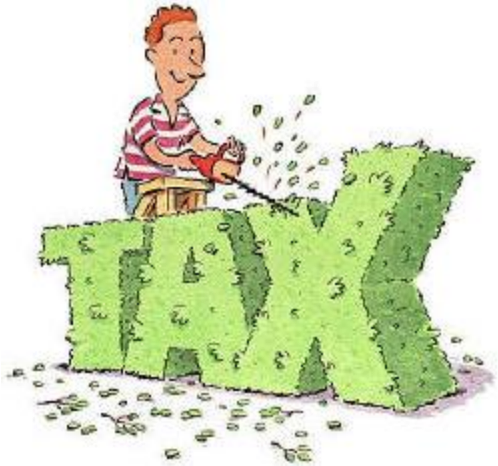
Is Tax Planning Legit?

"…. there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. ……… nobody owes any public duty to pay more than the law demands: taxes are enforced extractions, not voluntary contributions"

Judge Learned Hand, 1947

Introduction

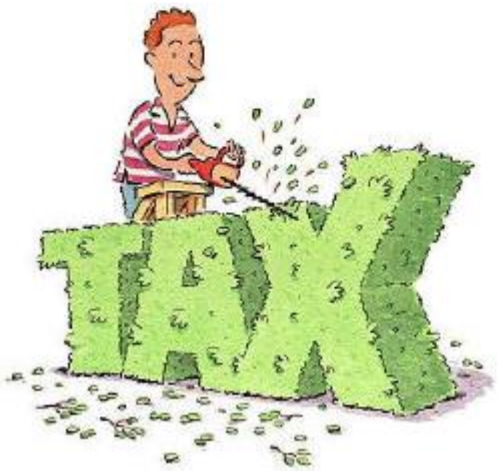
- Tax planning involves legitimate and judicious use of statutory provisions to minimize tax liability



- Aim is structure operations so as to pay the right amount of tax, at the right time, in the right way

Introduction

- Tax planning is a process of putting in place tax strategies that will help to exclude, defer or reduce the amount of taxes that will have to be paid

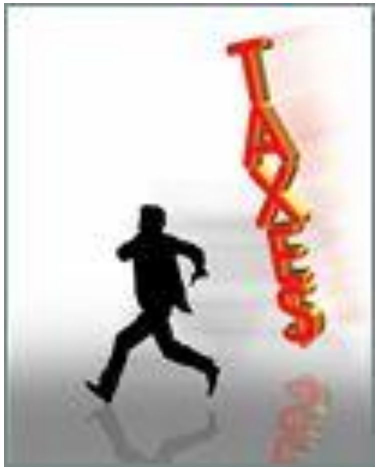


Is Tax evasion Legit?

- Tax evasion is expending efforts to reduce taxes or pay no taxes by illegal means

- Tax evasion is a crime and subjects the guilty party to fines or

  imprisonment



Why Tax Plan?

- To increase value
- To reduce the tax burden
- To defer tax payment
- To avoid penalties and interest
- To manage tax risks

Why Tax Planning Fails

- Lack of commercial rationale
- Lack of/wrongful implementation
- Corporate residence issues
- Improper/rogue communication
- Failure to keep records
- Disconnect with overall strategy – risk appetite
- Lack of frequent review

Methods of Tax Planning

How?

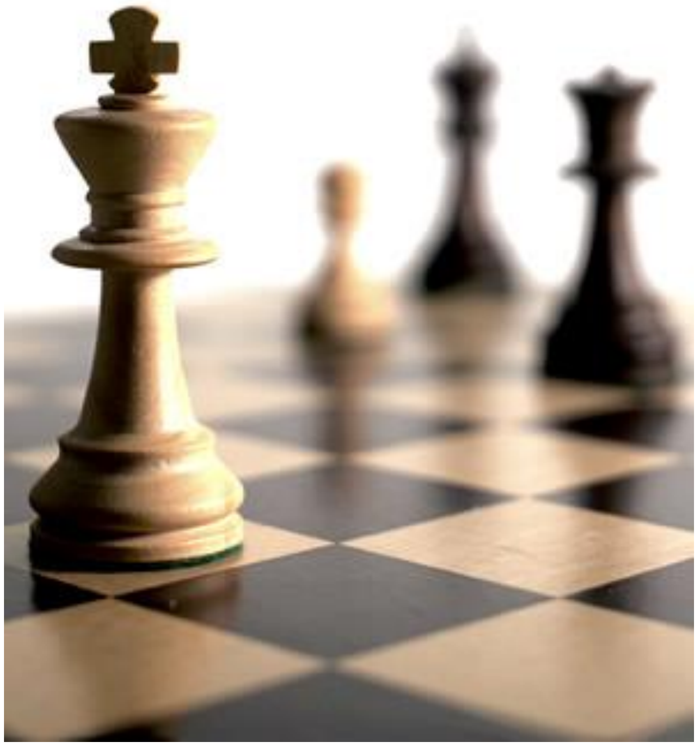
- Reduce taxable income
- Increase tax deductions
- Eliminate non-compliance costs i.e. fines, penalties and interest
- Rebates & refunds

Audit Triggers

- Staff – moles, unhappy employees
- Non compliance detected during a normal Audit
- Third party Information
- Information emerging from related company audits
- Changes in legislation

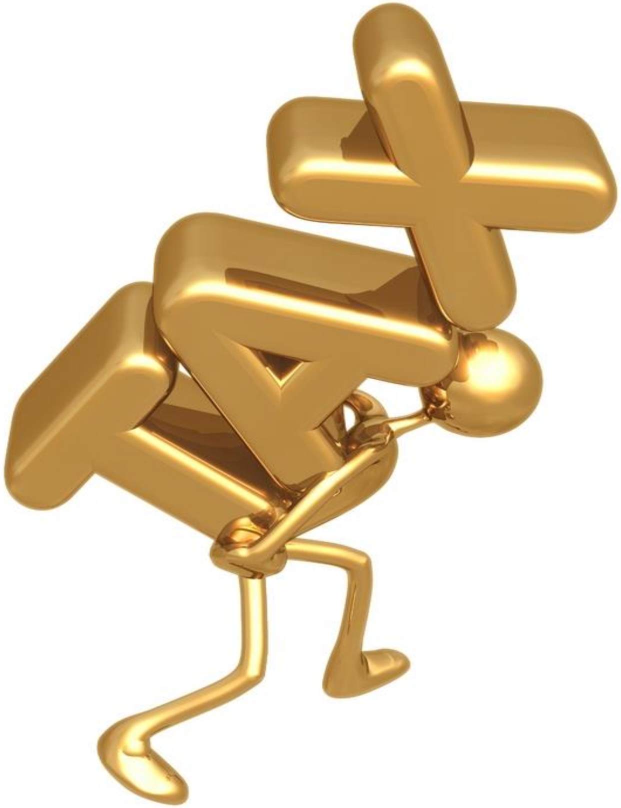
Audit Triggers

- Cessation of business or a large part of business
- The PIN
- Website
- Publicity
- Intelligence Unit



Tax Planning Measures

Direct Taxes



Corp Tax

- Avoid having the *"right" tax plan made "wrong"* by erroneous income projections – plan for your instalment tax payments properly!

- Capital allowances

  - Accelerated capital allowances

    - ID Claims

    - IBA at increased rates outside cities

Corp Tax cont . . .

- Plan companies’ investments/ incomes
- Shares - when does this income become business income as opposed to capital gains?

- Exempt dividend income
- Exempt interest income
- WHT on interest final tax
  - From banks, building societies
  - Housing bonds (up to KShs.

    300,000)

Corp Tax cont . . .

- Planning for thin capitalization

  - Foreign controlled co; debt- equity ratio leaning towards debt

    - Reduce loans
    - Reduce interest rates
    - Increase revenue reserves
    - Increase share capital
    - Charge management fees instead of interest

- Group operation reorganization

  - Tax losses; thin capitalization, TP

Corp Tax cont . . .

- House – Occupying versus letting
- Waiver of penalties and interest –take advantage of *in duplum* rule
- Application for relief for errors and mistakes made
- Export Processing Zones (EPZs)
- Newly listed companies – favorable rates
- Lobbying – Commissioner’s discretion

PAYE

- Watch out for the tax due dates
- Adopt on-line filing of returns

PAYE cont . . .

- Medical benefits are exempt – Sec 5(4)(b) of the ITA
- Loans to employees: FBT is paid by employer
- ESOPs – taxation at the end of the vesting period

PAYE

- Pensions/Provident Funds:

  - ***KShs 20,000*** pm is tax deductible

  - Retirement annuities (KShs 180,000 pa) are tax-free

  - Withdrawals – Lump sums of KShs. 60,000 p.a. for ten years   are tax exempt

PAYE cont . . .

- Pensions/Provident Funds:

  - Special withdrawals

    - Retirement on medical grounds; or
    - Membership of scheme - over 15 years
    - Individual is over 50 years

PAYE cont . . .

- Mortgage: Interest of *KShs 150,000* per annum is tax deductible

- Home Ownership Savings Scheme *KShs 48,000* per annum

- Benefits in kind not in excess of *KShs 36,000* per annum

PAYE cont . . .

- Insurance relief - 15% of premiums or KShs 5,000/= pm
- Allowances versus disbursements
- Staff training and development
- Educational institution to tutor staff members
- Home leave passages

PAYE cont . . .

- Staff party expenses
- Study leave
- Meal provision to low income employees
- Life insurance cover – Group
- Telephone benefit
- Terminal Compensation

PAYE cont . . .

- Car benefit/loan versus mileage claims

  - Car benefit – 2% of initial cost

    - Car allowance – 100% taxable

    - Car loan – FBT paid by employer

    - Own car benefit – Mileage claims

WHT

- Utilization of unilateral tax credits, or credits contained in DTAs to pay on ‘gross’ rather than ‘net’ basis
- Accruals versus general provisions
- Use of lower rates of withholding tax under DTAs and treaty shopping
- Split of foreign invoice between payments subject to WHT, and payments not subject to WHT

Indirect Taxes

Why Tax Plan for Indirect Taxes

- Indirect taxes account for substantial proportion of total cash outflow

- Indirect taxes lack the visibility of direct tax in annual accounts

- Processing systems for indirect taxes are not perfect

- Need for certificate of compliance for tendering purposes

Why Tax Plan for Indirect Taxes

- Avoiding non-compliance
- Determination of tax point
- Avoid tax penalties

VAT

- Observe the tax due dates
- VAT remissions and refunds
- Consider voluntary registration for VAT
- Account for reverse - charge VAT on a timely basis (and claim back in the following month, where applicable)

VAT Cont . . .

- Offsetting of VAT refunds against other taxes
- Correct choice of input VAT claimable
- Claiming VAT on bad debts
- Application for transfer of assets and stocks without VAT

Customs

- Import duty remissions
- Origin of goods – preferential treatment
- Bonded warehouses
- Classification of goods – rates
- Tariff incentives

Excise

- Obtaining remission/rebate of excise duty on export sales
- Refund of duty on returned or destroyed goods
- Segregation of costs relating to non-excisable products

QUESTIONS

Contacts

CPA Ngundi Mutua
Manager – Taxation Services
Stanley.Ngundi@ke.ey.com
Mobile: +254 720291561