

INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA

CONVERGENCE OF TAX TRENDS IN THE EAC

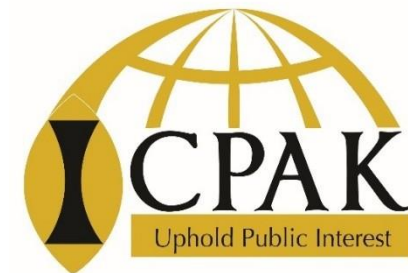
ICPAK 4TH ANNUAL TAX CONFERENCE

INCOME TAX POLICY

The Context, Objectives, Strategies & Risks

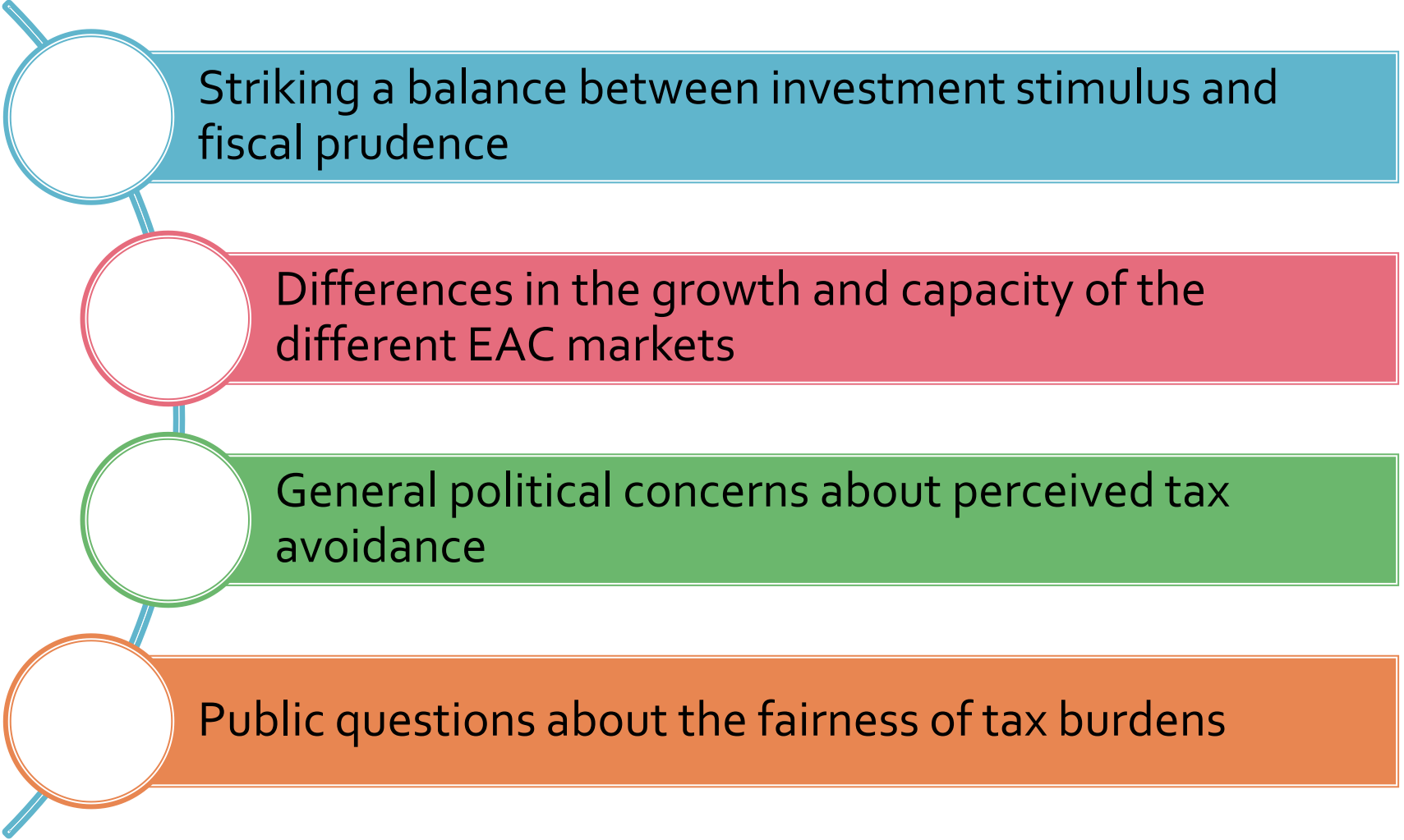
**Presented by : Ms. Lydia Ndirangu, Senior Manager Tax, Ernst & Young LLP
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OUTLINE



- Introduction
- The EAC into perspective
- Common tax practices across EAC
- Common dispute resolution mechanisms
- Trends in tax matters across the EAC
- Case studies: Cases and Tribunal Rulings

CRITICAL ISSUES FOR GOVERNMENTS



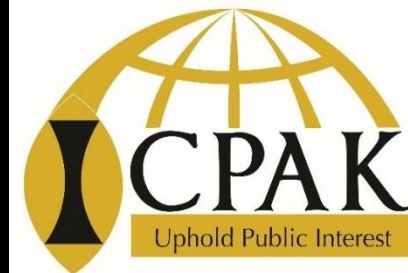
Striking a balance between investment stimulus and fiscal prudence

Differences in the growth and capacity of the different EAC markets

General political concerns about perceived tax avoidance

Public questions about the fairness of tax burdens

THE CHANGING BUSINESS AND TAX ENVIRONMENT



Business Trends:

- Growing globalization/regionalization
- The proliferation of the digital economy
- Complexity of value chains and intra-firm trade
- Increasing number of tax havens for MNCs

New reality for global economy

- More attention by on the international tax profile of MNCs
- Complexity in tax laws and reporting obligations
- More information sharing between governments
- More robust audits and more controversy

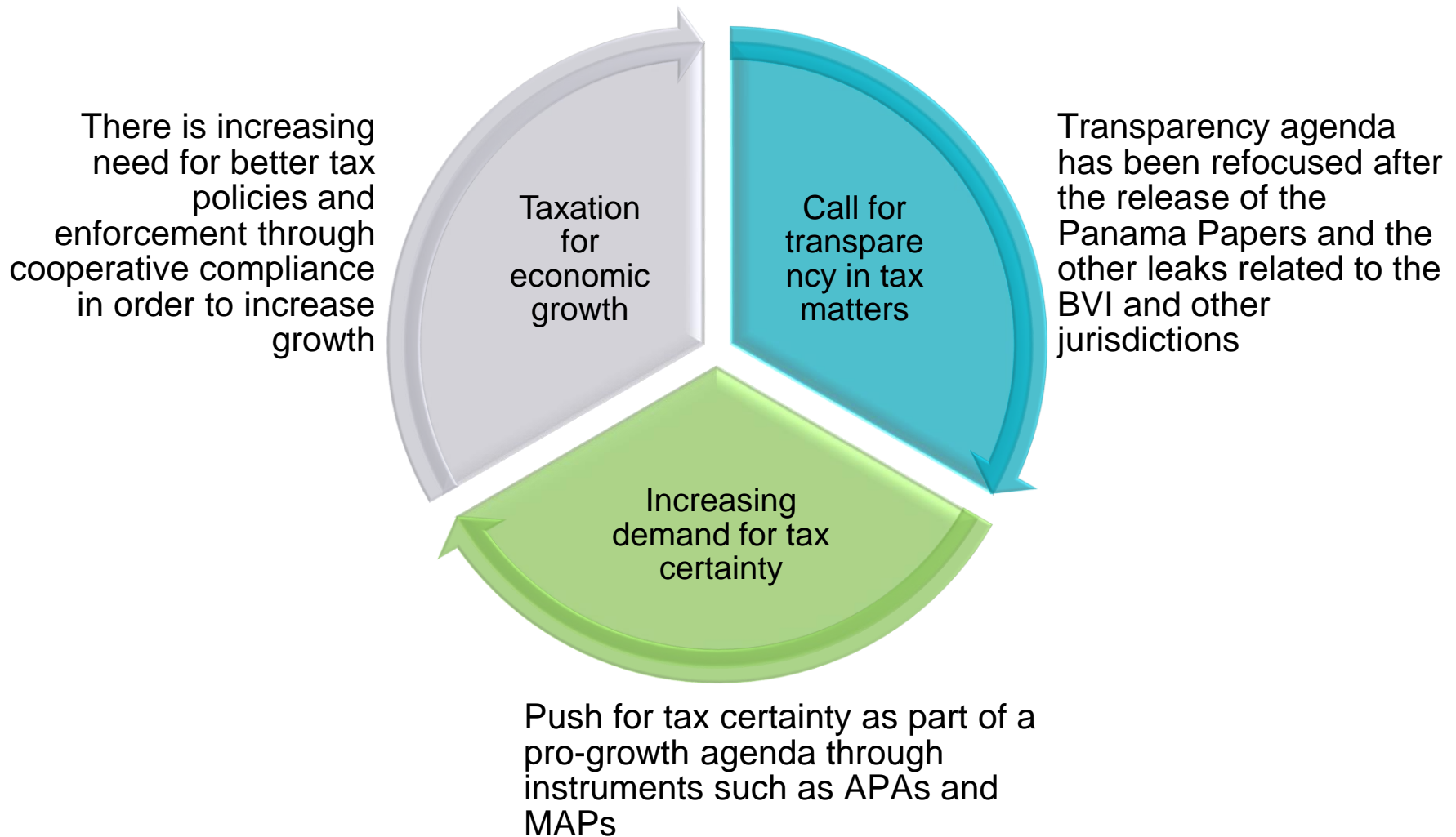
Tax implications:

Need for **transparency** in tax policies and measures

Consideration for **substance** over form for tax purposes

Focus on **sustainability** of the tax policies and strategies

TRENDS IN THE GLOBAL TAX POLICY



THE EAC INTO PERSPECTIVE

THE EAC JOURNEY



Current membership:

- The Republics of Burundi,
- Kenya,
- Rwanda,
- South Sudan,
- The United Republic of Tanzania, and
- The Republic of Uganda

Treaty for the Establishment of the East African Community enters into force

• **7 July 2000**

The Republic of Rwanda and the Republic of Burundi accede to EAC Treaty

• **18 June 2007**

Protocol for the Establishment of the EAC Common Market signed

• **20 November 2009**

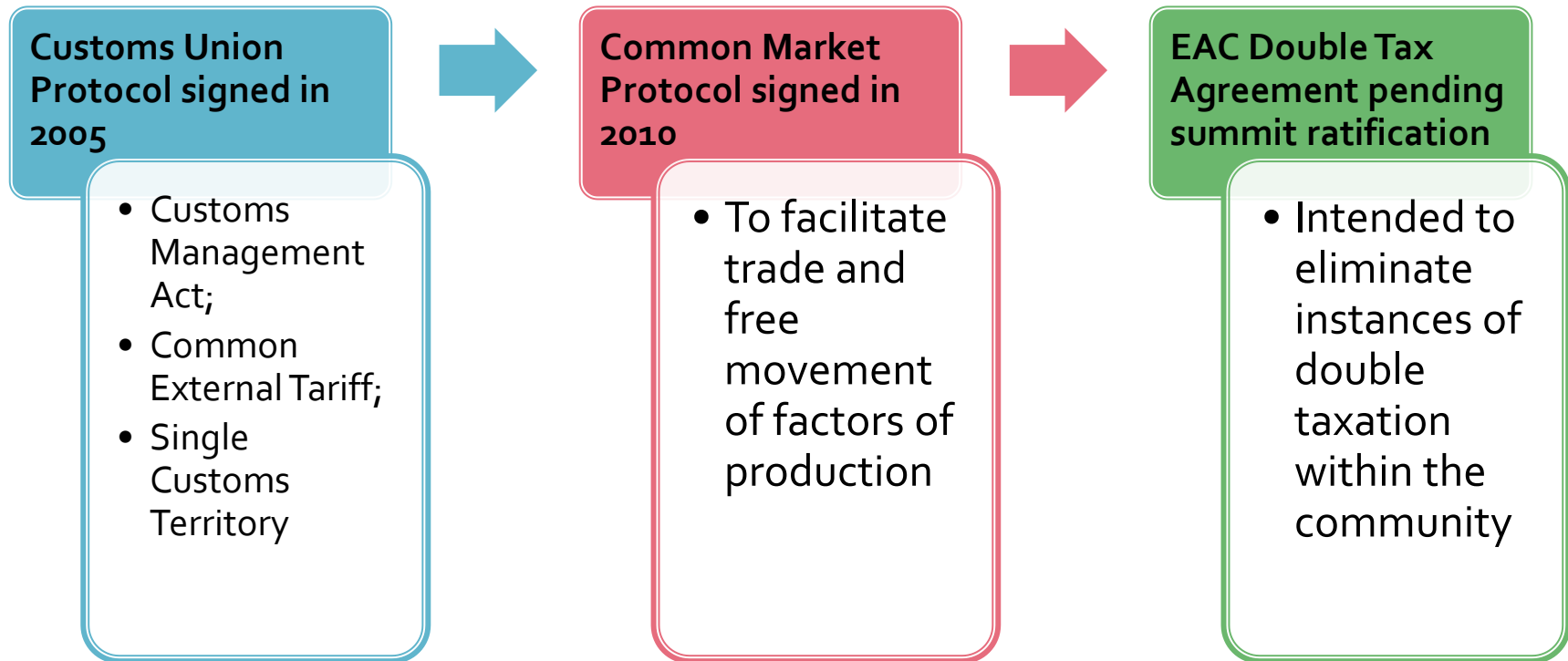
Protocol for the Establishment of the EAC Monetary Union signed

• **30 November 2013**

The Republic of South Sudan accedes to EAC Treaty

• **15 April 2016**

INSTRUMENTS FOR EAC HARMONISED TAX ADMINISTRATION



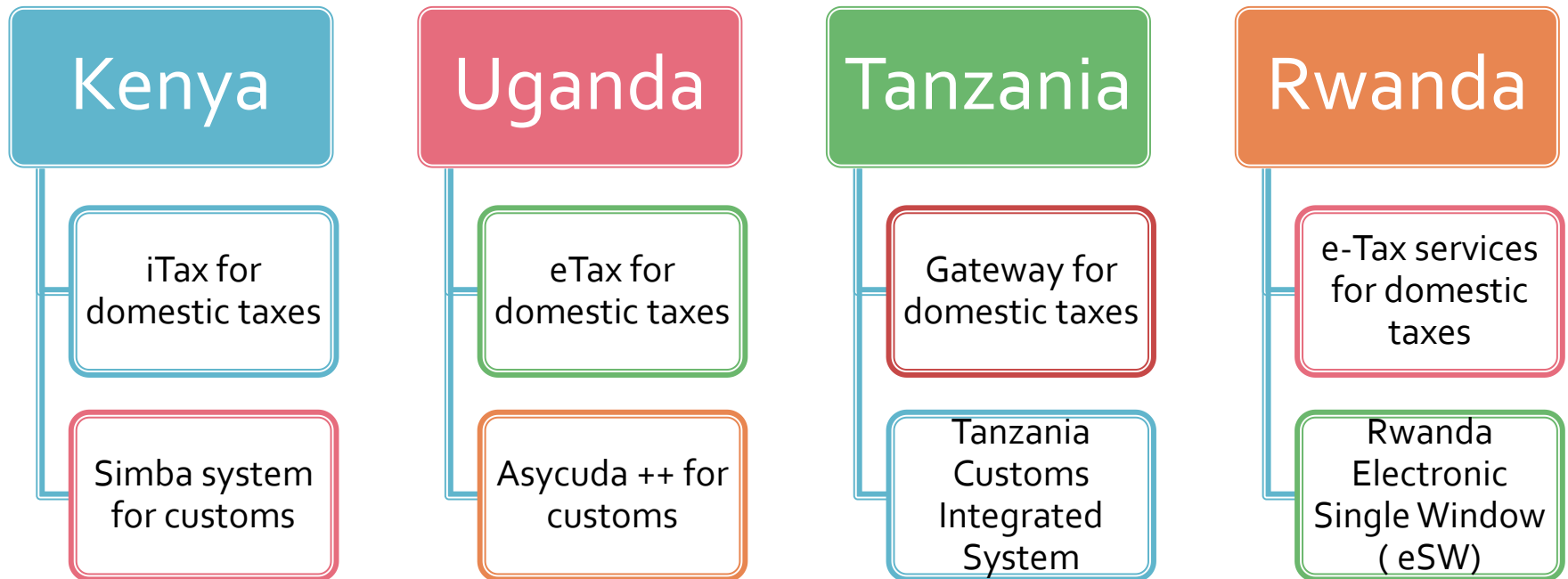
There has also been an attempt to harmonise application of VAT and Excise Duty across the community member countries and creation of the EAC Revenue Authority for harmonised tax administration

COMMON TAX PRACTICES ACROSS EAC

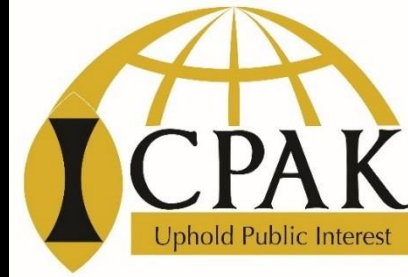
TAX ADMINISTRATION AND AUDIT PRACTICES



- Adoption of technology in the tax administration and enforcement;



TAX ADMINISTRATION AND AUDIT PRACTICES



- Judicial precedence borrowed and applied for persuasion e.g.

Kenya

- In-country
- United Kingdom
- Asia esp. India
- USA

Tanzania

- In-country
- United Kingdom
- India
- Africa

Uganda

- In-country
- United Kingdom
- India
- Kenya

COMMON TAX ADMINISTRATION AND AUDIT PRACTICES



Advance or private rulings

- Issued with reference to a taxpayer's particular facts;
- Provide guidance on issues that are unique, novel, or particularly difficult;

Cooperative relationships

- Geared towards facilitative tax law enforcement
- Efficient collection of taxes, saving audit and litigation resources

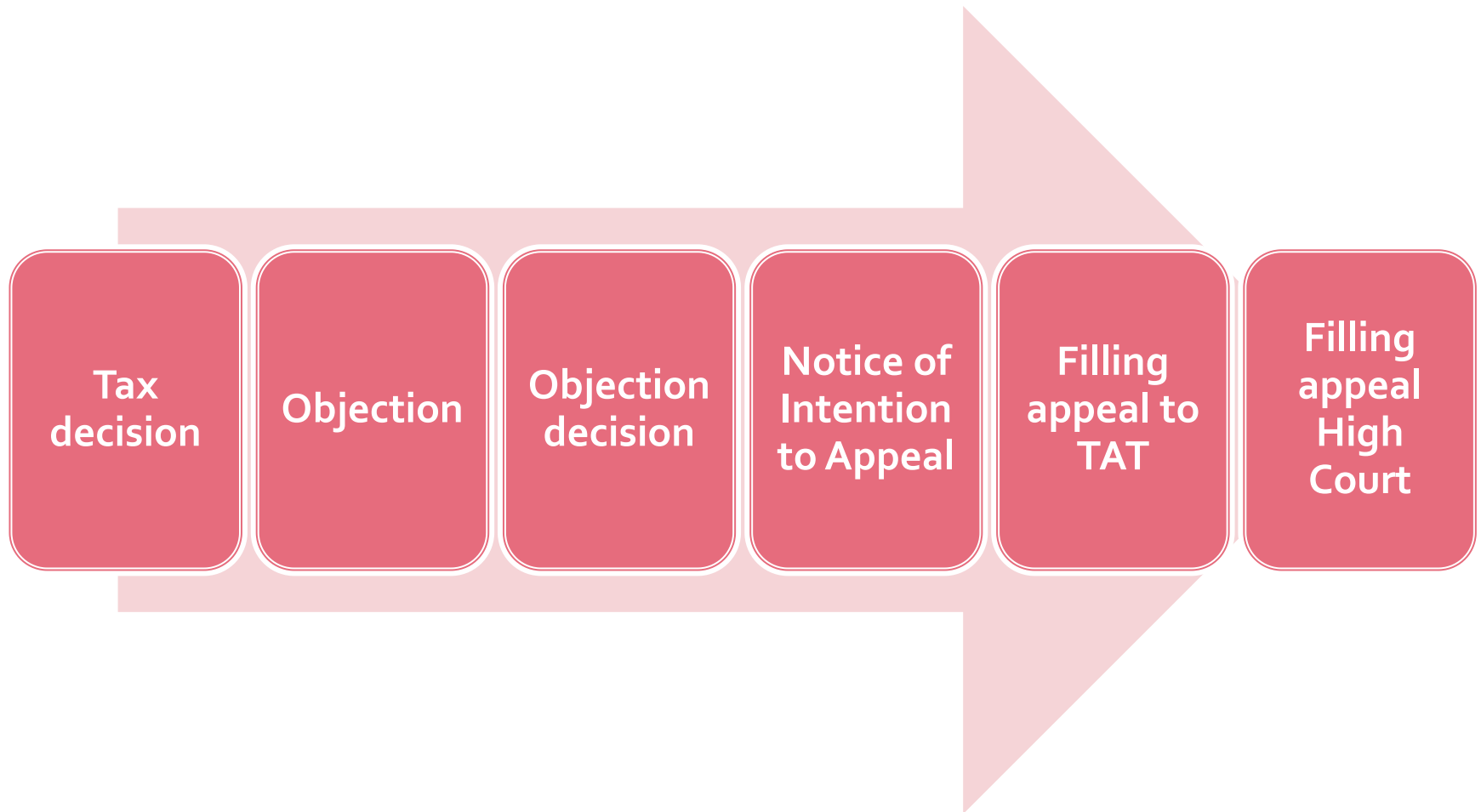
Audit settlements

- Audit settlements to resolve disputes with taxpayers;
- Based on clarifications and better understandings of relevant facts

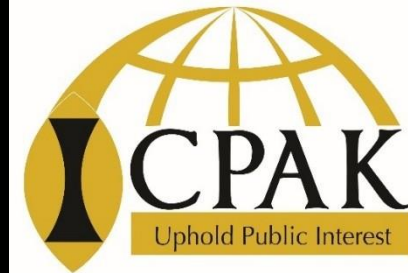
Litigation procedures

- Tax disputes adjudicated through judicial processes;
- Each member state has established a tax appeals tribunal as the first adjudicator on the tax disputes

Dispute Process in KE



DISPUTE RESOLUTION PROCEDURES



Kenya

Administrative
Procedures (Advance
Rulings, ADR)

Judicial system (TAT-
High Court-Court of
Appeal)

Mutual Agreement
Procedures (DTA)

Tanzania

Administrative
procedures (Private
Rulings)

Judicial System (Tax
Revenue Appeals
Board-Tax Revenue
Appeals Tribunal-Court
of Appeal)

Mutual Agreement
Procedures (DTA)

Uganda

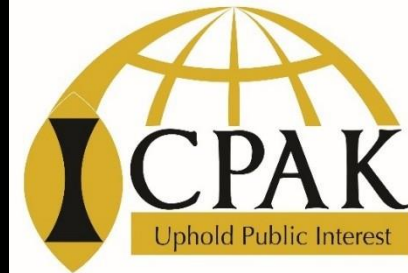
Administrative
Procedures (Private
Rulings, ADR)

Judicial System (Tax
Appeals Tribunal-High
Court-Court of Appeal-
Supreme Court)

Mutual Agreement
Procedures (DTA)

TRENDS IN TAX MATTERS ACROSS THE EAC

INFORMATION EXCHANGE



- **Increasing importance of information exchange among the tax administrators due to:**
 - The need to most effectively tackle tax evasion while minimising costs to governments and business
 - The need to reduce the possibility for tax evasion and discovery of formerly undetected tax evasion through emergence of tax havens
 - The increased mobility of capital flows across the market, facilitated by technological developments
 - The pervasive use of the residence principle in the taxation of cross-border (capital) income
 - The increasing influence of multinational corporations on the tax policies implemented by tax administrators

PARTICIPATION IN AFRICAN TAX ADMINISTRATION FORUM (ATAF)



- Launched in November 2009 in Kampala, Uganda, ATAF provides a platform for cooperation among African tax authorities
- ATAF aims to promote efficient and effective tax administration to improve the living standards of the people of Africa;
- ATAF's mission is to provide a platform to improve the capacity, capability and performance of tax administrations in Africa
- One of the objective of ATAF is to build capable African tax administrations that develop, share and implement best practices
- EAC members are active participants in ATAF

CASE STUDIES: CASES AND TRIBUNAL RULINGS

TULLOW TANZANIA BV VS. TRA (TANZANIA) 05/12/2012



Issue of determination	Facts and arguments	Determination
<p>Whether WHT is applicable for services performed outside Tanzania;</p> <p>Provision in question, Section 6(1)(b) which states:</p> <p>“.....a resident person who pays a <i>service fee</i> or insurance premium <i>with a source in the United Republic to a non-resident person shall withhold income tax</i> from the payment....”</p>	<ul style="list-style-type: none"> Acquisition of raw seismic data from various locations in Tanzania Data send to Dublin in Ireland for processing and production of seismic sections Processed seismic sections send to SA for interpretation and then sent to the taxpayer No WHT was deducted as the services were not performed in Tanzania TRA argued that since the process begins in Tanzania, WHT was payable on the fees 	<p>The Tax Revenue Appeals Board held:</p> <ul style="list-style-type: none"> The service fees in question had its source in Tanzania The interpretation also considered the wider societal interests WHT was liable on the service fees paid to the non-residents in Ireland and SA Case appealed

TRA VS. PAN AFRICAN ENERGY TANZANIA LTD (TANZANIA) 09/05/2016



Issue of determination	Facts and arguments	Determination
<p>Whether WHT is applicable for services performed outside Tanzania;</p> <p>Provision in question, Section 6(1)(b) which states:</p> <p><i>".....a resident person who pays a service fee or insurance premium with a source in the United Republic to a non-resident person shall withhold income tax from the payment...."</i></p>	<ul style="list-style-type: none"> • Drilled samples were sent to non-resident consultants in the UK for analysis and issuance of report; • WHT was not paid on the fees by the company • Taxpayer argued that the services were not performed in Tanzania • TRA demanded for the unpaid WHT on the technical fees paid to non-residents • TRA argued that since samples originated from Tanzania thus payment was subject to WHT. 	<p>The Court of Appeal held:</p> <ul style="list-style-type: none"> • Income tax is chargeable for service fee received for services rendered in Tanzania. • Services must be rendered in Tanzania • No tax was liable

REPUBLIC VS. KRA *EX PARTE* BATA SHOE COMPANY (KENYA) LIMITED (KENYA) 21/02/2014



Issue of determination	Facts and arguments	Determination
<p>Whether royalty payments by the taxpayer should be included in the dutiable value of the imported goods</p> <p>Reference law was the 4th Schedule Part (C) of the East African Community Customs Management Act of 2004</p>	<ul style="list-style-type: none"> A post clearance audit by KRA was done on the taxpayer KRA argued that royalty paid under Trademark Licensing Agreement ought to be part of customs value The taxpayer objected arguing that payment of royalties was not a condition of sale The taxpayer argued that a condition of sale did not exist in this case KRA argued the payment and agreement met the condition of sale principle for customs purposes 	<p>The High Court considered:</p> <ul style="list-style-type: none"> Interpretation of the condition of sale under the EACCMA Relevant clauses in the sales and royalty agreements by the taxpayer <p>Determination:</p> <ul style="list-style-type: none"> The royalty payment was not a condition of sale of the goods The payment not subject to customs duty

BATA SHOE CO. (U) LTD VS. URA (UGANDA) 04/08/2017



Issue of determination	Facts and arguments	Determination
<p>Whether royalty payments by the taxpayer should be included in the dutiable value of the imported goods</p> <p>Reference law was the 4th Schedule Part (C) of the East African Community Customs Management Act of 2004</p>	<ul style="list-style-type: none"> A post clearance audit by URA was done on the taxpayer URA argued that royalty paid under Trademark Licensing Agreement ought to be part of customs value The taxpayer objected arguing that payment of royalties did not fulfil conditions under the EACCMA for customs value The taxpayer argued that a condition of sale did not exist in this case URA argued otherwise and demanded customs duty on the royalty payments 	<p>The Tax Appeals Tribunal considered:</p> <ul style="list-style-type: none"> Interpretation of the conditions of sales under the EACCMA Relevant clauses in the sales and royalty agreements by the taxpayer <p>Determination:</p> <ul style="list-style-type: none"> The royalty payment was not a condition of sale of the goods The payment not subject to customs duty

Uphold

Public

Interest

MAYFAIR INSURANCE CO. LTD VS. KRA (KENYA) 02/05/2017



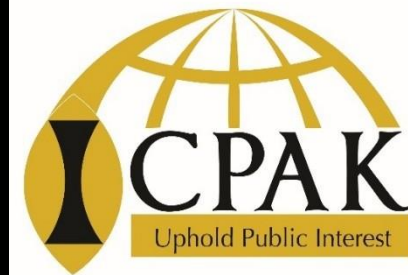
Issue of determination	Facts and arguments	Determination
Whether sale of motor vehicle salvage is exempt from charge on VAT	<ul style="list-style-type: none">• The KRA was contending that the sale of salvage constitutes a supply of taxable goods and that VAT should apply.• Insurance companies had disputed this position arguing that sale of salvage items is directly connected to their principal insurance business which is exempt from VAT• The insurance companies argued that the sale of insurance salvage is not a separate supply but is incidental to supply of insurance services which is exempt from VAT under the provisions of the VAT Act 2013	<ul style="list-style-type: none">• The TAT agreed with the position of insurance companies that VAT is not applicable on these salvage disposals• Such disposal is incidental to the supply of insurance services which is exempt from VAT• Takes the same VAT status as the main or principle supply

Uphold

Public

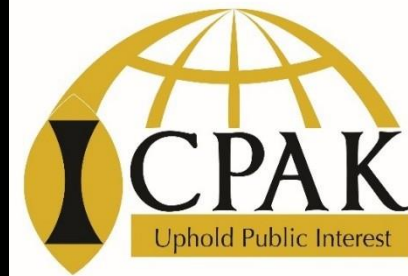
Interest

REPUBLIC VS. KRA *EX PARTE* FINTEL LIMITED (KENYA) 05/10/2012



Issue of determination	Facts and arguments	Determination
<p>Whether WHT was due on accrued (not paid) interest expensed in the audited accounts</p> <p>Whether accrual of interest amounts to payment subject to WHT under Section 35 of the ITA</p>	<ul style="list-style-type: none"> • The taxpayer had recognised interest as a liability in its books • The interest and the principle amount had not been paid by the taxpayer • KRA computed and assessed WHT on the unpaid interest and demanded payment • Taxpayer contended that accrual of interest is not a payment • Taxpayer argued that no WHT was applicable on the accrued interest 	<p>The High Court Considered:</p> <ul style="list-style-type: none"> • The definition of paid under Section 2 and Section 35 (1) (e) of the ITA • Submissions by the parties to the case <p>Determination:</p> <ul style="list-style-type: none"> • WHT is due upon payment – a necessary prerequisite for WHT to apply • No WHT is deductible on interest accrual

THE LAW SOCIETY OF KENYA VS. KRA AND AG (KENYA) 14/03/2017



Issue of determination	Facts and arguments	Determination
<p>Whether or not paragraph 11A of the 8th schedule is vague, contradicts the other provisions of the same schedule and whether it is unconstitutional;</p> <p>When does liability to pay Capital Gains Tax accrue</p>	<ul style="list-style-type: none"> • The constitutionality of paragraph 11A of the Eighth Schedule of the Income Tax Act challenged • It is inconsistent with the provisions of par 2 of the Schedule as read with Par 6 (1) (a) of the schedule • Payment of CGT upon presentation of the transfer instrument was considered limiting enjoyment of the right to property • KRA argued that the provisions are constitutional and do not contradict each other. 	<p>The High Court Considered:</p> <ul style="list-style-type: none"> • The relevant sections under consideration • Submissions by the parties to the case <p>Determination:</p> <ul style="list-style-type: none"> • Par 11A of the Eight Schedule of the ITA is inconsistent with the provisions of par 2 as read with par 6 (1) (a) of the Eighth Schedule • Unconstitutional, null and void.

KEY TAKEAWAYS



- Common approach for audit on service payment across EAC
- Reference to established jurisprudence in country, EAC, UK and India
- Notable ***strict interpretation*** of the tax laws by the different courts
- Call for certainty in the law

THANK YOU!

**The only difference
between death and
taxes is that death
doesn't get worse every
time Congress meets.**



Will Rogers
American actor
(1879-1935)

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Contacts

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