

Kenya Revenue Authority

Tax Principles Workshop

Thursday 31st,
January, 2019

Areas for discussion

1. An Overview of Tax Litigation in Kenya,
2. Tax assessments and Appeals (*Civil and Criminal Tax Cases*);
3. Selected cases from the courts.

An Overview of Tax Litigation In Kenya

Tax Litigation takes place in the following forums:

- The Courts
- The Tax Appeals Tribunal

Types of disputes

- Tax Enforcement Disputes.
- Tax Debts matters.
- Tax Evasion Cases
- International Tax Disputes e.g. on Transfer pricing

Tax Appeals Tribunal (TAT)

- TAT was established to hear tax disputes, and effectively serves as the forum of first instance before tax litigation can commence.
- Where a case is referred directly to the courts, the courts will often refer that matter back to the TAT.
- There are three main issues that commonly form the subject of tax litigation in Kenya:
 - a) Appeals from technical decisions of the TAT.
 - b) Where there is alleged abuse of process or other administrative excesses
 - c) Where infringement of constitutional rights is alleged.
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Appeals from Decisions of TAT

- **Appeals from technical decisions of the TAT**
- The TAT was set up under the Tax Appeals Tribunal Act 2013 to hear and determine disputes relating to taxation in Kenya.
- A party aggrieved by the decision of the TAT has a right of appeal to the High Court of Kenya.
- Appeals from the TAT will be on technical issues, and are usually a civil law matter.

Legislative framework

- **Civil tax litigation**
- The principal pieces of legislation governing civil tax litigation are as follows:
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 - Civil Procedure Act, Cap 21.
 - Tax Procedures Act, No 29 of 2015.
 - Tax Appeals Tribunal Act, 2013.
 - Tax Appeals Tribunal, Appeals to the High Court Rules 2015.
 - Tax Appeals Tribunal Procedure Rules 2015.
 - Court of Appeal Rules (CA Rules).

Legislative framework Cont'

Criminal tax litigation

The principal pieces of legislation governing criminal tax litigation are as follows:

- Criminal Procedure Code.
- Tax Procedures Act, 2015.
- Tax Appeals Tribunal Act, 2013.
- Tax Appeals Tribunal, Appeals to the High Court Rules 2015.
- Tax Appeals Tribunal Procedure Rules 2015.
- CA Rules.

Tax Evasion

Key elements that constitute tax evasion and other main criminal tax offences in your jurisdiction. If without reasonable excuse:

- Fails to provide a full and true return.
- Fails to keep records and proper books of account.
- Fails to produce any document for the inspection of the Commissioner of the Kenya Revenue Authority (Commissioner).
- Fails to account for tax in accordance with the provisions of the law.
- Makes an incorrect return by omitting or understating income.
- Makes an incorrect statement in a return.
- Provides incorrect information in relation to any matter affecting the liability to tax of another person.
- Prepares or maintains, or authorises the preparation or maintenance of, false books of account.
- Makes use of fraud, or authorises the use of fraud.

Tax Assessments and Appeals

- Kenya operates a self-assessment regime.
- The Commissioner has the power to assess taxpayers in order to determine whether tax has been properly accounted for.
- Where non-compliance is identified, the Commissioner issues a “notice of assessment” to the taxpayer setting out the tax payable. The taxpayer can then either:
 - Accept the position (after which he is required to remit the taxes stated as owing).
 - Object to the notice of assessment by providing an “objection notice” to the Commissioner in writing.
- The objection notice must both:
 - State the grounds of the taxpayer’s objection.
 - Be received by the Commissioner within 30 days from the date on which the notice of assessment was served.

How do tax disputes arise?

- 1) A **tax assessment** for which the taxpayer is expected to respond within 30 days.
- 2) **Taxpayer's Objection**, the Commissioner has three options namely;
 - a) To agree with the taxpayer wholly and vacate the assessment altogether, in which case there is no dispute,
 - b) To partially agree with the taxpayer and amend the assessment accordingly, or
 - c) To totally disagree with the taxpayer and confirm the assessment.

Dispute Process

- 1) Tax Decision** -Section 2 & 50 TPA
- 2) Objection by Taxpayer** - Section 51(1) TPA –
within 30 days –
- 3) Objection decision** -Section 51(8) to (11) TPA–
Within 60 days
- 4) Appeal to Tax Appeals Tribunal-** Section 52 TPA
if dissatisfied with commissioners decision
- 5) Appeal to High Court / Court of Appeal** –Section
53 &54 TPA if dissatisfied

APPEALS TO THE TRIBUNAL

"A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal" (sec. 12)



Tax Appeals

- Once an objection notice has been duly filed, the Commissioner can either:
- Amend the notice of assessment in accordance with, or in the light of, the objection notice.
- Refuse to amend the notice of assessment altogether.
- Where a taxpayer is not satisfied with either the degree of any amendment to the notice of assessment, or the failure of the Commissioner to amend the notice of assessment, he can appeal against the decision to the Tax Appeals Tribunal.
- In this case, the taxpayer must file a notice of appeal within 30 days of the date of the Commissioner's decision.
- He must then submit appeal papers (including a memorandum of appeal, statement of facts and the Commissioner's decision) within 14 days of filing the notice of appeal.

Trial Process

- The forum of first instance is the Tax Appeals Tribunal (TAT), and appeals from the TAT can be made to the High Court.
- Cases can be submitted to the TAT where a taxpayer has exhausted the administrative procedure provided by the Kenya Revenue Authority (KRA).
- Hearings in the TAT are conducted in private, and only the parties to the case are allowed to attend.
- However, hearings at the High Court are conducted in public. Notwithstanding, depending on the sensitivity of the matter, a party can make an oral application to have the matter heard in private.

Trial process cont'

- **Process at the Tax Appeals Tribunal**

- A notice of appeal to the TAT must be in writing and must be submitted to the TAT within 30 days of receipt of the Commissioner's decision.
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- Once the taxpayer has filed a notice of appeal to the TAT, he must, within 14 days from the date of filing the notice of appeal, submit enough copies as may be advised by the Clerk of the Tribunal (usually nine) of the following documents:
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- A memorandum of appeal (stating the grounds upon which the appeal is based).
- Statement of facts (setting out the circumstances leading to the KRA's decision on the objection notice submitted by the taxpayer).
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- The KRA's decision on the objection notice submitted by the taxpayer.
- Within seven working days of receiving the notice of appeal from the taxpayer, the officer in charge of the registry will notify the Secretary to the Tribunal of the particulars of that appeal.

Trials process Cont'

- The taxpayer must serve a copy of the notice of appeal to the Commissioner of the KRA within two days of filing the notice of appeal to the TAT. The Commissioner then has 30 days from receipt of the notice of appeal to file the following with the TAT:
- Copies of his statement of facts.
- A statement providing the reasons for the KRA's decision on the objection notice submitted by the taxpayer.
- All supporting documentation.
- The TAT then sets out the hearing date for the appeal.
- The Clerk of the Tribunal will provide at least 14 days' notice to all parties to the appeal of the date that has been fixed for the first hearing of the appeal. Dates for subsequent hearings can also be fixed by the Tribunal.

Trial Process Cont'

- During the hearing, evidence can be given orally or through affidavits or in whichever other way the Tribunal may direct.
- The Tribunal is also empowered to call witnesses to attend a hearing or produce any document if it is thought that such evidence is relevant to the proceedings.
- The Tribunal is additionally permitted to engage the services of an independent expert in any proceedings. Such evidence can be taken into account in the making of its decision.
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- The parties can also choose to settle the matter out of court and seek leave to do so through an application to the Tribunal. Upon the conclusion of a matter, the Tribunal is permitted to award costs.

Process at the High Court

- Within 30 days after the date the appellant has filed a “notice to appeal” with the High Court, the appellant must file a memorandum of appeal with the Registrar of the High Court (Registrar), and serve a copy on the respondent.
- After the memorandum and supporting documents have been filed, the Registrar will stamp those documents and number and enter the appeal as a tax appeal in the register of tax appeals.
- However, an appeal will abate in any case where any filing fees due have not been paid in full within 14 days from the date the appellant is notified of the total amount of the fees that are payable by him.

Process at the High Court Cont'

- The respondent must file a statement of facts (response) with the Registrar within 30 days after the memorandum of appeal has been served on him by the appellant.
- Thereafter, unless the parties agree otherwise, the Registrar will give 15 days' notice, in writing, to the parties of the date and place fixed for the hearing of the appeal.
- At the hearing of the appeal, the Court will hear the appellant and his witnesses first and the respondent will be given an opportunity to cross-examine the witnesses (if any).

Process at the High Court Cont'

- At the close of the appellant's case, the respondent's evidence will be heard
- The appellant will be given the opportunity to cross-examine each witness followed by re-examination by the respondent
- The parties can make oral or written submissions. The Court will then determine the matter.

Burden of Proof – Civil Cases

- Burden of proof in civil cases is on a balance of probabilities.
- **Rationale:** In some cases the question of the probability or improbability of happening is an imperative consideration to be taken into account in deciding whether that event has actually taken place or not.
- **Sec. 56** Tax Procedures Act, 2015 – *The Burden is on the Taxpayer to prove that a tax decision is incorrect.*
- Section 223 of the EACCMA, 2004

Burden of Proof- Criminal Cases

- **Constitution:** Art. 50 (2) (a) Constitution of Kenya 2010 – Presumption of Innocence.
- Every accused person is presumed innocent until the contrary is proved.
- **Burden :** At Common law the burden *is on the prosecution* and the standard is *beyond reasonable doubt*.
- It requires a higher degree of satisfaction for the prosecution to prove the commission of the offence.
- **Doubt:** Where there is slightest doubt as to the guilt of the accused, the accused is given the benefit of the doubt and his innocence is proclaimed.
- **Rationale/Basis:** The conviction of an innocent person as opposed to the acquittal of a guilty one is a fate more heinous.

Selected Cases

Thank
you

