

TAXATION MASTERCLASS:

ALTERNATIVE TAX DISPUTE RESOLUTION MECHANISMS

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- ❑ The views expressed by the presenter are not necessarily those of Deutsche Post DHL.

Presentation agenda



- ❑ Brief introduction to transfer pricing principles
- ❑ Transfer Pricing documentation Process
- ❑ Comparability analysis and challenges
- ❑ The Impact of Covid-19 on Transfer pricing and international taxation system

Introduction to Tax Disputes



Background



- ☐ Tax dispute arise based on the review of:
 - ☐ taxpayer's filed tax returns
 - ☐ Published and public information
 - ☐ Information obtained by the tax authorities from other taxpayers or otherwise
- ☐ Review provides wealth of information that tax authorities can examine further, such as:
 - ☐ Inconsistency in the taxpayer's returns: payroll taxes paid vs. employees' cost in audited financial statements (AFS); revenue per VAT 3 vs. revenue in the AFS
 - ☐ Consistent late (or non) filing of returns
 - ☐ Industry specific issues
 - ☐ Consistently reporting losses

Background



- ❑ Prior to 2015, each of the Revenue Statutes
 - ❑ Income Tax Act, Cap 470, Laws of Kenya – governing disputes on Corporate income tax; withholding tax and employee taxes
 - ❑ Value Added Tax (VAT) Act [Cap 476 (repealed), now 2013] – VAT
 - ❑ Customs and Excise Act, Cap 472 – Excise duty
- provided for an elaborate inbuilt Dispute Resolution Mechanisms
- ❑ The tax dispute resolution mechanism was harmonized with the enactment of the Tax Procedures Act, in 2015.
 - ❑ The process kicks in through an objection from a disputed assessment/impugned decision, to confirmation of the assessment/decision, through to the appeal to the Appellate Body/Courts of Law.

Domestic Dispute Resolution Options



- ❑ Audit process
 - ❑ Opportunity to manage the outcome of the audit:
 - ❑ Actively be involved in the audit process - provide information requested for
 - ❑ Factual based mistakes – accept / negotiate, do not antagonize the audit team
 - ❑ Legal matters / issues based on principle – litigate
 - ❑ *Issues raised during audit can be resolved easily by providing additional information or explanations*
- ❑ Assessments
 - ❑ Second best opportunity to manage the outcome of the audit - through lodging an **objection**
 - ❑ Provide grounds of objections, supporting documentation / explanation
 - ❑ Independent Review of Objections (IRO) – technical officers, panel of experts

The progression of Tax dispute resolution in Kenya



- ❑ Prior to 2018 – objections were reviewed by the HODs
 - ❑ No transparency, and to a great extent there was conflict of interest – tax revenue collection targets were on the HOD:
- ❑ CG delegated powers and functions relating to post assessment disputes to the commissioner responsible for Tax Dispute Resolution
 - ❑ To harmonize, centralize and ensure objectivity in tax dispute resolution processes,
 - ❑ Separation of powers between audit process leading to assessment and post assessment dispute resolution processes

The progression of Tax dispute resolution in Kenya



☐ Post-assessment dispute resolution:

☐ First stage: IRO

- ☐ Independent review by the tax administration (i.e., reviews are undertaken by designated review officers independent of the audit department)- (Commissioner Responsible for Tax Dispute Resolution created through GN. No 12048(Vol. CXX-No 141 dated 19th November, 2018)

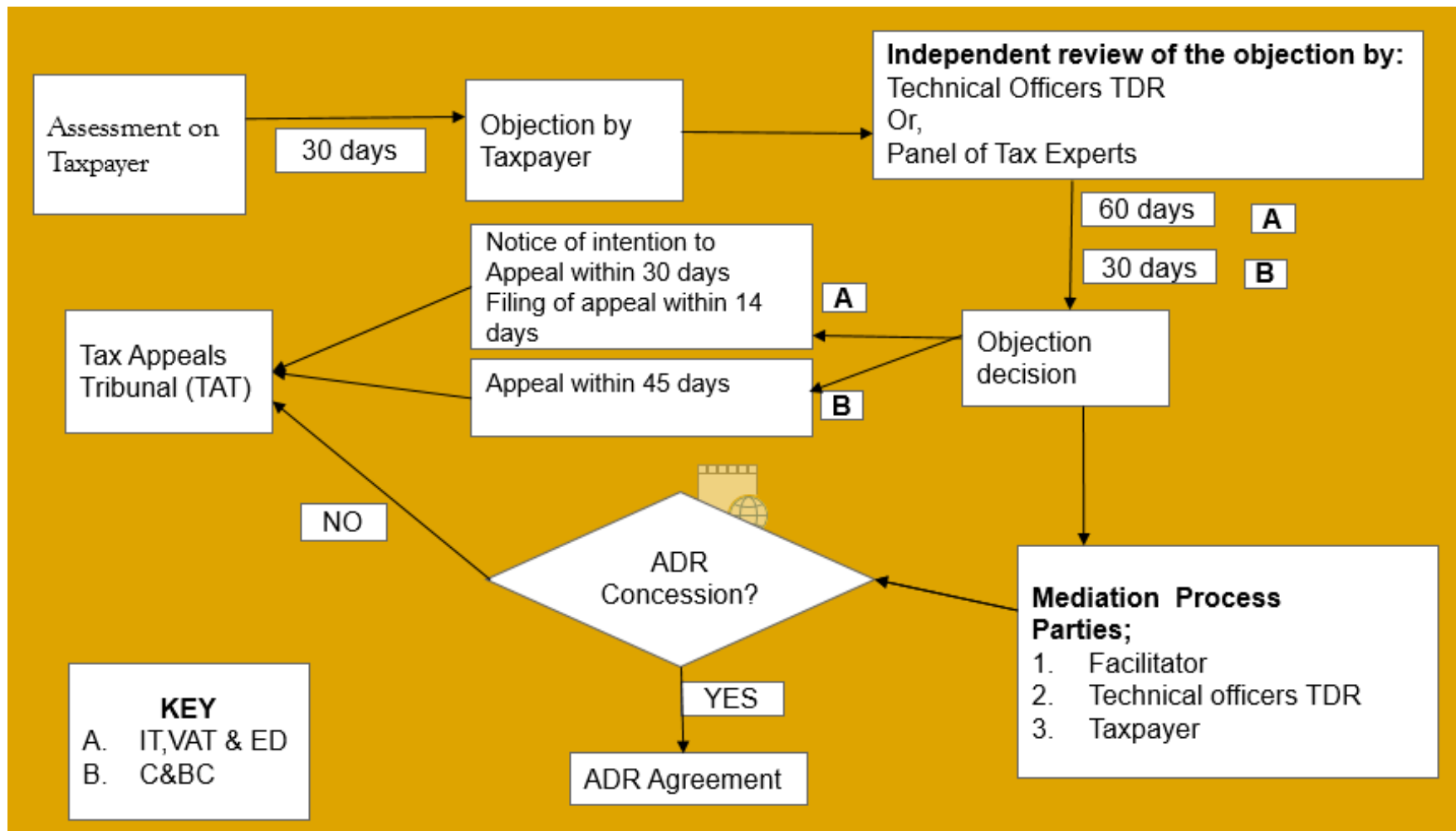
☐ Second stage

- ☐ Review by an independent external specialist tax tribunal, where the taxpayer is dissatisfied with the outcome of an administrative review
- ☐ Based on question of law and facts

☐ Final stage

- ☐ Review by a higher appellate court on questions of law (not facts)

Tax dispute resolution process cycle



Intro' to Alternative Dispute Resolution



Alternative Dispute Resolution (ADR)



- ❑ A facilitated, participatory and an all inclusive discussion over a tax dispute between the taxpayer (TP) and the Commissioner
- ❑ ADR allows for resolution of tax disputes outside the Dispute Resolution processes provided in the Revenue Statutes and outside Court litigation.
- ❑ Objectives of ADR in Tax Disputes
 - ❑ Expedite resolution of tax disputes;
 - ❑ Decrease cost of dispute resolution;
 - ❑ Enhance and manage relationships between KRA and TP.
 - ❑ Improve service delivery to TP and Tax Consultants
 - ❑ Enhance Facilitation to customer and improve compliance.
- ❑ ADR does not replace the Commissioners/ the Taxpayer's right in Law to proceed to the Tax Appeals Tribunal or the High Court

ADR – legal basis



- ❑ Constitution of Kenya, 2010 – Article 159 (2) © on Judicial authority to be based on certain principles, among them –
 - ❑ *alternative forms of dispute resolution* including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted,
- ❑ Tax Procedures Act, 2015 – section 55 on settlement of dispute out of court or Tribunal
- ❑ Tax Appeals Tribunal Act, 2013 – section 13 (8); section 28 – parties may apply to the Tribunal to settle the dispute out of the Tribunal
- ❑ Court annexed mediation process

Why ADR



- ☐ KRA's focus to shift from enforcement to trust and facilitation
- ☐ Addresses delays in conclusion of cases before courts and Tribunals.
- ☐ Confidential process
- ☐ Brings certainty to the outcome for KRA (tax) and taxpayer (tax liabilities in their books).
- ☐ Less costly, both from a time and cost perspective
- ☐ Has a win-win outcome.
- ☐ Improves compliance.
- ☐ Preserves relationships.

Parties to ADR



- ❑ ADR may be initiated by either the Taxpayer or the Commissioner and is a voluntary initiative.
- ❑ Application for ADR sent to Corporate Tax Dispute Resolution Division (CTDRD) - This is the Division mandated to provide oversight, coordination and Facilitation of ADR processes
- ❑ ADR Vetting Team – comprise of Technical/Legal experts from CTDRD
- ❑ The Facilitation panel – consisting of technical experts in law / tax or related specialist field
- ❑ A taxpayer maybe a natural or legal person, who has a tax dispute
- ❑ Commissioner – officer (s) involved in objection or review decision
- ❑ Facilitator – who chairs the ADR discussions, can be either internal or external
- ❑ ADR negotiations must be conducted within the applicable Tax Statutes

Role of the parties to ADR



- ☐ Uphold and maintain decorum, and confidentiality;
- ☐ Participate in all discussions fairly and diligently;
- ☐ Make full disclosure of material facts relevant to the Tax dispute;
- ☐ Attend all scheduled meetings;
- ☐ Strictly adhere to the agreed timelines,

ADR Facilitated discussions



The ADR process



- ☐ Application for ADR;
 - ☐ The taxpayer (or their representative) lodges a formal appeal before the Tax Appeals Tribunal
 - ☐ An application is made before the TAT for the matter to be settled through ADR. The taxpayer and the commissioner consents to have the tax dispute resolved via ADR
- ☐ Determination of suitability of tax dispute;
- ☐ Communication to taxpayer of the outcome of the suitability test;
- ☐ Commencement of ADR meeting;
- ☐ ADR settlement agreement is prepared and executed
- ☐ Consent is drawn and filed at TAT or Courts

The ADR suitability test



- ☐ Almost all tax disputes can be resolved via ADR, except;
 - ☐ The settlement would be contrary to the Constitution, the Revenue Laws or any other enabling Laws;
 - ☐ The matter borders on technical interpretation of law;
 - ☐ It is in the public interest to have judicial clarification of the issue;
 - ☐ There are undisputed judgments and rulings
 - ☐ A party is unwilling to engage in ADR process.
 - ☐ The matter has criminal elements like fraud etc

The ADR timelines



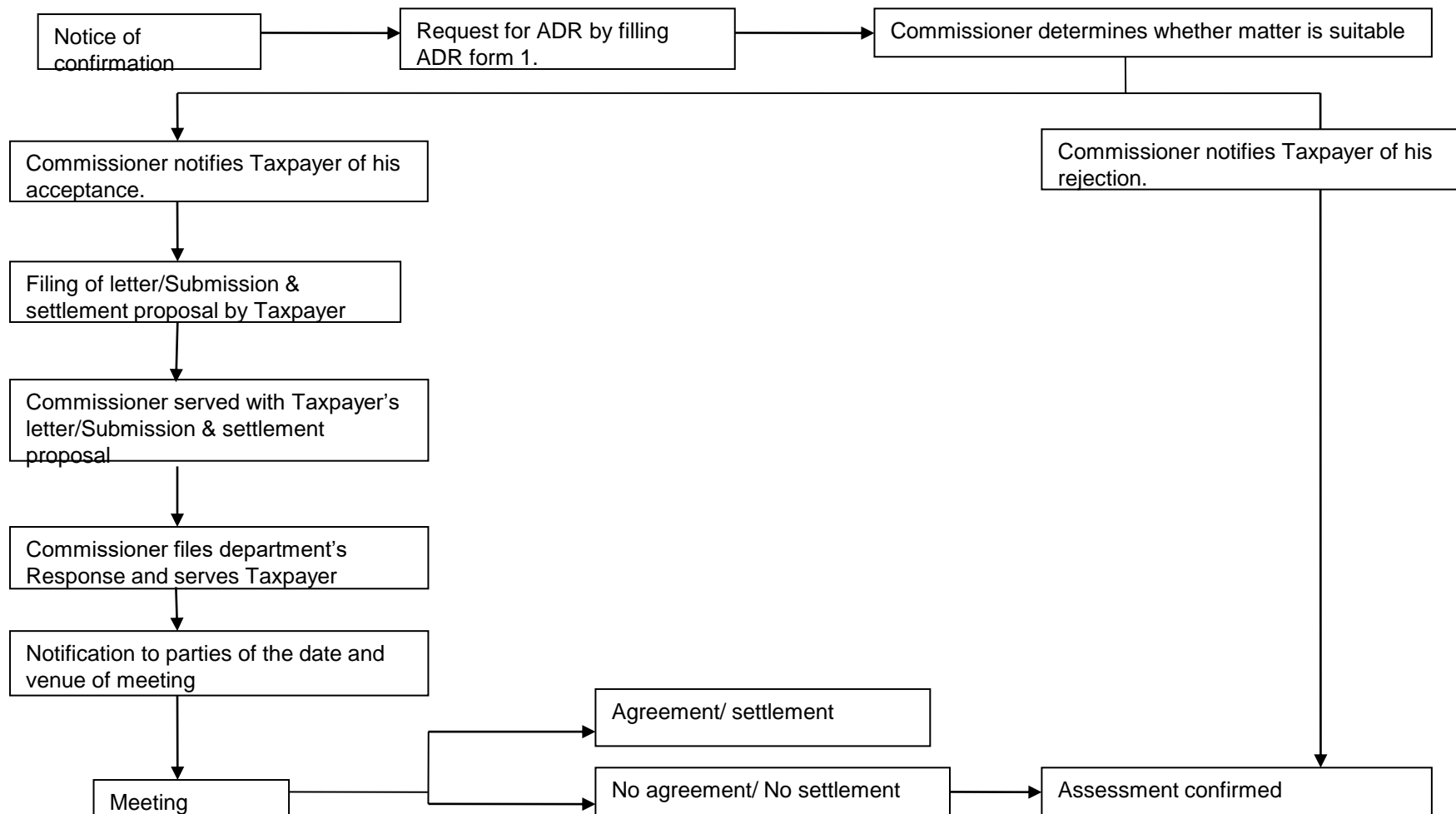
- ❑ ADR Timelines in a Case pending Before the Tribunal/Court
 - ❑ 90 days as provided for in Tax Procedure Act (TPA) section 55;
- ❑ Court initiated ADR - dependent on Court timelines given

Collapse of ADR

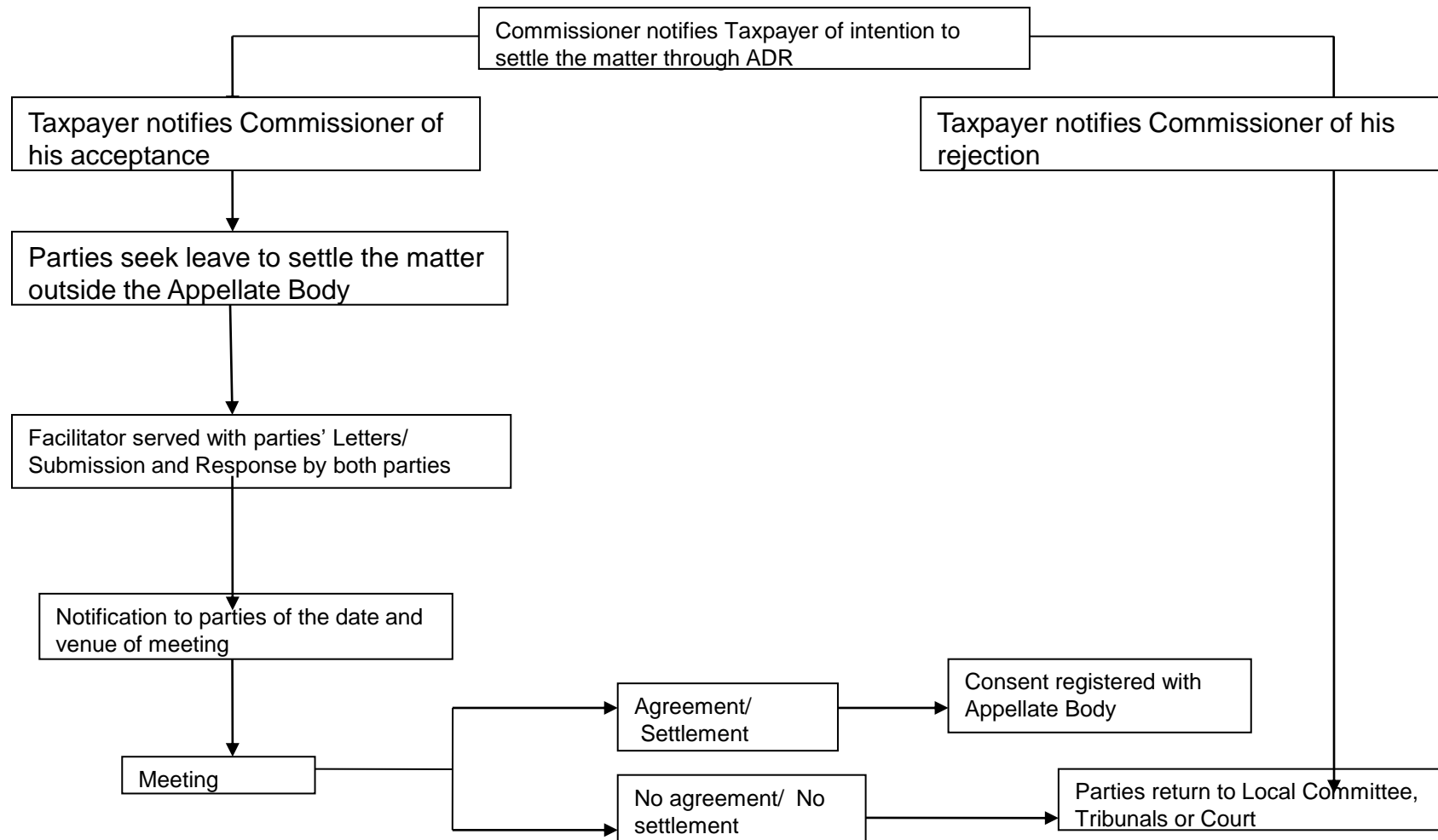


- ❑ ADR discussions can be terminated for the following reasons:
 - ❑ Where either party opts out of ADR;
 - ❑ Where parties unanimously agree to do so;
 - ❑ Where a party is of the opinion that the dispute cannot be resolved due to undue conduct on the part of the other party;
 - ❑ A party consistently fails to honor ADR meeting invitations;
 - ❑ Where a party fails to carry out a reasonable request by the facilitator with no valid justification.

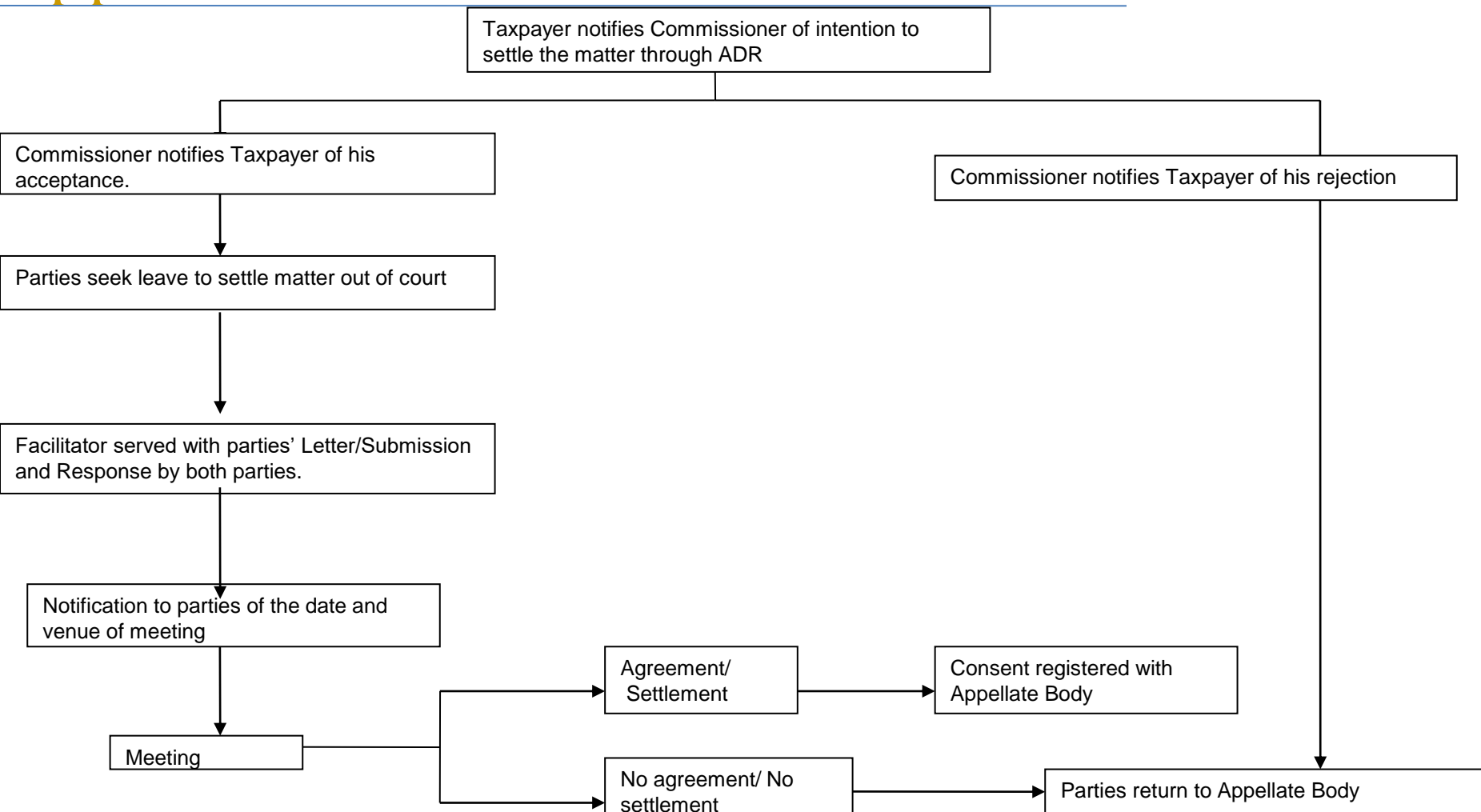
Initiated by taxpayer after confirmation of Objection



ADR process initiated by commissioner when dispute is in before TAT / appellate court



ADR process initiated by taxpayer when dispute is in before TAT / appellate court

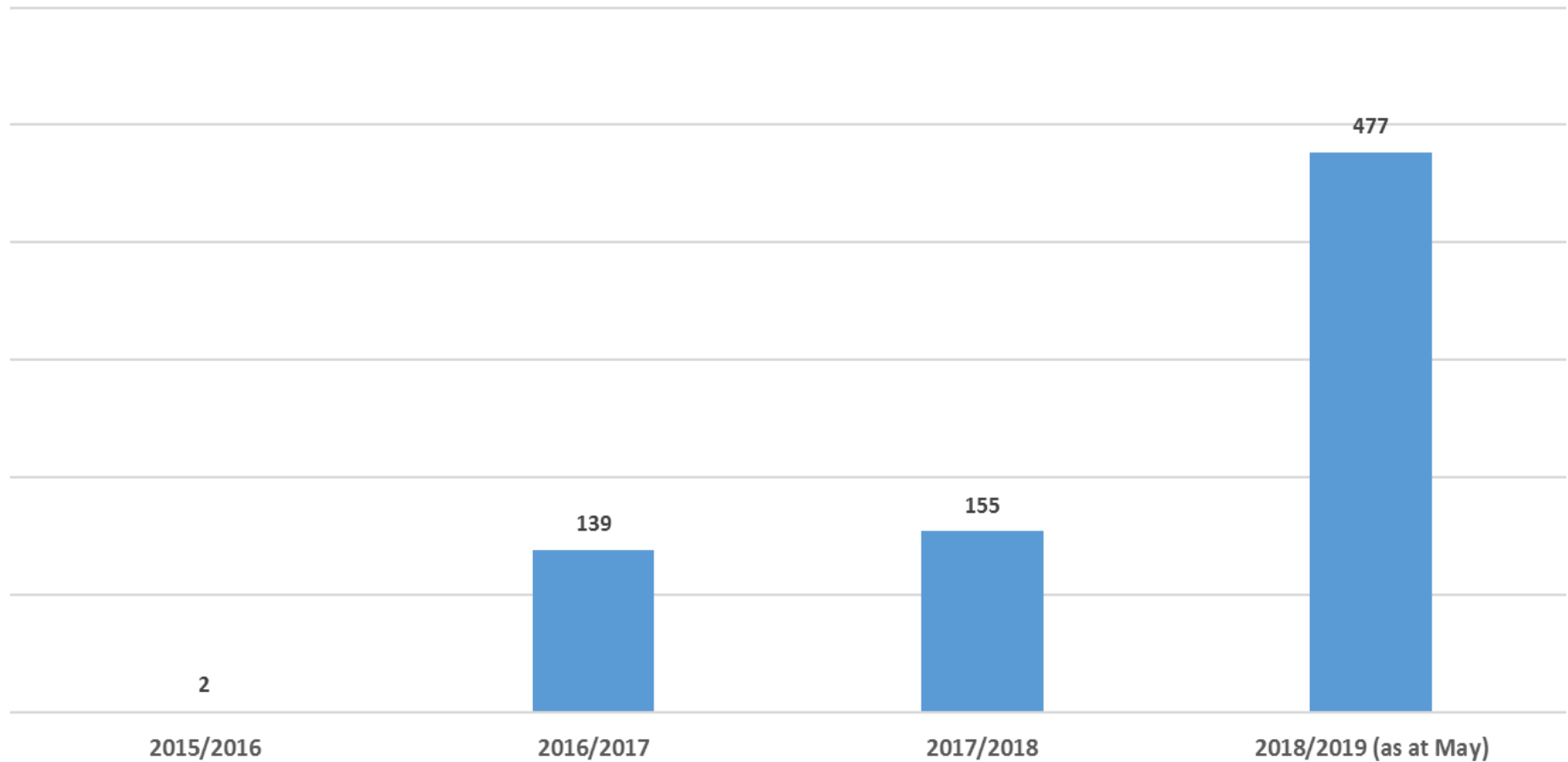


Successful ADR process

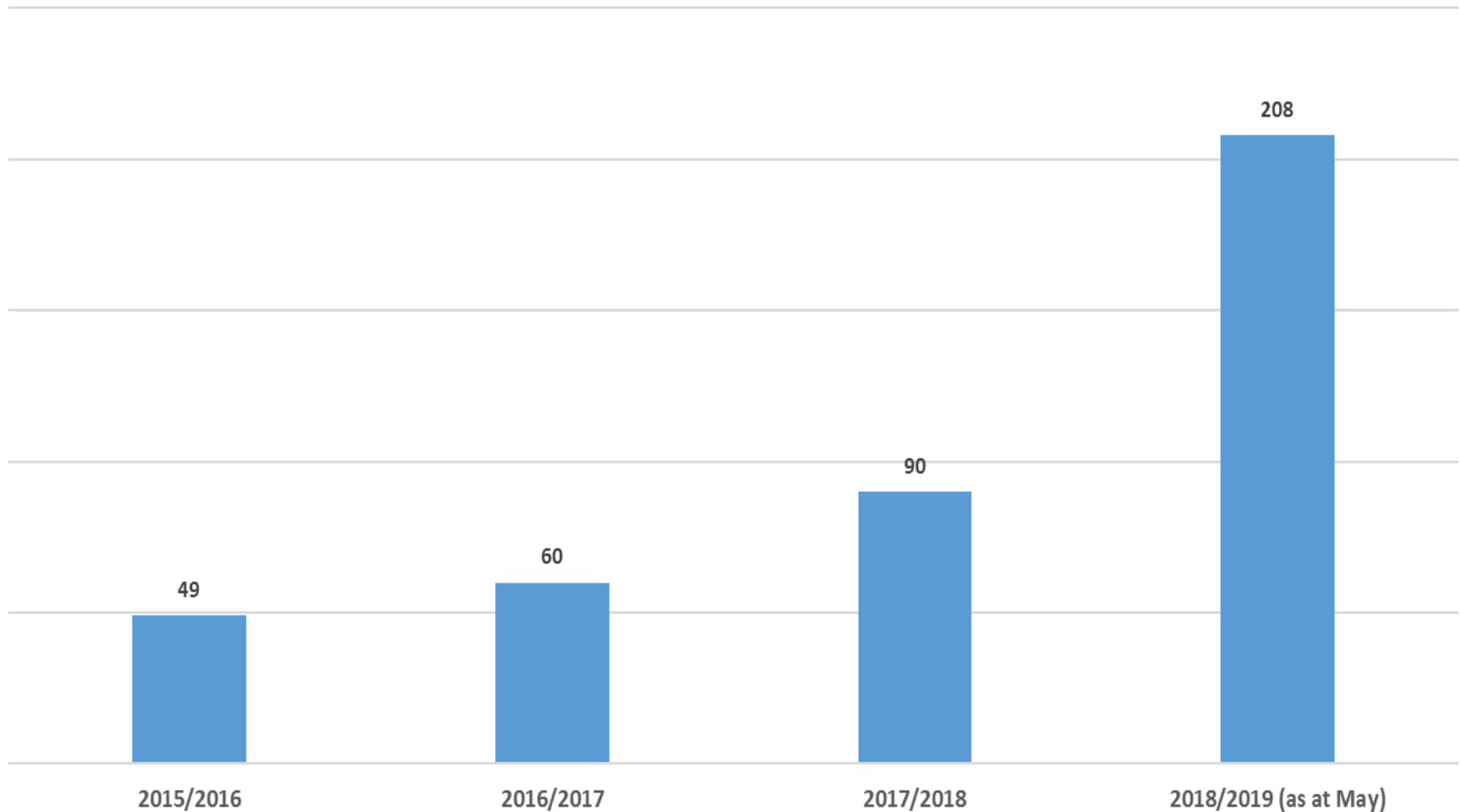


- ☐ Where ADR discussions have been successful, an ADR agreement:
 - ☐ To be in writing, signed by both parties, or their representatives, and
 - ☐ Witnessed by the facilitator
- ☐ The ADR Agreement to contain the following:
 - ☐ The background to the dispute and the issues in contention;
 - ☐ Agreed and non - agreed issues;
 - ☐ The processes and specific exercises undertaken during the ADR process;
 - ☐ Recoverable and non-recoverable taxes and justifications thereto;
 - ☐ Terms of settlement
 - ☐ Undertakings given by each party if any;
 - ☐ Payment plans where applicable.
- ☐ Consent is drawn and filed with the TAT or Court

Tax disputes received in ADR



Tax disputes resolved in ADR



Summary



- ❑ Emphasis is placed on avoiding or managing disputes at the earliest possible level.
- ❑ Intention is to resolve as many disputes as possible internally
- ❑ Support/Appreciation Of the Process.
- ❑ Sensitization and roll over to other taxpayers/stakeholders

Questions



THANK YOU

