



# 2<sup>nd</sup> RESEARCH CONFERENCE ON **ACCOUNTANCY**

**Theme:**

**BUILDING A RESILIENT ACCOUNTANCY PROFESSION  
AND ECONOMY IN A DISRUPTIVE ENVIRONMENT**

**DATES**

**7th-8th  
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**VENUE**

**Kenya School of  
Government - Nairobi**



**[Taxation & Auditing Thematic area]**

# **ALTERNATIVE DISPUTE RESOLUTION: AN OPTION IN MANAGING TAX DISPUTES IN TANZANIA**

**CPA Eric Sambu, CPS(K), LLB, MBA, MARLA, MAGL, PhD (ongoing)**

# OUTLINE



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# Introduction



- ❖ A tax system anticipates certain level of tax disputes. Some countries have excessive levels of tax disputes. A good tax system is one that resolves disputes expediently, when and if it occurs.
- ❖ Causes: a high volume of litigation challenging tax assessments, delay in resolving these tax disputes, and a lack of capacity in the judicial system.
- ❖ Consequences: delay in collecting tax due. Private sector may also suffer litigation costs, interest, time and effort, besides uncertainty created (Thuronyi and Espejo, 2013).
- ❖ A tax dispute is said to have arisen between the Commissioner-General (CG) and taxpayer when the taxpayer objects assessment made, calculation of tax due for refund, drawback or repayment of tax, duty, levy or charge, a refusal to make any refund or payment or a decision to register, refusal to register any trader for the purpose of VAT by the CG - *sections 12(1), 14(1)(a), (b) and (c) of the Tax Revenue Appeals Act, Cap. 408 [R.E. 2010]*.
- ❖ Corporate Governance codes recommend Alternative Dispute Resolution (ADR) to preserve business relationships and hence when a dispute arises, in exercising their duty of care, directors should endeavour to resolve it expeditiously, efficiently and effectively (IoDSA, 2009).

# Background to the problem



- ❖ The trend for the last 17 years has seen 1,968 cases reported with tax disputes amounting to TZS.7 trillion. Cases won by TRA were 738 worth TZS. 1.2 trillion, representing 37 per cent of the cases and 17 per cent of the tax disputed. Taxpayers won 478 cases worth TZS.2 trillion, representing 24% of the cases with 28% of the tax disputed. Partly allowed cases were 134 worth TZS.465 billion and represents 7% of the cases and 6% of the tax disputed. Cases pending at various stages were 489 worth TZS. 3 trillion, representing 25% of the cases and 43% of the tax disputed, with some cases dating back to 2007 and majority of the cases (474) filed between 2013 and 2017 (TRAB, 2017).
- ❖ The Controller and Auditor General (CAG) (2019:114) reported that taxes tied up in the appeal machinery pending rulings jumped by 8595 per cent in the year ending June 2018, to TZS 382.6 trillion, compared to TZS.4.4 trillion for the same period in the previous year.
- ❖ The CAG Annual General Report for the year ending 2018/2019 established inefficiency in handling and resolving tax objections cases by TRA pointing out that objection application with total taxes of Sh84.615 billion filed by taxpayers that were outstanding beyond the allowable period as specified in TRA Service Charter (CAG, 2019:115).
- ❖ The CAG Annual Report (2021:14-15) for the year ending 2019/2020 shows that the tax appellate bodies have 1,097 pending cases, “outstanding for a long time”, holding tax worth TZS.360 trillion and USD.181 million.



# Statement of the problem



- ❖ Protracted litigation is detrimental to the taxpayers as to the costs of litigations, piling interests from tax disputed and uncertainty created as a result of the situation. Therefore, expeditious resolution of tax disputes is critical in a tax system success to achieve revenue collection and spur development. The best way to manage tax disputes is to prevent them from occurring but TRA officers have been accused of causing many unnecessary tax disputes by making unreasonable claims and assessments (Ongwamuhana, 2015:18). ADR, if thoughtfully and creatively implemented, could substantially increase the efficiency and timeliness of tax case resolutions. In turn, an effective ADR program would protect taxpayer rights, reduce taxpayer burden and cost, encourage voluntary compliance, and economize scarce TRA resources.
- ❖ There is a clear tax dispute appeal process, with the three-tier system of TRAB, TRAT and CAT, and the rules set in 2018 makes the process easier to lodge appeal. But the mechanisms to resolve the tax dispute have been accused of ineptitude, inefficiency and ineffectiveness, leading to pile up of cases (CAG, 2017:98; CAG 2018:76-79). Whereas TRAA provides for ADR rules, none has been set. ADR's flexibility and participatory nature increase perceptions of equity and procedural justice. In turn, such perceptions can positively impact tax compliance behavior in the future (National Taxpayer Advocate, 2016:214).
- ❖ Specifically, the study sought to identify legislation and guidelines to ADR and tax resolution, identify challenges encountered with the mechanisms in place and hence assess applicability of ADR in tax disputes resolution in TZ.

# Methodology



- ❖ This study was designed under the philosophy of interpretivism. It used an inductive approach and adopted a case study strategy. The choices taken was mono (qualitative) and time horizon was cross-sectional. This approach was deemed appropriate since qualitative method is frequently used in business due to fewer business cases available and it is often useful to build case material (Saunders et al, 2019). Secondary and primary data will be collected through documentary research and interviews to validate and understand the reasons and will run concurrently.
- ❖ Doctrinal research was conducted in Dar es Salaam, in main libraries, legislation and online resources. It covered legal and regulatory provisions in other commonwealth jurisdictions, selected via convenient sampling. Interviews were conducted on 12 tax experts selected via purposive and convenience sampling. The tools were unstructured questionnaire and two focus group discussion during a seminar by NBAA. The researcher documented the responses and summarised them.
- ❖ Data was analysed via content analysis, and interviews collated along key research questions and presented by narratives.

# Alternative Dispute Resolution



- ❖ Alternative Dispute Resolution (ADR) refers to the set of mechanisms that are utilised to manage conflicts without resorting to the often-costly adversarial litigation, typically by placing the case in non-binding mediation or in binding arbitration (Leeds, 1997). ADR mechanisms have been hailed for their benefits which include cost-effectiveness, expeditiousness, flexibility, promoting party autonomy and preserving relationships amongst parties (Muigua, 2015). Studies in ADR demonstrate that efficient application can have a beneficial impact on tax compliance and tax administration (Jones & Maples, 2012:525; Wei, 2000:529). ADR mechanisms seek to address the root cause of disputes unlike litigation which concerns itself with reaching a settlement (Muigua, 2018).
- ❖ The Arbitration Act No.2 of 2020 defines arbitration as a process by which parties submit a dispute to the decision of a neutral person or persons appointed by mutual consent or in accordance with the provisions of the Act. Some studies show that up to 70% of the consumer contracts contain arbitration clauses, otherwise known as 'Scott vs Avery Clause' (Walker, 2015). Anam (2021) observed that many business agreements had arbitration clause because of the perception that arbitration was not time consuming, was efficient and done in privacy with terms agreed by the parties, including the choice of the arbitrator. Is the arbitral award final of a precursor to litigation?
- ❖ In mediation, parties to a dispute may refer the matter to an independent third party who will act a go-between, pointing out at points of agreement. The mediator does not impose a settlement on the disputants and neither does he rule on rights of any party. He is only a facilitator and does not establish facts, give advice, take sides, make a decision or decide who is 'right or wrong'

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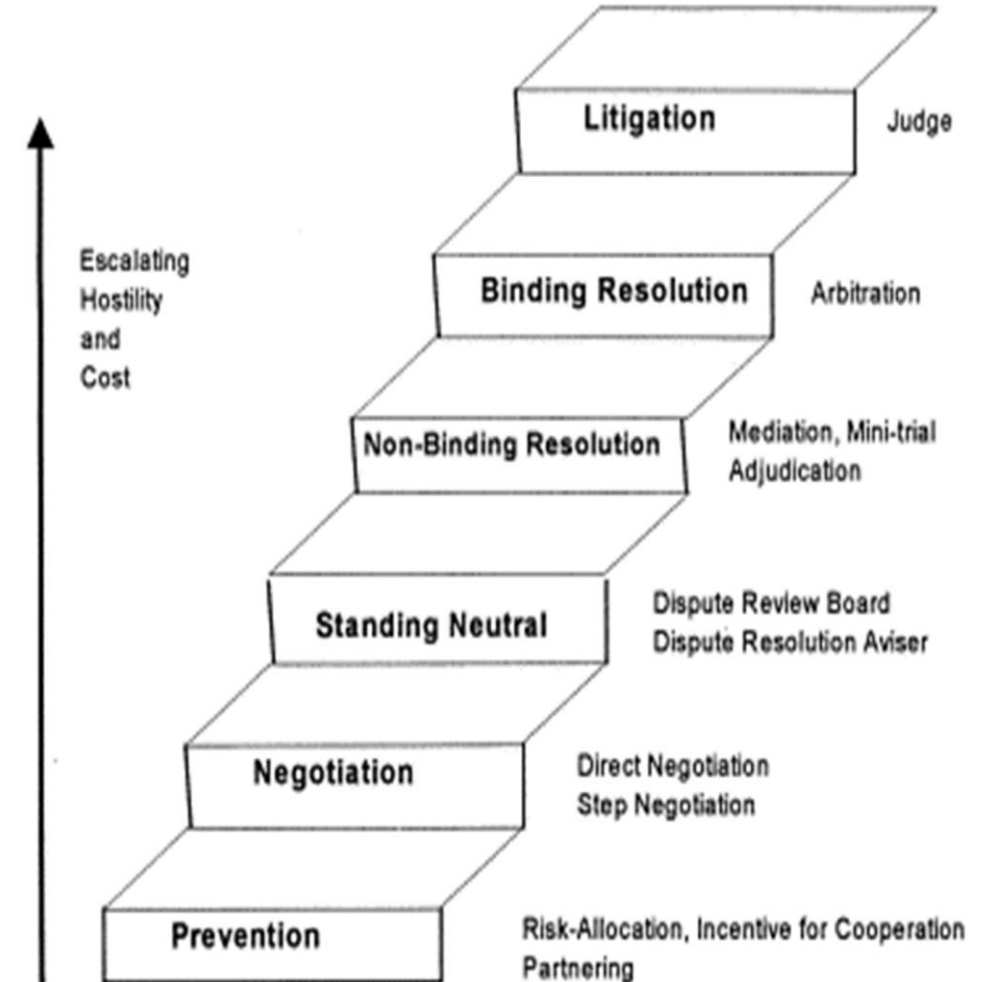
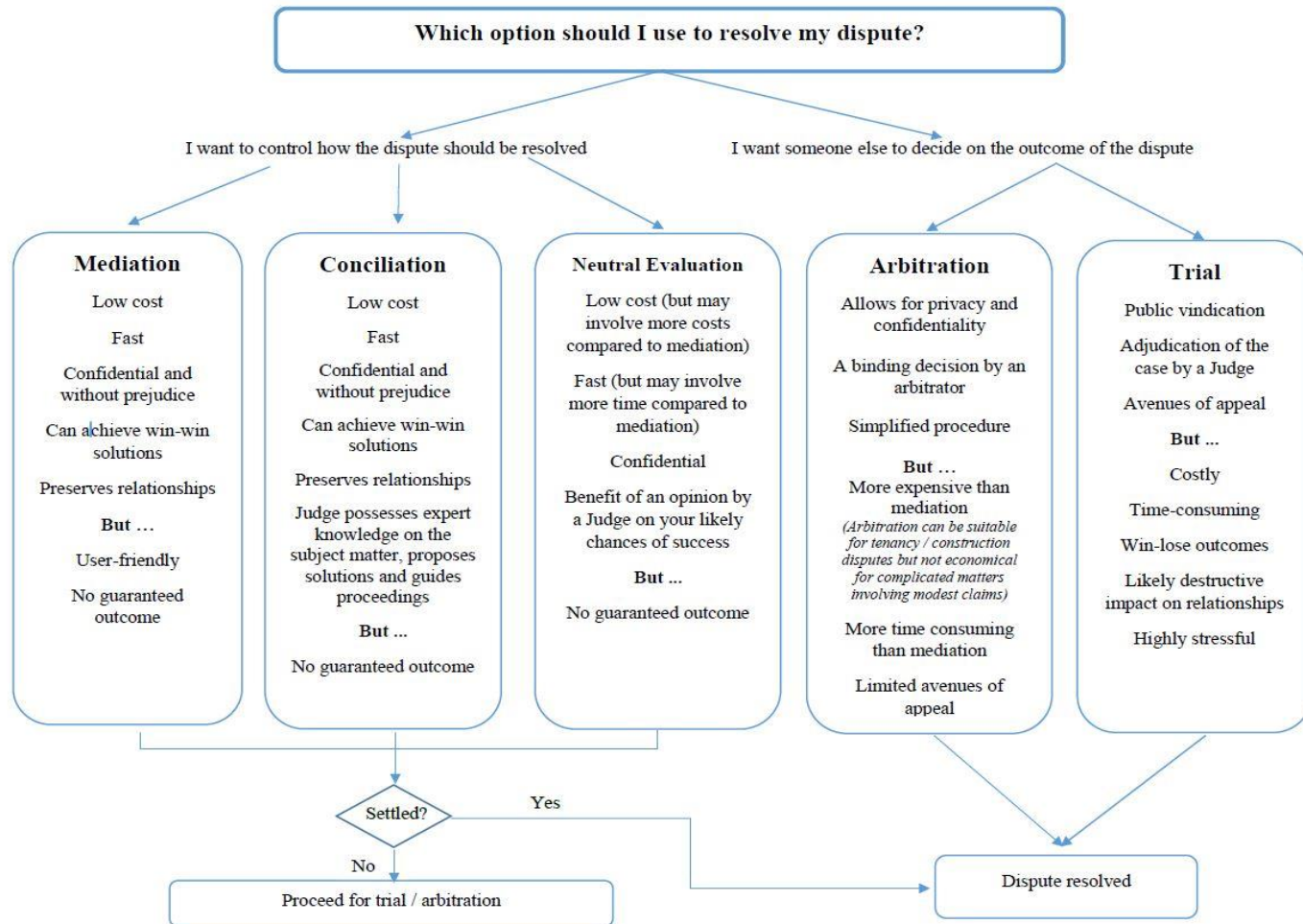


# Alternative Dispute Resolution

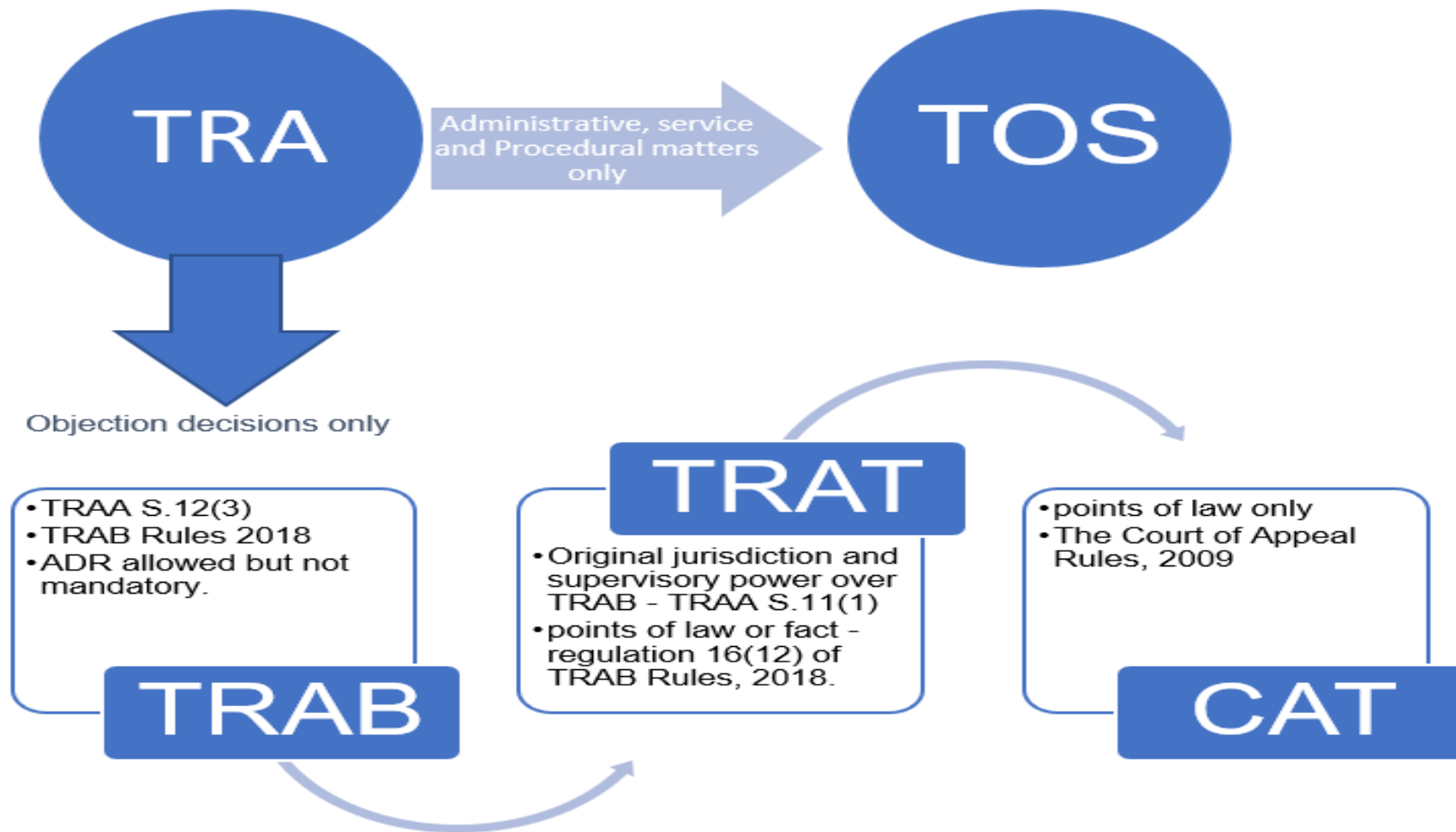


- ❖ Conciliation is similar to mediation but here, the conciliator suggests ways of resolving the dispute, and hence it is a recommendation-based process of settling the dispute out of court. Conciliator tactfully engages the disputants to align their interests after understanding the root cause of the problem until a settlement is reached. Given that it is a voluntary process, the proposed settlement by the conciliator is not binding on the parties (Mashamba, 2017).
- ❖ Negotiation involves engaging in constructive dialogue to seek a solution voluntarily by disputing parties in presence in a mediator who act as a go-between. It is applied in all ADR mechanisms. The process continues until mutually terminated by the parties or failure to reach a settlement (Mashamba, 2017).
- ❖ Special types of ADR include expert determination (where arbitrator uses inquisitorial powers to arrive at a binding decision), adjudication (use of an expert to rule on a technical issue), Med-Arb (a combination of mediation and arbitration), neutral evaluation (where a third party, usually someone with legal background, gives an expert opinion on the likely outcome of the dispute in case it went to trial, hence resort to out of court settlement) amongst the rest. Ombudsmen and industry regulators also play a key role in ADR (Mashamba, 2017).. Here, the parties agree to mediation but if that fails, the matter is referred to arbitration.
- ❖ The Office of Tax Ombudsman was set via Finance Act, 2019, but not operational. Its powers are limited to resolving administrative complaints about TRA, and not tax disputes.

# Dispute Resolution Mechanisms



# Tax Dispute Process



Source: Author, 2021

# Findings: Available legislation



- ❖ Article 107A (d) of the Constitution of URT gives ADR a legal grounding in Tanzania. ADR is formally recognised in the judicial system (via CJ Circular No 1 of 2002 – Operation of Alternative Dispute Resolution) and brought into judicial process by the rules to Civil Procedure Code (Amendment of Schedules) Rules (GN No 422 of 1994). The Civil Procedure Code, Cap 33 of the Laws of Tanzania duly incorporates the need to pursue ADR before litigation. The Civil Procedure Code (Amendment of the First Schedule) Rules, 2019 provide for the manner in which parties will conduct ADR process. Arbitration Act, 2020, has created an updated arbitration practices to modernize Cap 15.
- ❖ Resolving tax disputes using ADR is given recognition in S.17(1)(b) of TRAA, where TRAB and TRAT are required to mediate, conciliate, or arbitrate the dispute before them at any stage, on application of parties. Referring the tax dispute to ADR is however not. It is important to note that decisions entered with consent of the parties (eg in ADR) is not appealable (Reg 16 of TRAB Rules, 2018). The modalities of conducting tax dispute resolution using ADR is however not provided for in any guideline and this may have contributed to low uptake of this approach in resolving disputes, as players responded during the interviews.
- ❖ TRAB Rules, 2018, excludes the applicability of the rules of procedure made under the Civil Procedure Code, Cap. 33 and the Arbitration Act, Cap. 15 in tax dispute resolution (Rule 16(11) of TRAB Rules, 2018). Instead, TRAB and TRAT are mandated to set rules of procedure where none exist or silent about that situation (Rule 17(1) & (3) of TRAB Rules, 2018 and Rule 16(1) & (3) of TRAT Rules, 2018). Tanzania has no guidelines for using ADR in tax disputes.

# Findings: Challenges encountered



- ❖ The existing procedure of objection to the decision of the CG is seen as part of the litigation, it is adversarial as the taxpayer is required to present evidence to back up his grounds and support it with facts and law.
- ❖ Lengthy delay is viewed as affecting the collection of taxes due and frustrates the taxpayer with procedural or administrative delays, that cost them through interests and penalties piling, given that these continue to accrue as the dispute drags on. If a dispute goes through the entire appellate mechanisms, it will be concluded in ten years.
- ❖ TRA is viewed as unfairly enforcing their stand on the assessment, whatever the views of the taxpayer, driven by the pressure to meet annual revenue target, which they have missed consistently. This results in more disputes.
- ❖ the tax laws are viewed as negating the principle of natural justice of presumption of innocence until proven guilty, equality before the law and perhaps even the right to be accorded a fair hearing as provided for in the Bill of Rights. The interest and penalties continue to accrue. For an appeal to be entertained at TRAB, taxpayer is required to pay all taxes not in dispute or one third of the assessed amount, whichever is higher. Whereas CG is empowered to waive this requirement, his refusal is not appealable and hence where one has no resources to pay, he is clearly denied a chance to be heard.
- ❖ When tax dispute is referred to ADR, the non-involvement of TRAB, respondents observed, makes the process appear non-serious and in most of the cases, the matter remains as is, given that TRA often sticks to their position. Respondents clarified that it is for the taxpayer to accept and move on or revert to litigation.



# Findings: Challenges encountered



- ❖ Delays: The lack of skilled and experienced personnel at TRA, especially in Tax Audit and Technical Units, causes delay of closure of cases (CAG,2017:101). In 2014/2015, TRA settled only 26% of the objections raised. He attributed this to lack of adequate funding, warning that incompetent staff causes tax disputes to rise due to their misinterpretation of the provisions of tax laws. CAG (2018:79) pointed out that TRAB and TRAT only 48% of the sittings were conducted, with rest getting rescheduled.
- ❖ The Tax Ombudsman Office (TOS), was created but his powers exclude handling cases under tax objection or appeals system, handling of legal aspects or matters of tax policy - SS. 28A, 50 and 53 TAA, s. 11(1) of TRAA, 2001 and rule 25(1) of TRAT Rules, 2018.

# Findings: Applicability of ATDR



- ❖ TRA is mandated to assess, collect, and account for the revenue as per the set laws. It is provided for in Article 138 (1) of the Constitution of URT that no tax should be imposed except in accordance with an Act of Parliament. It follows therefore that TRA can only apply the provisions of the law in carrying out its mandate and hence agreement to increase or reduce taxes payable is in breach of the laws. It needs establishing tax liability correctly, fairly and even-handedly across all taxpayers in a way that minimizes cost and hence consensus does not mean compromise.
- ❖ ADR has weaknesses as well, including competence of mediators and conciliators, willingness of parties to resort to ADR, and it is seen as subject to administrative inefficiencies in the judicial system as well. It may not achieve the expected results of eliminating case backlogs if such issues are not addressed (LRCT, 2013).
- ❖ Gashaw (2012) recommends that clear rules and procedures are prerequisite in effective use of ADR in tax disputes. This is missing in Tanzania.
- ❖ Msando (2019) called for promulgation of rules that he called *The Tax Administration (Alternative Dispute Resolution) Rules*, though he is of the opinion that arbitration should not be part of it as it amounts to duplication, insisting that there is little difference between arbitration and litigation. Tax laws observe the canon of equality. If ADR is used, Msando (2019) observed that it may result in different treatment to different taxpayers for the same tax, depending on the negotiating skills of the parties and the competence of the mediators.

# Findings: Applicability of ATDR



- ❖ Matuku (2021) reported that Kenya Revenue Authority experienced a 20% growth in ADR in the last financial year, a sign that ADR is now at the centre stage of dispute resolution in tax matters; with 284 tax disputes concluded in the FY 2019/20 (Ksh. 9.561 Billion) compared to 237 concluded in 2018/19 (8.102 Billion).
- ❖ A Deloitte study indicated that it is possible to resolve up to 80% of the tax disputes globally by ADR. It established that South Africa resolves 66% of their tax disputes through ADR and Kenya resolved 181 cases between July 2015 and April 2018 through ADR, collecting KES. 8.3 billion in the process (Kirchheiner, 2019).
- ❖ A review of the ADR Frameworks in other jurisdictions, Kenya, South Africa and Australia, shows that arbitration has been excluded in tax dispute resolution, given that it is taken as determinative. Whereas ADR terminology included arbitration, it is observed that the practicable mechanisms are those with recommendation-based agreements, viz mediation, conciliation, and negotiation. TRAA however includes arbitration as part of the ADR processes.
- ❖ Australia encourages the taxpayer and the government to pursue ADR option as a legal requirement by requiring them to demonstrate “genuine steps” statement outlining the attempts taken to resolve the dispute by alternative means before resorting to litigation (KPMG, 2014).
- ❖ Some respondents cautioned that corruption may thrive in tax dispute resolution if ADR is allowed, especially at TRA, but others pointed that corruption is thriving now, given the low ranking in corruption indices, and proper guidelines of ADR will serve to reduce that possibility. The World Bank (2021)’s Ease of Doing Business Report 2020 Report ranks

Tanzania at 164<sup>th</sup> out of 190 countries ranked on the payment of taxes.

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# Recommendations



- ❖ Tax Dispute Resolution Policy is required to guide the practices in the country, by all parties involved. To operationalize the policy, a procedures manual is recommended, with key steps to be taken.
- ❖ Funding TRA, TRAB and TRAT – systems and personnel.
- ❖ ADR at TRAT is not effective at the moment, given the composition of the bench – they are at bare minimum. Expand the bench.
- ❖ There is an opportunity to improve on the current practice of tax dispute resolution by reducing administrative burdens surrounding ADR. Appellate bodies may consider **video conferencing** where parties request and examine scenarios where arbitration present attractive advantage to litigation. Flexibility and innovation is key to successful implementation of ADR.
- ❖ The government should consider establishing a unit at TRA, specifically to handle ADR program, will legal framework and guidelines, with KPIs to demonstrate their effectiveness in resolving disputes. That unit should be resourced with experts in ADR, law, audit, information technology, and accounting. They should be facilitated to cover large scope, geographically and taxpayer-wise. It is a best practice to have taxpayers protest to the tax administration to be a pre-requisite to lodging an appeal.
- ❖ The government should also consider publishing quarterly data relating to settlement percentages and cost-effectiveness of ADR. This will create awareness to the taxpayers to consider ADR as the main too, leaving few cases to be handled under legislation, more so, those to do with facts and law, tax policy and the need to set precedent and clarify a law for future similar matters.

# Recommendations



- ❖ To protect taxpayers, consideration should be given to restitution by TRA, when they win the appeal and have suffered cost of the appeal and consequential losses. Consequently, taxpayers raising frivolous appeals may be made to carry the burden of costs incurred by TRA in litigation, in addition to settling taxes due, interests and penalties.
- ❖ Decision on the deferral of tax due and interests accruing from it, given that TRA is not expected to pay interest if taxpayer wins the appeal. The burden of prove is currently on the taxpayer, but TRA may need to equally be tasked to prove when they take unreasonable stand.
- ❖ The Tax Ombudsman Office created in July 2019 is a welcome move. However, the restriction of the scope of work shows a missed opportunity. TOS does not handle matters under objection or under appeals. He cannot also touch on matters of tax law or policy. He is therefore reduced to hearing complaints regarding service or administrative actions by TRA and try to resolve by reconciling taxpayer and TRA, but still he cannot impose a decision. There may be a need to review section 28G of TAA creating the office and consider empowering him further to handle complaints about appeals. The Minister has not also created regulations to operationalize the provisions of the Act creating that office.
- ❖ There is need for institutional support and budget to ensure resources are availed. Training will enable them to understand the customer-centric approach in tackling issues, and hence develop an attitude of advisory, facilitation and recommendations, with full understanding of the tax law provisions. This will foster relationship and build an attitude of tax compliance in the minds of the taxpayers.



# Parting shot



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CAN EVEN MEND A CRACK IN THE SKY"  
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When asked about completing his income tax form, Albert Einstein had this to say: “This is a question too difficult for a mathematician. It should be asked of a philosopher”. Herman Wouk summed it up by saying: “Income tax returns are the most imaginative fiction being written today.”

Disputes are bound to happen. Let’s resolve them amicably.



*Thank  
you*



Email: [esambu@SGAsecurity.co.tz](mailto:esambu@SGAsecurity.co.tz) Tel: 0728970731