

IATJ 2017

OBTAINING EVIDENCE AND INFORMATION
COMMON LAW JURISDICTIONS

CANADA

KENYA

HONG KONG

UNITED KINGDOM

UNITED STATES

OUTLINE OF PRESENTATION KENYA

1. Background

- a) Taxation in Kenya**
- b) Tax Appeals Tribunal**

2. Appeal process

- a) Procedure for appeal**
- b) Hearing**
- c) Burden of proof**
- d) Decision of the Tribunal**

3. Provisions regarding evidence and information

- a) Disclosure and exchange of documents**
- b) Admissibility of evidence and documents produced electronically – Tax Procedures Act**
- c) Evidence at the hearing of the appeal**
- d) Presumptions on evidence**
- e) Expert evidence**

1.

BACKGROUND

KENYA

a)

Taxation in Kenya

- Kenya has a broad taxation system covering both direct and indirect taxes. The direct taxes include PAYE, Corporation Tax and Capital gains tax. The indirect taxes include VAT, excise tax and customs duty.
- Article 209 of the Constitution of Kenya 2010 outlines powers to impose taxes or raise revenue for both the National government and the County government. The national government solely imposes the main taxes which are Income Tax, Value Added Tax, Excise Tax and Custom duty/import duty. These taxes are governed by independent legislations that make provisions for the charge, assessment and collection of the respective taxes; the administration and general provisions relating thereto; and for matters incidental to and connected with the foregoing.
- These legislations are the Income Tax Act (Chapter 470 of the Laws of Kenya), The Value Added Tax Act (Act Number 35 of 2013 of the Laws of Kenya), the Excise Duty Act (Act Number 23 of 2015 of the Laws of Kenya) and the East African Community Customs Management Act (An Act of the Community making provisions for the management and administration of Customs and for related matters.
- In addition to these statutes, there is the Tax Procedures Act (Act Number 29 of 2015 of the Laws of Kenya) which harmonizes and consolidates the procedural rules for the administration of tax laws in Kenya, and connected purposes. The tax laws mean the Tax Procedure Act, Income Tax Act, Value

1.

BACKGROUND KENYA

a)

Taxation in Kenya

- Kenya Revenue Authority (KRA) is the agency of the Government for the collection and receipt of all revenue. It administers and enforces the provisions of the tax laws and for that purpose, assesses, collects, ascertains and accounts for all revenues in accordance with those laws. KRA has the authority to undertake reviews on individuals to confirm they are paying the right tax.
 - KRA's Chief Executive is the Commissioner General who is responsible for the day to day operations of the agency and has delegated some of the statutory roles to respective Commissioners.
 - The tax regime in Kenya is **self-assessment** for both direct and indirect taxes where the Kenyan taxpayers (both individual and corporate) are allowed to calculate the taxes due for a particular period themselves and subsequently submit a tax return to KRA and pay any outstanding balance by the due dates as stipulated in the legislations.
 - However, it is worth noting that there are other types of tax assessments apart from self-assessment under the law such as ;
- i. **Default assessment;** Where a tax payer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law and KRA, based on such information as may be available

1. **BACKGROUND** **KENYA**

a) **Taxation in Kenya**

- ii. **Advance assessment;** Where KRA issues an assessment based on available information and to the best of its judgment but only in isolated cases such as when there is bankruptcy, winding up or liquidation proceedings that have been instituted against a taxpayer, where KRA has reason to believe that a taxpayer is about to leave Kenya permanently, where a taxpayer has ceased, or KRA has reason to believe that a taxpayer will cease carrying on any business in Kenya and where a taxpayer has died.
- iii. **Amended assessment;** Where KRA amends an original assessment by making alterations or additions based on available information and to the best judgment of KRA.

1.

BACKGROUND KENYA

b)

Tax Appeals Tribunal

- The Constitution of Kenya 2010, provides for System of courts. These are superior courts (the Supreme Court, the Court of Appeal, the High Court, courts with the status of the High Court to hear and determine disputes relating to employment and labor relations; and the environment and the use and occupation of, and title to, land) and subordinate courts (the Magistrates courts, the Kadhis' courts, the Courts Martial and any other court or **local tribunal** as may be established by an Act of Parliament). Tribunals are therefore considered as part of subordinate courts.
- Generally, tribunals are bodies established by Acts of Parliament to exercise judicial or quasi-judicial functions. Tribunals supplement ordinary courts in the administration of justice according to the statutes establishing them. However, tribunals do not have penal jurisdiction and are not bound by the strict rules of procedure, as is applicable at the (superior) courts.
- Tribunals, like the courts, have to respect the Bill of Rights in their decisions and not be repugnant to justice and morality or be inconsistent with the Constitution or other laws of the land. Most tribunals are subject to the supervision of the High Court which has the powers to ~~hear appeals from decisions made by the Tribunal~~

1.

BACKGROUND

KENYA

b)

Tax Appeals Tribunal

- Some of the differences between the courts and tribunals are:
 - i. Tribunals decisions are not so bound by precedent in common law;
 - ii. Tribunals make decisions based on conclusions of the existing law whereas the (superior) courts may create new law in their decisions in the absence of precedent in common law, and;
 - iii. The tribunals do not strictly follow judicial rules of evidence and procedure;
 - iv. The decisions of the tribunals are reliant on pre-determined set of statutory provisions which require findings of facts to reach conclusions of law that justify the decision. The decisions are however enforceable, if not challenged by an appeal, as a decree of the court.
- The Tax Appeals Tribunal Act (Act number 40 of 2013 of the Laws of Kenya), which established the Tax Appeals Tribunal (TAT) came into operation on 1st April, 2015. The object of the Act is to make provision for the establishment of the TAT, the management and administration of tax appeals, and for connected purposes.
- The TAT rules of procedure were subsequently published by notice in the gazette four months later. The TAT's formal sittings for purposes of determining appeals began in December 2015 and TAT is therefore

1.

BACKGROUND

KENYA

b)

Tax Appeals Tribunal

- The TAT was established to hear and make determinations on appeals filed against any decision made by the KRA (Commissioner) under the aforementioned tax laws.
- As a body exercising judicial authority, and especially as provided by Chapter Ten of the Kenyan Constitution 2010, the TAT is guided by the following principles;
 - justice shall be done to all irrespective of status
 - justice shall not be delayed
 - alternative forms of dispute resolution shall be promoted
 - justice shall be administered without undue regard to procedural technicalities, and
 - protection and promotion of the purpose and principles of the Constitution.

- TAT is also guided by provisions on freedoms and fundamental rights in the Kenyan Constitution including: -

Article 47; Fair administrative action, where every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;

Article 48; Access to justice where the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice;

Article 50; Fair hearing, where every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent

2.

APPEAL PROCESS

KENYA

a) Procedure for appeal

- At first instance, a taxpayer dissatisfied with a decision by the Commissioner objects/ applies for review of the decision/omission stating the grounds upon which it is lodged. Thereafter, Commissioner is expected to review the decision and communicates its decision in light of the objection. If the taxpayer is still not satisfied with the decision after review, he may appeal to the Tribunal.
- A person (taxpayer) who disputes the decision of Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law and upon giving notice to the Commissioner, appeal to the Tribunal.
- *Note however, that an appeal under the Income Tax Act, VAT Act and Excise Act must be an 'appealable decision' which is defined as an objection decision and any other decision made under a tax law other than – a tax decision or a decision made in the course of making a tax decision.*
- *Tax decision means an assessment, a determination of the amount of tax payable or that will become payable by a taxpayer; a determination of the amount that a tax representative, appointed person, director or controlling member is liable for; a decision on an application by a self-assessment taxpayer; a refund decision; a decision requiring repayment of a refund; or a demand for a penalty.*
- The notice of appeal is in writing and submitted to the Tribunal within 30 days upon receipt of the decision of the Commissioner.

2.

APPEAL PROCESS

KENYA

a) Procedure for appeal

- *A notice of appeal to the Tribunal relating to an assessment shall be valid only if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.*
- The appellant then files the appeal which consist of:
 - i. A memorandum of appeal
 - ii. Statement of facts and
 - iii. The tax decision
- The appeal is filed within 14 days from the date of filing the notice of appeal but the period may be extended due to reasonable cause e.g. Absence from Kenya, sickness, etc.
- Once filed, the appeal is served on the Commissioner within two days.
- After being served with a copy of the appeal, the Commissioner is supposed to, within thirty days, submit to the Tribunal its statement of facts including reasons for the tax decision and any other document which may be necessary for the review of the decision by the Tribunal

2.

APPEAL PROCESS KENYA

a)

Procedure for appeal

- Thereafter, the Commissioner serves the appellant with a copy of the statement of facts and the other documents within two working days from the date of submission to the Tribunal. Upon application in writing by the Commissioner, the Tribunal may extend the time for submitting and serving the statement of facts and other documents where it is proved to its satisfaction that the delay was not inordinate or other reasonable cause that may have prevented the Commissioner from submitting and serving the statement of facts and the documents within the specified period.
- The tribunal may require Commissioner to submit to the Tribunal additional documents that in the opinion of the Tribunal are in the Commissioners possession or control.

2.

APPEAL PROCESS KENYA

b)

Hearing

- Parties are advised in writing of time and place of the hearing at least 14 days before the commencement of hearing.
- Tribunal may adjourn the hearing for reasonable cause.
- Tribunal has power to stay or otherwise affect the operation or implementation of the decision under review as it considers appropriate for purposes of securing the effectiveness of the proceedings and determination of the appeal.
- In the proceedings, the appellant may appear in person or be represented by a tax agent or by an advocate in the proceedings.
- In an appeal by a taxpayer to the Tribunal, in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal allows the person to add new grounds.
- The appellant may, by notice in writing, withdraw the appeal, the Tribunal may dismiss the Tribunal if the appellant fails without reasonable cause to proceed with the appeal or comply with a direction by the Tribunal or uphold the appeal if the Commissioner without reasonable cause fail to appear for the

2.

APPEAL PROCESS

KENYA

b) Hearing

- Parties to the appeal, may at any stage apply to the Tribunal to be allowed to settle the matter out of the Tribunal, and the Tribunal may grant such a request under such conditions as it may impose. The parties are then supposed to report to the Tribunal the outcome of settlement of the matter outside the Tribunal.

c) Burden of proof

- The appellant has the burden of proving that the tax decision is incorrect, i.e. the assessment is excessive or the tax decision should not have been made or should have been made differently.

d) Decision of the Tribunal

- Tribunal should hear and determine the Appeal within 90 days from the appeal is filed.
- The Tribunal makes a decision in writing-
 - i. Affirming the decision under review
 - ii. Varying the decision under review; or
 - iii. Setting aside the decision under review and either –
 - a) Making a decision in substitution for the decision so set aside; or
 - b) Referring the matter to the Commissioner for the reconsideration in accordance with any directions or recommendations of the Tribunal

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

- The Evidence Act (Chapter 80 of the Laws of Kenya) is the statute that declares the law of evidence. The Act applies to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.
- The Act defines evidence as the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and without prejudice to the foregoing generality, includes statements by accused persons, admissions and observation by the court in its judicial capacity. Court is defined to include all judges, magistrates and persons, except arbitrators, legally authorized to take evidence. The provisions of the Act then elaborate on aspects regarding presumptions, admissibility and relevancy of evidence, admissions, confessions and other related aspects of evidence.
- Being a public administrative independent and quasi-judicial body, the TAT has powers and procedures resembling those of a court of law and thus bound to determine appeals objectively based on the facts and evidence before it.
- Obtaining of evidence and information by the TAT is governed by statutory law. Given that the proceedings of the TAT are of judicial nature, the TAT Act, its subsidiary legislation and the tax laws have express provisions to guide the process.

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

- However, the TAT proceedings are exempted from the provisions of the Civil Procedure Act (Chapter 21 of the Laws of Kenya). This therefore means they need not conform to the procedural requirements and form as provided for in the Civil Procedure Act.
- In light of this, some aspects of the Civil Procedure Act, such as the principle of res-judicata cannot be invoked. In addition, the provisions of the Civil Procedure Act as read with the Evidence Act would not necessarily apply to proceedings. Aspects such as discovery (of documents, examination for discovery, oral examination, examination for discovery by written questions, etc.), admission (of agreed facts, requests, etc.) are not expressly provided.
- That notwithstanding, the Tribunal has power to determine its own procedures. Rule 27 gives it latitude to determine an appropriate procedure where there are no applicable procedures under the Rules of the Act, including how evidence and information may be obtained in proceedings before it. In exercising these power, it may be guided by the practice in court, other jurisdictions or develop its own practice based on the circumstances.

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

a) Disclosure and exchange of documents

i. Rule 5; Statement of facts of appellant

- The Statement of facts is to refer specifically to documentary evidence or other evidence which it is proposed to be adduced at the hearing of the appeal. The documentary evidence is to be annexed to the statement of facts.

ii. Section 15; Submission of material documents to the Tribunal by the Commissioner

- The Respondent/Commissioner is required to submit documents that are crucial in the determination of the appeal or necessary for the review of the decision. The submission is done at the time of the Commissioner filing its response to the appeal.
- The TAT may also require the Commissioner to submit to the Tribunal additional documents that in the opinion of the Tribunal, may be in the Commissioner's possession or control.

iii. Rule 10; Extension of time for submitting documents

- An application for extension of time within which to file a notice of appeal, memorandum of appeal, statement of facts and tax decision is to be supported by an affidavit stating the reasons why the applicant was unable to submit the documents in time. The respondent response to the application is by way of an affidavit.

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

b) Admissibility of evidence and documents produced electronically (Tax Procedures Act)

i. Section 57:

- Notwithstanding anything to the contrary in any other written law, a document, or copy of or extract from a document, relating to the affairs of any person which has been obtained pursuant to KRA's order to the person to produce records/ documents or obtained by KRA when exercising its power to search and seize as the case may be; or a statement made by a person relating to his affairs is made to KRA in accordance with the provisions of this Act; such shall be relevant, be admissible in civil or criminal proceedings which that person is a party.

ii. Section 76:

- In any proceedings, a statement contained in a document in electronic form shall be admissible as evidence of any fact stated in that document in the document is produced in the manner proscribed by the laws.

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

c) Evidence at the hearing of the appeal

i. Section 16(2): Manner of giving evidence before the Tribunal during a hearing

- Evidence to the Tribunal may be presented by a party either orally, by affidavit, statement on oath or by combination of any of these methods.

ii. Rule 25; Evidence by affidavit and interrogatories

- Where the TAT requires evidence to be received by means of affidavits or interrogatories, the affidavits or interrogatories and the answers shall be by such means and in such form as the Tribunal may direct.
- Further, where the evidence of a witness who resides outside Kenya is necessary, the Tribunal may issue a commission or letter of request to examine that witness abroad.

iii. Section 20; Powers of the Tribunal during a proceeding

- The TAT may take evidence on oath.
- It also has the powers of a subordinate court to summon a person to appear before it to give evidence or produce books, documents or things mentioned in summons.
- In addition, the TAT has the discretion, where it considers desirable, to receive evidence by affidavit and administer interrogatories and require the persons to whom interrogatories are administered to make a full and true reply to the interrogatories. It further has powers to

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

c) Evidence at the hearing of the appeal

iv. Section 17; Witnesses

- The Tribunal may call any person to attend a hearing and give evidence including production of any document if the Tribunal believes such evidence shall assist in its deliberations.

v. Rule 16; Summons for witnesses

- Witnesses can be issued with summons requiring them to attend a hearing on an appeal at a date, time and place specified in the summons.

vi. Rule 20; Order of addresses

- The appellant and his witnesses are heard first and the respondent is given an opportunity to cross examine the witnesses, if any, followed by re-examination by the appellant.
- Before the case is concluded, the evidence of the respondent is also to be heard and the appellant given the opportunity to cross examine each witness followed by re-examination by the respondent.
- The Tribunal has the discretion to put questions to either party, or to any witness and may call additional evidence as it may be necessary for further clarification of the issues raised at the

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

c) Evidence at the hearing of the appeal

vii. Rule 22; Recording of evidence

- The evidence of the parties and that of a witness is to be recorded by the members of the Tribunal or by a person authorized to do so in a form to be decided upon by the members and when completed shall be signed by the members of the Tribunal at that proceeding.
- Evidence may also be recorded in short hand or by mechanical means, and the transcript of anything recorded shall, if certified by members of the Tribunal in that proceeding to be correct, be deemed to be a true record of the evidence for the purposes of the proceeding.

viii. Section 26; Opportunity to make submissions concerning evidence

- In furtherance to one of the rights enshrined in the Constitution, the right to a fair hearing, every party in the proceedings before the TAT is given a reasonable opportunity to present their case and inspect any documents in relation to the proceedings and make submissions.

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

d) Presumptions on evidence

Section 38; Evidence

- In any proceedings, whether civil or criminal under the act,
 - a) Other than upon an appeal, a certificate from the Commissioner stating that any amount is due from any person by way of tax, or other liability under the TAT Act, shall be conclusive evidence that the amount is due and payable from that person.
 - b) The burden of proving that any tax has been paid or that any goods or services are exempt from payment of tax shall lie on the person liable to pay the tax or claiming that the tax has been paid or that the goods or services are exempt from payment of tax.
 - c) A statement by the Commissioner that a person is registered or is not registered under this Act, shall be conclusive evidence of the fact unless that person proves the contrary.

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

e) Expert evidence

Section 23; Expert evidence

- The Tribunal has the powers to engage the services of an independent expert in any proceedings as may be appropriate upon such terms and conditions as the Chairperson may determine.
- It may then use the views of the expert in making decision on an appeal.

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

f) Other provisions on evidence

i. Rule 24; Contents of decision

- The written decision of the TAT is required to contain a summary of the relevant evidence produced before it.

ii. Section 29; Decision of the Tribunal

- The Tribunal is to give reasons in writing for the decision, including its findings on material questions of fact and reference to the evidence or other material on which those findings.
- As part of the principle of fairness and transparency in the judicial process, all decisions of the TAT and evidence received by it including transcripts of the report of the hearings, are public records open to inspection of the public.
- The Published decisions of the TAT are evidence of the decisions of the TAT in all courts of Kenya, without any further proof of authentication.

iii. Section 33; Offences

- It is an offence to make any false statements, false claim for a refund, produce any false document or information or make any false return concerning any material particular relating to any matter under the TAT Act.

3. PROVISIONS REGARDING EVIDENCE AND INFORMATION KENYA

f) Other provisions on evidence

iv. Section 22; Penal provisions for disobedience of summons to give evidence

- Any person summoned by the TAT to attend and give evidence or to produce any records, books of account, statements, or other documents, whether in electronic form or otherwise, or who is required to answer interrogatories, and who without sufficient cause refuses or fails to attend at the time and place mentioned in the summons served on him or refuses or fails to answer, or to answer fully and satisfactorily, to the best of his knowledge and belief, all questions lawfully put to him or with concurrence of the TAT, refuses to or fails to produce any records, books of account, statements or to her documents, whether in electronic form or otherwise, which are in his possession or under his control, mentioned or referred to in any summons served on him commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

v. Section 23 of the Tax Procedures Act; Record keeping

- Records are to be maintained in either of the official languages; maintain any document required under a tax law so as to enable the person's tax liability to be readily ascertained; and subject to subsection, maintain the document for a period of five years from the end of the reporting period to which it relates or such shorter period as may be specified in a tax law.
- If necessary for a proceeding commenced before the end of the five-year period, the person shall

- THE END -