

Tax Dispute Resolution System in Tanzania: Mediation as a way forward

By Madeline Kimei¹

Change is the only constant. One must evolve with time; law and legal processes are no exception. When delivering her speech on 1 April 2021 the Honorable Excellency, President Samia Suluhu Hassan expressed her concern with the TRA and methods it has used to collect taxes in the past urging them to make changes immediately if at all the threshold of 2 trillion monthly collections goal is to be achieved as proposed in the financial audit for the year 2021 – 2022. It is now the right timing for the tax authority to rethink, modernize and reform the current dispute resolution system under the current laws.

According to Thomas, Lai and Kyte, the main causes of tax disputes are “*inconsistent application or interpretations, unclear tax policies and rules, resource constraint, complex administration procedures, insufficient understanding of international tax law, enforcement not in accordance with tax treaties, unintended consequence of domestic practice, inadequate transparency, and other, including non-tax factors.*”

For the last decade, the system has been clogged up with cases and has entered a period of crisis. Whatever the reason, the bottom line is clear: “*There can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike.*” In Tanzania, no alternative dispute resolution (ADR) procedures is available, and the tax litigation procedure must be followed in all cases. ADR provides flow-on improvements in taxpayer compliance by making it easier to resolve disputes with revenue authorities or even to allay concerns.

It is beneficial to both the tax administration and taxpayers to be able to resolve disputes as early, quickly and efficiently as possible. This article seeks to highlight certain issues that can help Tanzania determine which of the ADR mechanisms described best suit their circumstances, the nature of the tax disputes that typically arise for their tax administration and their own legal framework.

¹ Ms. Madeline Kimei is an Arbitration Practitioner, Arbitrator and Accredited Commercial Mediator (MCI Arb – UK); she is currently the President, Tanzania Institute of Arbitrators (TIArb); Member, ICC International Court of Arbitration; Member of the LACIAC Court; Member of the LCIA’s Africa User’s Council; SIAC’s User’s Council and serves on various panels globally. She is the founder and Principal Director of iResolve (www.iresolve.co.tz) and her profile can be followed on www.linkedin.com/in/madeline-kimei-25a4a330.

A clear, accessible and affordable disputes process is integral to the integrity of the tax system. The present disputes regime is expensive and its cost acts as a bar to smaller taxpayers in particular, prompting the question of whether a tax lawyer is required to provide assistance. Furthermore, there has been a very marked fall-off in substantive tax cases appearing in the courts.

Settlement of Tax Disputes in Tanzania

As with any other type of civil or commercial dispute, tax disputes can be amicably resolved between the parties at any time. As far as the author is aware, TRA does not resort to formal mediation (for example, engaging a neutral third-party mediator) to assist parties in their attempts to settle the tax dispute amicably.

Tanzania practises a self-assessment regime. Tax compliance is therefore monitored via tax audits or investigations by the TRA. Tax audits and investigations have heightened over the years and there is a definite increase in enforcement activities by the TRA. An increased pressure can be felt particularly in relation to corporate tax. It is commonly believed that all of this is a direct result of government attempts to increase tax revenue. While tax audits and investigations are broad-based, they are being centred on certain industries at present.

The dispute resolution process in tax matters is initiated if the taxpayer is dissatisfied with the decision of the Commissioner General (CG) (s.50(1)) and also see s.51(1) of Tax Administration Act². If the taxpayer is aggrieved by the final determination of tax assessment of the CG, he can prefer an appeal before the Tax Revenue Authority Board (TRAB). An appeal from the TRAB lies before the Tax Revenue Appeals Tribunal (TRAT) for both the taxpayer and the revenue authorities if aggrieved. The TRAT is a quasi-judicial body with a judicial member and an accounting member. The TRAT is the final fact-finding authority and permits a complete re-examination of the facts and evidence.

From this stage, the parties have the option of appealing further at the Court of Appeal of Tanzania. However, such appeals are limited to substantial questions of law³. However, apart

² Tax Administration Act, 2015

³ Section 26 Tax Revenue Appeals Act cap 408 R.E 2006

from the appellate process, the High Courts or the Court of Appeal of Tanzania may also be approached for judicial review through a writ petition in cases where miscarriage of justice is involved. Quite expectedly, it generally takes 4-7 years (if appeals go up to the Court of Appeal) to resolve a tax dispute in the country.

The maxim of "*Nemo iudex in causasua*" which means that no person should be a judge in his own cause. Several scholars have suggested that the TRAB could be made independent placed under the control of the TRAT as a solution. Although the TRAB has been retained as an adjudicatory body as of date without any change, the attitude of the authorities today incites thought that the proposition needs to be revisited.

An increasing number of tax disputes are taking place, due to some taxpayers' application of old-fashioned aggressive tax planning schemes, while the TRA is becoming more alert in respect of tax avoidance. During the past 6 years, there have been a record number of appeals being filed against assessments raised by TRA, to the extent that the TRAB and TRAT has taken longer than usual to dispose of appeals.

Despite the fact the taxpayer is often able to informally resolve the conflict with an TRA official upon completion of the audit, considering that Tanzania is a common law-based system, resulting to have an adversarial system in tax dispute resolution has hindered Tanzania's growth owing to the procedural complexities, inordinate delays and expenses involved.

Recent reforms in the Tanzanian tax dispute resolution system

Mediation of tax disputes was introduced under Section 77 of the Finance Act, 2021 which amended Section 22 of the Tax Revenues Appeal Act⁴ ("TRAA") by adding sub-section 7 which states "*a part to an appeal may, at any stage of the proceedings before the judgement is delivered by the Board or Tribunal as the case may be, apply for the appeal to be settlement amicably through mediation*". Sub-section 8 further provides that the "*Board or Tribunal shall (a) require the parties to report the outcome of the mediation within a specified time and the Board or Tribunal shall issue a final order with respect to such mediation; (b) issue the final*

⁴ Cap 408 R.E. 2010

order upon submission of a written settlement agreement duly signed by both parties; and (c) not entertain an issue which has been settled amicably by parties under this section”.

In 2022, the Finance Act made further changes to Section 22 of TRAA by removing the words “mediation” wherever it appears and replacing it with “*amicable settlement*”.

Tax ombudsmen are most commonly established independently from the tax administration but they could also be constituted within the administration. The Tax Administration (Tax Ombudsman Service Complaint Procedure) Regulations, 2022⁵ applies to all tax complaints by a taxpayer regarding the service, procedural or administrative matters arising in the course of administering tax laws by the Authority, the Commissioner General or staff of the Authority. A complainant according to the regulations is “any person who is not satisfied by the services rendered, procedural or administrative matter undertaken by the Commissioner General or staff of the Authority in the course of administering a tax law may lodge a complaint to the Tax Ombudsman Service (TOS)” (Regulation 4 (1)). There is a closed list of matters which complaints maybe lodged on are set out in Regulation 5 “(a) *non-compliance of procedures or mal administration by the Authority in administering tax laws; (b) delay in release of documents or assets seized during the investigations of tax affairs; (c) delay in responding to a complaint submitted by a taxpayer; or (d) nonresponse of letters or documents sent to the Authority*”.

This paper will not discuss the TOS as the purpose of the ombudsman is that it works to manage conflict within an organization, whereas mediation is a specific process used for dispute resolution. The function of a tax ombudsman bears some similarities to other described dispute resolution mechanisms in that it can serve as mediator to facilitate the resolution of taxpayer-specific disputes, but tax ombudsmen can also serve as a vehicle through which taxpayers that are concerned about general administrative issues or practices of the tax administration may express their views⁶. The ombudsman uses mediation as a tool, but their sole responsibility is for oversight of complaints involving the TRA.

There is a need for an internal system for the resolution of taxpayer complaints and problems to prevent problems escalating and being brought to the attention of the Ombudsman. To avoid

⁵ Government Notice No. 106 published on 4/3/2022.

⁶ https://www.un.org/esa/ffd/wp-content/uploads/2019/04/18STM_CRP2-Chapter3-Handbook-dispute-avoidance-and-resolution.pdf

floodgate of complaints, the 2022 TOS should have explored further to establish a specialist tax adviser position within the Office of the Ombudsman, with appropriate resources, to investigate matters of tax administration by the TRA. This will reduce the number of complaints as they will be handled at an early stage hence preventing the escalation of the conflict.

The Case for an Internal Alternative Dispute Resolution System (IADRS)

In the spirit of the current policy drive towards attracting foreign investment (FDI), is now the right time for the tax dispute system to evolve through greater harmonization to a point where the TRA has taken measures to effectively adopt co-operative compliance as defined by the Organisation for Economic Cooperation and Development (OECD) as opposed to an adversarial approach where the revenue authorities look at applying coercive measures to ensure compliance by the taxpayer.

Arguably, in the tax context, taxpayers and revenue authorities have a continuing relationship with respect to the compulsory imposition of tax (and interest and penalties, where applicable) by the revenue authority. However, the fundamental nature of the relationship between the tax authority and the taxpayer in tax disputes is a legal one which is distinct from a relationship concerned with the underlying needs and concerns (interests) of the parties. Therefore, the application of dispute system design (DSD) in tax dispute resolution may differ from other dispute resolution contexts in the respect that the application of an interests-orientated system may be limited by the underlying legal relationship between the parties. Moreover, this particular relationship overtly lends itself to the use of rights-based dispute resolution approaches.

Although proceedings at the TRAB and TRAT shall be of judicial nature, there are elements of ADR in the which includes the powers vested on the Board and Tribunal's routine practice to resolve any complaint or appeal by mediation, conciliation or arbitration under s.17 (1) (b) of the TRAA.

There is dire need to put in place several mechanisms by which the confrontationist approach to tax disputes has been rationalized through efficient case management, avoidance of procedural formalities and increasing opportunities for settlements and alternative dispute resolution.

The unique feature in the Kenyan model is that the taxpayer and Commissioner enjoy the authority to opt for resolution through mediation. In furtherance of this process, the revenue authority set out an alternative dispute resolution (ADR) framework. The Kenyan government⁷, through the revenue authority has been able to recover over KES6.5bn (approx. US\$60m) in respect of over 140 disputes resolved.

Similarly, in the UK the HM Revenue and Customs (HMRC) offers a voluntary ADR service also involving a HMRC staff member trained in ADR techniques and with no prior involvement in the case⁸. Using ADR does not affect a taxpayer's appeal rights. According to its 2017-2018 Annual Report 82% of cases accepted for ADR were resolved successfully. In 2017-18 94% of taxpayers and their representatives said they were either satisfied or very satisfied with the ADR process.

According to the United States Agency for International Development's (USAID) 2013 Report on Leadership in Public Financial Management, 95% of tax disputes in Canada are resolved through ADR, 85% in Australia, and 75% in Brazil. In South Africa, an estimate of 66% and in Kenya, 36%. These countries have considered the vast benefits associated with ADR compared to their court systems, including reduced costs, prompt resolution and the maintaining of confidentiality.⁹

In parallel, a general sense of unease or lack of trust had been building in Tanzania that large companies were not participating fairly in the Tanzanian economy. Justified trust is a concept from the OECD. Justified trust builds and maintains community confidence that taxpayers are paying the right amount of tax. It also allows us to focus our resources in the right areas.

The author recommends that the TRA should establish internal ADR pilot programs to test the use of ADR techniques to resolving tax disputes in cases involving (1) large or complex cases

⁷ The Tax Procedures Act, No 29 of 2015 (TPA), provides for an elaborate Internal Dispute Resolution Mechanism (IDRM)

⁸ Guidance Use Alternative Dispute Resolution to settle a tax dispute, 8 December 2014 <https://www.gov.uk/guidance/tax-disputes-alternative-dispute-resolution-adr> (accessed on 2 August 2023)

⁹ Kenyan Revenue Authority, 'Disputes Appropriate for Arbitration', available at: <https://www.kra.go.ke/en/individual/alt-dispute-resolution-adr/learn-about-adr/disputes-appropriate-for-adr>, last accessed 20 April 2020.

ranging across business, public bodies and individuals as well as (2) fewer complex cases involving SMEs and individuals.

Mediation of tax disputes

The key to a collaborative approach is the implementation of collaborative dispute resolution processes such as mediation. Adopting mediation processes for low-risk tax disputes, might go a long way in reducing the quantum of tax disputes and freeing the large amount locked in disputes.

Predominantly, the absence of mediation from the tax framework in Tanzania can be rooted in the traditional approach of the Government, and the comprehensive yet cumbersome tax structure enshrined in the Income Tax Act, R.E. 2019. However, recent reports have suggested that Tanzania has been pondering upon the introduction of mediation to prevent/resolve tax disputes.

If mediation were available concurrently with negotiation, it could prevent problems such as negotiation fatigue and stalemate and will level the negotiating table, mitigating the possibility that negotiations will result in an inequitable settlement for an unrepresented taxpayer.

The mediation process is characterized by informality, flexibility, voluntary participation, confidentiality, and nonbinding results. The neutral third-party acts as a bridge between the parties, facilitating an open dialogue by helping the parties overcome communication barriers and dissolving the emotional facets of the dispute. The mediator may either take a purely facilitative role, in which he refrains from providing any recommendations, or the mediator may take an evaluative approach, in which he considers the merits of the parties' positions, offers an evaluation of the case, and recommends a basis for settlement. Even if the mediator adopts a more evaluative approach and attempts to steer the parties on a course of settlement, a crucial characteristic of the mediation process is that the mediator does not have the authority to mandate a particular outcome and thus the results of mediation are always nonbinding. Whereas settlements reached through mediation are mutually assented to, both the taxpayer and the TRAT must voluntarily agree to submit the dispute to mediation in the first instance, and either party may terminate the mediation process at any time. Furthermore, resolutions reached through mediation are inherently non- precedential. Thus, unencumbered by the

concern of creating future policy, mediation affords the parties a high degree of control over the mediation process and the resolution of the dispute.

Advocates of mediation as a viable mechanism to resolve taxpayer disputes contend that mediation provides an opportunity for a “win-win” situation for both the taxpayer and the TRA. Due to mediation’s non-binding nature, the taxpayer and the appeals process have a financial incentive to give mediation a legitimate chance. The most enticing benefit of mediation is the time and costs that are potentially saved if the mediation process facilitates a settlement of the case prior to litigation. Whereas litigation may potentially drag on indefinitely, the post-appeals mediation process is estimated to take only two months, with the actual mediation session lasting only a few days. The low costs and expedited timetable present taxpayers with a low-risk opportunity to settle the case. Furthermore, even if a settlement is not reached, the mediation process will still provide the parties with a better understanding of both sides’ interests and the merits of their case.

From an international tax dispute, I am of the view that a comprehensive, multi-tier advanced and flexible system that offers tailor-made instruments for dispute resolution could be more appropriate for preventing and dealing with international tax disputes.

One of the basic principles of mediation is that it respects the autonomy of the disputing parties. This principle ensures that mediation could also be an appropriate procedure for international disputes because it respects the sovereignty of disputing states. Moreover, international tax law is based on diplomacy and considered as “*flexible rule orientated*” which means that there is room for negotiation, which can be in the advantage of mediation as well. However, another principle of mediation is interest-based bargaining. This approach differs from a legal approach. In law, conflicts are transferred into legal definitions in order to obtain access to the legal system and to find a (legal) solution. In mediation, the conflict does not receive a legal definition because the real interest of the disputing party’s (e.g. legal certainty, shareholders interest, etc.) is the starting point for the solution. Therefore, mediation is called negotiation in the shadow of the law: it basically ignores the legal positions of the disputing parties and just focuses on a solution (which is in accordance with the law). It is a prospective approach of solving disputes instead of a retrospective approach¹⁰.

¹⁰ Pasquale Pistone, Jan J.P. de Goede, Flexible Multi-Tier Dispute Resolution in International Tax Disputes, January 2021 <https://www.ibfd.org/sites/default/files/2021->

The UN Committee of Experts on International Cooperation in Tax Matters¹¹ identifies the use of “administrative mediation”. This is a procedure in which officials of the tax administration trained in dispute resolution techniques facilitate the dialogue between the relevant officials in the tax administration and the taxpayer with the aim of helping to resolve the dispute. Whereas under the procedures for administrative appeals and independent reviews of audit position the intervening parties provide their own analysis of the action or actions taken by the tax administration that led to the dispute, the role of mediation is merely to enhance the communication between the disputing parties. Through such facilitation, the mediators could assist the parties in clarifying and understanding each other’s positions or forming a mutually acceptable compromise. The administrative mediation function does not involve *de novo* evaluation or potential modification of the original decision against the taxpayer. Therefore, officers performing the administrative mediation function do not require the authority to evaluate and possibly modify the original decision against the taxpayer, as is the case with officers performing the administration appeals function. Nevertheless, the mediation officers will need to have the authority to have access to confidential (e.g. taxpayer-specific) information in order to properly fulfil its function of facilitating communication. To the extent that the officers who conduct the administrative mediation also work as appeals officers, they should already be legally allowed to access confidential information.

The UN Committee also suggests another option which is an independent mediation mechanism, is a function that is sometimes offered by a tax ombudsman service. The current TOS regulations is silent on the use of independent mediation mechanisms.

Arbitrating tax disputes

Arbitration may be available as a second stage option. Although controversial, with respect to tax disputes, arbitration is encouraged as a means of settlement. The Organisation for Economic Cooperation and Development (OECD) has repeatedly called for the use of arbitration in

[05/20 007 Flexible Multi Tier Dispute Resolution in International Tax Disputes final web.pdf](#) (Accessed on 2 August 2023)

¹¹ https://www.un.org/esa/ffd/wp-content/uploads/2019/04/18STM_CRP2-Chapter3-Handbook-dispute-avoidance-and-resolution.pdf

resolving tax disputes and has gone further to provide a template for arbitration clauses that may be incorporated into tax treaties in its OECD Model Tax Treaty.

Compared to traditional litigation, arbitration may provide a desirable alternative mechanism capable of rendering a final decision in a dispute that the parties were previously incapable of resolving themselves. This is particularly true for legally unsophisticated taxpayers who do not have legal representation. Even though arbitration is more structured than mediation, the environment is still more relaxed than courtroom formalities. The unrepresented taxpayer benefits from relaxed rules of evidence, in- formal discovery, and the absence of any real motion practice. In the arbitral setting, the average taxpayer, therefore, has a better opportunity to fully present his or her case, unencumbered by the hefty procedural requirements under the current legal framework.

Arbitration can be used to deal with specific-case disputes, but not interpretive disputes or legislative issues. There are two types of arbitration at the moment: “independent opinion” style arbitration (that is, the arbitration panel will issue an independent decision) and a “last best offer” or “final offer” approach (commonly referred to as “baseball arbitration”). Baseball style arbitration is preferred as it is simpler and less costly and is used in US tax treaties.

In a limited capacity as a “last resort” in the face of litigation, arbitration stills provides meaningful option in cases where the parties want to avoid going to court but need a third party to render a final decision. Moreover, Haslehner, Lyons, Pantazatou (2023)¹² provide a review of the arguments in favour of tax arbitration, discusses the practical and legal challenges for its wide-spread adoption and compatibility with existing domestic legal tax frameworks and international norms.

The US’ IRS is an existing example, it established an Appeals Arbitration Programme whereby either party can submit a request for arbitration of a taxation dispute even when a case is in appeals. However, the arbitrability is limited to factual disputes and not matters that require an interpretation of the law. The award passed by the arbitrator in such matters is binding on both parties.

¹² Werner Haslehner, Timothy Lyons, Katerina Pantazatou, *Alternative Dispute Resolution and Tax Disputes* Edward Elgar Publishing, 2023

The way forward

The appropriate use and application of ADR mechanisms should be explored. It should be clear that all tax disputes can be suited to be resolved through mediation. In order to have a positive result, the use of suitably experienced and trained mediators will be of utmost importance since tax issues are usually complex and technical¹³.

In addition to the above ADR processes such as mediation and arbitration being generally available to parties during the disputes resolution procedures, the TRA should also offer, as a specifically-developed ADR program, an in-house facilitation process for less complex disputes arising from indirect tax, small business and individual audits and objections.

Conclusion

If one rewinds 775 years ago, King John, in the Magna Carta, promised "*To no one will we deny or delay right or justice*". That promise has proven devilishly difficult to keep. It has yet to be completely fulfilled. Still, considering all the pressures on the nation's courts, we can be justly proud of their performances and innovations. Given the startling growth of a judge's workload over the last 10 years, I am heartened that the system has not already buckled. That the courts have survived testifies to a willingness to meet challenges through change. Judges today take a much more active role in case management than in years past, bolstered by increased power to sanction attorneys who wield discovery and delay as weapons. This ability to react has enabled the national court system to shoulder its vastly increased load while continuing to dispense quality justice. An even greater willingness to experiment is needed now. The sense of crisis gripping some in the legal community is all to the good if it spurs us to meaningful experimentation and reform.

Mediation will need to be re-introduced with a policy backed foundation aimed at providing a more cost and time-efficient model to prevent tax disputes and mitigate the staggering

¹³ Danny Quah, Mediating Tax Disputes in Singapore [2020] SAL Prac 9 <https://journalonline.academypublishing.org.sg/Journals/SAL-Practitioner/Arbitration-and-Mediation/ctl/eFirstSALPDFJournalView/mid/590/ArticleId/1509/Citation/JournalsOnlinePDF> (accessed on 3 August 2023)

pendency of tax appeals in Tanzania, thereby making the country more friendly for taxpayers. This will be a more structured negotiation process facilitated by a neutral third party as opposed to reverting to “amicable settlement” efforts under the auspices of the authority. It is hence strongly put forward that the introduction of mediation for tax dispute resolution introduced in the Finance Act of 2021 be recalled. Its implementation will require greater involvement of the alternative dispute resolution (ADR) professionals with strong tax law background and the TRA to have trusted institutions which may promote the proliferation of institution mediation in the country. Moreover, in the context of tax dispute resolution, particularly under a self-assessment system, a well-functioning tax disputes resolution system has the potential to positively impact on taxpayer voluntary compliance.

Taxpayers must not only have the right to challenge the Commissioner they must also feel that both TRA and the disputes process will treat them fairly. I do not consider a majority of taxpayers and practitioners involved with the current disputes process would accept that it is fair. The use of ADR in the tax arena creates an opportunity for greater engagement to resolve disputes and reduce unnecessary costs for taxpayers and the TRA alike. Against this backdrop it is therefore timely for a more robust structural (and legislative) changes to the Tanzanian tax disputes resolution system would be necessary.