TAX DISPUTES RESOLUTION IN KENYA: VIABILITY OF INCLUDING ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE MASTER OF LAWS (LL.M) DEGREE

BY:

KASHINDI GEORGE ASHIONO

G62/76903/09

SUPERVISOR:

PROF. ARTHUR ESHIWANI

2017

DECLARATION OF ORIGINALITY FORM

UNIVERSITY OF NAIROBI

Declaration of Originality Form

This form must be completed and signed for all works submitted to the University for Examination.

Name of Students	_____
Registration Number	_____
College	_____
Faculty/School/Institute	_____
Department	_____
Course Name	_____
Title of the Work	_____

DECLARATION

1. I understand what Plagiarism is and I am aware of the University's policy in this regard
2. I declare that this_____ (Thesis, project, essay, assignment, paper, report, etc) is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Where other people's work or my own work has been used, this has properly been acknowledged and referenced in accordance with the University of Nairobi's requirements.
3. I have not sought or used the services of any professional agencies to produce this work
4. I have not allowed, and shall not allow anyone to copy my work with the intention of passing it off as his/her own work
5. I understand that any false claim in respect of this work shall result in disciplinary action, in accordance with University Plagiarism Policy

Signature_____

Date _____

DECLARATION

This Thesis is my original work and has not been presented for a degree at the University of Nairobi or any other University or examination body.

Signed:……

Date……

KASHINDI GEORGE ASHIONO - G62/76903/2009

DECLARATION BY THE SUPERVISOR:

This Thesis has been submitted for examination with my approval as University Supervisor.

Signature.....

Date.....

PROFESSOR ARTHUR ESHIWANI

School of Law

University of Nairobi

DEDICATION

To my Lord and Saviour Jesus Christ whose mercies are new every morning. Without you where would I be?

To my loving wife, Irene, and our lovely children, Dag Heward and Dawn Buyanzi (including those who may come after them), for the inspiration to complete this work.

To my parents, Thomas Kashindi Ashiono and Leah Khavai Kashindi, who denied themselves to ensure my siblings and I received education but most importantly for raising us in the way of the Lord.

And to my siblings, Beatrice, Adelaide, Geoffrey, Silas, Paul and Ebby: let us continue to put our trust in God!

ACKNOWLEDGEMENT

As I have already stated, this is my original work. However, in the course of writing, I benefited immensely from a number of people.

First, I wish to thank my supervisor, Professor Arthur Eshiwani, who worked with me tirelessly and whose guidance I so greatly cherish. His wisdom on tax matters is unrivaled. It was a great privilege to be supervised by him.

I would also wish to acknowledge the important role played by my reader, Mr. Bosire Nyamori with whom I worked to structure and format the corrections. I found his input quite useful.

My father, Thomas Kashindi Ashiono, and my loving wife, Irene, deserve a special acknowledgment. They constantly, but in a loving way, nudged me to finalize this long overdue project.

And to many others who helped in a way or another, thank you!

TABLE OF CONTENTS

TABLE OF CASES

ACRONMYS AND ABBREVIATIONS

ADR	Alternative Dispute Resolution
ATO	Australian Tax Office
HMRC	Her Majesty's Revenue and Customs
IRS	Internal Revenue Service
KRA	Kenya Revenue Authority
OECD	Organisation for Economic Co-operation and Development
PAYE	Pay As You Earn
PSLA	Practice Statement for Law Administration
SARS	South Africa Revenue Services
STCT	Small Taxation of Claims Tribunal
TAA	Tax Administration Act
TATA	Tax Appeals Tribunals Act
UK	United Kingdom
UN	United Nations
US	United States
VAT	Value Added Tax

CONSTITUTION AND STATUTES

1. Constitution of Kenya 2010
2. Arbitration Act Cap 49
3. Australian Administrative Appeals Tribunal Act of 1975
4. Australian Civil Dispute Resolution Act, 2011
5. Australian Federal Magistrate Court Act, 1999
6. Charter of the United Nations 1945
7. Civil Procedure Act Cap 21
8. Civil Procedure Rules
9. Companies Act 2015
10. Customs and Excise Act Cap 472 of Laws of Kenya (repealed)
11. East African Community Customs Management Act 2009
12. English Tribunals Courts and Enforcement Act
13. Entertainment Tax Act Cap 479
14. Excise Duty Act 2015
15. Fair Administrative Action Act 2015
16. Federal Court of Australia Act 1976
17. Income Tax Act Cap 470
18. South African Tax Administration Act 2011
19. Stamp Duty Act Cap 480
20. Tax Appeals Tribunal Act, 2013
21. Tax Procedures Act 2015
22. Traffic Act Cap 403
23. UK Tribunal Procedure (FTT) (Tax Chamber) Rules 2009/273
24. Value Added Tax Act 2013

ABSTRACT

This study evaluates ADR as a potential alternative for resolving tax disputes in Kenya. It traces the historical development of tax disputes resolution approaches since independence and considers their shortcomings in terms of time, cost effectiveness and taxpayer satisfaction. It evaluates the current constitutional dispensation as well as recent tax legislative reforms and analyses the viability of inclusion of ADR as well as its potential benefits from a tax perspective. It critically looks at the ADR Framework proposed by KRA and considers the constitutional, legal, policy and administrative challenges that bedevil it. The study draws the conclusion that use of ADR in tax dispute resolution is a viable proposition. Drawing from lessons from commonwealth jurisdictions that have experimented with ADR, the study proceeds to make recommendations that will improve the viability of inclusion of ADR mechanisms in tax dispute resolution in Kenya.

CHAPTER ONE

AN INTRODUCTION TO THE STUDY

1.0 Background

The desire to accelerate economic growth through speedy resolution of disputes between individuals and the state has received considerable attention in various jurisdictions. This has made governments not only to rely on the formal court system, but also establish administrative tribunals, which are quasi-judicial in nature, and give them sufficient legal framework and mandate to adjudicate over disputes.[1] This is a common practice in most commonwealth jurisdictions.[2]

Kenya Revenue Authority (KRA) is the national government agency mandated by law to collect revenue on behalf of the State.[3] Over the recent years public expenditure has ballooned[4]. This expenditure is financed principally from tax collection[5]. This has exerted pressure on the Authority to collect more revenue.

---

[1] Attiya Waris, 'Taxation Without Principles: A Historical Analysis of Kenyan Taxation System ´(2007) 1 KLR 272.
[2] Some of these jurisdictions include United Kingdom, Canada, South Africa and Australia.
[3] Kenya Revenue Authority Act 1995, section 5.
[4] For instance in the financial year 2003/2004 KRA collected at total of K.Shs. 229 billion (see Revenews: KRA's in-house staff quarterly newsletter edition no. 22 of December, 2004 < http://www.kra.go.ke/pdf/publications/RevenewsDec2004.pdf > accessed 6 October 2016. In the financial year 2014/2015, KRA collected a whooping K.Shs. 1.001 trillion. (See < http://www.treasury.go.ke/media-centre/news-updates/189-kra-collected-ksh1-001-trillion-revenue-in-2014-2015-financial-year.html > accessed 6 October 2016).
[5] Linda Muthoni, 'Amend Tax Disputes Resolution Process' (Capital FM, 8 June 2011) < http://www.capitalfm.co.ke/eblog/2011/06/08/amend-tax-disputes-resolution-process/ > accessed 4 August 2016.

For purposes of this study a tax dispute refers to a disagreement or controversy which arises between the taxpayer and the revenue authority relating either to interpretation of the law or the facts or both during tax collection.[6] In Kenya and many other commonwealth jurisdictions such as Canada, South Africa and Uganda, tax dispute resolution has traditionally comprised of two avenues: firstly, settlement following agreement between the taxpayer and the tax authority; and secondly, appealing to administrative bodies set up under the various revenue statutes and subsequently to court.[7] The conventional process has been to put tax disputes to an adversarial formal hearing.

World over, one of the main mandates of revenue bodies is tax disputes resolution.[8] This has to be achieved against a backdrop of increase in number and complexity of controversies relating to tax collection as well as limited budgets.[9] For these reasons, many tax administrations have continued to pay heed to recommendation of the Organisation for Economic Co-operation and Development (OECD) to put in place efficient and relationship based approach to tax collection.[10]

---

[6] South African Tax Administration Act 2011, Chapter 9.
[7] Fernandes Barasa 'New Tax Dispute Resolution Plan' *Business Daily* (Nairobi, 6 September 2015) < http://www.businessdailyafrica.com/Opinion-and-Analysis/New-tax-dispute-resolution-plan/539548-2860512-b4jnjs/index.html > accessed 8 October 2016.
[8] Ernst & Young, Tax Dispute Resolution: A New Chapter Emerges: Tax Administration Without Borders (np:EYGM Limited, 2010)
[9] Ibid
[10] Organisation for Economic Co-operation and Development, *Addressing Base Erosion and Profit Shifting* (Paris: OECD, 2013) [Base Erosion]; Organisation for Economic Co-operation and Development, *Study into the Role of Tax Intermediaries* (Paris: OECD, 2008) [Tax Intermediaries]

Across many jurisdictions, the need to cultivate and maintain good relationships between the taxpayers and the tax administrators is considered vital.[11] One approach to improving this relationship is by utilizing Alternative Dispute Resolution (ADR) mechanisms in settling tax disputes.[12] ADR mechanisms offer quicker and cost effective resolution and are not prone to legal technicalities and complex procedures like formal dispute resolution mechanisms. The main procedure for settling disputes is through litigation which is a formal process. ADR refers to use of other procedures, such as arbitration and mediation to settle disputes.[13] ADR allows the taxpayers and tax administrators to come together to proactively seek resolution of the tax dispute. In jurisdictions where ADR has been used, the mechanism has enhanced efficiency in tax administration and to a great extent reduced the quantum of cases leading to litigation.[14]

In the context of tax, ADR refers to mechanisms that open up channels for taxpayers to collaborate with tax administrators, and resolve controversies relating to their tax affairs, thereby avoiding litigation.[15] It also includes approaches whereby taxpayers work with the tax administrators to obtain certainty on a potential tax issue and reaching an agreement on a certain tax position thereby giving both parties greater

[11] Muthoni (n 5).
[12] Sharon Katz-Pearlman, 'Tax Disputes And Controversy Update | KPMG | GLOBAL' (2016) < https://home.kpmg.com/xx/en/home/insights/2014/08/focus-on-alternative-dispute-resolution.html > accessed 6 October 2016.
[13] Bryan A Garner, *Black's Law Dictionary* (9th edn, 2009) 91.
[14] Barasa (n 7).
[15] Inessa Love, 'Settling out of Court: How Effective is Alternative Dispute Resolution?' (2011) Viewpoint: Public Policy for the Private Sector Note No. 329 < http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Setting-out-of-court.pdf > accessed 1 November 2016.

certainty[16] and the ability to channel scarce resources into more productive activities.[17] The main advantage of this approach is that the tax administrators cannot later raise an assessment on a position that was previously agreed and settled with the taxpayer.[18]

Generally, ADR approach is gaining popularity in Kenya.[19] Within the recently enacted tax legislation there has been a trend to incorporate certain aspects of ADR. Under public rulings, the Commissioner can make general public rulings setting out his interpretation on the application of the Act. Taxpayers can also apply to the Commissioner for private rulings in regard to their own transactions. These private rulings avenue, in particular, provides for a process akin to ADR whereby the Commissioner and the taxpayer can reach a binding position on the law without having to resort to litigation. The provisions on public and private rulings have been incorporated in the Tax Procedures Act 2015.[20] This provides the taxpayer with certainty of the tax implications of their transactions thus leading to greater certainty and compliance.

---

[16] This is mostly in the nature of private and public advance rulings whereby the taxpayer submits a case or scenario to the tax administrator for consideration and ruling, or the tax authority sets out its interpretation and application of the law *suo moto*. The taxpayer then relies on the ruling or interpretation to structure his tax or business affairs.

[17] Love (n 15).

[18] Melinda Jone and Andrew J. Maples, 'Mediation As An Alternative Option In Australia's Tax Disputes Resolution Procedures' (2012) 27 Australian Tax Forum 5 < http://www.civiljustice.info/cgi/viewcontent.cgi?article=1003&context=med > accessed 7 November 2016

[19] Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution' (Programme for Judges and Magistrates Training, 2012) available at < http://www.ciarbkenya.org/assets/a-paper-on-adr-and-article-159-of-constitution.pdf > accessed on 22 September 2016.

[20] Act No. 29 of 2015.

Whereas ADR methods are now used with much success in areas such as commercial law, labour disputes and family law, their applicability in relation to traditional public law areas such as tax has been somewhat hindered by special considerations that have to be borne in mind when settling public law disputes.[21] For instance, whereas a private party in ADR can settle on whatever terms it thinks fit, a public body entrusted with specific statutory duties must ensure that any eventual settlement through ADR process is consistent with the relevant constitutional and statutory provisions; is in line with public policy; does not undermine public duty; is fair, equitable and conforms to the usual requirements of confidentiality as well as other principles of taxation.[22]

In Kenya, any ADR settlement will be looked at from the perspective of the Constitution of Kenya, 2010 (the Constitution). Article 10 of the Constitution provides for national values and principles of good governance.[23] It binds all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, the law or public policy decisions.[24] These principles include accountability, public participation and equality. They should be taken into consideration when reaching any settlement.

Despite the hindered applicability alluded to above, ADR may be suitable for a wider range of disputes across different taxes, such as those which relate to transfer pricing,

[21] Jone & Maples (n 18).
[22] Waris (n 1) 272.
[23] Constitution of Kenya, Article 10.
[24] Constitution of Kenya, Article 10(1).

determination of capital and revenue expense items or valuation issues. It may particularly be useful in long running disputes where positions on both sides have become entrenched, where the revenue authority and the taxpayer cannot agree on the facts and where communication has broken down. However, ADR may not be suitable in a range of other matters including cases of criminal evasion or where statute has fixed default penalties and generally for matters on which the Commissioners are exercising their discretion given by law.[25]

1.1 Statement of the Problem

The pace at which tax disputes have been resolved has been a source of concern for the public and tax authorities.[26] While acknowledging the fact that dispensing justice is a complex matter, it is nonetheless rational to expect delivery of judgements within reasonable time by those charged with this responsibility.[27] It is estimated that over K.Shs. 34 Billion was tied up in the litigation disputes involving KRA and taxpayers as way back as in 2013.[28]

Integration of ADR methods in resolving tax disputes in other jurisdictions has largely been informed by the numerous benefits ADR has over conventional methods such as

[25] PwC, 'Alternative Dispute Resolution: A New Way to Settle Your Tax Dispute' < http://www.pwc.co.uk/services/tax/insights/alternative-dispute-resolution-a-new-way-to-settle-your-tax-dispute.html > accessed on 19 October 2016.
[26] Jone & Maples (n 18) 6.
[27] Muthoki Mumo, 'Sh34bn in tax revenue held up in ongoing court cases' *Daily Nation* (Nairobi 22nd October, 2013) < http://mobile.nation.co.ke/business/Sh34bn-in-tax-revenue-held-up-in-ongoing-court-cases/1950106-2043208-format-xhtml-lnnxcoz/index.html > accessed 7 November 2016
[28] Ibid.

litigation. These benefits include quicker and therefore more cost effective resolution, ability to have a wide ranging discussion on issues under dispute on a non-prejudicial basis, ability to narrow and clarify facts and issues in contention and the fact that both parties are able to retain ownership of the decision. In fact it is believed that a properly functioning ADR system in tax dispute resolution can enhance overall tax compliance.[29]

ADR is recognised by the Constitution as a vital means of settling disputes in Kenya. Article 159 of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by a number of key principles: justice shall not be delayed; alternative forms of dispute resolution including mediation and arbitration shall be promoted and justice shall be administered without undue regard to procedural technicalities.[30] Kariuki Muigua argues that the constitutionalisation of ADR makes a strong case for a paradigm shift in the policy on resolution of conflict towards encouraging ADR as opposed to formal dispute resolution mechanisms in Kenya.[31]

Section 28 of the Tax Appeals Tribunal Act (TATA), 2013[32] provides for the power of the tribunal in cases where parties reach an agreement. It provides room for the parties at any stage of the proceedings to apply to the tribunal to be allowed to settle the dispute out of the tribunal on such terms as the tribunal may impose.[33]

[29] Muthoni (n 5).
[30] Constitution of Kenya, Article 159.
[31] Muigua (n 19) 9.
[32] Act No. 40 of 2013.
[33] TATA section 28.

In 2015 Parliament enacted the Tax Procedures Act[34] to harmonise and consolidate procedural rules for administration of tax laws in Kenya. Section 55 of the Act provides for settlement of disputes in court or tribunal.[35] It provides that where a court or tribunal permits parties to settle a dispute out of court or the tribunal as the case may be, the settlement shall be made within ninety days.

It can be argued that the provisions of section 28 of the TATA and section 55 of the Tax Procedures Act contemplate inclusion of ADR mechanism in tax dispute resolution. It is noteworthy that in June 2015, KRA adopted a policy framework on the use of ADR in tax disputes which seeks to improve internal dispute resolution mechanisms for tax matters known as the KRA ADR Framework.

Despite the above enabling provisions of the constitution, there has been reluctance by legislature, policy makers and tax administrators to fully embrace use of ADR in tax disputes resolution. Over reliance has continued to be placed on formal and adversarial dispute resolution mechanisms.

This study evaluates ADR as a potential alternative for resolving tax disputes in Kenya. It traces the historical development of tax disputes resolution approaches since independence and considers their shortcomings in terms of time, cost and taxpayer satisfaction. It evaluates the current constitutional dispensation as well as recent tax

[34] Act No. 29 of 2015.
[35] Tax Procedures Act section 55.

legislative reform and analyses inclusion of ADR and its potential benefits from a tax perspective. It looks at the ADR Framework proposed by KRA and considers the constitutional, legal, policy and administrative challenges that bedevil it. Drawing from lessons drawn from a comparative study of use of ADR in other commonwealth jurisdictions, the study draws conclusions and recommendations that will improve the viability of inclusion of ADR mechanisms in tax dispute resolution in Kenya.

1.2 Research Hypotheses

Efficient and effective dispensation of justice in tax related disputes enhances economic growth and development in any country. Kenya is not an exception. This study is therefore premised on the following hypotheses:

- The settlement of tax dispute through formal dispute resolution mechanisms has hindered efficient and effective tax administration and collection

- The settlement of tax dispute through ADR mechanisms ensures that the dispute is resolved amicably in a collaborative and cooperative manner thus enhancing tax compliance.

1.3 Objectives of the study

The general objective of the study is to critically examine the constitutional, legal and policy framework and evaluate the viability of inclusion of ADR in tax dispute resolution.

The specific objectives of the study are to analyse what hinders the robust inclusion of ADR mechanisms in tax dispute resolution; consider the shortcomings of the current tax dispute resolution approaches; assess the benefits of inclusion of ADR methods in tax resolution and examine what legal and policy reforms would be necessary to achieve further inclusion of ADR in tax dispute resolution.

1.4 Research Questions

To achieve this objective, the study answered the following research question:

What is the viability of inclusion of ADR mechanisms in resolution of tax disputes in Kenya?

A number of other questions were addressed in an effort to answer the main research question:

- What is the historical and current constitutional, legal and institutional framework governing the resolution of tax disputes in Kenya?

- To what extent have ADR methods been employed in resolving disputes relating to tax in Kenya?

- How does the proposed KRA ADR Framework work?

- What are the gaps and shortcomings in the current ADR approaches relating to tax dispute resolution?

- What would be the efficacy and benefits of using ADR methods in tax disputes in Kenya?

- To what extent have ADR methods been employed in in resolving tax disputes in other jurisdictions and lessons can Kenya draw from them?

1.5 Justification for the Study

There are two main justifications for the study. Firstly, it is important as it will offer useful suggestions that will aid in further inclusion of ADR approaches in legislative and policy instruments and aligning them to the new constitutional dispensation in so far as tax dispute resolution is concerned. Secondly, as ADR continues to gain popularity, this study will make a valuable contribution to the body of knowledge especially to the users of the ADR mechanisms including KRA officials, taxpayers, tax agents, tax consultants, lawyers and the judiciary.

1.6 Theoretical framework

One of the greatest proponents of legal positivism was Bentham who proceeded from the preposition that nature had placed mankind under the governance of pleasure or pain.[36] This study is argued on Bentham's legal principle of Pleasure and Pain. The good or evil of an action should be measured by the quality of pain or pleasure resulting from it. Bentham defined utility as:[37]

> That principle which approves or disapproves of every action whatsoever according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question.

Bentham argued that the definition of law depended on its purpose. He argued that the business of government was to promote the happiness of the society by furthering the enjoyment of pleasure and affording security against pain. He explained that 'it is the greatest happiness of the greatest number that is the measure of right or wrong'.[38] He stated that the happiness of the society as a whole would be attained by four goals of subsistence, abundance, equality and security for the citizens. Bentham stated that 'all the functions of law may be referred to under these four heads: to provide subsistence; to produce abundance; to favour equality; and to maintain security'. [39]

---

[36] Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (1789).
[37] Ibid.
[38] Bentham (n 36).
[39] Bentham (n 36).

Democratic ideals are recognized and given prominence by the constitution under chapter eleven which provides for devolution of governance. Some of the objects of devolution listed under Article 174 of the constitution are: to promote democratic and accountable exercise of power; to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them; and to recognize the right of communities to manage their own affairs and to further their development.[40]

According to Bentham, it is the act that produces the greatest happiness of the greatest number that determines what is right. ADR relies on facilitating dialogue and communication between parties. Participation in tax resolution by the public through communication channels that open up mutual understanding and exchange of information will result in improved relationships between taxpayers and tax administrators. This will enhance greatness and happiness in the society. Shorter time in dispute resolution of tax related matters will lead to achieve subsistence, abundance, equality and security and overall tax compliance will increase.

Rudolph von Jhering (1818 – 1892) wrote the book "*Law as Means to an End".* [41] He argued that the sole purpose of the law is not to protect individual liberty but to bring about equilibrium between the individual principle and the social principle. He argued that the law should be seen as 'the realized partnership of the individual and the

[40] Constitution of Kenya, Article 174.
[41]Rudolf von Jhering and Isaac Husik, Law As A Means To An End (Boston Book Co 1913).

society'. In his view, the law served to coordinate the individual interests and reconcile them with the societal interests in order to minimise conflict. Where conflict was inevitable, Jhering assigned greater weight to the societal interests.

From a jurisprudential point, an argument can be made that reliance on formal dispute resolution mechanisms by tax administrators has often resulted in perpetuation of conflict. This is because formal dispute resolution mechanisms are adversarial by nature and are not effective in conflict resolution because they have complex legal technicalities, are prone to delays and are expensive. ADR techniques such as negotiation, conciliation, and mediation increase accessibility to justice since they are flexible, informal, cost-effective, expeditious, efficient, they foster parties' relations and produce win-win outcomes.[42] Adoption of ADR approaches in tax dispute resolution therefore sits well with Jhering's theory of social utilitarianism. Through inclusion of ADR in tax legislation and policy, the interests of the taxpayer as well as those of the society (acting through tax administrators) are carefully coordinated and as a result, conflict is minimised.

Oliver Holmes once wrote that:[43]

[42] Mishra S, 'Justice Dispensation through Alternate Dispute Resolution System In India,' available at <http://www.legalindia.in/justice-dispensation-through-alternate-dispute-resolution-system-in-indiab >, (accessed on 10/12/2017)
[43] Oliver Wendell Holmes, The Common Law (Belknap Press of Harvard University Press 2009).

> The life of the law has not been logical. It has been experience. The felt necessities of the time, the prevailing moral and political theories, institutions of public policies avowed or have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

The need to develop good working relationship between tax administrators and taxpayers cannot be overemphasized. ADR approaches have been tested in a number of jurisdictions and they offer practical benefits over other formal dispute resolution mechanisms. These benefits have already been alluded to in the preceding paragraphs. In jurisdictions where ADR has been used, the mechanism has enhanced the overall efficiency in tax administration and also served to reduce the number of cases that proceed to litigation.

It is the above experience that informed the inclusion of ADR in the constitution. To provide for ADR laws, rules and policies in tax dispute resolution and comply with the same will enhance efficiency in tax administration thus enhance service delivery to the people.

Arthur Pigou put forward an influential theory that economic efficiency demands that businesses should be sanctioned and regulated through taxation or tort law to 'internalize' the cost they pass on to other people and their activities (externalities) as a

result of such businesses' activities.[44] Persons who create negative externalities such as harm to the environment should be taxed so that they are discouraged to engage in too much of such activities. On the other hand, persons who engage in positive externalities such as innovating energy saving ways of production may have no incentive to undertake more of such innovations. To encourage such persons, the government needs to subsidise such innovations.

The use of ADR as a mode of resolving tax disputes will enhance the efficiency in administration of tax systems in the country and at the same time enhance tax compliance. The benefits postulated by Pigou in his theory of externalities will thereby be more realistically achieved.

1.7 Literature Review

The KRA ADR Framework is relatively new having been introduced in June 2015. The literature available on this subject is more developed in countries where ADR methods have been successfully used such as Canada, United States, United Kingdom, Australia and South Africa.

Sir Gavin Lightman and Felicity Cullen QC, in their article, '*Mediation in Revenue Cases,*' appreciate the fact that in resolving a dispute between parties there are many methods

[44] Arthur C. Pigou, *The Economics of Welfare* (1st edn, Macmillan and Co 1932).

available for reaching the agreed outcome.[45] Out of the numerous methods available, mediation stands out. In mediation, an independent third party plays a key role of facilitating an agreement. Mediation is voluntary and collaborative. The mediator can play a facilitative role or may take an evaluative approach. The bottom line is that parties reach their own resolution, through consensus. From experience, the appointment of a trained and experienced mediator who is trusted and acceptable to the disputants greatly facilitates the negotiation process and increases prospects of success. That is the basis for mediation. It is the selection and role of the mediator which differentiates mediation from other ADR processes.

Lightman and Cullen agree that there is sufficient basis for mediation in the tax cases and believe that in certain types of cases mediation could become quite extensively used particularly heavy cases. However, the writers do not think the uptake will be overnight. They attribute the slow uptake not on resistance or reluctance on HMRC's[46] part, but due to the special considerations that must be borne in mind when dealing with a public body mandated to exercise public law functions. The development of mediation in the tax field is therefore likely to be a relatively slow process.

Although the authors make useful arguments regarding the relevance of mediation in resolving tax disputes, their work is narrow in the sense that it solely focuses on

[45] Gavin Lightman and Felicity Cullen, 'Mediation in Revenue Cases' (8th July 2010) < http://taxbar.com/wp-content/uploads/2016/01/Mediation_in_Revenue_Cases_FC.pdf.pdf > accessed 7 November 2016.
[46] Her Majesty Revenue and Customs (HMRC) is the revenue collection agency in the United Kingdom.

mediation and not the entire ADR spectrum. Secondly, their work discuses applicability and relevance of mediation within the United Kingdom jurisdiction which has a more developed ADR framework for tax disputes. Thirdly, their work does not consider the constitutional underpinning of ADR as is the case in Kenya.

David Parsly in his article, '*The Internal Revenue Service and Alternative Dispute Resolution: Moving from Infancy to Legitimacy*,' states that ADR has achieved greater acceptance in the US, and that ADR programmes promoted by the government have grown in size, number and significance.[47] Internal Revenue Service (IRS)[48] provides a great example of a public institution experimenting and garnering quite successful results through adoption of various ADR mechanisms.

Parsly further examines the types of ADR approaches being employed by the IRS focusing on how IRS has structured each programme by striking a unique balance between demand for efficient tax administration with the principles of mediation, negotiation and arbitration.

Parsly connotes that even though mediation programmes run by IRS are certainly flawed, they signify critical progress in the development of mediation as a feasible tax dispute resolution tool. Post-appeals mediation and fast-track settlement, in particular,

[47] David Parsly, 'The Internal Revenue Service And Alternative Dispute Resolution: Moving From Infancy To Legitimacy' (2007) 677 Cardozo Journal of Conflict Resolution < http://cardozojcr.com/issues/volume-8-2/ > accessed 7 November 2016.
[48] Internal Revenue Service is the tax collection agency in the United States.

exemplify a new approach through which to resolve the challenges of settling taxpayer disputes in an efficient, fair and equitable manner. Parsly opines that even though the mediation programme is new and uptake is still low, mediation will develop into a staple and preferred approach for settling tax disputes for IRS if taxpayer education and awareness is increased so that the benefits of ADR are appreciated.

Parsly concludes by making suggested changes that are geared towards enhancing fairness, efficiency and overall confidence and satisfaction in the mediation programmes for both the IRS and the taxpayer. Parsly opines that the IRS stands to receive substantial economic gain considering the cost and time savings that emanate from providing for mediated settlements at the earliest opportunity. In his view, IRS should work to remove any obstacles inhibiting the full implementation and utilization of its ADR programmes. Adequate resources need to be devoted to public outreach, sensitization and marketing of its new ADR programmes, in order for IRS to finally drive ADR from a periphery scheme to the mainstream dispute resolution mechanism utilized by all taxpayers.

Parsly's views provide very relevant context within which to evaluate the Kenyan position especially with regard to confidence, efficiency, fairness and overall satisfaction in the implementation of KRA ADR framework. In addition, useful lessons may be borrowed on how to drive ADR from a pilot project to a mainstream dispute resolution mechanism for all taxpayers. However, for our purposes, the American tax system is

very different from and is more developed than the Kenyan one. Moreover, Parsly's work does not examine the role of ADR in resolving tax disputes in the context of constitutionally set standards.

Chris Jaglowitz in his article '*Mediation in Federal Income Tax Disputes*,' states that the government of Canada has started utilizing ADR approaches in many spheres of operation.[49] This includes the handling of employment grievances within the public service, resolving economic and trade related matters with other nations, and as a way of preventing litigation in civil and other matters involving the federal government.

Jaglowitz examines what useful role mediation could play in this area as well as what hinders effective adoption of mediation in tax disputes. To be effective, Jaglowitz opines that a tax system based of self- must be seen to have integrity in that it 'engenders perceptions of fairness, reflects consistency across tax bases and taxpayers, and enhances efficiency in its operations'.[50] There is a real likelihood that use of ADR may give rise to a scenario whereby two taxpayers whose cases are equally situated are treated differently. Because personalities of players in mediation will differ from case to case, and mitigating or aggravating circumstances will be unique for each case, the outcomes of mediation sessions may very well differ even where the facts of the case are similar. For this reason, use of ADR way be questionable to some extent.

[49] Chris Jaglowitz 'Mediation in Federal Income Tax Disputes' (Canadian Forum on Civil Justice, 1999) < http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/17454-mediation_tax.pdf > accessed 4 November 2016.
[50] Ibid.

According to Jaglowitz, while Canada Revenue Agency[51] a great majority of objection cases appear to be resolved internally through the Agency's objection resolution mechanisms, a good number of cases still go into litigation. The government still incurs a substantial cost to handle these cases even if they are ultimately dropped by the taxpayer. Taxpayers able to resolve their tax cases amicably enjoy savings. As a result, taxpayer satisfaction is boosted and voluntary compliance is enhanced.

Jaglowitz's work is important since it highlights key considerations to be taken into account when designing an effective ADR framework for tax disputes in order to achieve a fair treatment for taxpayers across the board notwithstanding their unique circumstances. The shortcoming of this work is that it does not evaluate the significance of ADR from a constitutional viewpoint. Besides, Canadian tax and legal systems are far more developed than the Kenyan system.

This study served to fill the gaps identified in the above literature review. First, it analysed the legal and policy framework relating to taxation from a constitutional perspective. Secondly, it looked at the entire ADR spectrum as opposed to one method of ADR. Thirdly, the study was undertaken based on a Kenyan tax and legal system context as opposed to more advanced foreign jurisdictions.

[51] Canada Revenue Agency is Canada's revenue collection agency.

1.8 Research Methodology

Most of this study was based on desktop research. An analysis of the Constitution, relevant statutes, government policies and regional legislation were carefully considered. A number of case law was also considered. In addition, a number of journal articles and books, newspaper articles and opinions and other relevant documents were reviewed based on how relevant such material was in answering the research questions for this study. South Africa, UK and Australia were selected as case studies for purposes of drawing useful lessons.

The study also employed research on the application of ADR methods in resolving tax disputes in other jurisdictions. The purpose of this was to determine whether there were any best practices or useful lessons Kenya could borrow from those countries. The choice of United Kingdom, Australia and South Africa was informed by the fact that in these countries, ADR methods have effectively applied in resolving tax disputes to save costs and time. Therefore, they offered useful lessons for Kenya.

1.9 Scope and Limitation of the study

The researcher admits that the scope of the study is limited. First, as the title of this study suggests, the focus is on the inclusion of ADR methods in resolving tax disputes. Research focused exclusively on the viability of using ADR methods to resolve tax disputes in Kenya. It also critically examined the KRA ADR Framework to establish its

compliance with the relevant constitutional and statutory provisions. The study did not analyse statutes governing the management and administration of tax in Kenya. However, where they were considered, the aim was to look at the relevant provisions that provide for tax dispute resolution.

The study faced financial constraints given the need to access books and other relevant resources from abroad and need to administer field questionnaires which would have involved a considerable expense. This challenge was overcome by use of literature review on information already available on tax dispute resolution.

1.10 Chapter Breakdown

The study is divided into five chapters. Chapter one provides an introduction to the study comprising of a general introduction to the research, statement of the research problem, research hypotheses, general and specific objectives of the study, rationale of the study, research questions, theoretical framework within which the research was carried out, methodology applied, limitations of the study and chapter summary and breakdown. Chapter two examines the conceptual framework of tax dispute resolution. It starts by providing a brief introduction to what tax disputes entail. It then outlines the different types of disputes that arise in the course of tax collection. Thereafter a definition of ADR is attempted and relevant forms of ADR applicable to tax disputes are discussed. Chapter three focuses on how tax disputes are resolved in Kenya. To set the context for this, the historical development of tax disputes resolution is traced from the

time of independence after which the current legislative framework is analysed, taking into account the new constitutional dispensation as well as recent legislative developments in the tax arena. Chapter four critically examines ADR as a mechanism for tax dispute resolution. Here, the legal framework relating to ADR in tax dispute resolution is analysed by examining the constitutional, statutory and institutional policy framework in place. Afterwards, the KRA ADR Framework is critically examined to establish its compliance with the relevant applicable constitutional and statutory provisions. A brief comparative analysis is undertaken with a view of drawing useful lessons and best practices from tax jurisdictions that have experimented with ADR. Chapter five concludes the journey of this thesis by doing two major things: first, it summarises the major findings of this study and secondly, it makes specific recommendations aimed at effective use of ADR in tax dispute resolution.

CHAPTER TWO

CONCEPTUAL FRAMEWORK FOR TAX DISPUTE RESOLUTION IN KENYA

2.0 Introduction

This chapter is divided into two parts for purposes of clear understanding of the conceptual framework in place to govern the resolution of tax disputes in Kenya. Part one commences with a brief introduction of what tax disputes entail. It provides the different types of disputes that arise in the course of tax collection as provided in the tax statutes. Thereafter, a definition of ADR is attempted and a brief overview of relevant forms of ADR applicable to tax disputes is discussed.

A dispute refers to a contest, conflict, controversy or disagreement concerning lawful existence of a duty or right or liability by extent or type claimed by the injured party for a breach of such duty or right.[52] Looked at from a tax perspective, a tax dispute is a disagreement or controversy on the interpretation of either the relevant facts involved or the law applicable thereto or of both the facts and the law which arise in the course of tax collection.[53] The nature of disputes arising from tax matters in Kenya can be broadly categorized as follows:

[52] Garner B, *Black's Law Dictionary* 9th edn.
[53] South African Tax Administration Act 2011, Chapter 9.

(i) Disputes involving assessments where the Commissioner and the taxpayer are not able to agree on what amount should be assessed as tax.

(ii) Disputes relating to treatment of expenses with regard to what should be allowed or disallowed.

(iii) Disputes relating to imposition of penalties and interest as may be provided for by law and the refusal by the Commissioner or the Cabinet Secretary to waive such penalties or interest where a taxpayer has made an application.

(iv) Collection proceedings to recover tax due. The tax statutes provide the Commissioner with an avenue to collect taxes through agency notices. This means that the Commissioner can resort to banks and any other person holding monies belonging to a taxpayer and require them to pay such monies over to the Commissioner in settlement of a taxpayer's obligation. This has been a source of considerable disputes.

(v) Disputes relating to Commissioner's interpretation of statute. Over time, there has existed what is commonly referred to as the KRA's position. This is essentially the position taken by KRA in respect of a certain provision in tax law. Taxpayers are generally required to arrange their tax affairs in conformance to the KRA position. The Commissioner also makes an array of administrative rulings by applying the tax law. Sometimes however, the KRA position or ruling is contentious and not acceptable to the

taxpayer. This necessitates subjection of the position to a Court of law so that the Court can pronounce itself on what interpretation should be adopted.

(vi) Disputes relating to Commissioner's administrative action. There are a whole range of matters that come into the area of administrative law as we know it. These matters arise where the taxpayer is challenging the decision making process of KRA. It must be borne in mind that the work of KRA Commissioners requires them to make numerous decisions on a day to day basis. They determine how the law in place should apply to the variety of business transactions by the taxpayer. It must also be understood that the law does not provide for how all matters will be dealt with. A lot of room is left for the Commissioner to administer the tax laws tempered with their discretion. In doing so, the decisions of the Commissioner do aggrieve taxpayers who may not agree with them or fault the decision making process. This area has been made robust by Article 47 of the Constitution that requires fair administrative action. Already, Parliament has passed the Fair Administrative Action Act, 2015 that also makes substantive provisions on this matter.

(viii) Another form of dispute usually arises by the failure of persons to execute their mandate either willfully or through error or omission. Many tax provisions place an obligation on persons to collect and account for tax on behalf of KRA. For instance, an employer has an obligation to collect PAYE from the salary and other emoluments he pays to his employee. This obligation is onerous since such employer must recover the

correct amounts of tax and must remit them on or before the due dates. In addition, he must file a number of other returns in order to comply with the law. Similarly, a person making payment of fees for certain professional services must deduct and remit to KRA withholding tax. He must do so at the correct rate since different rates apply to different services. Payments to non-residents also have their own different rates. He must then account for the tax to KRA and file a number of returns in order to be in compliance. VAT also operates on this basis. The tax is charged on the person purchasing the goods or services, is collected on behalf of KRA by the person rendering the goods or services and the person is expected to account to KRA and to file appropriate returns. Many disputes that arise around this area include failure to deduct or charge tax on behalf of the KRA; failure to apply the correct tax rate; failure to remit the amounts collected to KRA; remission of the amounts collected after the due date and failure to file the requisite returns or filing them after the due dates.

ADR refers to procedure for settling a dispute by means other than litigation such as arbitration and mediation.[54] The ADR Institute of Canada defines alternative dispute resolution as, "... a basket of procedures outside the traditional litigation process, usually entered into voluntarily by parties to a dispute in an attempt to resolve it".[55]

[54] Bryan A Garner, *Black's Law Dictionary* (9th edn, 2009) 91.
[55] ADR Institute of Canada, online: <http://www.adrcanada.ca> accessed 10 December 2017.

Muigua opines that ADR mechanisms mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.[56] ADR has mainly been categorized into facilitative processes where contesting parties work with a third party referred to as a facilitator to identify issues in dispute and to move towards a resolution; evaluative processes in which a third party takes a more prominent role of examining the dispute and guiding the parties on the various likely outcomes, and these include processes such as expert appraisal and early neutral evaluation and lastly, determinative processes which involve the contesting parties making rival arguments and present evidence in support of their cases and the third party, sometimes referred to as the tribunal adjudicates the case and makes a determination. Determinative approaches include expert determination and arbitration. Muigua views negotiation as perhaps a fourth category that does not fit in the three ADR processes discussed above. Negotiation entails parties meeting directly, and without the help of a facilitator, to talk over the dispute and tackle issues at hand with a view of arriving at mutually agreeable resolution.

Muigua views the appealing characteristic of ADR to be its simplicity, speed, flexibility and accessibility when looked at in comparison with formal dispute resolution mechanisms such as litigation. ADR emphasises win-win situations for both parties which results in high party satisfaction; it is cost effective meaning it is accessible to many parties in a dispute and therefore increases accesses to justice; it has less legal

[56] See generally, Muigua K, Setting *Disputes through Arbitration in Kenya*, Glenwood Publishers Limited, 2012, pp.1-19.

technicalities and complex procedures and thereby improves efficiency and is expeditious. ADR mechanisms are applicable to a wide range of disputes as we have seen in chapter one.

In the context of tax, ADR is a series of approaches that open up channels for taxpayers to interact with tax administrators, and resolve issues or disputes, without resorting to litigation.[57] It also includes approaches such as advance rulings and private and public rulings whereby taxpayers work with the tax administrators to obtain certainty on a potential tax issue and reaching an agreement on a certain tax position thereby giving both parties greater certainty[58] and the ability to channel scarce resources into more productive activities.[59] The main benefit arising from this approach is that the revenue authorities cannot later raise an assessment on a position that was previously agreed upon with the taxpayer.[60]

[57] Inessa Love, 'Settling out of Court: How Effective is Alternative Dispute Resolution?' (2011) Viewpoint: Public Policy for the Private Sector Note No. 329 < http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Setting-out-of-court.pdf > accessed 1 November 2016.

[58] This is mostly in the nature of private and public advance rulings whereby the taxpayer submits a case or scenario to the tax administrator for consideration and ruling, or the tax authority sets out its interpretation and application of the law *suo moto*. The taxpayer then relies on the ruling or interpretation to structure his tax or business affairs.

[59] Love (n 15).

[60] Melinda Jone and Andrew J. Maples, 'Mediation As An Alternative Option In Australia's Tax Disputes Resolution Procedures' (2012) 27 Australian Tax Forum 5 < http://www.civiljustice.info/cgi/viewcontent.cgi?article=1003&context=med > accessed 7 November 2016

2.1 Brief Overview of Alternative Dispute Resolution in Kenya

ADR refers to all those decision making processes other than litigation. It includes but is not limited to arbitration, mediation, negotiation, conciliation and others.[61] Fenn[62] views the term ADR as a misnomer as it may be understood to mean that ADR mechanisms are secondary to litigation which is not the case. Article 33 of the UN Charter[63] prioritises the use of ADR mechanisms in dispute resolution between parties be they states or individuals. The Charter requires that parties consider ADR as a means of dispute resolution before resorting to other means.

The Constitution lists reconciliation, mediation, arbitration and traditional dispute resolution as some of the forms of ADR. The Constitutional list is not exhaustive since ADR includes other forms. Considering the nature of tax disputes and the parties involved, this study acknowledges the fact that arbitration, negotiation, mediation, early neutral evaluation, expert determination and mini trials are the most relevant applicable forms of ADR. This selection is informed by the fact that other forms of ADR such as conciliation, reconciliation and traditional forms of ADR would not be well suited for tax disputes. But even for the relevant and applicable forms listed above, the study has selected to focus on the four main forms of ADR, namely arbitration, negotiation, mediation and early neutral evaluation. The four selected forms of ADR are discussed below:

---

[61] Muigua (n 19) 2.
[62] P. Fenn, "Introduction to Civil and Commercial Mediation' in Chartered Institute of Arbitrators, Workbook on Mediation, (CIarb, London, 2002) pp. 50 – 52.
[63] Charter of the United Nations 1945, Article 33.

2.1.1 Negotiation

Negotiation is a two way discussion between two parties to a dispute without an input of a third party neutral. It is an informal process that offers parties maximum control over the process. It entails parties meeting to discuss the matter with a view of arriving at a mutually acceptable decision.[64] Negotiation focuses on the common interest of the parties rather than their power or position. At the end of the process, the aim of negotiation is to ensure that the parties arrive at a "win – win" solution to the dispute at hand. Traditionally, negotiation does occur between a taxpayer and the taxman even before the matter is presented to tribunals.

2.1.2 Arbitration

Arbitration is a form of ADR that is subject to statutory provisions. It involves disputes being determined by a private tribunal selected by the parties to the dispute. It entails a third party neutral being appointed by the parties involved or an appointing authority to determine the dispute and give a final and binding award. The Arbitration Act, 1995[65] defines arbitration as 'any arbitration whether or not administered by a permanent arbitral institution'. In many aspects, arbitration is an adversarial process and in many ways resembles litigation.[66]

[64] Muigua (n 19) 7.
[65] Cap 49 Laws of Kenya.
[66] Muigua (n 19) 3.

The use of arbitrators has been on the rise and the whole regime is still governed by Arbitration Act of 1995 as amended in 2009, section 59 of the Civil Procedures Act[67] and Order 46 of the Civil Procedure Rules. The Arbitration Act governs appointment of a tribunal, timelines for hearings and the grant of arbitral awards and the manner of their challenge before a court of law. The arbitration takes place in a tripartite condition; when there is an arbitration agreement, reference to arbitration and mandatory arbitration procedures. The reference to arbitration is governed by the court annexed arbitration procedures in Kenya.

Arbitration, whether by the direct agreement or court-annexed, still leads to an award issued by the arbitrator. The non-preference of arbitration in some occasions may however arise from the formalities that it comes with and the fact that it may take a little longer due to costliness in terms of time and resources when disputants challenge the arbitration results in court or better still engage in arbitration process which is much more procedurally complex.

2.1.3 Mediation

Mediation is a form of ADR that involves a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process. It involves a neutral third party helping parties to arrive at a negotiated settlement. This neutral third party has to be impartial and acceptable to the parties involved. The neutral third party has no

[67] Civil Procedure Act, section 59.

authoritative decision making powers but assists the parties in voluntarily reaching their own mutually acceptable settlement of the matter in dispute.

2.1.4 Early neutral evaluation

Early neutral evaluation is an ADR process that involves an informal presentation by parties to a neutral third party with respected credentials for an oral or written evaluation of the parties' positions. The evaluation could be either binding or non-binding. It is an important process particularly in cases where the dispute involves technical or factual issues that require an evaluation done by an expert before parties consider litigation. It could also be an effective alternative to formal discovery in traditional litigation.

This chapter has considered the conceptual framework relating to tax disputes; enumerated the different types of disputes that arise in the course of tax collection; and outlined a brief overview of relevant forms ADR applicable to tax disputes. The next chapter deals with the legal framework in place to govern tax disputes resolution in Kenya.

CHAPTER THREE

HOW TAX DISPUTES ARE RESOLVED IN KENYA

3.0 Introduction

This chapter examines the legal framework in place to govern tax dispute resolution in Kenya. It starts with tracing the historical development of tax dispute resolution from independence in the first part. The second part deals with current legislative framework taking into account the new constitutional dispensation as well as recent legislative reforms in the tax arena.

Article 209 of the Constitution grants exclusive power to the national government to impose income tax, value added tax, customs duties and excise duty.[68] National government may also impose any other tax or duty through legislation except property and entertainment taxes which are a preserve of the county governments.[69] The constitution does not make provision for settling tax disputes and this is generally achieved through statute.

Kenya has a taxation system currently covering Income Tax,[70] Value Added Tax[71] and Excise Duty.[72] Customs matters are governed by the East African Community Customs

[68] Constitution of Kenya, Article 209.
[69] Constitution of Kenya, Article 209.
[70] Cap 470 of the Laws of Kenya.
[71] Act No. 35 of 2013.

Management Act[73] which is a regional legislation applicable to members of the East African Community.[74] Many other statutes make provisions on the charge, assessment and collection respecting a range of other taxes. Kitenga[75] notes that the tax specific statutes in Kenya may even be broader to include Stamp Duty Act,[76] Traffic Act,[77] and Entertainment Tax Act[78] among others.[79] Mostly the tax laws target taxes that are paid by individuals as well as corporate entities. Until the recent enactment of the Tax Procedures Act[80] in 2015, the main tax statutes[81] provided a framework for tax dispute resolution through the respective legislations.[82] The Tax Procedures Act repealed the provisions relating to tax dispute resolution in the respective tax statutes[83] and consolidated the tax dispute resolution mechanisms in the Tax Procedures Act.

3.1 Historical perspective of tax dispute resolution in Kenya

Historically, resolution of tax disputes in Kenya was largely been adversarial. The legal framework provided for canvassing of matters before a tribunal or the courts. Administratively, there was an avenue to dispute tax assessments through the objection procedures provided in the tax statutes. Also, there have always been opportunities

---

[72] Act No. 23 of 2015.
[73] East African Community Customs Management Act 2009.
[74] EAC comprises the following members Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan.
[75] Gabriel Kitenga *Introduction to Tax law, Vol 2* (LawAfrica 2010).
[76] Cap 480 of the Laws of Kenya.
[77] Cap 403 of the Laws of Kenya.
[78] Cap 479 of the Laws of Kenya.
[79] Kitenga (n 75) 281.
[80] Act No. 23 of 2015.
[81] Income Tax Act, Value Added Tax Act and Customs and Excise Act.
[82] Ibid.
[83] Ibid.

with the tax statutes for taxpayers to discuss tax assessments with the revenue authority and to reach amicable settlement, or what is referred to as agreed assessment.

3.1.1 Tax dispute resolution under Value Added Tax

Value added tax is a multi-stage consumption tax charged on both local supply and importation of taxable goods. It is an indirect tax collected on various stages of the supply chain.[84] VAT is governed by Value Added Tax (VAT) Act, 2013. This Act repealed the 1989 law which had been in operation since 1989. Usually, the scope of this tax includes: the imports, supplies, manufactured goods and services provided in Kenya and other goods and services designated by the cabinet secretary in charge of the Treasury. For the taxable supplies, the rate standard rate is currently sixteen percent and those that are zero rated are charged at zero percent. The exempted goods and services are not charged any tax at all. The intention of the overhaul was to increase the revenue, to simplify the tax collection method and VAT administration and to deal with the ever increasing burden of VAT refunds.

Previously, in the repealed Act, the dispute resolution was provided for under Part X of the Act. The Commissioner had power to assess tax in a number of cases including: a taxpayers' failure to charge tax on supplies; failure to lodge a return; where the

[84] Kitenga (n 75 above) 247

Commissioner was not satisfied with the return lodged by the taxpayer; and where the person had charged tax but had failed to account for it.

Under the said Part X of the repealed Act, the Minister was given power to appoint a tribunal consisting of a chairman and not less than two members and not more than five members to sit and decide on matters relating to VAT appeals. A person who disputed an assessment made by the Commissioner by virtue of his powers granted under section 3 of the Act was entitled to object to the assessment upon giving a written notice to the Commissioner. Such notice had to be given within thirty days of service of the notice of assessment on the taxpayer. The Commissioner had the discretion, on application of the taxpayer, to extend the period of giving such notice where the taxpayer showed good cause.

There are three main ways in which the Commissioner would resolve an objection by a taxpayer under the appeals procedure in the repealed Act. Firstly, the Commissioner had the option of amending the assessment in accordance with the objection lodged by the taxpayer. In other words, the Commissioner would concede that he was wrong and adjust the assessment in accordance with the manner proposed by the taxpayer. Where this happened the matter was fully resolved since the taxpayer would have had his way. The second option was for the Commissioner to amend the VAT assessment in light of the objection lodged by the taxpayer but to in accordance with the Commissioner's best judgment. Where the Commissioner exercised this option, two outcomes were possible.

The taxpayer would be happy with the Commissioner's partial adjustment, meaning that even though the Commissioner did not take into account his entire objection, he nevertheless took into account some aspects of it. The second possible outcome was for the taxpayer to dispute the manner in which the Commissioner had dealt with the objection and appeal to the tribunal. The third option for the Commissioner was to decline the taxpayer's objection in its entirety. In this event, the Commissioner would refuse to amend the assessment objected to by the taxpayer. Depending on the treatment, the Commissioner would issue either an amended assessment or a confirming notice and it is on this basis that a dissatisfied taxpayer would move to the tribunal.

A party to the appeal who was dissatisfied with the decision of the tribunal had a right to appeal to the High Court within fourteen days of being notified of the decision of the tribunal.

The tribunal had all powers of a subordinate court of the first class to summon witnesses, take evidence on oath or affirmation and to call for production of books and other documents. The tribunal had a lee way to take into account evidence without observing the strict rules of evidence. In addition, the tribunal had power to award costs and to direct such costs to be taxed in accordance with scales applicable to High Court suits. The Chief Justice had power to make rules governing appeals to the

tribunal and providing for procedural matters. The Civil Procedure Act and Rules also applied to the proceedings where the rules in place were deficient.

Under the new VAT regime, the procedural matters were transitioned to the Tax Procedures Act. Any person who is not satisfied by the decision of the Commissioner on his objection may lodge an appeal conducted in accordance with the Tax Appeals Tribunal Act. A party dissatisfied with decision of the Tax Appeals Tribunal may lodge a notice of appeal to the High Court.

In conclusion, it would be correct to conclude that the dispute resolution mechanism under the VAT law have been mostly adversarial with decisions made by the Commissioner challengeable before the tribunal or the courts.[85] There was no accommodation of ADR in the legal framework.

3.1.2 Tax dispute resolution under Income Tax

Dispute resolution framework under income tax mainly revolves around the charge of tax, imposition of penalties, refusal to grant allowances and deductions, assessments, interpretation of various provisions of the Act and challenge on administrative decisions made by the Commissioner under the Act. The framework for objections and appeals was previously set out under the Income Tax Act, Cap 470. Matters relating to dispute

[85] Kitenga (n 75 above) 306

resolution are set out under Part X of the Act which deals with objections, appeals and relief for mistakes.

Under section 82 of the Act, the Minister had power to appoint a local committee comprising of a chairman and not more than eight members for a specified area. Section 83 of the Act provided for the minister to appoint a tribunal comprising of a chairman and not less than two and not more than four members. The dispute resolution mechanism under the Income Tax Act worked in the following manner:

A taxpayer who disputed an assessment made upon him would object to it in writing by a notice to the Commissioner. The notice had to be given within thirty days of service of the assessment on the taxpayer. The Commissioner had the discretion to extend this period and to allow for late objections if the person objecting showed good cause. However, the person objecting had to first deposit with the Commissioner the tax due or such part thereof as the Commissioner would have required. A person had a right to challenge the decision of the Commissioner refusing to admit a late objection to the local committee. The law provided that the decision of the local committee on this issue would be final.

Where a taxpayer objected to a notice of assessment, the Commissioner had three options, more or less like those available under the VAT law. Firstly, the Commissioner had the option of amending the assessment in accordance with the objection lodged by

the tax payer. The second option available to the Commissioner was to amend the assessment in light of the objection lodged by the taxpayer but in accordance with the Commissioner's best judgment. In the first two options, the Commissioner would issue an amended assessment. The third option for the Commissioner was to decline the taxpayer's objection in its entirety in which case the Commissioner issued a confirmation notice.

A person served with a notice amending the assessment to the Commissioner's best judgment or confirming the assessment had the right to appeal to the local committee of the area where he resided. If such person was a non-resident, he would appeal to the Nairobi area local committee. However, it the assessment was based on the Commissioner's direction issued under section 23 and 24 of the Act, such an appeal would lie with the tribunal and not the Local Committee. Section 23 and 24 of the Act deal with transactions designed to avoid liability to tax. Under these provisions, the Commissioner has power where he is of the opinion that the main purpose for which a transaction was effected was the avoidance or reduction of liability to tax to direct that such adjustments be made with respect of liability to tax so as to counteract the avoidance or reduction of liability occasioned. These are the provisions that KRA has mainly used to deal with transfer pricing issues as well as tax avoidance and planning schemes by taxpayers.

The procedures of the appeals under income tax were previously set out in section 87 of the Act as well as the Income Tax Rules. To a great extent, the Civil Procedure Act and Rules also applied. The Act also envisaged further appeals to the High Court as well as the Court of Appeal and established the rules that guided appeals to the courts.[86]

In conclusion, it is evident from the structures created by the Income Tax Act that the law adopted a completely adversarial process of tax dispute resolution. One party won and the other one lost. Historically, the law has been deficient in providing for mechanisms to incorporate alternative dispute resolution in managing income tax disputes.

3.1.3 Tax dispute resolution in respect of Customs and Excise Duties

Customs duties are taxes levied on the movement of goods beyond territories based on specific units and ad valorem (based on value). Until 2015 when Parliament passed the Excise Duty Act, the main source of excise law in Kenya was the Customs and Excise Act Cap 472.

Historically, the broader customs tax administration can be said to have fallen under the two main laws. One is the Customs and Excise Act, Cap 472 and the East African

[86] *The Commissioner of Income Tax v Syed Abdul Hadi Abdulla (1958) EA327 Civil case 233 of 1957* where the rulings on procedure were reaffirmed. Campbell C.J held that since the defendant had failed to object to the Ccommissioner or appeal to the supreme court within the prescribed time, he could not now depend upon the merits.

Community Customs Management Act, 2004. Since excise tax is a local imposition, the Customs and Excise Act remained in force largely to regulate the charge, assessment and collection of excise duties within Kenya but was repealed recently with the coming in force of the Tax Procedures Act. The East Africa Community Customs Management Act[87] regulates the customs collection across the borders of the three countries that make East African Community.

Main areas of disputes within customs and excise arise in a number of instances including valuation of goods whereby customs and the taxpayer disagree on the value on which to base duty; classification of goods where customs and the taxpayer do not agree on the mixtures and composition or type of goods and hence the duty rate applicable for such goods; origin of goods and its consequential impact on bilateral and multilateral reliefs; misdeclaration of goods to take advantage of favorable duty rates; interference with goods under customs control; exemptions, refunds, draw backs and rebates; enforcement of collection of duties through agency notices and distress; auction of goods that have remained unentered for periods longer than what is prescribed in law; false documentation intended to defraud customs; diversion of goods meant for export into the local market; keeping excess or deficient stock of excisable goods; restrictions in manufacturing excisable goods; flouting customs procedures dealing with manufacturing under bond or manufacture of excisable goods; record keeping; warehousing; movement of goods on transit or for export; refusal to grant or

[87] Act of 2004

revocation of licenses and so on. Customs also police a whole range of other matters including smuggling, prohibited and restricted goods, counterfeits, concealed goods and trafficking of persons, drugs and other goods.

3.1.3.1 Customs and Excise Act

Section 159 of the Customs and Excise Act provided for resolution of general disputes in this area. The section provided that if before the delivery of imported or excisable goods from customs control a dispute arose as to whether any or what duty is payable on those goods, the importer or excise licensee shall pay the amount demanded by customs but may not later than six months after the date of payment file a suit in court for the determination of the matter in dispute. If the court determined that a lesser or no amount was properly payable in respect of duty on the goods, the amount overpaid would be refunded to the taxpayer.

Also, section 163 made further provisions on disputes. Where the conditions of a bond issued by a person had not been complied with, the Commissioner had power to require the person who gave the security to pay the Commissioner the amount of the security within one month of the notice. If the person failed to pay up, the Commissioner was at liberty to enforce payment of the security as if it were duty due and unpaid. A person aggrieved by the decision of the Commissioner to enforce collection had the right to file a suit in court for determination of the matter within six months of the enforcement.

However, before doing so, the person aggrieved had to deposit with the Commissioner the full amount of duty demanded.

The other provision that governed dispute resolution under the customs and excise was section 127 E of the Customs and Excise Act. This provision made room for establishment of an Appeals Tribunal for hearing of disputes under section 127 B of the same Act which deals with appraisal of value of goods. Where a dispute arose regarding the decision of customs on matters dealing with valuation of goods, the person liable for payment of duty had a right to appeal to the tribunal within thirty days of notification of such decision. The tribunal would consider the matter and render a decision specifying the reasons thereof. Parties to an appeal to the tribunal had a right of appeal to the High Court in the event they were dissatisfied with the decision of the tribunal.

The tribunal comprised of a chairman and not less than four and not more than six members appointed by the Minister. A taxpayer was required before filing an appeal with the tribunal to deposit with the Commissioner the full duty assessed. The tribunal had powers of a subordinate court of the first class to summon witnesses, take evidence, call for production of books and documents, administer interrogatories, award costs and direct the same to be taxed in accordance with the scales prescribed for suits in the High Court and to admit representation advocates and other persons. The Chief

Justice had power to make rules to govern the appeals and to a large extent the provision of the Civil Procedure Act and Rules applied to the appeals.

Again it can be seen that there was no room for alternative dispute resolution within the customs and excise regime. The mechanisms provided by law for settlement were largely adversarial resulting into a winner and loser.

3.1.3.2 East African Community Customs Management Act (EACCMA)

As already stated above, EACCMA is a regional law that applies uniformly across the East African states. Tax dispute resolution under this law is contained in Part XX of the Act which deals with appeals.

The law provides that a person directly affected by the decision or omission of the Commissioner on matters relating to customs is required to lodge an application for review of that decision or omission within thirty days. The application for review is lodged with the Commissioner of Customs. The tax payer is required to set out the grounds upon which the review is sought. The Commissioner has power to extend the time within which an aggrieved tax payer can seek review if reasonable cause is shown. The Commissioner is required to communicate his decision on the application for review within thirty days of receipt of the application or any other information he needs to make the decision. If the Commissioner does not communicate his decision within thirty

days stipulated, the Commissioner shall be deemed to have made a decision to allow the application for review. A person dissatisfied with the decision of the Commissioner on his review application has the right to appeal to the Tax Appeals Tribunal as provided for in section 230 of the EACCMA.

It can be seen that the EACCMA too does not have provision for inclusion of alternative dispute resolution mechanisms within the law.

3.2 Current Legal Framework for tax dispute resolution

3.2.1 Tax Procedures Act, 2015

Parliament passed the Tax Procedures law in 2015. The law is aimed at harmonizing and consolidating procedural rules for the administration of tax laws in Kenya.[88] Up until this point in time, the procedural rules were not uniform and were contained in the respective tax statutes. Uniform procedures serve to enhance consistency and efficiency in administration of tax laws.

Part VIII of the Act is relevant to our study. It provides for Tax Decisions, Objections and Appeals. Section 49 provides that where the Commissioner has refused an application under a tax law, the notice of refusal shall include a statement for the

[88] Tax Procures Act

refusal.[89] This provision is vital in the realization of Article 47 of the Constitution which provides for fair administrative action and includes duty to give written reasons whenever an administrative action is taken.[90]

Section 51 provides the procedure for lodging an objection against a tax decision of the Commissioner.[91] An aggrieved taxpayer is obligated to first lodge an objection against the tax decision in writing within thirty days of being notified of that decision.[92] The taxpayer must do so before proceeding under any other written law.[93] The notice must state the grounds for the objection, the amendments required to be made to correct the decision and the reasons for the amendment.[94] Where the objection relates to an assessment, the taxpayer is required to pay the tax due under the assessment that is not in dispute. The taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection. Where the objection has been validly lodged the Commissioner shall make an objection decision which is communicated to the taxpayer. Where the Commissioner fails to make a decision within sixty days of lodgment of the objection, the objection shall be allowed.[95]

[89] Tax Procedures Act, Section 49.
[90] Constitution of Kenya, Article 47(2).
[91] Kenya Revenue Authority Act, section 2 defines Commissioner as the Commissioner General of the Kenya Revenue Authority.
[92] Tax Procedures Act, section 51.
[93] Ibid.
[94] (n 92).
[95] This provision is in line with Article 47 of the constitution which requires administrative action to be expeditious.

Section 52 of the Act provides that a taxpayer who is dissatisfied with the decision of the Commissioner may appeal to the Tax Appeals Tribunal. A taxpayer dissatisfied with the decision of the Tribunal may appeal to the High Court within thirty days. A similar period is allowed for an appeal to the Court of Appeal in the event a taxpayer is aggrieved by the decision of the High Court. Appeals to the High Court and the Court of Appeal shall only be on a question of law. The Act provides that the burden of proving that the tax decision is wrong lies on the taxpayer.[96]

The Tax Procedures Act is important in the following aspects: firstly, it provides for uniform and consistent procedures for resolving tax disputes across different revenue statutes. Previously, the revenue statutes contained differing procedures on matters relating to tax dispute resolution. Secondly, the Act consolidates the procedures for resolving tax disputes into one code making dispute resolution more effective and efficient. Previously these procedures were scattered across the different revenue statutes. The Act is aimed at improving and facilitating overall tax compliance by taxpayers.

3.2.2 Tax Appeals Tribunal Act, 2013 (TATA)

The Tax Appeals Tribunal Act was assented to in the year 2013 in the month of November. Once it was enforced through Kenya Gazette notice[97], this Act has made

[96] Tax Procedures Act, Section 56(1).
[97] Via a Kenya Gazette notice No. 3137 dated 8th May, 2015, the chairperson and members of the Tribunal were appointed by virtue of in section 4 of Tax Appeals Tribunals Act by Cabinet Secretary Henry Rotich.

several modifications to the existing revenue laws as far as dispute resolution and other tax matters are concerned in order to expedite the process by setting certain timelines and procedures. The law consolidated all provisions in tax statutes dealing with tax appeals.

To achieve this aim of expediting the dispute resolution process and procedures, the Act has thus repealed section 32 of the Value Added Tax Act of 1989 that established the Value Added Tax Tribunal and its membership. The Act also repealed sections 82 and 83 of the Income Tax Act (Chapter 470, Laws of Kenya) and effectively did away with the Local Committee and Tribunal that were established under those provisions. The Act also modified the tax dispute resolution institutions in Customs matters by repealing section 127E of Customs and Excise Act[98] that had made a provision for creation of an Appeals Tribunal.

The Act replaced the previous tax appeals systems by creating the Tax Appeals Tribunal[99] whose role is to hear any appeal against any tax decision made by the Commissioner under any tax statute in Kenya.

In terms of composition,[100] the Tribunal comprises of a Chairman and not less than fifteen and not more than twenty other members appointed by the Cabinet Secretary. The law requires five members of the Tribunal to be Advocates of the High Court of

[98] Cap 472 of Laws of Kenya.
[99] The tribunal is created under section 28 of TATA.
[100] TATA, section 4.

Kenya. The Chairman must be qualified to be appointed as a Judge of the High Court of Kenya. These new requirements in terms of constitution of the members of the Tribunal are vital to enhance the quality of decisions that emanate from it. Hitherto, there had been no requirement to incorporate members of the legal profession in the Tribunal. Most persons appointed were businessmen and other professions.

To a large extent, the previous tribunals lacked a legal mind to guide them and in most cases their decisions were not properly grounded in the law. The tribunal is required to submit an annual report to the Cabinet Secretary detailing its performance in the preceding year.[101] This requirement will ensure that the tribunal is accountable for its performance especially on the issue of dealing with backlog. Previous tribunals were not required by law to make any reports to the appointing authority and this may have contributed to backlog since there was no motivation for them to conclude appeals lodged within any given period.

The appeals commence by notice of intention to appeal.[102] The person appealing shall pay a non-refundable fee of twenty thousand shillings.[103] This payment is perhaps aimed at ensuring that there is no abuse of the trial processes through frivolous appeals. The appellant is required to lodge a memorandum of appeal, statement of facts and the tax decision being appealed against within the fourteen days of the

[101] TATA, section 9(3).
[102] TATA, section 12. Section 13 proceeds to provide that the notice must be in writing and be submitted to the tribunal within thirty days.
[103] Ibid.

presentation of the notice of intention to appeal. The Commissioner is required to respond to the appeal within thirty days of being served with the copy of the appeal. The Commissioner is required to file his statement of facts, reasons for the tax decision and any other documents which may be necessary for review of the decision by the tribunal.

The procedures of the tribunal allow the taxpayer to present himself personally or he may be represented by a tax agent. The burden of proof squarely rests on the appellant. In order to function well, the Act gives the tribunal certain powers of the subordinate courts including the power to call witnesses, order for stay of execution, adjourn proceedings, award costs and direct them to be taxed in accordance with the scale applicable for High Court suits, issues summonses, order for production of books and documents and to take decisions that have a legal force.[104] Notable among these powers is the ability to punish for contempt of court.[105] Also, the law has given the tribunal power to engage the service of independent experts in any proceedings as may be appropriate.[106] It can be argued that this move will serve to ensure that the decisions reached by the tribunal are of good quality having taken into account independent experts' opinions where necessary.

[104] The decisions are taken by the vote of the majority of its members and in case of a tie, the chairperson has the decisive vote.
[105] TATA, section 21.
[106] TATA, section 23.

The tribunal is required to render its decision within ninety days from the date the appeal is filed. The decision shall be in writing and shall contain reasons. This is a departure from the previous appeals regime that did not require the tribunals to give a reasoned ruling. The tribunal can decide in a variety of ways: it can affirm the decision under review; it can vary the decision under review; and it can set aside the decision under review either by making a decision in substitution of the decision so set aside or by referring the matter to the Commissioner for reconsideration in accordance with any directions or recommendations of the tribunal.

The Act has an appeal system which enables a party to the proceedings before the tribunal to, within thirty days[107] of being notified of the decision or within such other longer period as the High Court may allow, appeal to the High Court. The wording of the Act suggests that appeals of the tribunal's decision can only be heard by the High Court in accordance with the rules provided for by the Chief Justice.[108]

The next chapter will critically examine ADR as a mechanism for tax dispute resolution in Kenya.

[107] The period may even be further than the thirty days as the High Court may allow under section 31(1) of TATA.
[108] TATA, Section 32(2).

CHAPTER FOUR

ADR AS A MECHANISM FOR TAX DISPUTE RESOLUTION

This chapter is divided into two major parts. Having already examined the general legal framework governing tax dispute resolution in the previous chapter, the first part analyses the legal framework relating to ADR in tax dispute resolution in Kenya. It examines the constitutional, statutory and institutional policy framework in place. The second part critically examines the KRA ADR framework to establish its compliance with the relevant constitutional and statutory framework. A brief comparative analysis is undertaken with the view of drawing useful lessons and best practices from tax jurisdictions that have experimented with ADR.

4.0 Constitution of Kenya, 2010

As already discussed in Chapter One, Article 159 of the Constitution stipulates various principles to guide the Courts and tribunals whenever they are exercising judicial authority. As noted in Chapter One these principles include the requirement that justice shall not be delayed; alternative forms of dispute resolution shall be promoted; justice shall be administered without undue delay to procedural technicalities and that the purpose and principles of the Constitution shall be promoted and protected.

The Constitution refers to diverse methods of alternative dispute resolution as opposed to the courts' adversarial system. These include mediation, reconciliation and arbitration. Also, it is clear that the framers of the Constitution intended that ADR not only extend to courts but also to the tribunals[109] that exercise quasi-judicial powers. Muigua puts forth an argument that in view of the fact that Article 159 and 189(4) of the Constitution both provide for ADR, this serves to provide a constitutional basis for the application of ADR in dispute resolution in Kenya.[110] Muigua further argues that the scope for the application of ADR has been extensively broadened by the Constitution hence ADR ought to apply to all disputes. From Muigua argument, it is clear that ADR ought to be incorporated as a key means of resolving tax disputes.

4.1 Tax Procedures Act, 2015

Section 55 of the Tax Procedures Act provides for settlement of disputes out of Court or the Tribunal. The Section provides that where the Court or Tribunal permits parties to settle a dispute out of Court or Tribunal as the case may be, the settlement shall be made within ninety days. Where the parties fail to reach a settlement the matter shall be referred back to the Court or Tribunal.

This provision is important because it opens up opportunity for parties in a tax dispute to adopt ADR as an option to litigation. If utilized well, the ADR process would ensure a

[109] Constitution of Kenya, Article 159 (2) (c) mandates Courts and Tribunals to apply ADR mechanisms in resolving disputes.
[110] Muigua (n 19).

speedier dispute resolution. Parties are required by law to resolve the dispute within ninety days which is quicker than the time it would require to go through a formal court process. Also, the process is likely to resolve the dispute without undue regard to procedural technicalities thus conforming to the Article 159(2) (d) of the Constitution. Parties have autonomy over the process, forum and the outcome. It preserves relationship because there is high party satisfaction. The parties are also likely to enjoy a cost benefit since ADR process is cheaper.

4.2 Tax Appeals Tribunal Act, 2013

Section 28 of the Tax Appeals Tribunal Act states that: [111]

> The parties may at any stage during proceedings, apply to the Tribunal to be allowed to settle the matter out of the tribunal, and the Tribunal shall grant the request under such conditions as it may impose' and 'that the parties to the appeal shall report to the tribunal the outcome of the settlement of the matter outside the Tribunal.

The provision in section 28 of the Act is instrumental as far as establishing a framework for ADR is concerned. For the first time, in a revenue statute, the Act makes a provision for the possibility of initiating and subsequently negotiating an out-of-tribunal settlement at any stage of the tax dispute resolution.

[111] TATA, section 28(2).

The importance of the provision is manifest as it envisages the initiation to make an out of tribunal settlement can come from the taxpayer as well as the Commissioner. The provision too does not make stage limitations as to when the application can be made within the proceedings. Thirdly, the wording of the section as to what the Tribunal should do when faced with an out-of-tribunal application is in mandatory terms requiring the Tribunal to comply. However, with this much value that it adds to the tax dispute resolution mechanisms, it is not satisfactory in itself thus it requires certain implementing mechanisms and additional frameworks. Unless there is a statute mandated framework, uptake of the avenue will be limited.

4.3 KRA Alternative Dispute Resolution Framework

In June, 2015 KRA published an ADR Framework on pilot basis to guide resolution of tax matters through ADR. The Framework starts off with a disclaimer that it does not constitute professional advice and should not be relied on. Taxpayers are advised to seek professional help from their tax advisors. The ADR Framework states that KRA will not take responsibility for consequences suffered by anyone acting or refraining from acting in reliance to the information contained in the ADR Framework.[112]

[112] This may be seen as a half-hearted approach by KRA. The disclaimer diminishes taxpayers' confidence in the Framework.

4.3.1 Preamble to the KRA ADR Framework

The preamble to the ADR Framework states that it seeks to improve internal dispute resolution mechanisms by introducing ADR as an additional and or alternative to the judicial and quasi-judicial processes currently available to resolve tax disputes. It is voluntary, participatory and facilitated discussion of a tax dispute between KRA and the taxpayer. It is in the form of facilitated mediation as opposed to arbitration meaning that the facilitator has no power to impose any decision on the parties.

4.3.2 Benefits of the KRA ADR Framework

The benefits of incorporating ADR in tax dispute resolution can be seen from the point of time savings,[113] decrease in legal costs associated with litigation, improving relationships between KRA and the taxpayer due to the non-adversarial nature of ADR, confidentiality whereby taxpayers are assured their matters will not be reported in the press and is also viewed as a compliance tool in that for some cases, reaching a settlement through ADR may increase compliance in the related business sector. The ADR Framework gives the reassurance that following the ADR route does not in any way take away the parties' rights to proceed to the Tribunal or the courts if need arises.

[113] Studies in the UK have shown that HMRC spends 15 hours resolving a dispute through ADR as opposed to 250 hours if the case goes to the first tier Tribunal < http://www.accaglobal.com/gb/en/technical-activities/technical-resources-search/2014/may/hmrc-alternative-dispute-resoution.html > accessed 1 November 2015.

4.3.3 Objectives of the KRA ADR Framework

The ADR Framework aims to provide a taxpayer focused approach to tax dispute resolution. As mentioned above, most the of the avenues previously available under the various tax statutes have been adversarial and have served to have the KRA perceived as an agency that does not have the interests of the taxpayer at heart. The ADR Framework aims to remedy this by availing the taxpayer an internal opportunity to have his case relooked at by an independent facilitator. The ADR Framework provides for rules of conduct, timelines for resolving disputes and many other matters relevant to the ADR process.

4.3.4 Legal Basis of the KRA ADR Framework

Firstly, the ADR Framework finds its basis in Article 159(2) of the Constitution which we have already discussed above. This Article requires Courts and Tribunals to promote ADR mechanisms in their dispute resolution methods. Secondly, section 55 of the Tax Procedures Act provides for an avenue for the parties to resolve their dispute out of Court or Tribunal. Thirdly, the ADR Framework identifies section 28 of the Tax Appeals Tribunal Act as another source of its basis. This section which is discussed in the preceding paragraphs provides for power of the tribunal to enter settlement where the parties reach an agreement out of the tribunal.

4.3.5 When can parties engage in ADR?

ADR under the KRA Framework is voluntary and may be initiated by the Commissioner or the taxpayer. The ADR Framework provides that where the Commissioner proposes to amend the assessment in light of the objection lodged with the taxpayer but to the Commissioner's best judgment or where the Commissioner entirely refuses to amend the assessment as objected to by the taxpayer, then the taxpayer will first be given an opportunity to be heard before the Commissioner can issue an amended or confirmed assessment. The Commissioner is obligated to give the taxpayer details for the rejection of the objection on each of the issues that the taxpayer raised in the objection. The ADR Framework requires the timelines for hearing the taxpayer to fit within the timelines given under the tax statutes for the Commissioner to communicate his decision on the objection.

4.3.6 Matters pending before the Tax Tribunal and the Court

For matters pending before the Tax Appeals Tribunal or Court, the ADR Framework provides that a party may at any time apply to refer such matters to ADR. The party making the request is required to submit to the other party a written request accompanied by a settlement proposal. The other party has an option to accept or decline the proposal to refer the matter to ADR. Where the parties agree to refer the matter to ADR, they will inform the Court or Tribunal accordingly. The parties may apply for stay of hearing of the dispute to allow the ADR process to proceed. Where a

matter has been referred to ADR, the parties have ninety days to reach an agreement and to revert to the Tribunal or Court to record the agreement reached. Notable in the provisions of the ADR is the possibility of the parties involving the Attorney General or the Director of Public Prosecution or the Commission on Administrative Justice to take part in the process or to facilitate the ADR.

4.3.7 How does the KRA ADR Framework work?

The ADR Framework provides how it will work. The Corporate Tax Resolution Division of the KRA provides the secretariat, coordination, facilitation, management and oversight of the ADR process. The ADR Evaluation Team, also from KRA vets the disputes referred to ADR to determine their suitability, meaning not all tax disputes are admissible to the ADR process. The Commissioner's Technical Team submits the Commissioner's case during ADR, whereas the taxpayer or his agent submits the taxpayer's case. The Facilitation Panel helps identify the issues and aid in coming up with a resolution and the Facilitator takes charge of the process, convenes the discussions and generally moderates the conduct of the ADR.

The ADR Framework provides for how various persons involved in the ADR process will be appointed. It also provides for matters relating to *inter alia* the independence, integrity and conduct of persons involved in the ADR process. The rules of engagement will be agreed upon by the parties with the help of the Facilitator but will generally be required to conform to the general provisions of the law under which the ADR is carried

out meaning the parties cannot agree to rules that are in breach of the relevant tax statute. Each party is required to provide certain documents instrumental to aiding in resolution of the dispute. The ADR Framework also provides for instances where the ADR discussions may be terminated by the parties.

4.3.8 Appropriateness of Disputes for ADR

The KRA ADR Framework identifies certain disputes to be appropriate for reference to ADR. These include where settlement would be in the interest of good management of the tax system; where the costs would be unnecessarily too high if the litigation route were followed; cases involving complex factual or quantum issues or other evidentiary difficulties; and where settlement of the dispute through ADR would promote sector wide compliance.

The ADR Framework identifies the following cases to be inappropriate for ADR: those that relate to tax evasion or fraud; where it would be in breach of the Constitution or statute to settle; where public interest requires a judicial determination of the matter; and where the conduct of the taxpayer is such that the matter does not commend itself to ADR.

4.3.9 ADR Agreements under KRA Framework

Where the parties have reached an agreement, the ADR Framework requires that the issues agreed upon shall be put in writing including the amount of tax recoverable,

withdrawal of other proceedings and agreement on costs. The Commissioner is required to adjust the assessment according to the agreement of the parties. A signed ADR agreement shall represent the agreement of the parties and will be the full and final settlement of the issues which had been identified in the dispute. The amended assessment shall not be the subject of an objection, appeal or any other litigation except on the ground of correction of arithmetical errors and errors on the face of the record or on the ground that the amended assessment itself is not in line with the signed ADR agreement. This is an important provision necessary to ensure matters processed and agreed under ADR are brought to closure and that the same are not reopened.

The Framework provides that the ADR discussions are held on a without prejudice to the parties statutory rights and unless an agreement has been reached, representations made, documents tendered and other matters appertaining to the ADR discussions may not be relied upon in any other proceedings and no person shall be compelled to give evidence or to produce documents on the basis of the ADR discussions. Moreover, the ADR Framework stipulates that the settlement reached shall not be used as precedent even for similar matters and shall only be applicable to the parties to the respective dispute.

4.4 Conclusion

This part has examined the legal and institutional framework relating to tax dispute resolution in Kenya. It started with an analysis of the relevant provisions in the Constitution, Tax Procedures Act and Tax Appeals Tribunal Act which are the main statutes that govern tax dispute in Kenya. With respect to the application of ADR in tax disputes, the chapter discussed constitutional basis for the application of ADR in tax disputes. It also examined the relevant statutory provisions in the Tax Procedures Act and Tax Appeals Tribunal Act relating to the application of ADR in tax disputes. Lastly, it provided a descriptive analysis of the KRA ADR framework that was introduced in 2015.

It is clear that there exists a constitutional, statutory and policy basis for the application of ADR mechanisms in resolving tax disputes. ADR methods have a promising future in tax dispute resolution in Kenya in light of Article 159 of the Constitution, section 55 of the Tax Procedures Act, section 28 of the Tax Appeals Tribunal Act and the KRA ADR Framework. ADR will play a crucial role in enhancing tax compliance by taxpayers as well as expeditious resolution of tax disputes.

The next part critically examines the KRA ADR framework to establish its compliance with the relevant constitutional and statutory framework.

4.5 A critical analysis of the KRA ADR Framework

This section examines key issues in the Framework along three main dimensions: the Constitution, statutory provisions and international best practices.

4.5.1 Constitutional issues

Article 159 of the Constitution envisages ADR as a broad and wide concept of resolving different types of disputes. The ADR Framework takes a narrow approach to the dispute resolution envisaged by the Constitution. It identifies and adopts a facilitated mediation as the only form of ADR to be utilized in terms of resolving tax disputes between KRA and taxpayers. This restrictive approach does not seem to be in line with Article 159 of the Constitution which contemplates adoption of numerous forms of ADR in dispute resolution including arbitration, negotiation and reconciliation. The KRA framework restricts the taxpayer's entitlement to enjoy a variety of ADR forms particularly when mediation fails or is not preferred by the taxpayer.

This argument is validated further when looked at from access to justice perspective. Article 48 of the Constitution guarantees the right to access to justice for all. It can be argued that by providing for mediation only, the ADR framework constricts access to justice in that it does not offer other forms of ADR for utilization by a party who is not keen on using mediation.

Muigua argues that Article 159 (2) and 189(4) provide for elevation of ADR as a form of dispute resolution.[114] Muigua further argues that ADR applies to all disputes hence broadening its applicability.[115] This is a clear manifestation of the acceptance of ADR as a means of resolving different disputes. The Framework approach lacks clear understanding and appreciation of ADR from this standpoint. ADR processes are still considered as secondary to litigation and are not given the constitutional prominence required. This could explain why the Framework does not have statutory basis in terms of substantive provisions of the law or regulations. It is only promulgated as an internal non-binding policy framework of KRA. The Framework even advises taxpayers to rely on the substantive law and other formal dispute resolution steps contained in the law. This serves to devalue the relevance of the Framework.

Article 10 of the Constitution provides equality, equity, fairness and accountability as national values and principles of good governance. It requires state organs to be guided by these values when interpreting the law and policy. The framework lacks internal structures to ensure equality, fairness and equity during the ADR processes. Even though ADR is not subject to precedence or the principle of *stare decisis* and there is no requirement that like cases should be treated in a similar way, it is crucial for the Framework to have inbuilt structures to ensure equity and fairness for matters that are resolved by ADR. These structures should aim at preventing abuse of the process as well as preferential treatment of cases.

[114] Constitution of Kenya, Articles 159(2) & 189(4).
[115] Muigua (n 19) 20-21.

The second argument under Article 10 of the Constitution would be on the basis of good governance, integrity, transparency and accountability.[116] By its very nature, adoption of ADR procedures in resolution of tax disputes would entail KRA foregoing taxes that are due in a bid to reach a win-win position with the taxpayer. Since the amounts foregone in this arrangement are public funds, there is an obligation on KRA to be accountable and transparent in as far as ADR settlements are concerned by providing justification for such an arrangement. KRA cannot be accountable to itself thus there in need to be accountable to a separate authority as is the case in South Africa. This requirement to account to an independent organ is lacking in the KRA ADR Framework. This argument can be supported by the provisions of Article 210 of the Constitution which places an obligation on the public authority whenever waiver of tax is made to maintain a public record of this waiver.

Related to the above argument but approached from the perspective of Article 210 of the Constitution which provides that no tax or license fee may be imposed, waived or varied except as provided by legislation[117] is the argument that the Constitution restricts any variation of taxes without backing of the law. This means in all settlements reached by KRA, it has to collect the entire amount imposed or assessed and cannot vary or waive any portion of it unless as provided for by law.

[116] Constitution of Kenya, Article 10(2) (c).
[117] Constitution of Kenya, Article 210.

As noted above, for ADR processes to be effective parties must negotiate and at times must compromise their positions in order to reach a settlement. This may require in the case of the Commissioner to vary certain aspects of the taxes due so as to reach a beneficial settlement with the taxpayer to save on time, costs and maintain relationship with taxpayers for purposes of future tax compliance. It can be argued that any variation or waiver in the context of ADR would be contrary to Article 210 hence unconstitutional. The only cure to this would be to make substantive provisions within the revenue statutes or tax procedures legislation granting the Commissioner power to reach such ADR settlements as may be expedient in the interests of revenue.

Further, Article 10 of the Constitution envisages public participation as a constitutional requirement in making decisions that affect members of the public. The Framework identifies four stakeholders namely tax consultants/legal advisors, the courts/tribunals, professional bodies and the government agencies (Attorney General, the Director of Public Prosecution and Commission for Administrative Justice). Even though the public is the taxpayer, the Framework has failed to identify and consider members of the public as stakeholders. Besides, it is not clear whether the public or any of the stakeholders listed were consulted in formulating the ADR policy framework.

4.5.2 Statutory argument

Section 28 of Tax Appeals Tribunal Act states that:

> The parties may at any stage during proceedings apply to the tribunal to be allowed to settle the matter out of the tribunal and the tribunal shall grant the request under such conditions as it may impose. The parties to the appeal shall report to the tribunal the outcome of settlement of the matter outside the tribunal.

On the other hand, section 55 of the Tax Procedures Act provides that:

> Where a court or the tribunal permits the parties to settle a dispute out of court or the tribunal as the case may be the settlement shall be made within ninety days from the date the court or the tribunal permits the settlement. Where parties fail to settle the dispute within the period specified in subsection one the dispute shall be referred back to court or the tribunal that permitted the settlement.

The above statutory provisions provide an avenue for to parties to use ADR to resolve tax disputes. However, these provisions are hardly adequate in terms of providing any meaningful guidance to parties keen on using ADR. This is clear when you compare the KRA Framework with the South African position. The South Africa Tax Administration Act 2011 under section 107 (5) provides that 'by mutual agreement, SARS and the taxpayer making the appeal may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the rules'. The South African law

provides a clearer context and framework in which the ADR processes may be explored in resolving tax disputes.

As argued above by Muigua[118] the constitutionalisation of ADR process has elevated them to prominence and therefore the ADR processes should be on equal footing with other formal dispute resolution mechanisms such as litigation. However, an analysis of the Tax Procedures Act does not reflect this reality. A lot of emphasis has been placed on the formal dispute resolution. The Act focuses on the formal court system with elaborate provisions for the use of tribunal, high court and court of appeal, all which are formal disputes resolution mechanisms. No express accommodation or mention is made for adoption of any ADR mechanisms. The relevant provisions in the Act talk of 'out of court settlement' and not specifically providing expressly for any ADR forms. An argument can be made that there is still statutory and policy reluctance in making sufficient use of ADR opportunities within the tax dispute resolution arena.

From a statutory perspective, the KRA ADR Framework may be viewed as narrow in scope. The two statutory provisions discussed above are general in nature in that they simply permit the parties to explore and reach out of court or the tribunal settlement. This presupposes that parties are granted wide permission and they are entitled to explore the entire spectrum of ADR processes suitable to their dispute. However, the KRA ADR Framework restricts the availability of ADR processes to facilitated mediation

[118] Muigua (n 19) 3.

only. It can be argued that the Framework unnecessarily limits the statutory permission granted. Deliberate attempts should be made to expand ADR opportunities available to taxpayers if they were to enjoy the full benefits of the law.

4.5.3 International best practices

In Australia, the tax tribunal plays an active role in promoting ADR processes in tax disputes. It can offer incentives, provide guidance where there is deadlock and it directs appellants to indicate whether they have attempted ADR before resorting to litigation. In terms of incentives, they would punish parties by making them liable to pay costs where it is demonstrated that they frustrated the ADR process. The tribunal in Kenya however, appears not to be involved in the ADR process. It has left it to KRA which is an interested party to tax disputes to promote the ADR process. This could raise issues of independence in the whole process.

In other jurisdictions including the UK and Australia, the revenue authorities take a leading role in promoting ADR process. This is achieved by coming up with more guidelines for their staff when considering or applying ADR. For instance, the ATO has come up with many practice statements to ensure proper implementation and enforcement of the ADR provisions in the tax statutes. On its part, HMRC has put up more mechanisms to ensure there is practicalisation of the ADR framework. In South Africa the increased activities is manifested in the use of tax council networks on priority technical issues. The effect of this would be to ensure there is not only increase

in the use of ADR methods but also to result in quicker dispute resolution of tax disputes.

The next Chapter will conclude this study by revisiting the major findings, drawing conclusions and making recommendations that can aid in making ADR more viable in tax dispute resolution in Kenya.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This concluding chapter has two objectives. First, it restates the major findings of this study. Second, it provides specific recommendations aimed at enhancing the use of ADR mechanisms in resolving tax disputes in Kenya. The Chapter commences by stating what the objective of the study was. This is followed by a summary of the key issues on what was discussed in each Chapter and ends with major findings and specific recommendations.

This study examined the viability of including ADR methods in resolving tax disputes in Kenya. The study first considered conceptual framework for tax dispute resolution. An examination of what disputes entailed and enumerated the different types of disputes that arise in the course of tax collection. A brief overview of forms of ADR relevant to tax disputes was provided. This was followed by an analysis of how tax disputes are resolved in Kenya including a historical discourse of tax disputes resolution in Kenya. The study finally examined the ADR as a mechanism for tax dispute resolution in Kenya. This was done by firstly considering the constitutional, statutory and institutional policy provisions that relate to ADR. Thereafter, the study critically analysed the KRA ADR

Framework in light of relevant constitutional and statutory provisions as well as international best practices.

First, the use of ADR methods in resolving tax disputes in Kenya is a viable proposition. ADR is not a fantastical concept given the fact that it has been used successfully in several other countries.[119] It is clear that what is needed for ADR to be effectively and efficiently adopted to resolve tax disputes are the relevant revenue laws and the institutions that provide for the application of ADR methods in tax disputes. In other words, ADR processes for tax resolution ought to be anchored in legislation. In Australia, for example, there are laws including Tax Administration Act,[120] the Administrative Appeals Tribunal Act and the Federal Magistrates Courts Act which define how assessments and objections are made. They also provide a framework for application of ADR in the tax dispute resolution. The Australian tax authority apart from collecting revenues, has established certain procedural regulations including practice statements and codes of settlements that further practically entrench the utilization of ADR in resolution of tax cases.

A similar position obtains in the United Kingdom. The HMRC[121] has tax laws which govern assessments, objections and appeals and at the same time incorporates use of ADR in tax disputes. The United Kingdom's Tribunal Courts and Enforcement Act

[119] Use of ADR in resolving tax disputes is currently in use in Australia, United Kingdom and South Africa among many other jurisdictions.
[120] South African Tax Administration Act Part V.
[121] Her Majesty's Revenue and Customs

creates other institutions such as tribunals and specific tax chambers to expedite ADR processes.

The ADR processes have been applied with relative success in those countries. Therefore there is no technical barrier that can be said to inhibit the application of the ADR to tax dispute resolution in Kenya when the Constitution expressly provides for the application of ADR in all disputes. Article 159(2) of the Constitution provides for the use of ADR mechanisms in resolving disputes generally. Section 28 of Tax Appeals Tribunal Act expressly provides for reference of matters to out of tribunal settlements. In addition, section 55 of the Tax Procedures Act[122] provides for out of court settlements. These provisions provide and avenue for use of ADR in tax dispute resolution. These constitutional and statutory provisions provide basis for elevated use of ADR mechanisms to resolve tax disputes within the Kenyan legal system.

Secondly, as noted thereby this study, the use of ADR to resolve tax disputes has tremendous benefits. ADR has very many remarkable advantages over litigation. Litigation is often associated with high costs of resolving disputes and backlog of cases which delays access to justice. Also, party participation and satisfaction in litigation is low. Tax disputes are a unique type of disputes for a number of reasons. One, tax is an important aspect of any country since most countries collect taxes as a way of sustainably and independently funding their national development projects and

[122] Section 55 of the Tax Procedures Act.

recurrent expenditure. Secondly, the KRA has become too aggressive in its collection of taxes in recent years.[123] Thirdly, the taxpayers are now more aware of their rights under the Constitution and the tax procedure laws to object to assessments done by the relevant Commissioners of tax.[124] In other words, there is an upsurge in litigation attributable to the new constitutional order. Fourthly, usually the taxpayers who are involved in tax disputes with KRA are corporate entities which would like to keep their trade secrets, protect public image as well as preserve their relationship with the KRA. Due to this uniqueness, it is only a cost effective, timely, confidential, voluntary means of disputes resolution that will ensure that ultimate efficiency in tax administration, increased tax compliance due to voluntary participation and high party satisfaction and also increased access to justice due to its cost effectiveness thus affordability by a cross section of the taxpaying public.

Thirdly, the ADR recognition and implementation has its own challenges. As much as ADR mechanisms are supported for their cost-effectiveness, timeliness, flexibility, confidentiality and its voluntary nature, there are a number of challenges that may be faced by the implementing authorities. For instance, it was noted in the Australian case of *C of T (SA) v. Executor Trustee and Agency Company of Australia Ltd* [125] that some challenges may affect mediation in tax disputes and the court aptly stated that 'the legal framework of tax dispute resolution recognizes that mediation cannot be applied when the outcomes are unlikely.' This unlikelihood if interpreted strictly would mean

[123] Barasa (n 7).
[124] Ibid.
[125] *C of T (SA)* (n 121).

that almost every case will not be fit for mediation since in most,[126] if not all cases, the amount of tax due is almost always fixed and not subject to discussion.

Fourthly, as showed in chapter two, it appears the preferred ADR mechanism used in resolving tax disputes is mediation. Of all the forms of alternative dispute resolution including conferencing, negotiations, arbitration, summary jury trial, conciliation and case appraisals, most of the jurisdictions favour the use of mediation as the means of dispute resolution. In United Kingdom, the Tax Chamber of the Tribunal Court is supposed to apply mediation in its tax disputes that are referred to the courts. In South Africa, mediation is the most preferred means of resolving disputes. It involves the use of SARS officials who are trained in ADR mechanism and are deemed to act independently. Notably, arbitration is expressly excluded in most regulations by tax authorities. For instance the Practice Statement of Law Administration by ATO expressly excludes the use of arbitration in resolving tax disputes. Similarly the United Kingdom system has adopted the Post Appeals mediation so as to discourage any reference to arbitration should mediation fail before appeals. The most striking argument in favour of this exclusion is the fact that arbitration is mandatory and adjudicatory[127] in nature and is therefore accompanied by procedural complexities of discovering and producing evidence and therefore the tremendous benefits of alternative means of resolving disputes is unlikely to be realized in arbitration.

[126] Ibid.
[127] 3rd preambular statement of KRA ADR Framework. This statement directly excludes Arbitration Act as an applicable Act in the tax dispute resolution process.

Mediation is therefore the most preferred form of ADR in most revenue laws, codes of settlement, practice statements, and guidelines given under the auspices of the tax authorities of the different countries. This is because it triumphs over the disadvantages of other identified models and comes out to be the most voluntary, confidential, flexible, timely and cost effective means of resolving disputes that can also preserve relationships. In Kenya, KRA ADR framework has adopted the use of facilitated mediation to resolve tax disputes between the revenue authority and taxpayers. Kenya can be said to be on the right track as far as the choice of the mediation as its preferred ADR route is concerned.

Fifthly, there is one principle that runs across all the jurisdictions which have adopted ADR mechanisms in tax dispute. This principle is that one size does not fit it all. It is crucial for each country to first consider relevant factors in their country's context before making a decision on which system should be adopted to ensure effective and efficient resolution of tax disputes. Different countries have adopted different ways of going about ADR in resolving tax disputes. The United Kingdom has effectively adopted the use of piloting system which works best for its economy. In South Africa, the reporting system seems to work well for it. The best approach to ensure that a country adopts effective mechanisms is not by borrowing heavily from a system that has been adopted in another jurisdiction word for word but should be by benchmarking to identify the key common areas and strategies that could be borrowed and applied in Kenya as best practices. In order to make legal provisions and regulations relating to

use of ADR mechanisms to resolve tax dispute more realistic the adoption of a particular ADR model should look at the best home grown solution and not simply copy paste what has worked elsewhere.

The next section provides specific recommendations.

5.1 Recommendations

The study makes eight specific recommendations. First, the hurdles of Article 210 of the Constitution should be dealt with. Currently, the constitutional position is clear that taxes are compulsory and that no tax or licensing fee may be imposed, waived or varied except as provided for by legislation. The impetus of the provision is to make resolution of tax disputes to be as inflexible as possible. As Justice Lenaola puts it, 'Give what belongs to Caesar and so shall be it'.[128] The constitutional provision[129] and the court decision mean that the legal backing of use of ADR in tax disputes is hanging on the balance. Streamlining this hurdle will help prevent litigious Kenyans from challenging the KRA ADR framework for being unconstitutional.

This aspect is recognized within the South African ADR regime. The settlement procedures recognize that SARS is not entitled to forgo any tax which a taxpayer is legally liable to pay. To deal with this hurdle, the Parliament enacted Tax Administration

[128] *CfC Stanbic Bank Limited v KRA & Anor* (2014) eKLR para 54.
[129] Constitution of Kenya, Article 210.

Act that prescribes circumstances under which SARS may settle a dispute with a taxpayer where it would be in the best interests of the state to do so. The rationale behind this provision is growing appreciation and general consensus within revenue authorities that more emphasis should be placed on resolving tax disputes using other mechanisms other than through litigation. The South African approach recognizes that whereas SARS is obligated by law to assess and collect all amounts due to the state, sometimes it may be in the best interest of the state, and for purposes of good management of the tax system to forgo tax. This seems to be a good lesson that could be learnt and borrowed to deal with our own constitutional hurdles. Parliament must thus take legislative steps to overcome this hurdle. The most efficacious and expedient way to achieve this is through amending the Tax Procedures Act and through rulemaking as opposed to coming up with a new legislation as this may take considerable time.

Secondly, the ADR process of resolving tax disputes should be made free or the fees charged should be minimal so as to avoid an inevitable paradox of a more costly mediation process. In South Africa, the process of mediation is wholly facilitated by the SARS officials who are independent and not hired independently by parties. This gives a pointer to the fact that the users of ADR can see the benefit only if the process is made less costly. The further regulations on ADR in tax disputes given by KRA or under its auspices should be aimed at making ADR process less costly to ensure all the taxpayers and the KRA can benefit from it.

Thirdly, the KRA should carry out intensive creation of awareness and sensitization so as to encourage the use of ADR among the legal community and citizenry at large. The ADR Framework as it stands is not much highly publicized. This is second to the concern that the Tax Appeals Tribunal Act, which provides a paradigm shift in tax dispute resolution, is a very recent Act[130] and has not been widely publicized. Therefore the intended purpose and target of a cheaper and timely means of resolving tax disputes may not be realized.

Fourthly, ADR Framework or other subsequent KRA guidelines and regulations should provide elaborately on matters of confidentiality, fairness, transparency, and effectiveness of ADR, independence and voluntariness and flexibility of the system. These abstract concepts should be made more practical by the Framework itself to ensure the Framework is applied uniformly. In a nutshell, the new guidelines should look at the application of the principles of confidence and transparency in light of the Kenyan realities so that they can be both elaborate and effective. An increased confidence in use of ADR is important because the system is voluntary and it will encourage parties to use it. However, in taking into account this methodology, a caution must be taken by the KRA to make sure the system remains simple and devoid of any complexities or technicalities even as they expand the guidelines.

[130] Enacted in 2013.

Fifthly, KRA should be involved in the intensive programme of training of persons involved in the ADR process. The facilitators[131] should undergo training to keep them updated with the current trends in mediation, effectiveness, transparency and confidentiality. For instance, in Australia, there is the Codes of Settlement Practice formulated by ATO. This code applies to settlement of taxation disputes.[132] It requires that at least two (2) tax officers who are independent, impartial and trained be available for the ADR processes. The reason behind this is the fact that expertise and independence are critical to the success of the ADR system since it will boost the confidence of the parties as to the effectiveness of the system and its alternativeness to litigation process.

Sixthly, KRA should adopt a reporting system in Kenya. Currently, the reporting requirements are missing from the KRA ADR Framework. KRA must be obligated to report to the Minister or to Parliament on how much tax has been forgone and how much savings in litigation costs has been realised. As discussed in earlier chapters, this will prevent corruption from creeping into the ADR processes that may ruin the confidence of parties in the system.

Seven, there should be a bipartisan involvement in tax dispute resolution. Currently the ADR Framework is KRA owned and driven. The taxpayer is left with little discretion since the guidelines were proposed by KRA. There must be bipartisan involvement. That

[131] Provided for in the KRA ADR Framework.
[132] Whether or not they occur in the course of the ADR.

is the only way taxpayers can have a buy in the idea of alternative dispute resolution. The KRA should find an integrated approach where all other stakeholders are involved so that the process is participatory in nature so as to boost the confidence of the parties.

Eight, the KRA should ensure that the framework is expressly anchored in legislation to give it a force of law as well as to increase uptake, confidence and certainty in the process. The legislation may be used to support the use of Tribunal annexed ADR. Again, this can be achieved quickly through amending the Tax Procedures Act as opposed to coming up with a new law. Through this system, the policy may provide that all disputes first go to ADR before they proceed to the Tribunal. Such a system has worked very well in the United States, and there is in principle no reason why it may not apply in Kenya. For instance, US has adopted Fast Track Settlement to ensure that disputes are resolved at the earliest stages of their inception without having to wait until the mature stages when party positions may have been made stronger.[133] This will weed off matters that can be settled by ADR from clogging the judicial wheel.

[133] Shannon Thomas, 'Overview of ADR Options at the IRS' 2007 Journal of Consumer and Commercial Law < http://www.jtexconsumerlaw.com/V10N3/V10N3ADR.pdf > accessed 1 November 2016.

BIBLIOGRAPHY

BOOKS

1. Bentham J, *An Introduction To The Principles Of Morals And Legislation* (T Payne 1789).

2. Garner B, 'Black's Law Dictionary' 9th edn.

3. Holmes O, *The Common Law* (Belknap Press of Harvard University Press 2009).

4. Jhering R and Husik I, *Law As A Means To An End* (Boston Book Co 1913).

5. Kitenga G, *Introduction to Tax Law* (LawAfrica Pub 2010).

6. Muigua K, *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers Limited 2012).

7. Pigou A, *The Economics Of Welfare* (Macmillan and Co 1932).

JOURNALS

1. Fenn P, *"Introduction to Civil and Commercial Mediation'* in Chartered Institute of Arbitrators, Workbook on Mediation, (CIarb, London, 2002) pp. 50 – 52.

2. Friedman M and Friedman R, 'The Case For Free Trade' [1997] Hoover Digest < http://www.hoover.org/research/case-free-trade >

3. Jaglowitz C, *Mediation In Federal Income Tax Disputes* (1st edn, University of Windsor, Faculty of Law 1999) < http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/17454-mediation_tax.pdf > accessed 7 November 2016.

4. Jone M and J. Maples, *'Mediation as an Alternative Option in Australia's Tax Disputes Resolution Procedures* (1st edn, Australian Tax Forum 2016) < http://www.civiljustice.info/cgi/viewcontent.cgi?article=1003&context=med > accessed 7 November 2016

5. Lightman G and Cullen F, *Mediation In Revenue Cases* (1st edn, 2010) <http://taxbar.com/wp-content/uploads/2016/01/Mediation_in_Revenue_Cases_FC.pdf.pdf > accessed 7 November 2016.

6. Love I, 'Settling Out Of Court: How Effective Is Alternative Dispute Resolution?' [2011] Viewpoint: Public Policy for the Private Sector < http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Setting-out-of-court.pdf > accessed 1 November 2016.

7. Muigua K, 'Alternative Dispute Resolution and Article 159 of the Constitution' (Programme for Judges and Magistrates Training, 2012) available at < http://www.ciarbkenya.org/assets/a-paper-on-adr-and-article-159-of-constitution.pdf >accessed 22 September 2016.

8. National Alternative Dispute Resolution Advisory Council, 'The Resolve To Resolve — Embracing ADR To Improve Access To Justice In The Federal Jurisdiction' (2009) < https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/the-resolve-to-resolve-embracing-adr-improve-access-to-justice-september2009.pdf > accessed 1 November 2016.

9. Parsly D, 'The Internal Revenue Service and Alternative Dispute Resolution: Moving from Infancy to Legitimacy' (2007) 8.2 Journal of Conflict Resolution < http://cardozojcr.com/issues/volume-8-2/ > accessed 7 November 2016.

10. Thomas S, "Overview Of ADR Options At The IRS" [2007] Journal of Consumer and Commercial Law < http://www.jtexconsumerlaw.com/V10N3/V10N3ADR.pdf > accessed 1 November 2016.

11. Waris A, 'Taxation Without Principles: A Historical Analysis Of The Kenyan Taxation System' (2007) vol 1 Kenya Law Review <http://www.kenyalaw.org/Downloads_Other/waris_taxation.pdf > accessed 1 November 2016.

PRACTISE NOTES AND REPORTS

1. Law Society of New South Wales, 'Review Into The A TO's Use Of Early And Alternative Dispute Resolution' (2011) < http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/574225.pdf > accessed 7 November 2016.

2. 'Practice Notes' (*Fedcourt.gov.au*, 2016) < http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes > accessed 7 November 2016.

3. 'Practice Notes' (*Fedcourt.gov.au*, 2016) < http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes > accessed 7 November 2016.

4. 'PS LA 2009/9 - Conduct Of ATO Litigation And Engagement Of ATO Dispute Resolution (As At 19 December 2013)' (Law.ato.gov.au, 2016) < http://law.ato.gov.au/atolaw/view.htm?docid=PSR/PS20099/NAT/ATO/0000 > accessed 7 November 2016

WEBSITES

1. 'Alternative Dispute Resolution: A New Way To Settle Your Tax Dispute' (*PwC*, 2016) < http://www.pwc.co.uk/services/tax/insights/alternative-dispute-resolution-a-new-way-to-settle-your-tax-dispute.html > accessed 7 November 2016.

2. http://www.accaglobal.com A, 'HMRC'S Alternative Dispute Resolution | ACCA Global' (*Accaglobal.com*, 2016) <http://www.accaglobal.com/gb/en/technical-activities/technical-resources-search/2014/may/hmrc-alternative-dispute-resoution.html > accessed 7 November 2016.

3. Katz-Pearlman S, 'Tax Disputes And Controversy Update | KPMG | GLOBAL' (*Home.kpmg.com*, 2016 <https://home.kpmg.com/xx/en/home/insights/2014/08/focus-on-alternative-dispute-resolution.html > accessed 6 October 2016

NEWSPAPERS

1. Barasa F, 'New Tax Dispute Resolution Plan' *Business Daily* (2015) < http://www.businessdailyafrica.com/Opinion-and-Analysis/New-tax-dispute-resolution-plan/539548-2860512-b4jnjs/index.html > accessed 8 October 2016.

2. Mumo M, "Sh34bn in Tax Revenue Held up in On-going Court Cases' *Daily Nation* (2013) < http://mobile.nation.co.ke/business/Sh34bn-in-tax-revenue-held-up-in-ongoing-court-cases/1950106-2043208-format-xhtml-lnnxcoz/index.html > accessed 7 November 2016.

3. Muthoni L, 'Amend Tax Disputes Resolution Process - Capital Blog' (*Capital Blog*, 2016) < http://www.capitalfm.co.ke/eblog/2011/06/08/amend-tax-disputes-resolution-process/ > accessed 4 August 2016.