

Tax Administration in Kenya

By Prof. Migai Akech

Draft of 14th July 2015

Administrative Law & Governance Project

University of Nairobi, School of Law

I. INTRODUCTION	3
II. ADMINISTRATIVE JUSTICE AND EFFICIENCY IN TAX COLLECTION	5
III. THE ADMINISTRATION OF INCOME TAX AND VALUE ADDED TAX	8
A. PUBLIC PARTICIPATION IN RULE-MAKING	9
B. RULE APPLICATION AND ADJUDICATION OF DISPUTES	16
I. TAX ASSESSMENT AND DISPUTE RESOLUTION PROCEDURES	16
II. TAX ASSESSMENT AND DISPUTE RESOLUTION PRACTICE	23
IV. CONCLUSION	39

I. Introduction

People form government so that it can protect their liberties, according to the social contract. The government performs this important function by preserving order through promulgating and enforcing laws.¹ Life “under law” is therefore perceived to be more desirable than life “in the state of nature,” which is said to be insecure and prone to disputes since there is no law, and no one to enforce it.² But government requires resources if it is to preserve order. It therefore becomes necessary to require citizens to provide the financial resources needed to run government, so that it can provide public goods such as order. This is the primary objective of taxation,³ which is a system of compulsory contributions levied by government on taxpayers in order to raise the revenue it requires to pursue the public good.

Although taxation is therefore necessary, the taxing power needs to be exercised judiciously, lest it threatens the very same individual liberties that government is established to protect. In other words, the taxing power can be abused, just like any other power. For this reason, many countries have established various principles to guide the exercise of the taxing power. These principles include equity (the idea that all taxpayers with a greater ability to do so should pay a greater amount of tax, while similarly situated taxpayers should be treated similarly),⁴ fair treatment of taxpayers, and accountability of the tax system to taxpayers (for example, the idea that changes in tax policy should be publicized and open to public debate).

How, exactly, is the taxing power exercised? Governments impose all kinds of direct and indirect taxes, including taxes on the income of individuals and business entities, taxes on goods and services, taxes on property, taxes on exports and imports, and taxes on social security contributions. These taxes are administered differently. For example, in the case of the income of individuals,

¹ See Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, 2004).

² Ibid.

³ See, e.g., Reuven S. Avi-Yonah, “The Three Goals of Taxation,” 60 *Tax Law Review* 1 at 3 (2006).

⁴ See, e.g., Danshera Cords, “Administrative Law and Judicial Review of Tax Collection Decisions,” 52 *Saint Louis University Law Journal* 429 at 430 (2008).

their employers, acting as the agents of the taxing authority, are usually required by law to deduct the tax at source. But where individuals are self-employed, or have obtained other chargeable incomes in the tax year,⁵ they would be required to register as taxpayers (by obtaining a Personal Identification Number or PIN), complete self-assessment returns for that year, and submit these returns to the taxing authority. In these returns, they would be required to declare their incomes, compute their tax liability, and pay tax to the government if due, or seek refunds if applicable. This approach is also used to administer the taxes payable by business entities, including income tax and taxes on goods and services. In the case of value added tax (VAT), for example, registered business entities would be required to charge, collect and account for VAT on their taxable supplies,⁶ and remit the tax to the government. In either case, the taxing authority is typically empowered to audit or investigate a taxpayer where it has reason to believe that the taxpayer's self assessment return is not truthful, and to adjust the taxpayer's liability. This power is necessary because the government should be able to verify the information provided by taxpayers and detect non-compliance. It is also common for the law to empower the taxing authority to issue what are known as agency notices, by which the taxing authority compels an institution holding a taxpayer's money, such as a bank, to transmit such money to it in settlement of a tax debt.

These are wide-ranging, and often, discretionary, powers, and their exercise may have adverse impacts on the liberties and livelihoods of taxpayers. For example, the issuance of an agency notice can literally lead to the closure of a business entity. As in other contexts, these powers should therefore be exercised in a manner that adheres to the principles of administrative law.

This Chapter examines Kenya's tax administration regime from the perspective of administrative law. It seeks to determine how the taxing authority, known as the Kenya Revenue Authority (KRA), makes and applies rules, and adjudicates disputes arising from the exercise of its powers relating to the administration of income tax and VAT. In doing so, the chapter has three

⁵ A tax year is an annual accounting period for keeping records and reporting income and expenses. In Kenya, the tax year runs from the 1st of January to the 31st of December.

⁶ A taxable supply is a sale of taxable goods and/or delivery of taxable services. Taxable here means that VAT should be applied to the affected transaction.

overall concerns. First, the chapter seeks to establish whether and the extent to which KRA's administrative practices adhere to the principles of administrative law. Second, it seeks to establish whether and the extent to which the public participate in the decision-making processes of the KRA. Finally, it seeks to assess the role and impact of judicial review on the KRA's decision-making.

The remainder of the chapter is organized as follows. Part II provides a conceptual framework and examines taxation in the context of administrative justice. Part III analyzes Kenya's tax administration regime, focusing on public participation in rule making, the administration of income tax and VAT, and the resolution of tax disputes. Part IV concludes.

II. Administrative Justice and Efficiency in Tax Collection

The goal of administrative justice is that individuals should receive justice whenever they encounter administrative decision-making. Its concern is that administrative decision-making should be considerate. This entails adhering to the principles of administrative law, including legality, reasonableness, procedural fairness, and fulfilling legitimate expectations. Procedural fairness is particularly important in tax administration, in terms of rule making, rule application and adjudication of disputes. First, fair procedures – in the sense of a taxpayer having the opportunity to present his or her arguments, to be listened to, and to have those views considered in the final decision taken by the taxing authority – contribute to fair outcomes.⁷ So that where, for example, the taxing authority wishes to challenge a taxpayer's return, it ought to give the taxpayer an opportunity to make representations. Second, and perhaps even more importantly, research demonstrates that procedural fairness encourages voluntary self-reporting, which enhances the efficiency of a tax system since it reduces the costs of tax collection.⁸ In other words, taxpayers are more likely to comply with the law (by, for example, filing their tax returns) if they believe that

⁷ See D. J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* 6 (Clarendon Press, 1996).

⁸ Cords, *supra* note __ at 430; Kristina Murphy, "Procedural Justice and Tax Compliance," Centre for Tax System Integrity, Working Paper 56, Australian National University, February 2004.

the system will treat them fairly.⁹ The rights of taxpayers should therefore be clearly set out and respected.

But while it is accepted that there should be administrative justice in tax administration, realizing this goal is often a daunting task for many jurisdictions. The particular challenge that tax administration presents is that taxes ought to be collected with all due speed, otherwise government would not be able to obtain the resources it requires to provide public goods. But giving taxpayers administrative justice means that they must have an opportunity to challenge the decisions of the taxing authority, including assessments, audits, and the issuance of agency notices. However, the exercise of this right to contest the decisions of the taxing authority is often dilatory, particularly where taxpayers seek judicial intervention, with the effect that taxes due are not collected on time, thereby jeopardizing the delivery of public goods. A need therefore arises to balance the right of taxpayers to administrative justice with the need for efficient tax collection.

One solution to this dilemma is to establish a dispute resolution mechanism within the institution of the taxing authority, while restricting the jurisdiction of courts to entertain taxpayer complaints. In Australia, for example, the Administrative Decisions (Judicial Review) Act 1977 removes the following classes of decisions from its purview: decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge, or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty.¹⁰ Australian Courts, therefore, do not have jurisdiction to entertain taxpayer complaints over such decisions. The idea is to force taxpayers to use the taxing authority's dispute resolution mechanism.¹¹ The danger with this approach, however, is that such an ouster clause may prevent the courts from redressing genuine cases of unfair administrative action in tax assessments. In principle, courts should therefore be

⁹ Jinyan Li, "Taxpayer Rights in Canada," 7 *Revenue Law Journal* 83 (1997).

¹⁰ Administrative Decisions (Judicial Review) Act 1977, Schedule 1, Para. (e) (Australia).

¹¹ Paul Bray, "The ADJR Act: Its Effect on Taxation Administration," 20 *Federal Law Review* 138 at 139 (1991) (Observing that the "well-established system of judicial and administrative review of assessments is one of the main reasons why assessment decisions are excluded from the ambit of the ADJR Act.")

able to review a taxing authority's decision-making processes, provided they do not substitute their own decisions for that of the taxing authority. This, perhaps, explains why Australian courts have interpreted the above ouster clause narrowly, and why commentators have called for its repeal.¹²

Similarly, United States federal law prohibits lawsuits whose objective is to prevent the collection of taxes.¹³ However, there are exceptions to this injunction. One such exception relates to the Internal Revenue Service Restructuring and Reform Act of 1998.¹⁴ This Act gives taxpayers a number of new rights, including the right to a collection due process (CDP) hearing before the taxpayer's property is taken away by levy or after the filing of what is known as a notice of federal tax lien. Before the Internal Revenue Service (IRS) levies on a taxpayer's assets to collect tax liability that is assessed but unpaid, it must send the taxpayer a notice of the right to a CDP hearing.¹⁵ The notice must, in simple and non-technical terms, inform the taxpayer of the amount of the unpaid liability, and describe the proposed collection action.¹⁶ The taxpayer is then given thirty days from the date on which the IRS mailed the CDP notice to request a CDP hearing.¹⁷ And if the taxpayer requests a CDP hearing, the IRS Office of Appeals must hold this hearing before collection activity can proceed.¹⁸ The officer conducting the CDP hearing must be impartial, in the sense of not having had prior involvement with the unpaid tax specified in the CDP notice.¹⁹ It should be noted that the CDP hearings are informal, and the courts have upheld hearing procedures such as face-to-face hearings, telephonic hearings, and correspondence hearings.²⁰ Following the hearing, the officer conducting it issues a CDP determination.²¹ A taxpayer who is dissatisfied with the

¹² See, e.g., Vince Morabito and Stephen Berkoczy, "Restricting the Judicial Review of Income Tax Assessments: The Scope and Purpose of Schedule 1(e) of the Administrative Decisions (Judicial Review) Act 1977 (Cth)," 21 *Sydney Law Review* 36 (1999).

¹³ 26 U.S. Code §7421 provides that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."

¹⁴ Internal Revenue Service Restructuring and Reform Act 1998, Pub. L. No. 105-206, 112 Stat. 685.

¹⁵ Danshera Cords, "Collection Due Process: The Scope and Nature of Judicial Review," 73 *University of Cincinnati Law Review* 1021 at 1025 (2005).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid* at 1026.

²¹ *Ibid* at 1027.

determination may appeal to the courts, as an exception to the tax anti-injunction.²²

Has this reform measure resolved the dilemma of dilatory taxpayer complaints to the courts? According to some commentators, although the CDP requests delay the tax collection process, and while “some taxpayers have used the CDP procedures to advance frivolous positions and delay collection, many more taxpayers use the CDP procedures properly – as a forum to propose collection alternatives, raise... defenses, and challenge the amount of underlying tax liability when the taxpayer has not otherwise had a chance to do so.”²³ Nevertheless, it is felt that the CDP hearing rights and procedures should be clarified, since they require significant administrative and judicial resources and sometimes delay the collection of unpaid tax liabilities.²⁴

Ultimately, the challenge for the taxing authority is to ensure that it establishes procedures that guarantee the taxpayer procedural fairness but do not unduly burden the tax collection system.

Let us now examine how Kenya’s tax administration regime has handled this challenge.

III. The Administration of Income Tax and Value Added Tax

The Kenya Revenue Authority (KRA) is the government agency charged with collecting revenue, a function that entails administering and enforcing all tax laws,²⁵ including the Income Tax Act²⁶ and the Value Added Tax Act.²⁷ Prior to the establishment of the KRA in 1995, the Government’s revenue collection function was distributed among some five ministries and departments, leading to inefficiency and low accountability since the work of these agencies was not

²² Ibid.

²³ Ibid at 1022-1023.

²⁴ Danshera Cords, “How Much Process is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings,” 29 *Vermont Law Review* 51 at 54 (2004).

²⁵ Kenya Revenue Authority Act 1995, sections 3 and 5. KRA administers seventeen tax laws.

²⁶ Income Tax Act, Chapter 470, Laws of Kenya.

²⁷ Value Added Tax Act, Act No. 35 of 2013 (This Act repealed the Value Added Tax Act, Chapter 476, Laws of Kenya).

coordinated.²⁸ The KRA was therefore established to enhance efficiency, transparency and accountability in revenue collection by bringing the various agencies under one umbrella.

A. Public Participation in Rule-Making

The Cabinet Secretary (formerly Minister) is solely responsible for making the rules or regulations necessary for the carrying out or giving effect to the purposes of all the tax laws.²⁹ The Board of Directors of KRA also has a limited rule-making role, in so far as it has power to make regulations for the carrying into effect the provisions of the Kenya Revenue Authority Act.³⁰ Accordingly, the applicable laws do not require public participation in these rule-making processes. This view was confirmed in *Republic v Minister for Finance & another ex parte Peter Kinya & 295 others*.³¹ The petitioners' complaint was that the Minister had not considered their views in enacting the Value Added Tax (Electronic Tax Registers) Regulations of 2004. The court held that the law did not impose an obligation on the Minister to give the petitioners, or taxpayers in general, a hearing before making regulations on taxation. The court seemed to suggest that public participation in the making of these regulations was not necessary provided that the legislature had consulted taxpayers in enacting the primary legislation.³² But this decision was made before the Constitution of 2010 was promulgated.

This Constitution stipulates that “there shall be openness and accountability, including public participation, in financial matters.”³³ Further, it requires the National Assembly to seek the representations of the public and take its

²⁸ Kenya Revenue Authority, Write-up for the Research Project on Administrative Law and Governance in East Africa 2 (2014).

²⁹ See, e.g., Income Tax Act, section 130; Value Added Tax Act 2013, section 67.

³⁰ Kenya Revenue Authority Act 1995, section 21. The Board has power to make rules prescribing procedures for the appointment of the Authority's members of staff, prescribing a code of conduct and discipline, concerning the administration and management of the funds of the Authority, and establishing performance targets.

³¹ *Republic v Minister for Finance & another ex parte Peter Kinya & 295 others* [2007] eKLR.

³² *Ibid* (observing that “Parliament intended that, before any taxation is effected taxpayers be heard, the legislation would have made provisions for the hearing and consultation of taxpayers.”)

³³ Constitution of Kenya 2010, article 201(a).

recommendations into account when it is discussing the Government's annual estimates of revenue and expenditure.³⁴ It is through this process that the National Assembly considers the Finance Bill every year. This Bill is important for our purposes because the Government tends to use it to introduce new taxes. Where the Finance Bill proposes to introduce a tax that will affect a particular category of persons – as has happened in the case of stockbrokers, the gaming industry, and the insurance industry – a question arises as to what kind of procedures would satisfy the constitutional requirement of public participation.

This question arose in *Association of Gaming Operators-Kenya & 41 others v Attorney General & 4 others*.³⁵ The petitioners claimed that the National Assembly had failed to consult the gaming industry during the legislative process leading to the enactment of the Finance Act 2013. While the National Assembly was considering the bill, the petitioners had written to the relevant committee of the National Assembly, indicating that the proposed introduction of a twenty per cent withholding tax on winnings gained from betting and gaming was astronomical and prohibitive, and would have long lasting and drastic impacts on the gaming industry. But this committee did not give the petitioners an oral hearing to elaborate these views. The issue before the court was whether the Finance Act 2013 was unconstitutional for want of public participation. The court held that there was sufficient public participation in the consideration of this law, reasoning that the petitioners were not entitled to make oral submissions before the relevant committee of the National Assembly. According to the court, “an oral hearing is not necessary in every situation and the legislature has wide latitude to determine how to receive submissions.”³⁶ In order for the National Assembly to satisfy the public participation requirement, the court took the view that it only needed to provide an opportunity “for some form of public participation,” including allowing the public to make written or oral submissions.³⁷ Nevertheless, since the petitioners were likely to be directly affected by the new law, it is arguable that they were entitled to an oral hearing.

³⁴ Constitution of Kenya 2010, Article 221(5).

³⁵ *Association of Gaming Operators-Kenya & 41 others v Attorney General & 4 others* [2014] eKLR.

³⁶ *Ibid* at para. 29.

³⁷ *Ibid*.

A similar scenario unfolded in *Kenya Association of Stock Brokers and Investment Banks v Attorney General & another*.³⁸ Here, the petitioner sought to challenge certain provisions of the Finance Act 2014 on the ground, among other things, that it had been enacted without public participation contrary to the requirements of the constitution. By this law, the National Assembly had reintroduced a capital gains tax (CGT) that had been suspended in 1985 to encourage investment in the real estate sector as well as spur growth in the securities market. The CGT is payable on the net capital gains realized by a person on the transfer of property, including marketable securities. The government now felt that the time had come to reintroduce the CGT, to ensure that those who earned income from capital gains bore a similar burden to those who earned labor or other incomes.³⁹ The petitioner was aggrieved that although the Finance Bill 2014 that was published and shared with the public had not contained any amendments relating to CGT, the National Assembly only introduced the offending provisions when it was discussing the bill on the floor of the house. The public did not therefore have an opportunity to comment on the said provisions. And because there was no public participation,⁴⁰ the petitioner contended that the resulting law was not only vague (in the sense of lacking clarity whether it would be a transactional tax payable at the end of each transaction, or a regular tax payable at the end of the tax year), but also practically impossible to comply with (in the sense that in the case of stockbrokers it would not be possible to correctly calculate the CGT payable since the information they would require to do so would neither be verifiable, nor be available at the time of trading). The petitioner was therefore concerned that the new law would expose “the stockbrokers to liability for failure to collect and remit the correct amount of tax [that] is not practical and makes it extremely difficult to run a viable stockbroker business.”⁴¹

In its response to the petition, the KRA had contended that it was not mandated to ensure public participation in the enactment of the Finance Act. It

³⁸ *Kenya Association of Stock Brokers and Investment Banks v Attorney General & another* [2015] eKLR.

³⁹ *Ibid* at para 47.

⁴⁰ *Ibid* at para 27.

⁴¹ *Ibid* at para 24.

also contended that the Constitution did not define public participation. Further, the KRA thought that the Finance Act had been duly enacted by the National Assembly, having been considered by the parliamentary committee responsible for scrutinizing taxation measures, and having gone through the required three readings in the National Assembly. Nevertheless, it noted that it had, since 1998, been involving stakeholders in the budget making process through a Medium Term Expenditure Framework in which sector specific discussions were conducted before coming up with fiscal measures. But it should be noted that although stakeholders have welcomed KRA's efforts to seek their views, some of them feel that it does not pay serious attention to those views.⁴²

The court in *Kenya Association of Stock Brokers and Investment Banks* agreed with the KRA. It held that the provisions of the Finance Act 2014 that the petitioner had disputed were constitutional, debate thereon having been in accordance with the standing orders of the National Assembly. According to the court, Parliament has "wide discretion in determining the manner in which public participation will take place, and it need not take place at the pre-legislation stage."⁴³ Further, the court reasoned that "while the public has a right to participate, there is no requirement that the views held by any particular group or individual on a matter before the legislature must prevail."⁴⁴ The court also thought that because the CGT was not new, having merely been suspended in 1985, its re-introduction did not now require prior public participation.⁴⁵ In this respect, the judge observed that "As a provision that was already in the statute books, whose re-introduction was already debated in 2006 and 2013, and was again debated in 2014, I am unable to find a violation of the principle of public participation in the circumstances of this case."⁴⁶ Further, the court reasoned that the lack of public participation would not render the re-introduction of the tax unconstitutional. In the court's view, the constitutional principle of (direct) public participation was not intended to "negate the principle of indirect participation through duly elected representatives in whom

⁴² Interview with tax lawyer, Nairobi, 21st April 2015.

⁴³ *Kenya Association of Stock Brokers and Investment Banks v Attorney General & another* [2015] eKLR at para 90.

⁴⁴ *Ibid* at para 93.

⁴⁵ *Ibid* at para 101.

⁴⁶ *Ibid* at para 103.

the citizen has vested legislative power under Article 1 of the Constitution.” According to the court, “it would render legislative business redundant, which would run counter to the provisions of Article 1 of the Constitution, if lack of direct public participation by a particular sector would lead to invalidation of legislation.”

The effect of this decision is to render the requirement of public participation in the enactment of legislation superfluous. What, then, would be the point of Article 201 of the Constitution if it cannot shape the manner in which Parliament goes about the business of making law? The court’s decision in *Kenya Association of Stock Brokers and Investment Banks* fails to appreciate the limitations of representative government. Legislators do not always represent the views, and act in the interests, of their electors.⁴⁷ In any case, our largely first-past-the-post electoral system has served to ensure that ethnic majorities have better representation than, and therefore dominate, ethnic minorities in governance.⁴⁸ In addition, there are foreign entities that invest in the property and securities markets. Such entities do not have “duly elected representatives” in Parliament, and their views can only be considered if there is effective direct participation in the affairs of the legislature. It is also not persuasive for the court to claim that because the re-introduction of CGT was debated in the past, it cannot now be open to debate, irrespective of any changes that might have occurred in the country’s social, economic and political circumstances.

Mechanisms that facilitate the effective participation of minorities in the affairs of the legislature, such as direct participation in law making, are therefore critical if we are to realize inclusive democracy. From this perspective, courts therefore ought to interrogate the nature of the direct participation that occurs with respect to the consideration of any law by Parliament. The courts should be slow to validate laws enacted without direct public participation. And while there is no requirement that the views held by any particular group or individual on a matter before the legislature must prevail, it must be clearly demonstrated that the legislature *in fact* considered such views. In other words, Parliament ought to account to any group or individual that gives its views on a bill, so that

⁴⁷ Robert A. Dahl, *Democracy and Its Critics* 30 (Yale University Press, 1989).

⁴⁸ Migai Akech, “Building a Democratic Parliament in Kenya” 4 (ICJ Kenya, 2015).

such groups or individuals can know whether or not, and how exactly, their views have been treated. And in the absence of such accountability, the courts ought to be prepared to invalidate the affected laws. It is only through such measures that the public can be persuaded that the tax system is accountable – that is, that changes in tax policy are publicized and open to public debate.

Even where aggrieved parties have contended that proposed taxes would be impractical to implement (due to vagueness, for instance), the courts have been hesitant to consider the merits of such contentions, reasoning that to do so would be to question the wisdom of legislation or its policy object. For example, in *Mark Obuya, Tom Gitogo, Thomas Maara Gichuhi acting for or on behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes*,⁴⁹ the court observed that “The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court the licence to declare it unconstitutional [read interfere with it].”⁵⁰ Similarly, in *Kenya Association of Stock Brokers and Investment Banks*, the court observed that it could not inquire into the wisdom or otherwise of a law that met constitutional muster, and should there be problems with its implementation, that would be a matter to be addressed to the tax authorities and the legislature, but not the courts.⁵¹ Surely, part of the reason for public participation is to facilitate the implementation of proposed taxes. Wouldn’t it therefore be preferable if any potential challenges relating to a proposed tax were debated before the law imposing it were enacted?

From the foregoing analysis, it is clear that the public’s right to participate directly in the making of tax laws and regulations is tenuous in practice, despite the constitution mandating it. Not only is the public (including interest or affected groups) not entitled to an oral hearing when Parliament is considering tax legislation, but the courts will be exceedingly hesitant to invalidate any law enacted without direct public participation, however impracticable. Further, the KRA does not always invite the public to participate in its rule-making processes,

⁴⁹ *Mark Obuya, Tom Gitogo, Thomas Maara Gichuhi acting for or on behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes* [2014] eKLR.

⁵⁰ *Ibid* at para 32.

⁵¹ *Kenya Association of Stock Brokers and Investment Banks*, *supra* note __ at para 68.

⁵² but there is a modicum of public participation through various channels.⁵³ Whenever it seeks public participation in its rule-making, KRA's practice is to put advertisements in the print media for the public to send proposals (for example, on the issues they would like to be addressed in the Finance Bill), and then hold meetings with stakeholders.⁵⁴ It also holds informal discussions with stakeholders in some cases.⁵⁵ Nevertheless, the KRA does not have a firm policy on public participation in its rule-making processes, with the result that the public participation that it allows from time to time is not structured.

However, some of the stakeholders do not think that the KRA takes the question of public participation seriously. According to these stakeholders, once the authorities (the Ministry of Finance, the KRA and Parliament) have decided to impose a tax, they are reluctant to remove it, irrespective of its impracticability or likely impact on the affected stakeholders.⁵⁶ They cite the case of *Mark Obuya, Tom Gitogo, Thomas Maara Gichuhi acting for or on behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes*⁵⁷ as an illustration. Here, the KRA had imposed an excise duty on insurance premiums and premium related charges or fees. The insurance industry was aggrieved that it had not been consulted before the Finance Bill 2013 seeking to impose excise duty on their services was published. They were concerned that the tax would make insurance products expensive and inaccessible for the ordinary citizen, and maintained that they should have been given an opportunity to voice their concerns. Although they lost this case, the KRA engaged them thereafter. But they felt that the public participation process that ensued was mere window dressing, as it seemed to them that the authorities had long made up their mind to impose the tax.⁵⁸ Nevertheless, it should be noted that the KRA endeavors to

⁵² Interview with tax lawyer, Nairobi, 21st April 2015; interview with tax consultant, Nairobi, 22nd April, 2014; interview with tax lawyer, Nairobi, 24th April 2015; interview with tax consultant, Nairobi, 5th May 2015.

⁵³ Interview with tax consultant, Nairobi, 8th May 2015.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Interview with tax lawyer, Nairobi, 24th April 2015; interview with tax consultant, Nairobi, 5th May 2015.

⁵⁷ *Mark Obuya, Tom Gitogo, Thomas Maara Gichuhi acting for or on behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes* [2014] eKLR.

⁵⁸ Interview with tax lawyer, Nairobi, 24th April 2015.

inform the public of the existence of new legal requirements or rules, in an effort to facilitate compliance therewith.

B. Rule Application and Adjudication of Disputes

i. Tax Assessment and Dispute Resolution Procedures

The KRA operates a self-assessment system for the administration of income tax and VAT. It has been doing so since 1995, when Kenya began modernizing its tax system.⁵⁹ Prior to this, the government operated a provisional assessment system, by which it would issue assessments based on information provided by taxpayers.⁶⁰ In the case of income tax, the Income Tax Act (ITA) now requires every person with chargeable income to obtain a PIN from the Domestic Taxes Department. Having acquired a PIN, the taxpayer is required to declare his or her income and compute his or her tax liability by completing a self-assessment return and submitting it to the Domestic Taxes Department.⁶¹ For individuals (namely, employees and sole proprietors) and partnerships, the return of income for any year of income should be submitted on or before the 30th of June of the following year. The only individuals exempted from this obligation are employees who had no income chargeable to tax for the applicable year of income other than emoluments, and the tax payable in respect of those emoluments has been recovered under the Pay as You Earn (PAYE) system.⁶² For corporate taxpayers (such as companies, trusts and cooperatives), the return is due on or before the last day of the sixth month after the end of the accounting period. Further, individual and corporate taxpayers can make claims to the Commissioner of Domestic Taxes for the refund of taxes overpaid, and the ITA requires this Commissioner to settle such claims upon verifying their validity.

Similarly, in the case of VAT, registered business entities are required to obtain PINs, and to charge, collect and account for VAT on their taxable supplies, and remit the taxes to the government. Every registered business is required to

⁵⁹ Interview with tax consultant, Nairobi, 8th May 2015.

⁶⁰ Ibid.

⁶¹ Income Tax Act, section 52B.

⁶² Ibid, sections 37, 52B.

submit online monthly returns,⁶³ with details of the tax on goods and services charged to its customers (otherwise known as output tax) and the tax on goods and services charged by its suppliers (otherwise known as input tax).⁶⁴ The business is then required to subtract the input tax from the output tax and pay the difference to the Commissioner of Domestic Taxes, assuming the latter is greater. But where the input tax is greater, the business should carry forward the difference as a credit to its next VAT return. Further, where the business supplies what are called “zero-rated” supplies (such as exports), KRA will refund the excess of its input tax over output tax. The objective of the zero-rating policy is to enable exporters, manufacturers and suppliers of certain categories of goods and services to claim refunds for the taxes they have paid on the inputs they have incurred in producing such goods and services. For example, zero-rating is desirable where the government does not wish to tax basic foodstuffs, or it wants to encourage exports, or even investments in the production of merit goods such as roads. In the case of items such as basic foodstuffs, zero-rating is considered necessary to alleviate the burden on poor households, since VAT can be a regressive tax.⁶⁵

What administrative actions can the Commissioner take once he or she has received a taxpayer’s return or where a taxpayer fails to submit a return? In the case of income tax, the ITA provides that the Commissioner has two options where a taxpayer has delivered a return of income.⁶⁶ Either, the Commissioner may accept the return and deem the amount the taxpayer has declared as his or her self-assessment. In that eventuality, the matter ends there, and the Commissioner need not issue any further notification. Or, if the Commissioner has reasonable cause to believe that the return is not true and correct, the Commissioner may determine, according to the best of his or her judgment, the amount of the income of the taxpayer and assess the taxpayer accordingly. But where a taxpayer has not delivered a return of income, and the Commissioner

⁶³ Value Added Tax Act 2013, section 44(1).

⁶⁴ The good or service that the business supplies is its output, and the tax it charges on behalf of the Government is the output tax. But the business is bound to have purchased some goods or services in order to produce the final product that it sells to the consumer. These purchases constitute its input, in respect of which it pays what is known as an “input tax.”

⁶⁵ See, e.g., Javad Khalilzadeh-Shirazi & Anwar Shah, eds, *Tax Policy in Developing Countries* 81 (World Bank, 1991).

⁶⁶ Income Tax Act, section 73(2).

considers that the taxpayer has income chargeable to tax for the year in question, the Commissioner may, “according to the best of his judgment, determine the amount of the income of that person and assess him accordingly.”⁶⁷ The Commissioner also has power to assess a taxpayer at such additional amount as “according to the best of his judgment,” that taxpayer ought to be assessed.⁶⁸ This power applies where the Commissioner considers that the taxpayer has been assessed at a less amount than that at which he or she ought to be assessed, either in relation to the income assessed or to the amount of tax payable.⁶⁹

Evidently, these are considerably wide discretionary powers that are bound to adversely impact taxpayers. The ITA, therefore, allows taxpayers to contest the decisions of the Commissioner. It gives a taxpayer who disputes an assessment to object to the assessment, in the form of a notice in writing.⁷⁰ That notice is only be valid if it states precisely the grounds of objections to the assessment, is received by the Commissioner within 30 days after the date of service of the notice of assessment, and is accompanied by a return of income together with all the supporting documents.⁷¹ The Commissioner has three options upon receiving a valid notice of objection: amend the assessment in accordance with the objection, or amend the assessment in light of the objection “according to the best of his judgment,” or refuse to amend the assessment.⁷² If the Commissioner chooses either of the first two options, and the aggrieved taxpayer agrees with the proposed amendment, the assessment would be amended accordingly, and the Commissioner would issue that taxpayer with a notice setting out the amendment and the amount of tax payable.⁷³ But if the Commissioner exercises the second option, and the taxpayer does not agree with the Commissioner as to the proposed amendment, the assessment would nevertheless be amended as

⁶⁷ Ibid, section 73(3).

⁶⁸ Ibid, section 77.

⁶⁹ Ibid.

⁷⁰ Ibid, section 84.

⁷¹ Ibid, section 84(2). It should be noted that the Commissioner had power to admit the notice after the expiry of the thirty-day period if there was reasonable cause, the person objecting applied for the notice to be admitted out of time, and deposited with the Commissioner part of the tax due under the assessment as the Commissioner may have required. Further, a person aggrieved by the Commissioner’s refusal to admit a notice of objection out of time could, after depositing part of the tax due, appeal against the refusal to a Local Committee, whose decision was final.

⁷² Ibid, section 85(1).

⁷³ Ibid, section 85(2).

proposed by the Commissioner, and the Commissioner would issue the taxpayer with a notice setting out the amendment and the amount of tax payable.⁷⁴ And where the Commissioner exercises the third option, he or she would issue the taxpayer with a notice confirming the assessment.⁷⁵

Once the taxpayer receives such a notice, he or she could appeal the Commissioner's decision either to the Tribunal or a Local Committee, upon giving a notice of appeal in writing to the Commissioner within 30 days after receiving the Commissioner's notice setting out an amendment or confirming an assessment.⁷⁶ The Tribunal dealt with cases where the Commissioner was of the opinion that the main purpose, or one of the main purposes of a transaction, was to avoid or reduce tax liability, and cases where the Commissioner was of the opinion that a company had not distributed dividends to its shareholders within a reasonable period.⁷⁷ The Local Committees, which the Minister established in any area as he or she deemed fit, handled all other cases.⁷⁸ A refusal of the Commissioner to make a tax refund could also be appealed to the relevant Local Committee.⁷⁹ In either case, a party dissatisfied with the decision of the Tribunal or a Local Committee could appeal to a court of law.⁸⁰ It should be noted that a Tax Appeals Tribunal has now replaced the Tribunal and the Local Committees.⁸¹

In the case of VAT, similarly, the Commissioner may take a number of actions upon receiving a registered person's return or where a registered person fails to submit a return.⁸² Upon receiving a registered person's return, the Commissioner may amend an assessment "as he considers necessary to ensure that a registered person is liable for the correct amount of tax in respect of the tax period to which the assessment relates," and serve notice of the amendment

⁷⁴ Ibid, section 85(3)(a).

⁷⁵ Ibid, section 85(3)(b).

⁷⁶ Ibid, section 86.

⁷⁷ Ibid, sections 23, 24, 86.

⁷⁸ Ibid, sections 82(1), 86.

⁷⁹ Ibid, section 105.

⁸⁰ Ibid, section 86(2).

⁸¹ Tax Appeals Tribunal Act 2013.

⁸² A registered person is a person who has registered under the Act. The Act requires the following to categories of persons to register: (a) a person who has made or expects to make taxable supplies, the value of which is five million shillings or more in any period of twelve months; or (b) a person who is about to commence making taxable supplies the value of which is reasonably expected to exceed five million shillings in any period of twelve months. Income Tax Act, section 34.

on the registered person.⁸³ On the other hand, where a registered person fails to submit a return, or keep proper books of accounts and records, or apply for registration as a registered person, the Commissioner may make an assessment of the tax payable by the registered person, and issue such a person with a notice stating the amount of tax payable.⁸⁴

In either scenario, a person who disputes the Commissioner's assessment may object to the assessment, by giving the Commissioner a notice in writing.⁸⁵ This notice must satisfy the same conditions of validity applicable to notices under the ITA. Again, as in the case of the ITA, the Commissioner has three options upon receiving a valid notice of objection: amend the assessment in accordance with the objection, or amend the assessment in light of the objection according to the best of his judgment, or refuse to amend the assessment. The only difference is that the VAT Act stipulates that the Commissioner must exercise any of these options within thirty days.⁸⁶ If the Commissioner chooses either of the first two options, and the person objecting agrees with the proposed amendment, the assessment would be amended accordingly, and the Commissioner would issue that person with a notice setting out the amendment and the amount of tax payable, within fifteen days.⁸⁷ However, if the Commissioner exercises the second option, and the person objecting does not agree with the Commissioner as to the proposed amendment, the assessment would nevertheless be amended as proposed by the Commissioner, and the Commissioner would issue that person with a notice, within fifteen days, setting out the amendment and the amount of tax payable.⁸⁸ And where the Commissioner exercises the third option, he or she would issue the person objecting with a notice confirming the assessment, again within fifteen days.⁸⁹ So that the VAT Act establishes timelines within which the Commissioner must exercise any of the three options. It also imposes a sanction where the Commissioner violates these timelines: the Commissioner shall be deemed to have agreed to amend an assessment in

⁸³ Ibid, section 46.

⁸⁴ Ibid, section 45.

⁸⁵ Ibid, section 50.

⁸⁶ Ibid, section 50(4).

⁸⁷ Ibid.

⁸⁸ Ibid, section 50(5).

⁸⁹ Ibid, section 85(3)(b).

accordance with the objection should the Commissioner fail to communicate his or her decision on a person's objection within sixty days of the receipt of the objection.⁹⁰

Formerly, a person aggrieved by the decision of the Commissioner could appeal to the VAT Appeals Tribunal.⁹¹ It is interesting to note that the law required such a person to pay to the Commissioner the assessed tax or such part thereof as the Commissioner could require.⁹² And the Commissioner now has far-reaching powers once the tax due is payable. First, the VAT Act 2013 empowers the Commissioner to require the taxpayer or registered business concerned to furnish security for the due tax.⁹³ Second, the due tax immediately attracts various penalties. In the case of income tax, a penalty of twenty per cent immediately becomes due and payable.⁹⁴ In addition, a late payment interest of two per cent per month shall be charged on the tax remaining unpaid for more than one month after the due date until the full amount is recovered.⁹⁵ However, this interest shall not exceed one hundred per cent of the principal tax owing, and shall not attract interest.⁹⁶ Late payments of VAT also attract interest,⁹⁷ except here any interest that remains unpaid after becoming due and payable attracts a further interest of two per cent per month.⁹⁸ In both cases, the Commissioner has power to grant remission of the whole or part of the penalty or interest due. In the case of VAT, the Commissioner may do so if he or she is "satisfied that such remission is justified."⁹⁹ And in the case of income tax, the Commissioner need not demonstrate that the remission is justified.¹⁰⁰

A party dissatisfied with the decision of this Tribunal could appeal to the High Court.¹⁰¹ Following the enactment of the Tax Appeals Tribunal Act 2013, the Tax

⁹⁰ Ibid, section 50(7).

⁹¹ Value Added Tax Act, Chapter 476, Laws of Kenya, section 33 (Repealed).

⁹² Ibid, section 33 (1).

⁹³ Value Added Tax Act 2013, section 47(1).

⁹⁴ Income Tax Act, section 72D.

⁹⁵ Ibid, section 94(1).

⁹⁶ Ibid.

⁹⁷ Value Added Tax Act, section 21(1).

⁹⁸ Ibid, section 21 (2).

⁹⁹ Ibid, section 21(3).

¹⁰⁰ Section 94(4) of the Income Tax Act simply provides that "The Commissioner may, upon application by a person from whom interest is due under this section, remit whole or part of any penalty or late payment interest or both such penalty and interest.

¹⁰¹ Value Added Tax Act, Chapter 476, Laws of Kenya, section 33(2) (Repealed).

Appeals Tribunal now hears all disputes arising from the decisions of the Commissioner.¹⁰² This Act requires a person aggrieved by a decision of the Commissioner to appeal to the tribunal upon giving a notice in writing to the Commissioner. It then requires the appellant to submit a written notice of appeal to the tribunal within thirty days upon receipt of the Commissioner's decision.¹⁰³ Further, within fourteen days from the date of filing the notice of appeal, the appellant shall submit a memorandum of appeal, statement of the facts, and the tax decision complained of.¹⁰⁴ The Commissioner has thirty days from the date of being served with a copy of the appeal to submit to the tribunal its statement of facts including the reasons for the tax decision.¹⁰⁵ And the tribunal has ninety days, from the date the appeal was filed, to hear and determine the appeal.¹⁰⁶ The VAT Act also gives the Commissioner a wide power to require a registered person in respect of whom it is demanding the payment of taxes to provide security for the amount it is claiming.¹⁰⁷

It should also be noted that the Commissioner has the power to issue instructions – called “agency notices” – to institutions holding a taxpayer's money, such as a bank or a debtor, to transmit such money directly to the KRA in settlement of a tax debt. The applicable procedures are essentially the same for both income tax¹⁰⁸ and VAT.¹⁰⁹ First, the Commissioner issues a written notice to the person holding the taxpayer's money, appointing that person as the agent¹¹⁰ of the concerned taxpayer or registered business. This notice instructs the agent

¹⁰² Section 12 of the Tax Appeals Tribunal Act provides that “A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal.”

¹⁰³ Ibid, section 13(1).

¹⁰⁴ Ibid, section 13(2).

¹⁰⁵ Ibid, section 15.

¹⁰⁶ Ibid, section 13(7).

¹⁰⁷ Value Added Tax Act 2013, section 47. This section provides that “The Commissioner may, in order to secure the payment by any person of any tax, or other sum payable under this Act, require the person concerned to furnish security thereof in such manner as may be prescribed and for such amount as the Commissioner considers reasonable having regard to the circumstances.”

¹⁰⁸ Income Tax Act, section 96.

¹⁰⁹ Value Added Tax Act 2013, section 25.

¹¹⁰ An agent is a person who: (a) owes or is about to pay money to the principal or registered person; or (b) holds money for or on account of the principal or registered person; or (c) holds money on account of some other person for payment to the principal or registered person; or (d) has authority from some other person to pay money to the principal or registered person. Income Tax Act, Section 96(10); Value Added Tax Act 2013, section 25.

to pay the amount of tax specified therein within thirty days,¹¹¹ although the VAT Act does not stipulate the period within which this tax is to be paid. Second, the agent has seven days to notify the Commissioner where it is unable to comply with this notice, and the Commissioner is at liberty to either accept or reject this notification. Third, following the issuance of this notice, the Commissioner may also require the agent to furnish him or her with a return showing the money it is holding for the taxpayer or registered business. The two statutes require the taxpayer or registered business to supply this return “within a reasonable time, not being less than thirty days from the date of service of the [agency] notice.”¹¹² Fourth, if the agent fails to pay the amount of tax specified in the agency notice within thirty days, the Commissioner shall collect and recover the tax as if it were due and payable by the agent.¹¹³

ii. Tax Assessment and Dispute Resolution Practice

In cases where the KRA doubts the truthfulness of returns how does it go about determining the income of a taxpayer and assess the tax payable (in the case of income tax), or determine the tax payable by a registered person (in the case of VAT)? Second, how does the KRA process claims for tax refunds? Third, to what extent are the principles of administrative law followed in the administration of income tax and VAT? Fourth, has the right of taxpayers to administrative justice been balanced with the need for efficient tax collection? We sought to answer these questions by interviewing senior officers of the KRA, tax experts and reviewing the decisions of the tax tribunals and the judicial review decisions of the courts.

KRA has a number of options where it doubts the truthfulness of a return.¹¹⁴ First, it can carry out compliance checks. This procedure is based on the realization that some taxpayers do not file valid returns either because they do not understand the law, or do not know how to comply. A compliance check therefore seeks to assist such taxpayers to comply with the law. Second, KRA can

¹¹¹ Income Tax Act, section 96(7).

¹¹² Income Tax Act, section 96(8); Value Added Tax Act 2013, section 25(4).

¹¹³ Income Tax Act, section 96(7).

¹¹⁴ Interview with KRA officer, 16th October 2014, Large Taxpayers Officer, Times Tower, Nairobi.

carry out audits. This procedure applies to taxpayers who are either evading (that is, deliberately seeking not to pay tax) or undertaking tax planning (that is, organizing their affairs with a view to pay less tax than is due). Third, KRA can carry out investigations. This procedure applies to taxpayers who are engaging in fraudulent activities, and have no intention of paying taxes that are due. To assist it in carrying out investigations, KRA has established a revenue protection service. Further, the ITA and the VAT Act give it powers to raid the premises of taxpayers.

In the case of audits, both the ITA¹¹⁵ and the VAT Act¹¹⁶ empower the Commissioner, by notice in writing, to require a taxpayer or registered person to produce for examination any documents (such as accounts, books of accounts, and contracts) that the Commissioner may consider necessary. Further, these laws empower the Commissioner to inspect such documents and take copies of any entries therein. It is also worth noting that the Commissioner has latitude with respect to the time frames of these audits. First, in ordinary cases the Commissioner may exercise these powers in relation to a year of income at any time prior to the expiry of seven years after that year of income.¹¹⁷ Second, where the Commissioner has reasonable cause to believe that fraud or gross or willful neglect has been committed in connection with, or in relation to, tax for a year of income, the Commissioner may exercise these powers in relation to any year of income.¹¹⁸

Since the applicable laws do not stipulate the duration of the notice, in practice the KRA normally gives taxpayers between fourteen and thirty days to produce the documents that the Commissioner seeks.¹¹⁹ Where a taxpayer requests for more time, the KRA says it would accommodate the taxpayer, provided it deems the request reasonable.¹²⁰ But a tax expert claims that as a strategy to win disputes with taxpayers, the KRA sometimes makes unreasonable demands for documentation (for example, seeking all the invoices

¹¹⁵ Income Tax Act, section 56.

¹¹⁶ Value Added Tax Act, section 48.

¹¹⁷ Income Tax Act, section 56(3).

¹¹⁸ Ibid.

¹¹⁹ Interview with KRA officer, 16th October 2014, Times Tower, Nairobi.

¹²⁰ Ibid.

going back seven years to support a transportation expense).¹²¹ The notices specify the place of audit, but the audits are usually conducted in the taxpayer's premises. During the audit, the KRA audit team, consisting of three officers one of whom leads the team, would hold meetings with the taxpayer. In the case of manufacturing concerns, the KRA auditors also tour the business premises. The auditors then conduct an audit and identify the audit issues, that is, the areas of potential non-compliance for tax. These issues are discussed with the taxpayer, who is given a summary of findings, and asked to respond to the audit issues. The taxpayer has a right to be represented by a tax consultant or a lawyer in these meetings. At the end of this exercise, a record of prepared and signed by both parties. The parties then agree on the time by which the taxpayer is to respond to the audit issues.

Where the parties agree on an issue, the assessment is amended and the Commissioner issues the taxpayer with a notice setting out the amendment and amount of tax payable. The process of amending the assessment is elaborate. The audit team proposes the amendment, sends it to a Compliance Manager for review, and where this manager is satisfied with the audit findings and assessment he or she forwards it to a Station Manager, who then approves for the assessment to be issued and tax demanded.

But where the parties do not agree on an issue, the assessment would nevertheless be amended as proposed by the Commissioner, and the Commissioner would issue that person with a notice setting out the amendment and the amount of tax payable. In the latter case, the taxpayer can then object to this additional assessment. This could happen where, for example, the taxpayer claims that the assessment is premised a wrong provision of the law, such as one that imposes a higher tax burden than is rightfully due.

A similar process is followed in the case of compliance checks. However, investigations are carried out through the Office of the Director of Public Prosecutions. It should also be noted that in the case of an audit, a taxpayer would be required to pay a penalty of 20% on the tax due. This penalty is higher in the case of investigations. These penalties are only payable after the principal tax is agreed upon or otherwise determined. In other words, the taxpayer would

¹²¹ Interview with tax consultant, Nairobi, 8th May 2015.

only be required to pay the due tax and penalty after the dispute is resolved. As an exception to this practice, however, taxpayers are required to pay the taxes due immediately in cases where they are deemed to be tax collection agents, for example, in the case of PAYE or withholding tax. In addition, where a taxpayer only objects to part of an assessment, he or she would be required to pay the portion of tax admitted.

Although, as we have seen, an aggrieved taxpayer has thirty days to object to an assessment, in practice the Commissioner sometimes only gives the taxpayer fourteen days. In addition, the Commissioner sometimes takes too long to make a decision on an objection. This may explain why the VAT Act now requires the Commissioner to make a decision within sixty days. But the KRA's legal office says that it has sensitized revenue officers on the importance of adhering to the tax assessment procedures, and issued administrative guidelines on the timelines, and that thereafter the institution has witnessed fewer incidents of non-adherence. Nevertheless, once an objection is received, the internal dispute resolution committee of the relevant station reviews it. This committee consists of the station's audit manager, compliance manager, policy unit technical manager, and the station head. And should this committee determine that the matter requires further consideration, it would refer it to the "Technical Forum" in the Head Office, which consists of the station managers in the regions. Further, the Technical Forum can refer the matter to the Policy Unit Technical in the Head Office, which can also refer it to the Commissioner's Technical Meeting, which brings together all the Commissioners, Deputy Commissioners, the Nairobi Station Managers, and the Policy Unit Technical officers in the Head Office.

Once the taxpayer appealed to the Local Committee or the VAT Tribunal, the Commissioner would refrain from demanding payment until the appeal was heard and determined. But it should be noted that before a taxpayer can file an appeal, the KRA requires it to pay 30 per cent of the tax claimed up front.¹²² According to a number of tax experts, this requirement is unfair, since taxpayers are required to pay this amount irrespective of the merits of their appeals.¹²³ Further, taxpayers thought that because the Minister of Finance (the chief tax

¹²² Interview with tax lawyer, Nairobi, 24th April, 2015.

¹²³ Ibid.

collector) appointed the members of these tribunals, they could not be impartial in their decision-making, and tended to rule in favor of the KRA.¹²⁴ Unfortunately, the new TAT Act has not remedied this defect, as the Cabinet Secretary appoints the members of the TAT.¹²⁵

Upon receiving favorable decisions from these tribunals, the Commissioner would compute the tax payable and issue an assessment to that effect, which the KRA officers would immediately demand from the taxpayer. According to a legal officer of the KRA, this provision might be encouraging aggrieved taxpayers to avoid the tribunals, and instead file constitutional petitions in the High Court, where they are, in a good number of cases, granted orders staying assessments even before they are due for enforcement. In other words, because an aggrieved taxpayer knows that he or she would be required to pay tax immediately upon losing an appeal before the tax tribunals, it has an incentive to avoid the tribunal altogether, and instead file a suit in the High Court, where it might just be lucky enough to obtain an order stopping the KRA from enforcing the assessment. What troubles the KRA is that in some cases taxpayers have sought court injunctions simply to delay enforcement, or to waste away their assets, for example, by closing and forming other companies, thereby making it difficult for the KRA to enforce assessments, even where the courts eventually decide in its favor. Further, the KRA holds the view that the courts have given substantive remedies in judicial review proceedings even where the matters in question are technical tax issues that would better be resolved by way of appeal.

As far as refunds are concerned, the KRA has established a process for validating claims. In the case of VAT refunds, a claimant is required to lodge a claim, and attaché all supporting documents. Officers of the KRA then audit the attachments, and will not accept a claim if the requisite documents are not attached. Where the person seeking a refund is making a claim for the first time, the officers audit that person with a view to establishing its existence as a *bona fide* taxpayer. The KRA then processes the claim, by verifying the authenticity of the supporting documents such as invoices, and ensuring that the claimant has filed the returns against which it is claiming. And where the claimant claims to

¹²⁴ Ibid.

¹²⁵ Tax Appeals Tribunal Act 2013, section 4(1).

have exported goods or services, the officers verify the export transaction. Indeed most claims for tax refunds are now export-based, given that the Value Added Tax Act 2013 has removed most local transactions from zero rating. For first claimants and registered businesses profiled as “high risk” (because, for example, they are suspected of fraud), the refunds take longer than thirty days to process. But the claims of registered businesses profiled as “low risk” or “medium risk” (because, for example, they have a good tax compliance record and make returns and payments when due) are processed within thirty days. The KRA also considers the nature of the business activity in profiling claimants. For example, it considers claims lodged by a flower exporting company to be low risk because Kenyans in general do not buy flowers. It would therefore pay such claims without fuss because the chances that the flowers would be dumped in the local market are low. This could be contrasted with products that Kenyans consume mightily such as sugar and spirits.

In the case of claims for income tax refunds, the KRA officers say that they automatically settle claims where the amount of the refund due does not exceed Ksh.30,000, provided they have processed the return forming the basis of the claim (including verifying the entries in the return). It then forwards these refunds to the Ministry of Finance for payment.

At present, however, the KRA has a huge backlog of claims that have been processed but are yet to be paid, now amounting to some Ksh. 1.2 billion. The problem is that the Government does not allocate to the KRA sufficient funds to settle tax refund claims. In the last budget, for example, it only allocated Kshs. 300 million for this purpose. Although the KRA operates a general rule by which it settles tax refund claims on a first-in-first-out basis, lack of funds has compelled it to vary this rule. It therefore gives priority to the claims of persons with disability and corporations.¹²⁶

The majority of the decisions of the tribunals have turned on the merits of tax assessments, as opposed to the decision-making procedures. An example is a decision by the Commissioner, following an audit, to disallow a write-off of loans owed by the employees of an appellant who had taken advantage of the

¹²⁶ Since corporations pay income tax in advance based on their projections of expected earnings, claims for refunds could arise from overpayments, where they earned less than projected in any given year of income.

taxpayer's voluntary early retirement scheme and for whom the appellant had paid taxes on the amounts written off.¹²⁷ The Commissioner had deemed that the taxes so paid were additional benefits to the employees and therefore subject to tax, and which tax the appellant ought to have deducted and remitted to the KRA.¹²⁸ A second example is a decision by the Commissioner to raise assessments against the appellant for the years of income 2006 to 2009 claiming tax in respect of premiums paid for a group life assurance policy that the appellant had taken out on its employees.¹²⁹ The appellant maintained that this assurance policy was for its benefit, as the employer, and therefore could not be viewed as a benefit to the employees subject to taxation. The tribunal allowed the appeal in this instance. In yet another case, the Commissioner had disallowed an "investment deduction" claim in respect of a machine on the grounds that the appellant had failed to prove that this machine was involved in manufacturing corrugated paper cartons.¹³⁰ Under the Income Tax Act, a machine would only be eligible for the investment deduction if it were used in manufacturing, and would be ineligible for this deduction if it were merely used in activities ancillary to manufacturing. The Commissioner had issued the appellant with an additional assessment, claiming that the machine in question was merely used in activities ancillary to the manufacture of paper cartons. The tribunal disagreed, and upheld the appeal.

For their part, the courts have faulted the KRA's decision-making procedures and the reasonableness of its decisions in various instances. In one case concerning the KRA's decision-making procedures,¹³¹ the court found that a tax demand letter sent to the applicant "fell short of the requirements of a proper notice in as far as it failed to disclose its nature and the implication and consequences of non-compliance as well as notifying the taxpayer of the avenues

¹²⁷ *Barclays Bank of Kenya Limited v Commissioner of Domestic Taxes*, Nairobi Income Tax Local Committee, Decision of 25th November 2010.

¹²⁸ *Ibid.*

¹²⁹ *Housing Finance Limited v Kenya Revenue Authority*, Nairobi Income Tax Local Committee, Decision of 24th March 2011.

¹³⁰ *Allpack Industries Limited v Commissioner of Domestic Taxes*, Nairobi Income Tax Local Committee, Decision of 24th March 2011.

¹³¹ But *see, e.g.*, *Republic v Kenya Revenue Authority ex parte Mobile Planet Limited* [2014] eKLR, where the court held that a letter that KRA sent to the applicant constituted a notice as it clearly communicated the Commissioner's decision disallowing the applicant's objection, confirmed the provisions of the law under which the assessment had been issued, and informed the applicant of the remedies available to it under the applicable law.

of appeal or review available to it.”¹³² According to the court, the right to fair administrative action demands that “A notice of the nature issued to enforce collection of taxes must clearly state to be such a notice, state the amount claimed, state the legal provision under which it is made and draw the taxpayer’s attention to the consequences of failure to comply with the law and the opportunity provided by the law to contest the finding.”¹³³

Again in *Geothermal Development Company Limited v Attorney General & 3 others*,¹³⁴ the court held that the KRA had not issued the petitioner with a proper assessment notice, thereby violating its right to fair administrative action, and quashed the consequent agency notices. Here, following an audit, the KRA sent the petitioner a tax demand letter in June 2011, indicating the tax due and requesting the petitioner to pay it immediately to avoid further interests accruing. The petitioner’s case was that the tax demand did not satisfy the requirement of a proper notice, contrary to Article 47(1) of the Constitution. According to the petitioner, the tax demand did not draw its attention to the fact that it was an assessment or indicate the consequences of non-compliance. In addition, the tax demand did not give the date of assessment. In these circumstances, the petitioner contended that following the audit, the KRA should have issued it with an assessment to enable it exercise its right of appeal by moving to the VAT tribunal to contest the assessment. In other words, it could only have exercised its statutory right of appeal if KRA had issued a proper notice of assessment. Indeed, the petitioner’s tax agent wrote to the KRA, requesting to be issued a notice of assessment, but the KRA did not respond. Instead, it served the petitioner’s bank with an agency notice.

Further, the petitioner submitted that the KRA issued it with a notice of assessment in August 2012, after it had filed the court petition. In addition, it contended that the KRA had denied it the right to fair administrative action by seeking to enforce the tax due by issuing agency notices against it, even before issuing a proper notice of assessment. It therefore argued that it was unreasonable for the KRA to proceed to enforce the taxes demanded in the letter of June 2011, and subsequently issue a notice of assessment. In any case, there

¹³² *Geothermal Development Company Limited v Attorney General & 3 others* [2013] eKLR.

¹³³ *Ibid.*

¹³⁴ *Geothermal Development Company Limited v Attorney General & 3 others* [2013] eKLR.

were discrepancies in the tax due in the demand letter and the notice of assessment. The KRA's response was that it was not mandatory for the VAT assessments to be raised using notices of assessment, while no specific forms were available for withholding tax and PAYE. Further, it stated that it had not issued the petitioner with a notice of assessment because the requisite form was computer generated but its computer systems were not working at the material time.

On these facts, the court held that the demand letter of June 2011 fell short of the requirements of a proper notice because it failed to disclose its nature, and the implication and consequences of non-compliance, as well as notifying the petitioner of the avenues of appeal or review available to it. Further, it held that the KRA's administrative action was unreasonable because: (1) it sent the notice of assessment after it had commenced enforcement proceedings, and (2) this notice came one year after the demand letter.

In *Kenafri Industries Limited v Commissioner of Domestic Taxes & 4 others*,¹³⁵ the High Court also faulted the KRA's decision-making procedures, holding that the issuance of a provisional assessment violated the right to fair administrative action. The petitioner had applied for the refund of VAT. Upon receiving this application, the Commissioner had referred the matter to its Investigation and Enforcement Department for audit and investigation, and subsequently raised a provisional assessment on VAT and corporation tax. The petitioner claimed that the Commissioner made this provisional assessment solely to deny the petitioner's claims for VAT refund. The Commissioner acknowledged receiving the petitioner's application for VAT refund, but contended that the petitioner had been engaged in fraudulent conduct, which it was entitled to investigate. The court found that the Commissioner had issued the provisional assessment to forestall the petitioner's VAT refund claim, and failed to give reasons for not processing or paying the petitioner's VAT refund claims. In these circumstances, the court found that the Commissioner's conduct was unfair and unreasonable. In the court's view, therefore, the provisional assessment ought to have addressed the petitioner's VAT refund claims. Further, the court held that the petitioner was "entitled to expeditious and efficient processing of its VAT

¹³⁵ *Kenafri Industries Limited v Commissioner of Domestic Taxes & 4 others* [2012] eKLR.

refund claims and where this is not possible the petitioner must be informed of the reasons for failing to process the claims timeously.” It should be noted that the VAT Act does not make contemplate provisional assessments. Further, although the ITA formerly empowered the Commissioner to make provisional assessments, this power is no longer available following an amendment to the ITA.¹³⁶

Another interesting case is *Republic v Kenya Revenue Authority & another ex parte Tradewise Agencies*,¹³⁷ where the High Court found the Commissioner guilty of abuse of power for failing to give a petitioner the opportunity to explain its position where it had issued an agency notice. Here, the Commissioner had debited the petitioner’s VAT account without notice to the applicant and without granting the applicant an opportunity to be heard. The petitioner’s auditors had then sought an explanation from the Commissioner, but received no response to their letter. Meanwhile, the Commissioner had continued to issue the petitioner with tax compliance certificates, confirming that the petitioner’s tax returns were current and that its tax payments were up to date. The petitioner had also made several claims for VAT refund, which the Commissioner processed and paid. Subsequently, however, the petitioner noticed a strange debit in its bank account, and upon inquiry was informed by its bank that it had received an agency notice from the Commissioner requiring it to deduct and remit the amount of this debit to the Commissioner as alleged tax due from the petitioner, who had not been given a copy of this notice. The petitioner had therefore contended that the agency notice was premature and the deductions from its account irregular and unjustified, since it had not been given a notice of assessment. The court agreed with the petitioner, and quashed the agency notice.

In *Republic v Commissioner General Kenya Revenue Authority ex parte Ndykak Investments Limited*,¹³⁸ although the court found that the petitioner had been served with a tax assessment and given a fair hearing when it disputed the assessment, it held that the KRA had flouted the rules pertaining to the enforcement of agency notices, in so far as it had sought to enforce an agency

¹³⁶ Finance Act, No. 16 of 2014, sections 2 and 17.

¹³⁷ *Republic v Kenya Revenue Authority & another ex parte Tradewise Agencies* [2013] eKLR.

¹³⁸ *Republic v Commissioner General Kenya Revenue Authority ex parte Ndykak Investments Limited* [2010] eKLR.

notice within the same month in which it had been issued. The court then ordered the KRA to refund the money collected from the petitioner's accounts in the bank concerned, and to comply strictly with the provisions of the Income Tax Act pertaining to the grace period given to agents.¹³⁹

In other words, the agency notice cannot be enforced before the thirty-day period is over. However, as the Court of Appeal has noted in *Pili Management Consultants Limited v Commissioner of Income Tax*,¹⁴⁰ the “agent can remit the money to the Commissioner within two, ten, fifteen or even twenty-nine days after the receipt of the notice,” but cannot “go beyond thirty days before remitting the money which he has in his possession.” Thus although the Commissioner can demand immediate payment upon issuing an agency notice, he or she can only take action against the agent after the expiry of the thirty days. According to the Court of Appeal, an agency notice does not violate the taxpayer's right to fair administrative action because it offers room for the taxpayer to sort out its tax obligations before the agent to whom it is addressed is required to effect payment in terms of the notice.

But the Court of Appeal's reasoning here could be faulted. Once the Commissioner issues an agency notice, there is nothing to stop the agent from making immediate payment if the KRA demands it. In such a scenario, where, exactly, is the room for the taxpayer to sort out its tax obligations if the agent has already effected payment in terms of the notice? On the one hand, it is arguable that it would not be desirable to require the KRA to inform a taxpayer that it proposes to issue an agency notice against it, for the simple reason that the taxpayer would then have an incentive to dispose of its assets. But on the other hand, there is a need to enhance procedural fairness in the administration of the agency notice, and agencies should therefore be required to inform taxpayers once they have received agency notices, and request the taxpayers to sort out their tax obligations before the expiry of the thirty-day period, failure to which the agent would effect the payments in terms of the agency notices.

An interesting case concerning the reasonableness of the KRA's decisions is *Republic v Kenya Revenue Authority & another ex parte Kenya Nut Company*

¹³⁹ See Income Tax Act, section 96(6).

¹⁴⁰ *Pili Management Consultants Limited v Commissioner of Income Tax* [2010] eKLR.

Limited.¹⁴¹ Here, the issue was whether withholding tax was payable in respect of agency commissions retained by several entities domiciled in foreign jurisdictions, which sourced customers for the applicant's goods. The applicant had maintained that it had no control over these commissions and could not therefore withhold tax. For its part, the KRA insisted that the applicant was responsible for this tax, and demanded the withholding tax together with interest thereon. The applicant therefore claimed that the KRA's decision was unreasonable since it (the applicant) could not be required to recover taxes as an agent of the KRA even though it had no control of the taxable income. According to the applicant, the KRA's insistence on charging withholding tax, "in spite of the impossibility and overwhelming difficulty of recovering tax from foreign traders," violated its legitimate expectation that the KRA would be fair and reasonable, since the ITA contemplated that withholding tax would only be recovered where a tax payer (constituted as an agent of the KRA) actually made deductions from funds within its control. The Court agreed with the applicant, finding that since the commissions in question were paid by way of deduction at source, the applicant was not in a position to effect deduction of the withholding tax at the time when the foreign agents paid themselves the commissions. The court also nullified the penalty imposed on the applicant, on the basis that the KRA had failed to specify the statutory basis of the penalty. The Commissioner had imposed a penalty at the rate of twenty percent yet the applicable regulations stipulated a rate of ten percent.¹⁴² At the hearing, the Commissioner had contended that this higher penalty was imposed under the ITA but had failed to cite a specific provision of this law to justify it.

What explains these departures from the KRA's decision-making practices described above? Why have the officers concerned failed to adhere to the stipulated tax assessment and enforcement procedures in these instances? I interviewed a number of tax lawyers and consultants to obtain answers to these questions. First, it seems that KRA tends to adhere to the stipulated tax assessment and enforcement procedures when it is dealing with large taxpayers,

¹⁴¹ Republic v Kenya Revenue Authority & another *ex parte* Kenya Nut Company Limited [2014] eKLR.

¹⁴² Ibid, paras. 61-64.

and to flout them when it is dealing with small taxpayers.¹⁴³ The former are more organized than the latter, and have the requisite resources and courage to contest the decisions of the KRA. In the case of small taxpayers, one tax consultant observed that revenue officers tend to issue agency notices immediately after issuing a letter of findings, which contains the findings of an audit.¹⁴⁴ As such, this letter is not a notice of assessment, which is a formal document specified in the law and signifies demand for additional tax.¹⁴⁵ Second, it seems that revenue officers are under internal pressure to collect tax, since they have performance targets to meet, which may drive some of them to flout the established procedures.¹⁴⁶

Third, it seems that revenue officers have considerable discretionary powers, and which are prone to abuse since they are not circumscribed. Confronted with the unfair exercise of this power, many taxpayers have opted to move directly to the courts. According to a tax lawyer, taxpayers sometimes take this route because the KRA has flouted the tax assessment procedures.¹⁴⁷ For example, although the tax assessment and enforcement procedures are usually followed, it is alleged that KRA revenue officers have in some cases insisted on issuing agency notices even where there is a dispute as to whether tax is due, or before raising an assessment, or even without conducting audits.¹⁴⁸ And where the revenue officers issue agency notices without raising assessments, taxpayers are in a bind, since they cannot formally object to such action or appeal to the tribunals. It therefore seems that revenue officers have considerable discretion in practice. They even seem to have discretion to lift agency notices, on condition that the taxpayer agrees to pay the claimed amount or part thereof.¹⁴⁹ Where the revenue officer in question is not inclined to exercise this discretionary power in the taxpayer's favor, the taxpayer is likely to resort to judicial remedies. Another motivation for rushing to court is that although the law gives the KRA a

¹⁴³ Interview with tax consultant, Nairobi, 22nd April 2015.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Interview with tax lawyer, Nairobi, 21st April 2015; interview with tax consultant, Nairobi, 8th May 2015.

¹⁴⁷ Interview with tax lawyer, Nairobi, 21st April 2015.

¹⁴⁸ Interview with tax lawyer, Nairobi, 21st April 2015; interview with tax consultant, Nairobi, 5th May 2015; interview with tax consultant, Nairobi, 8th May 2015.

¹⁴⁹ Interview with tax lawyer, Nairobi, 21st April 2015.

maximum of thirty days to respond to objections, it tends to take much longer.¹⁵⁰ For example, one tax lawyer contends that it is not uncommon to find the KRA confirming assessments even two years after a taxpayer has filed an objection.¹⁵¹ The law is therefore perceived to favor the KRA, given that it gives taxpayers only thirty days to object to assessments, while it does not establish a time limit within which the KRA should respond to taxpayer objections.¹⁵² The issuance of an agency notice is another reason why taxpayers often rush to court.¹⁵³ Once a taxpayer's bank receives this notice, it freezes operations in the taxpayer's account, making it impossible for the taxpayer to continue operating. Confronted with such a scenario, the taxpayer would quickly move to court to get the agency removed. All in all, it is felt that taxpayers would not be rushing to court if taxpayers were treated fairly and the revenue officers followed the stipulated tax assessment and enforcement procedures.¹⁵⁴ In this respect, it has been suggested that the KRA should refrain from issuing agency notices where there is a clear dispute, and only issue them where the parties agree that a tax is outstanding and the taxpayer has taken unreasonably long (for example, the KRA has sent demand letters but which the taxpayer has ignored) to settle it.¹⁵⁵

On the question of tax refunds, the courts have ruled in a series of cases that the KRA has a duty to process refunds in a timely manner. For example, in *Republic v Kenya Revenue Authority ex parte L.A.B. International Kenya Limited*,¹⁵⁶ the applicant had asked the court to issue an order of mandamus to compel the KRA to pay to it a VAT refund, contending that the KRA's failure to pay the refund due violated its right to fair administrative action and the right to the use and enjoyment of its property. Further, the applicant contended that the KRA's failure to pay the refund was inequitable because whilst any delay by the applicant in paying taxes attracted stringent penalties and interests, the KRA paid no penalties or interests on delayed refunds. For its part, the KRA contended that it had not paid the VAT refund in question as it was still

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Interview with tax consultant, 22nd April 2015.

¹⁵³ Interview with tax consultant, 5th May 2015.

¹⁵⁴ Interview with tax lawyer, Nairobi, 21st April 2015..

¹⁵⁵ Ibid.

¹⁵⁶ *Republic v Kenya Revenue Authority ex parte L.A.B. International Kenya Limited* [2011] eKLR.

conducting an audit. Further, the KRA contended that it had no control over the payments of VAT refunds, and could only make these payments once the Ministry of Finance availed the required funds. But the court disagreed with the KRA, observing that “If those agencies to which the respondent is operationally related are baldly invoked as governing premise, to justify the respondent’s non-delivery, the effect would be to nullify vital private rights safeguarded under the Constitution.” According to the court, the KRA therefore had no justification for failing to make VAT refunds timeously.

A second illustration is *Kenya Data Networks Limited v Kenya Revenue Authority*,¹⁵⁷ where the petitioner contended that the KRA’s refusal to settle its VAT refund claims while pursuing the petitioner for alleged unpaid taxes was unconscionable, unfair and in bad faith. Further, the petitioner contended that the KRA’s failure to respond to its refund claims filed in 2009 until early 2012 violated its right to fair administrative action. The petitioner argued that although the KRA was justified in seeking to verify its claims for refund, the verification had to be done within a reasonable period, and a period of three years could not be said to be reasonable. In its response, the KRA contended that it had not settled the petitioner’s refund claims because the petitioner was in arrears of duty arising from the fraudulent acts of its agent, which resulted in under-declarations and under-payment of tax lawfully due. Although the Court agreed with the KRA that it was entitled to investigate the tax affairs of the petitioner and to withhold refunds for any amounts erroneously claimed, it held that the KRA had no authority to withhold “tax refunds for periods that fell outside the span during which the respondent [KRA] alleges acts of fraud in self-assessment and self-declaration were committed by the petitioner’s agent for which it needed to carry out investigations.” Further, the court held that the KRA had a duty to act on the petitioner’s VAT refund claims timeously, observing that “While there is no statutory period within which KRA ought to make good tax refund claims, it cannot have any basis for failing to process tax refund claims several months, and in some cases several years, after they were made.” Further,

¹⁵⁷ *Kenya Data Networks v Kenya Revenue Authority* [2013] eKLR. *See also* *Ericsson Kenya Limited v Attorney General & 3 others* [2014] eKLR (where the court ordered the KRA to consider, process and pay out the petitioner’s VAT refund claims within a period not exceeding sixty days).

the court observed that it was not open to the KRA to respond to the petitioner's claim for tax refund by demanding that the petitioner pays arrears of tax. It therefore found that it was unreasonable for the KRA to withhold tax refunds, which were much higher than the amount allegedly due as tax arrears and erroneous tax refunds.

And in *Ericsson Kenya Limited v Attorney General & 3 others*,¹⁵⁸ whose facts were very similar to *Kenya Data Networks Limited*, the court went even further, in so far as it ordered the KRA to consider, process and pay out the petitioner's VAT refund claims within a period not exceeding sixty days.

In a bid to resolve this problem, taxpayers have suggested to the KRA that it should allow them to offset refunds against their tax liabilities.¹⁵⁹ Alternatively, they have suggested that the Government should impose a commercial interest rate for every month that the refund remains outstanding.¹⁶⁰

Judicial review has therefore been a useful instrument in holding the KRA accountable whenever it violates the principles of administrative law. The drawback, however, is that taxpayers have sometimes deployed judicial review as a dilatory tactic. Typically, these are cases where the petitioner has failed in obtaining a favorable decision on the merits, and hopes that the courts can somehow find fault with the KRA's decision-making processes.¹⁶¹ In some of these cases, KRA has contended that the petitioners have bypassed the tribunals and filed judicial review applications simply to prevent delay the collection of taxes due.¹⁶² The case of *Republic v Kenya Revenue Authority ex parte ABN-AMRO N.V.*¹⁶³ illustrates this problem. At issue was whether the KRA had based a tax

¹⁵⁸ *Ericsson Kenya Limited v Attorney General & 3 others* [2014] eKLR.

¹⁵⁹ Interview with tax lawyer, Nairobi, 21st April 2015.

¹⁶⁰ *Ibid.*

¹⁶¹ *See, e.g., Stanbic Bank Kenya Limited v Kenya Revenue Authority* [2009] eKLR (on whether payment to a non-resident company that provides on-line information on financial markets should attract withholding tax); *Republic v Kenya Revenue Authority ex parte Cimbria (E.A.) Limited*, Nairobi High Court Miscellaneous Civil Application No. 1388 of 2002 (unreported) (observing that the court could not verify the applicant's allegation because doing so would go to the merits of the KRA's decision).

¹⁶² *See, e.g., Navcom Limited v Kenya Revenue Authority* [2013] eKLR (observing that while the KRA has a duty "to be fair and reasonable in executing its mandate of tax collection, where no unreasonableness or violation has been demonstrated its mandate ought not to be frustrated by a party, which has had every opportunity to deal with its tax issues seeks to hide behind an intended appeal to the Local Committee.")

¹⁶³ *Republic v Kenya Revenue Authority ex parte ABN-AMRO Bank N.V.*, Nairobi High Court Judicial review Application no. 1135 of 2002 (unreported).

assessment on the correct provision of the ITA, although the applicant ostensibly claimed that the KRA had not given it a fair hearing. According to the applicant, KRA had based its assessment on a wrong provision of the ITA, with the result that it converted an ordinary employment contract terminable by either party into a fixed term contract that would run up to the retirement age of employees it had declared redundant, thereby increasing its tax liability. In other words, while the KRA maintained that the said employees were on fixed term contracts and would remain in the applicant's employment until they reached the age of 55 years, the applicant maintained that it had not retained them under fixed term contracts. Although the applicant claimed that the KRA had not given it a hearing, the court found that it was accorded a fair hearing. According to the court, "the fact that the parties did not agree on the mode of taxation [could not] be taken to mean that the respondent acted unreasonably, or that it acted beyond its powers or for that matter, in excess of its jurisdiction, neither did it breach the rules of natural justice." Further, the court agreed with the KRA that if the applicant were aggrieved by the assessment decision, it ought to have appealed against it, instead of filing the judicial review application.

The courts have often dismissed such cases on the basis that they constitute an abuse of the court process. Since these cases delay the collection of due taxes, a need arises for the courts to establish procedures for their speedy disposal.

IV. Conclusion

Tax administration entails balancing the need to collect taxes efficiently with the fair treatment of taxpayers. Although the KRA has made considerable progress in the recent past in its quest to attain this balance, much remains to be done. As we have seen, the courts have faulted the KRA's decision-making procedures in a number of respects. Among other things, the courts have faulted the KRA for failing to issue proper tax assessment notices, failing to give taxpayers a hearing, seeking to enforce agency notices unprocedurally, making unreasonable decisions, taking inordinately long to respond to taxpayer objections, failing to process tax refunds in a timely manner, and refusing to consider tax refund claims because taxpayers owe taxes. Judicial review has therefore been useful in

holding the KRA accountable, and the KRA has in some instances responded to adverse judicial review decisions by sensitizing revenue officers on the importance of adhering to the tax assessment procedures. The foregoing failures to exercise the taxing power judiciously could be attributed to two main factors that need to be addressed: the considerable discretionary but uncircumscribed powers of revenue officers, and internal pressures to collect taxes. But we have also seen that judicial review can be abused, making it necessary for the courts to develop mechanisms that can deter taxpayers from doing so.

As we have also seen, a tax system ought to be accountable, in the sense that tax policy should be publicized and open to public debate. Kenya's tax system remains wanting from this perspective. The public's right to participate directly in the making of tax laws and regulations is weak at best, even if the KRA has made some efforts to involve the public in its rule-making. Concerns remain that the KRA is not sincere in its public engagement initiatives, and rarely changes its positions following public engagements. A need therefore arises for the KRA to establish a firm policy that could facilitate structured participation by the public in its rule-making processes. For their part, the courts have held that the public, even affected groups, is not entitled to an oral hearing when Parliament is considering tax proposals. Further, the courts are exceedingly hesitant to invalidate any law enacted without direct public participation, however impracticable that law is. The courts have so far failed to consider the limitations of indirect participation through elected representatives. But the implementation challenges that arise after tax laws, which tend to be complex, have been enacted could be precluded through prior and meaningful engagement of affected individuals and groups. In other words, effective public participation promises to enhance the quality of tax laws, and enhance their legitimacy, thereby making them easier to enforce.