



**KENYA REVENUE
AUTHORITY**

ISO 9001:2015 CERTIFIED

THE ALTERNATIVE DISPUTE RESOLUTION (ADR) FRAMEWORK

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DISCLAIMER

This ADR Framework has been prepared for the general guidance of the Stakeholders who would wish to engage in Alternative Dispute Resolution (ADR) to resolve their tax disputes.

This Framework does not constitute professional advice and Stakeholders are hereby advised not to act upon information contained in this publication without obtaining professional advice from their Tax Consultants.

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ACRONYMS AND ABBREVIATIONS

1. KRA - Kenya Revenue Authority
2. ADR - Alternative Dispute Resolution
3. CRF - Case Review Forum
4. EACCMA - East African Community Customs Management Act, 2004
5. IDRM - Internal Dispute Resolution Mechanisms
6. TATA - Tax Appeals Tribunal Act, No. 40 of 2013
7. TAT - Tax Appeals Tribunal
8. TPA - Tax Procedures Act, No 29 of 2015

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DEFINITIONS

1. **Alternative Dispute Resolution (ADR)**- means a voluntary facilitated mediation process of settling tax and customs disputes between a Taxpayer and the Commissioner outside of the Tax Appeals Tribunal or Court in the presence of a mediator or facilitator, and where applicable upon seeking leave of the Tax Appeals Tribunal or Court as the case may be;
2. **ADR Agreement**- means an executed agreement entered into between parties and witnessed by a facilitator, upon the conclusion of the Alternative Dispute Resolution process and upon the parties reaching a settlement on the dispute with finality;
3. **Commissioner**- means Commissioner Responsible for Tax Dispute Resolution.
4. **Dispute**- Means tax and customs dispute where applicable between the Commissioner and the Taxpayer
5. **Facilitator** - means a person who mediates by engaging the parties in a tax or customs dispute and provides indirect or unobtrusive assistance, guidance, or supervision for them to reach an agreement;
6. **Facilitated mediation** -means a dispute resolution strategy that assists parties in a tax and customs dispute to define the subject matter in dispute and their underlying interests so as to resolve the dispute;
7. **Parties**- except in cases involving investigations and enforcement means Commissioner responsible for tax dispute resolution and the Taxpayer seeking or engaging in ADR.
8. **Taxpayer**- means natural or non-natural person issued with an objection or review decision.

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1. PREAMBLE

- 1.1. The Tax Procedures Act, No 29 of 2015 (TPA), provides for an elaborate Internal Dispute Resolution Mechanism (IDRM). A tax dispute commences with an objection by the Taxpayer to a tax decision made by the Commissioner or to an appealable decision as stipulated under the TPA , 2015. The dispute culminates to an Appeal to the Tax Appeals Tribunal or Courts of Law.
- 1.2. This Framework seeks to improve on the IDRM by introducing ADR as an additional and/or alternative means of resolving tax disputes outside the judicial and quasi-judicial process.
- 1.3. ADR is a voluntary, participatory and facilitated discussion over a tax dispute between a taxpayer and the Commissioner. It is in the form of facilitated mediation and not arbitration as envisaged in the Arbitration Act, (Chapter 49 Laws of Kenya), as the facilitator has no power to impose any decisions regarding the outcome of the tax dispute. Instead, the parties are facilitated to find a solution to the dispute.
- 1.4. Overall, ADR seeks to enrich the entire dispute resolution process by providing flexibility and timely/early dispute management without the limitations imposed by judicial and quasi-judicial processes as regards technical procedures, untimely decisions and the rising costs of litigation.
- 1.5. Today, ADR is widely favoured over litigation and applied in a number of Tax Revenue Administrations globally with great success. This Framework has been benchmarked against the experiences of these Tax Revenue Administrations.

2. BENEFITS OF ADR IN TAX DISPUTES

- 2.1. Expedited resolution of tax disputes
- 2.2. Decreased cost of tax dispute resolution associated with litigation
- 2.3. Enhances and manages cordial relationships between KRA and the Taxpayer
- 2.4. Improve service delivery to the TP, Tax Consultants and Legal Advisors
- 2.5. Addresses customer concerns and improves tax compliance

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2.6. Confidentiality

3. THE OBJECTIVES OF THIS FRAMEWORK

- 3.1. To provide a taxpayer focused approach to dispute resolution by giving the taxpayer an opportunity to seek amicable resolution to their disputes alternative to litigation/appeal
- 3.2. To provide internal structures and processes which will support tax dispute resolution through oversight, monitoring and management of the ADR processes
- 3.3. To provide for the rules of conduct for the parties during the ADR discussions so as to ensure that the process is manageable and flexible and maintains discipline
- 3.4. To provide an additional approach for dispute resolution to complement the existing Internal Dispute Resolution Mechanisms (IDRM) provided in the TPA.

4. THE LEGAL BACKING FOR ADR

4.1 ADR has the following legal backings:

- a) Article 159 (2) (c).of the Constitution of Kenya, 2010
- b) Section 55 of the Tax Procedures Act, No 29 of 2015
- c) Section 28 of the Tax Appeals Tribunal Act, No. 40 of 2013
- d) Section 59C of the Civil Procedure Act, Cap 21 Laws of Kenya
- e) Revenue Statutes (the Commissioner may engage ADR at the review of an objection before confirmation)

4.2 ADR negotiations and settlements must have legal basis within the Tax Laws.

4.3 ADR does not negate the legal rights of the Commissioner or the Taxpayer with regard to seeking legal redress at the Tax Appeals Tribunal or the Courts of Law.

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An aggrieved party must file an Appeal within the stipulated time frame as set out in the TPA.

5. PARTY INITIATING ADR

ADR is voluntary and ADR discussions may be initiated by either the Taxpayer or the Commissioner.

6. WHEN TO ENGAGE ADR

6.1 Parties may request to be given an opportunity to engage in ADR before issuance of an objection decision.

- a) This Framework takes into cognizance that the TPA provides that the Commissioner in charge of tax dispute resolution, through the Deputy Commissioner TDR, must make an objection decision and communicate it to the Taxpayer within sixty days from the date that the taxpayer lodges an objection to an assessment. There are consequences for non-compliance with the statutory timelines on the part of the Commissioner as stipulated in the TPA.
- b) The East African Community Customs Management Act (EACCMA) 2004 provides that the Commissioner must act on an application for review of a decision or omission within 30 days from the date of application.
- c) When a taxpayer raises an objection against a tax decision by the Commissioner, the Commissioner may deal with the objection in any of these three ways stipulated under the law:
 - i. amend the assessment in accordance with the objection or,
 - ii. amend the assessment in light of the objection according to the best of his judgement,
 - iii. decline to amend the assessment.
- d) If the Commissioner's decision is to amend the assessment partially as in (ii) above or declines to amend the assessment altogether as in (iii) above the Commissioner in charge of dispute resolution may give that Taxpayer an opportunity to engage in ADR if the Taxpayer so wishes, before issuing an objection decision.

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- e) The timelines to hear the taxpayer above must not be in contravention with the timelines given by the TPA for concluding and communicating an objection decision.

6.2 ADR in Cases Pending before the Tax Appeals Tribunal and Courts.

- i. Any dispute pending before the Tax Appeals Tribunal or Courts of Law may be referred to ADR at the request of any party to the dispute at any stage pursuant to the
- ii. This Framework takes into cognizance that there are statutory timelines that maybe dictated by a Court or the Tax Appeals Tribunal within which parties seeking to engage in ADR negotiations must adhere to.
- iii. The TPA provides that where parties before the Tax Appeals Tribunal and Courts seek to engage in ADR discussion, the negotiations/ discussions must be done within 90 days.
- iv. Parties who seek to engage in ADR discussions in a dispute which is pending before the Tax Appeals Tribunal and/ or Courts will be expected to revert back to these respective bodies within 90 days with the terms of the agreement reached and where no agreement will have been reached, the matter may proceed as guided by the respective bodies.
- v. The Courts may also direct or dictate specific timelines within which a dispute before it may be negotiated under ADR.

7. ADR STAKEHOLDERS

7.1 Stakeholders include but are not limited to;

- a) The Taxpayer
- b) The Commissioner responsible for Tax Dispute Resolution and where applicable
- c) Commissioner, Investigation and Enforcement
- d) Commissioner, Domestic Taxes
- e) Commissioner, Customs and Border Control
- f) Tax Agents and Legal Advisors

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- g) The Courts and the Tax Appeals Tribunal
- h) Professional Bodies and Industry umbrella bodies
- i) Government Agencies (i.e. The Attorney General, the office of the Director of Public Prosecutions and Commission for Administrative Justice).

8. THE ROLE OF ADR STAKEHOLDERS

8.1 Tax Agent or Legal Advisor

- a) The Tax Agent or Legal Advisor is an important stakeholder as they interact with parties to ADR disputes from the onset of a tax audit or tax dispute. Their roles in ADR include but are not limited to;
 - i. Assisting in the implementation of this Framework by recognising ADR as an integral part of the tax dispute resolution mechanism
 - ii. Assisting the parties in initiating the ADR process and provision of the necessary documentation
 - iii. Submitting their client's case during the ADR discussions
 - iv. Assisting the parties to identify the contentious and non-contentious issues in a dispute
 - v. Assisting the parties in the ADR discussions and to narrow down issues with a view to reach an expedited conclusion

8.2 The Courts and Tax Appeals Tribunal

- a) The Courts give effect to Article 159 (2) (c) of the Constitution by encouraging and permitting litigants to a tax dispute to engage in ADR.
- b) Similarly, where parties wish to negotiate a tax dispute through ADR, the Tax Appeals Tribunal is mandated under Section 28 of the Tax Appeals Tribunal Act and;
- c) Section 55 (1) of the Tax Procedures Act to permit the parties to engage in ADR.

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8.3 Professional Bodies

The role of the Professional Bodies is to encourage their members to engage ADR as a way of handling the tax disputes.

9. THE ADR FACILITATOR(S)

A Facilitator shall provide guidance to the discussions and must not necessarily be an expert in Tax or Law.

9.1 The role of a facilitator shall be to;

- a) Convene ADR meetings.
- b) Chair the ADR sittings and manage the meetings including providing administrative guidance.
- c) Attest to the signing of the ADR Agreements.
- d) Generally guide the parties in the discussions towards reaching an amicable agreement.

10. INDEPENDENCE OF THE FACILITATOR(S)

10.1 The Facilitator(s) are persons who were not involved in the tax audit or investigation or the disputed decision.

10.2 The Facilitator(s) must disclose to the parties any fact that is likely to bring about a conflict of interest arising from the dispute at hand. Upon disclosure, should the parties communicate in writing to the ADR office that they are no longer comfortable with the facilitator handling the dispute, he or she may recuse himself/ herself and a new facilitator may be appointed.

11. RULES TO GUIDE THE FACILITATOR(S)

11.1. In performing their duties the Facilitator(s) will be guided by the following rules:-

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- a) Ensure the process is simple and flexible
- b) Ensure as far as is practicable, that each party is able to freely participate in the discussions
- c) Ensure parties adhere to the timelines provided in the TPA or court
- d) Remain neutral in the discussions and only act as Facilitator in the resolution of the dispute
- e) Maintain confidentiality of the process

12. CONDUCT OF FACILITATOR(S)

12.1. A person appointed to be a Facilitator will ensure that they;

- a) Seek a fair, equitable and legal resolution of the tax dispute between the parties,
- b) Promote and protect the integrity, fairness and efficiency of the process;
- c) Act independently, impartially and avoid any circumstances which can bring a conflict of interest.
- d) Bring the dispute to an expeditious conclusion,

13. CONDUCT OF THE PARTIES TO ADR

13.1. The Parties must;

- a) Uphold and maintain decorum, trust, and confidentiality,
- b) Uphold the integrity and fairness of the process,
- c) Participate in all discussions fairly and diligently,
- d) Make full disclosure of material facts and documentation relevant to the dispute.
- e) Be committed to the ADR process and attend ALL scheduled meetings.

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- f) Where a party is unable to attend a scheduled meeting, they will be required to;
 - i. issue sufficient prior notice accompanied by an apology citing a reasonable explanation for their absence
 - ii. send a suitable proxy to attend the meeting on their behalf.
- g) Refrain from all potentially destructive activities e.g. telephone calls and other disruptive activities.
- h) Strictly adhere to the agreed timelines, save for cases where there are reasonably extenuating circumstances.

14. SUITABILITY OF DISPUTES FOR ADR

14.1. All ADR applications will be subjected to a suitability test prior to admission to ADR. Disputes which are unsuitable for ADR discussions include those where;

- a) The settlement would be contrary to the Constitution, the Revenue Laws or any other enabling Laws
- b) The matter borders on technical interpretation of law
- c) It is in the public interest to have judicial clarification of the issue
- d) The pursuit of the matter through the Courts will significantly promote compliance
- e) The parties have not complied with the provisions of any Act and there is evidence that the non-compliance is consistent or deliberate.
- f) One party is unwilling to engage in ADR discussions

Notwithstanding paragraphs (a) to (f) above, a dispute can still be handled under ADR where there are valid reasons for such considerations and where the parties have evaluated the said reasons and are agreeable that the dispute ought to be handled under ADR.

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15. DOCUMENTATION

15.1 Relevant documentation must be provided to support the dispute and guide the ADR discussions. Documentation may include but is not limited to: -

- a) The relevant assessment
- b) a notice of objection and all documents submitted to the Commissioner
- c) The Objection decision
- d) A settlement proposal with basis in the law as may be appropriate, if any
- e) A summary of the issues in the dispute
- f) Any other documentation as may be required during ADR discussions

15.2 All documents submitted by either party in an ADR discussion shall be confidential and shall not be disclosed to third parties except with consent of either party owning the document.

16. MANAGEMENT AND PROCEDURES IN ADR SITTINGS.

16.1 The parties may opt to act on their own behalf during the ADR discussions or be represented by a tax Agent or Legal Advisor of their choice. However, the parties to the dispute are encouraged to be present during ADR discussions at all times so as to enhance the efficiency of the process.

16.2 The Facilitator may require a party to produce a witness or subject matter expert if in the opinion of the parties the evidence of such witness may be necessary to unlock the dispute.

16.3 In cases involving investigations and enforcement, the Commissioner responsible shall be involved in the entire process of ADR discussions including the initiation and or confirmation in writing of intention to engage in ADR process.

17. TERMINATION OF ADR DISCUSSIONS

17.1 ADR discussions may be terminated for the following reasons;

- a) Where either party opts to do so.

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- b) Where parties unanimously agree to do so.
- c) Where a party is of the opinion that the dispute cannot be resolved due to undue conduct on the part of the other party.
- d) If a party consistently fails to honor ADR meeting invitations when specifically requested to do so without any justifiable cause.
- e) Where a party fails to carry out a reasonable request by the Facilitator with no valid justification.

17.2 Once the ADR discussions have been terminated as provided in the preceding paragraphs, both parties may proceed to have the matter determined by the TAT or Court as may be applicable, as if no ADR discussions had taken place at all.

17.3 The above notwithstanding, a matter may be re-admitted to ADR where such an application has been made and the other party is willing to engage in discussions. The said re-application shall be accompanied by a proposal on settlement and/or justifications for the matter to be readmitted to ADR.

18. SIGNING OF ADR AGREEMENT

An ADR agreement;

- 18.1 Must be in writing
- 18.2 Must be signed by the taxpayer and the Commissioner or their duly authorised representatives and attested to by the Facilitator
- 18.3 Must be duly signed as in (b) above and a copy retained by each of the parties as evidence of ADR discussions and the outcome
- 18.4 Will form the basis for preparation and filing of a duly executed consent before the Tax Appeals Tribunal or Court as may be applicable
- 18.5 Shall be binding to both parties to the dispute.

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19. AGREEMENT TERMS, SETTLEMENT PROCEDURES, AND APPROVALS

19.1. Where parties have reached an agreement, the issues agreed upon shall be put in writing. The ADR agreement terms will set out;

- a) The background to the dispute and the issues in contention
- b) Agreed and non - agreed issues,
- c) The processes and specific exercises undertaken during the ADR process,
- d) Any working meetings held between the parties, in order to carry out reconciliations and/ or compute workings, which working meetings may have been conducted in the absence of the ADR team.
- e) Taxes payable and justifications thereto
- f) Terms of settlement
- g) Undertakings given by each party if any
- h) Payment plans where applicable

The signed agreement will represent the final position between the parties and will be in full and final settlement of the dispute.

20. RESERVATION OF RIGHTS

ADR discussions are held on a without prejudice basis unless any of the parties waive their rights in writing. However, parties reserve their rights of appeal to the Tax Appeals Tribunal or Court.

21. REVIEW OF THE FRAMEWORK

This Framework takes into cognizance that there will be changes in Revenue Laws, other Laws which compliment Revenue Laws in tax collection and Regulatory or Policy changes. This may necessitate future review of the Framework in order to align it with the changing circumstances.

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22. APPLICATION AND INTERPRETATION

The interpretation of this ADR Framework shall be within the Constitution of Kenya, the Revenue Statutes and Laws supporting Revenue Administration.

ANNEX 1 - LODGING OF ADR APPLICATIONS AND PROCEDURES

1. Applications and requests for ADR shall be addressed to the Tax Dispute Resolution (TDR) Division and copied to the relevant Commissioner.
2. Applications shall be made through the online portal/link on the KRA website in the prescribed form and should be accompanied with all relevant documentation as guided by the checklist in the application form.
3. The applicant shall receive an acknowledgement through e-mail.
4. The dispute for which ADR has been applied will be allocated to a case manager and undergo a suitability test.
5. The relevant parties will be invited to the preliminary ADR meeting through written letters, e-mail and telephone correspondence.

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ANNEX 2 – PROCESS FLOW IN ADR

