

# MONTHLY **NEWSLETTER**

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# Tax Court in Kenya: A Viable Option or a Rosy Dream?

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## 1. Introduction

The National Treasury Principal Secretary, Julius Muia recently announced that the National Treasury is in the process of developing a National Tax Policy. The policy proposes a raft of measures aimed at bolstering revenue collection. Among the proposals in place, is creation of a Tax Court for resolution of tax disputes between the taxpayers and the Kenya Revenue Authority (KRA).

It is projected that the establishment of a tax court will be instrumental in resolving disputes between Kenya Revenue Authority and taxpayers in a timely manner thus unlocking revenue. In that regard, the proposal calls to fore the efficacy of the court taking into account the successes, challenges and failures of the Tax Appeals Tribunal and our judicial system in general.

The aim of this alert therefore, is to analyse the viability of Tax Court, the underlying legal challenges and whet the debate on the subject. This is in light of the fact that, internationally, tax system reforms have gained traction in order to cope with the changing global dynamics attributed to changes in tax code, narrow tax base and concerns over horizontal equity.

In Kenya, the reform began with the Tax Modernisation Programme in the 1980's geared towards increasing revenue collection, redistribution of wealth and attaining a sustainable tax system. As such, while the objectives of taxation and a tax system is mainly raising revenue, distribution of wealth and encouraging or discouraging certain activities (sin tax/incentive), the weight placed on them vary depending on fiscal policy, priorities and competing interests. In Kenya for example, the revenue raising objective to fund government expenditure, has been the overriding objective of the tax system. It is against this backdrop that this alert analyses the viability of a tax court and its contribution towards a holistic achievement of the other objectives of taxation in a changing fiscal environment.

## 2. Resolution of Tax Disputes – Tax Appeal Tribunal

Presently, all disputes between the tax man and the taxpayer are referred in the first instance to the Tax Appeals Tribunal established under the Tax Appeals Tribunal Act No. 40 of 2013. Generally, tribunals are specialised quasi-judicial organs that deal with the technical and narrowed down technical aspect of a subject. In essence, they are the bodies that understand the nuances of a subject as they interact with the litigants on a specialised level.<sup>2</sup> Colloquially speaking they understand “*vitu kwa ground*” i.e. they best know the situation at the basic level. Further, unlike courts, the legal strictures are a little bit relaxed and friendly to the

<sup>2</sup> See, Julius Katana Kithi & another v Franklin Vuru Chiruu & 5 others [2017] eKLR, Paragraph 11.

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lay person as opposed to strict jacket procedures in the courts.

Presently, all tax payers aggrieved by an appealable decision by the Commissioner (KRA) may appeal to the Tax Appeals Tribunal for determination. Thereafter Appeals from the Tribunal lie to the High Court (Commercial and Tax Division) and all the way to the Supreme Court in line with the set laws and principles i.e. if it raises issues of constitutional interpretation or is certified as a matter of general public importance, otherwise, most appeals terminate at the Court of Appeal.

The above notwithstanding, the impetus behind the proposal for the establishment of a tax court has not been attributed to the failures of the Tax Appeals Tribunal but rather the backlog of cases at the High Court and the Court of Appeal, and, the protractions over the years that have locked up revenue in long litigious processes. In the interim, to cure this, alternatives such as out of court settlement and alternative dispute resolution mechanisms have been proposed and explored. This led to the establishment of an Alternative Dispute Resolution (ADR) Framework within KRA with considerable success. Nonetheless, the bogeyman in litigation tax tussles remain the judicial backlog mostly at the High Court.

### 3. Comparative Experience

Riding the crest of the debate and proposal for the establishment of a tax court has been the comparative experience drawn from the Federal Republic of the United States of America. The United States Tax Court is established by Congress as a federal court of record pursuant to article 1 of the Constitution of the United States of America.

Notably, the Court handles disputes from taxpayers who contest the determinations of the Internal Revenue Service (IRS) without subjecting them to the requirement of prepayment of any portion of disputed taxes unlike other district and federal courts.<sup>3</sup> In its composition, the Court is presided by nineteen (19) presidentially appointed judges who are later confirmed by the senate. Physically it is headquartered at Washington DC, although, its officers traverse the vast expanses of the nation at designated places of trial to handle matters.

### 4. Legal Hurdles and Challenges

It is the trust of this alert that the proposal for the establishment of a Tax Court may be realised either administratively; or through legislation by parliament. The basis for this argument is that, constitutionally, under article 162, there is established two specialised courts, namely the Environment and Land Court and the Employment and Labour Relations Court that have been operationalised through the respective act of parliament. These Courts have the same status as the High Court although their jurisdictions differ.<sup>4</sup> They however offer a specialised approach towards resolution of disputes within their special jurisdiction.

With regard to specialisation, the court in the case of Peter Kariuki Muibau & 11

<sup>3</sup> See, *Flora v United States* 26 U.S.C. § 7441 on determination of the “full payment rule”.

<sup>4</sup> See, *Republic v Karisa Chengo & 2 others* [2017] eKLR.

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others vs The Attorney General & another [2018] eKLR offered notable guidance; that the organization of courts to hear different types of cases is necessary to ensure specialization of court personnel at each level, and to ensure each court understands the specific needs of the parties coming before it. In this case, the establishment of a specialised tax court is thus timely owing to the technical nature of tax matter and the backlog of cases experienced and the need to expedite their resolution.

In that regard, legislatively, the Court may be established by parliament as was done in the case of the United States of America through the exercise of legislative Authority. In Kenya, the legislative prerogative is derived from the people and vested in parliament under article 94 of the Constitution. Thus, Parliament is the only organ with power to make legal provision with the force of law within the republic of Kenya.

On the other hand, administratively, considering that the court sought to be established is of the status of a High Court, the same may be housed (administratively) as a distinct division of the High Court courtesy of the High Court (Organization and Administration) Act No. 27 of 2015. This will mean that the Tax Division will be detached from the Commercial and Admiralty section. In doing this, it will allow for the separation of tax matters from other commercial matters thus giving a new lease of life to the backlog cases considering that tax matters will not be competing for judicial time with other commercial cases. In summary, it will offer some sort of expressway from the Tax Appeal Tribunal to a 'Tax Court' i.e. the Tax Division of the High Court handling purely tax disputes as their specialisation.

## 5. Conclusion

In summary therefore, it emerges that the development of a tax court or otherwise the dedication of tax division of the high court to exclusively handle tax matters is handy as well as viable – an idea whose time has come.

Taking lessons from the United States of America, the Tax Court/Division can co-exist with the Tax Appeals Tribunal and serve both as an appellate court as well as a court of first instance where the taxpayer does not have to pre-pay the disputed taxes in order to gain audience.

However, fiscally speaking, it would be viable to dedicate a division in the High Court purely for handling tax matters as opposed to establishing an independent court, will offer the much-needed relief in the resolution of tax matters in order to unlock revenue held up in court cases. This will also be advantageous considering that the jurisdiction of the High Court is wide.