

Tax & Exchange Control

ALERT | 11 July 2024



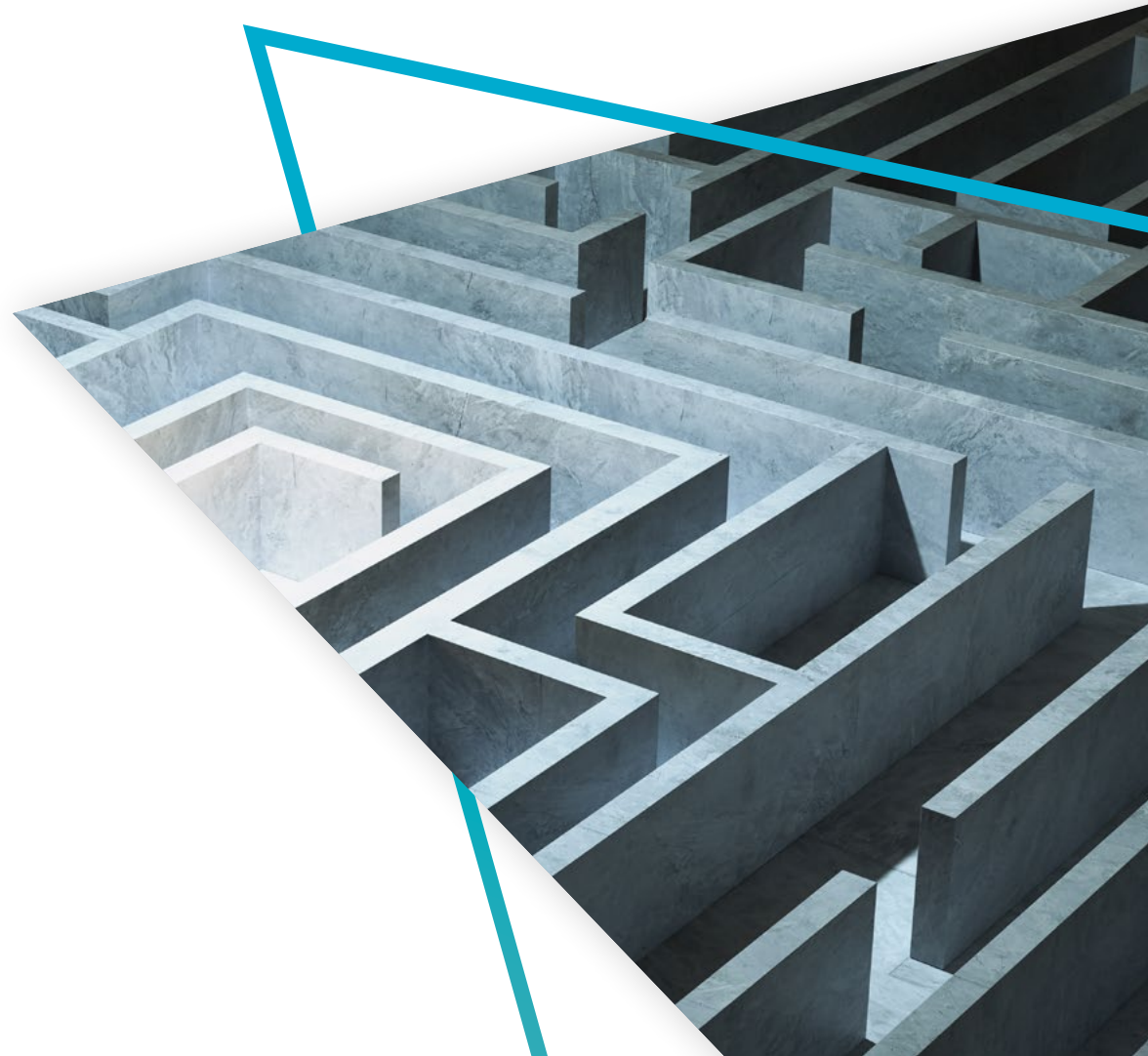
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KENYA

Let's bake a tax-alicious appeal pie: A look at the crucial role of tax procedures in tax dispute resolution



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TAX & EXCHANGE CONTROL ALERT

Let's bake a tax-alicious appeal pie: A look at the crucial role of tax procedures in tax dispute resolution

To bake a perfectly delicious pie, one needs to get the right quality and quantity of ingredients and, more importantly, follow the recipe to the letter. In the same way, failing to follow the procedures for the institution and adjudication of tax disputes as set out in the Tax Procedures Act as read together with the Tax Appeals Tribunal Act, can be detrimental to an appeal.

It is trite that where there is a clear procedure for redress of any grievance prescribed by the constitution or a statute, that procedure must be strictly followed. These procedures are crucial in ensuring a fair and equitable outcome. Failure to follow procedures can unravel the very fabric of justice, leading to dismissal of cases on technicalities.

There are key 'ingredients' to instituting an appeal before the Tax Appeals Tribunal (Tribunal). First on the list is a tax decision issued by the Kenya Revenue Authority (KRA), against which the taxpayer must file a valid notice of objection within 30 days. Second, upon receipt of a valid Notice of Objection, the issuance of an objection decision within 60 days, which forms the basis of the appeal before the Tribunal. Once a taxpayer receives an objection decision, the next step is to file a notice of appeal within 30 days, followed by a memorandum of appeal and statement of facts, 14 days thereafter.

Just the same way that deviating from the actual recipe may result in an inedible end product, flouting procedural rules as set down in the law may render a tax appeal invalid.

In the recent past, we have noticed a surge in appeals being dismissed by the Tribunal, not on matters of merit but for failing to follow set out procedures. Below we highlight three thematic areas that seem to be the common bases for the dismissal of such appeals.

Jurisdiction

One of the key reasons for dismissals is around the jurisdiction of the Tribunal. Subject to provisions of both the Tax Procedures Act and the Tax Appeals Tribunal Act, an appeal can only be lodged at the Tribunal once an objection decision has been issued by the KRA. Without such a decision, the Tribunal does not have jurisdiction, and this oversight has been the basis of the dismissal of a number of appeals, including the case of *Transchem Pharmaceuticals Limited v Commissioner of Domestic Taxes* [2023] (Appeal 1525 of 2022) [2023] KETAT 938 (KLR) (20 December 2023) where the Tribunal categorically stated that:

"Having determined that there is no appealable decision before the Tribunal, the Tribunal will not delve into the second issue as the same has been rendered moot ... The upshot of the foregoing is that the appeal is incompetent and unsustainable in law."

Timelines

Both the Tax Procedures Act and the Tax Appeals Tribunal Act only allow the Tribunal to act on a notice of appeal that is submitted within 30 days of receipt of the decision of the KRA Commissioner, after which the taxpayer is required

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to file its memorandum of appeal and statement of facts within 14 days. Any unexplained or inordinate delay in filing this will lead to the appeal being found to be invalid and dismissed, as was the case in *Sirrom Trading Company Limited v Commissioner of Domestic Taxes [2024] (Tax Appeal 405 of 2023) [2024] KETAT 727 (KLR) (17 May 2024)* in which the Tribunal determined that:

"On the question of timelines the Tribunal reiterates its holding on the question of timelines in W.E.C. Lines Ltd vs. The Commissioner of Domestic Taxes [TAT Case No.247 of 2020] where it was held ... that: 'Where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures. The relevant procedure here is the process of opposing an assessment by the Commissioner.' ... Accordingly, the Tribunal finds that the instant appeal is invalid."

There are certain instances when a party, subsequent to filing an application for extension of time, is granted the opportunity to file an appeal out of time within new timelines as prescribed by the Tribunal in its ruling. The Tribunal has the power to grant leave to file an appeal out of time and direct new timelines to file the appeal. Nevertheless, this is a special request as it is discretionary and failure to follow the timelines, despite seeking leave to file out of time, will therefore be considered concerning. For instance, the case of *Jaggi Renovators Limited v Commissioner of Domestic Taxes [2024] (Tax Appeal 121 of 2023) [2024] KETAT 741 (KLR) (9 May 2024)*, was dismissed for failure to comply with new timelines as directed by the Tribunal.

Documentation

The Tax Procedures Act provides that for a notice of objection to be valid, not only does it have to be filed within 30 days of receipt of the tax decision but, importantly, it has to be supported with all the relevant documents to enable the Commissioner to have an accurate and proper finding. Documentation forms a key ingredient in any tax

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Chambers Global 2024 Results

Tax & Exchange Control

Chambers Global 2018–2024 ranked our
Tax & Exchange Control practice in:
Band 1: Tax.

Emil Brincker ranked by
Chambers Global 2003–2024 in
Band 1: Tax.

Gerhard Badenhorst was awarded
an individual spotlight table ranking in
Chambers Global 2022–2024
for Tax: Indirect Tax.

Stephan Spamer ranked by
Chambers Global 2019–2024 in
Band 3: Tax.

Jerome Brink ranked by
Chambers Global 2024 as an
"Up & Coming" tax lawyer.



appeal as it enables the taxpayer to discharge its burden of proof. This was recognised by the Tribunal in the case of *Daton Engineering Services Limited v Commissioner of Domestic Taxes (Tax Appeal 1246 of 2022) [2023] KETAT 963 (KLR) (20 December 2023)* in which it stated that:

"On this basis, the Tribunal finds that the respondent has properly demonstrated that it not only requested for more information from the appellant but that it took into account the information it was provided and made a determination based on its best judgment ... The Tribunal therefore finds that the appellant has failed to discharge its burden of proving the assertions that the assessment orders were incorrect and the respondent's objection decision of 28 September 2022 was proper and justified ... The upshot to the foregoing is that the appeal is not meritorious."

Conclusion

In order to bake a perfect pie, one has to use the right ingredients and mix them up as set out in the recipe. In the same breath, for an appeal to stand a chance of being determined on matters of merit, a taxpayer seeking redress before the Tribunal needs to ensure that the procedures as set out in the law have been adhered to.

One of the key ingredients that binds everything together is getting the right representation. Failure to seek the necessary expert advice can also have dire consequences and as such, oversight and dismissal of otherwise arguable appeals still fall at the taxpayer's feet as determined by the Tribunal in the case of *Charles Wanjuki Wamai v Commissioner of Domestic Taxes [2023]* where it stated that "when a party selects a professional, who fails to represent [them] as instructed, sometimes it is fair to let the consequences fall on the party".

Lena Onyango and Mike Ogutu

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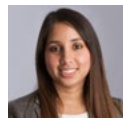
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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