Implications of the Finance Bill, 2022 on Tax Procedures

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> Death and Taxes are certain
>
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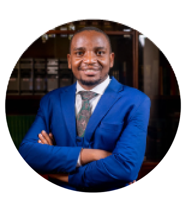

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Introduction

In the year 1789, Benjamin Franklin stated that nothing is certain except death and taxes. Up to date, over 200 years later, that quote still resonates and is as applicable. Moving back to Kenya, **Ukur Yatani**, Cabinet Secretary for the National Treasury and Planning, on 7th April 2022 tabled the **Finance Bill 2022**. The theme for the budget this year 'Accelerating Economic Recovery for Improved Livelihood'. The Bill majorly seeks to amend various legislations on taxes and duties.

If parliament does not make any amendments to the Bill and the Bill is operationalized as some of the proposed section shall take effect immediately. Despite the many tax laws that will be amended, this paper will focus mainly on the implications of the Finance Bill on the **Tax Procedures Act (TPA)**

What entails Tax Procedures

Tax procedures are governed under the Tax Procedures Act, 2015 and it basically entails the procedural rules and laws governing the administration of tax laws in Kenya. In simple terms Tax Procedures is *inter alia* about how the tax man collects taxes, how the tax payer ought to file returns, the recovery of tax, the refund of taxes and tax decisions, objections and appeals.

A. ASSESSMENT OF TAXES

Addition of a new sub-section into of Section 31 of the Tax Procedures Act

A tax assessment is what you owe the tax man. In Kenya, a tax payer assesses the tax he or she should pay through a self assessment system. These payments are made to the Kenya Revenue Service.

Section 31 of the Tax Procedures Act provides for amendment of assessments where the Kenya Revenue Service Commissioner may amend the original assessment due to various factors such as deficits in income tax or excess amount of input tax in VAT and so forth.

The Finance Bill seeks to amend 31 by introducing sub-section 5 which provides that deduction of input tax shall only be within a time-frame of six months after the end of the tax period in which in the supply or importation occurred. The implication of this being that after the 6-month period a tax payer will not be allowed to deduct input tax. We note that this may result in Tax payers forfeiting any sums not claimed after the expiry of the 6 months.

B. SECURITY ON PROPERTY FOR UNPAID TAX

Repealing of the entire Section 40 of the Tax Procedures Act.

This amendment has expounded on the definition of property that can be used as security for payment of unpaid tax. In short, the current section only provides for the use of land as security however, the amendment under the Finance Bill broadens to bring about the use of any property as security.

Additionally, the amendment will allow the Kenya Revenue Service Commissioner to dispose of the property, mortgage or charge by public auction or private treaty. Basically, failure to pay taxes, Kenya Revenue Service can hold your property as security and if you remain in default, they can proceed to sell that property. However, in doing so shall the Service be subjected to the rigors of the ensuring compliance with the provisions of the Land Act as pertains to the rights of accorded to parties when exercising the right of redemption.

C. OFFSET OR REFUND OF OVERPAID TAX.

Repealing of the entire Section 47(1)

This section majorly focuses on the refund of overpaid tax. The Finance Bill entirely will repeal the section by clearly stating within the specified two-year period, failure to refund the overpaid tax, the amount due shall accrue an interest of one percent each month or part of the amount which has not been paid. In instances where the commissioner has notified the tax payer of an application of the overpaid tax to offset the tax payers future tax liabilities, no interest or penalties shall accrue on the said amount applied in offsetting the outstanding tax liability from the date of the application. The commissioner ascertains this within a period of 90 days. However, interest and penalties shall accrue in cases where, an application by the commissioner has been made to offset the overpaid tax in reference to the outstanding tax liability.

In cases where there has been overpayment of tax within five years or 6 months for value added tax, the commissioner may issue a refund within a period of two years from the date of application. Conclusively, the time frames provided when it comes to the refund of tax are long and hence not convenient and considerable in cases where the refund is considered urgent by the tax payer.

D. TAX PAID IN ERROR

Repealing of the entire Section 47(1)

Section 47(a)(3) of the Finance Bill defines 'tax paid in error' as payment of tax that is satisfactory to the Commissioner it ought not to have been paid. The entire section amends **Section 40 of the Tax Procedures Act** as pertains tax paid in error. The commissioner has the power to refund tax paid in error upon approval by the Cabinet Secretary. Placing the final approval to the docket of the Cabinet Secretary shall cause unwarranted delays towards recovery of any funds in error, the Bill should provide a clear time frame to which the CS should provide an approval, failure to which an alternative person to provide the Approval.

E. OBJECTIONS

The Bill provides that a commissioner will issue a notice a response within 14 days, rather than "immediately" as previously stated in the Tax Procedures Act in cases where, the commissioner realizes that an objection is not lodged under the required modifications. Additionally, within the same specified period of time after application of the notice of objection has been received, the commissioner, will notify the tax payer of the final determination of the objection. The decision is made by the commissioner within 60 days from the date of receipt of a well-grounded notice of objection. 30 days after issuance of the decision by the commissioner, a party who is discontented with the decision, may appeal to the tribunal.

The case of ***Revenue Authority v Man Diesel & Turbo SE Kenya [2021] eKLR***, the court laid down the general provisions relating to objections and appeals which include; the burden of proof will always be on the tax payer to prove that a tax decision is incorrect, an appeal to the High Court or Court of appeal will only be on the basis of a question of law and, a tax payer shall rely strictly on the grounds stated in the objection to which the decision relates unless the tribunal or court allows for the addition of new grounds.

The case of ***Republic v Commissioner of Domestic Taxes Ex Parte Fleur Investments Limited [2020] eKLR*** is very instructive on objections procedures under the Act. First is that the statute refers to the making of an objection decision by the commissioner in mandatory terms, meaning that the commissioner must make an objection decision within 60 days from the date of receipt of a valid and compliant objection notice. Secondly, the case emphasizes the need for the Commissioner to exercise his powers when making an objection decision, with the policy and human rights aims of the right to be heard and the right to fair administrative action under **Article 47 of the Constitution.**

At this juncture, we find it apposite to emphasize that undue delay in making an objection decision is a ground for reviewing the inaction of the commissioner on the administrative law ground of unreasonable delay. Thirdly, the decision made a finding that the objection decision of is "administrative action" which is amenable to judicial review. This means that the commissioners exercise of power is subject to the higher level of scrutiny on both the process and merits of the decision. The grounds for such a higher standard of scrutiny under **Section 7 of the Fair Administrative Action Act** are:

a. Bias
b. Procedural unfairness
c. Where the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
d. the commissioner failed to consider relevant considerations;
e. The commissioner acted in bad faith
f. Irrationality, where the decision of the commissioner is not rationally connected to: the purpose for which it was taken (in this case the policy aims of tax dispute resolution mechanism); the purpose of the empowering provision; the information before the administrator; or the reasons given for it by the administrator.
g. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law.
h. The administrative action or decision is unreasonable.
i. The decision is not proportionate to the interests or rights affected
j. The decision is a violation of the legitimate expectations of the person to whom it relates;
k. the administrative action or decision is unfair;
l. the administrative action or decision is taken or made in abuse of power.

Lastly, the case of ***Kenya Revenue Authority v Republic (Exparte Fintel Ltd) [2019] eKLR*** clarified the rules for construing tax statutes. First, penal tax provisions are strictly interpreted to ensure the section is only enforced in respect of those that the provision was intended for. Secondly, where the tax statute gives a word a technical meaning, the technical meaning of the statute must be preferred over its ordinary meaning. Such an approach ensures that the Court remains the custodian of the will of parliament and enforces it.

Conclusion

Although the Finance Bill has come into force to increase the tax volume of the State, it is evident the new amendments are heavy on the tax payer and not the tax body (**Kenya Revenue Service)**. The specified period stipulated when filing for notice of objections, appeals and refund of over paid taxes is time consuming and extremely lengthy which is a tedious process to the tax payer. This is unfavorable to the tax payer because refunds are not readily available and hence may aggrieve the tax payer in cases where they are in financial distress.

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