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Newsletter

MBAYA AND ASSOCIATES

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Introduction

We are pleased to release the ninth edition of our tax newsletter. The focus of this issue is on Tax Refunds. We hope this insight will encourage taxpayers to apply for tax refunds on the described tax overpaid. This issue also highlights the tax dispute resolution mechanism known as Alternative Dispute Resolution (ADR).

On the right column of the newsletter you will find contact details for the senior members of our team who can help answer any questions you may have about the issues highlighted in this newsletter or any other matter.

We are interested in your feedback on the items covered and any topics you would like to see featured in upcoming issues of the newsletter.

Please provide any feedback at tax@mbaya.co.ke

In this issue



Tax Refunds

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» From the **TaxDesk** »

Tax Refunds

A tax refund is a reimbursement of excess tax paid, or tax paid in error for a given period. It arises when the tax liability is less than the taxes paid.

When a taxpayer has overpaid a tax under a tax law, the taxpayer may apply to the Commissioner for a refund of the overpaid tax within five years of the date on which the tax was paid.

The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit.

The Commissioner shall notify in writing to an applicant of the decision in relation to the application within ninety days of receiving the application for a refund.

Where, in relation to an application for a refund made under this section or made under any other tax law, the Commissioner is satisfied that a taxpayer has overpaid a tax, the Commissioner shall apply the overpayment in the following order:

- a) In payment of any other tax owing by the taxpayer under the tax law;
- b) In payment of a tax owing by the taxpayer under any other tax law; and
- c) Any remainder shall be refunded to the taxpayer

The Commissioner shall repay the overpaid tax within a period of two years from the date of application, failure to which the amount due shall attract an interest of 1% per month or part thereof of such unpaid amount after the period of two years.

The different types of refunds include:

- Income tax
- Value Added Tax (VAT)
- Excise duty
- Stamp duty

On this issue, we will discuss the two most popular tax refunds, Income Tax and VAT refunds.

Income Tax Refund

Income tax refund can arise in case an employer fails to grant relief to an employee who has an insurance policy or a mortgage on owner occupied property. For an individual with a mortgage to qualify for a tax relief, the mortgage must be from specific financial institutions as listed on the 4th schedule on Income Tax Act.

Insurance policies considered for a tax relief purposes are education and life policies.

An income tax refund can also arise where a taxpayer has not been granted a personal relief during the year. Additionally, a tax refund arises where tax deducted at source is in excess of the final liability.

Taxpayers eligible for Income Tax Refunds fall under the following categories:

Category	Required documents
Life or Education Insurance policy holders.	Insurance policy certificate and Tax deduction card (Form P9)
Home owners with Mortgage from the following financial institutions Banks, Insurance companies, Building Societies, National Housing Corporation.	Mortgage certificate and Tax deduction card (Form P9).
Persons with Disability holding an exemption certificate.	Exemption certificate and Tax deduction card (Form P9).
Taxpayers who have paid tax deducted at source (Withholding Tax) in excess of final liability.	Withholding Tax Certificate and Tax deduction card (Form P9) where applicable.
Taxpayers who pays tax in error.	Relevant documents to prove tax was paid in error.

VAT Refund

VAT refunds arises from the following scenarios:

- Tax paid in error on any supply.
- VAT paid on bad debts.
- Excess input tax resulting from zero rated supplies.
- Overpayments or credits resulting from Withholding VAT.

In the case of tax paid in error, the claim should be lodged within 12 months from the date the tax became due and payable.

In the case of a bad debt, a tax refund is paid to a VAT registered businessperson who has accounted and paid tax on a supply but has not received any payment after a period of three years from the date of that supply and the person liable to pay the tax has become legally insolvent.

Claims for refund for bad debt should be made within five years after which it becomes time barred. However, if the person recovers the tax from the recipient of the supply after receiving the refund, the tax should be paid within 30 days after the recovery date.

If payment is not made within the time specified above, interest of two per cent per month or part thereof of the tax refunded shall forthwith be due and payable: Provided that the interest payable shall not exceed one hundred percent (100%) of the refunded amount.

The claim for tax refund is applied online. Upon approval or rejection of a claim, the taxpayer automatically receives an approval order or rejection order respectively via email.

Erroneous Refund of Tax

Where any tax has been refunded in error, the person to whom the refund has been erroneously made shall, on demand by the Commissioner, pay the amount erroneously refunded.

Where a demand has been made by the Commissioner for any amount of tax as specified above, that amount shall be deemed to be due from the person liable to pay the tax on the date upon which the demand is served upon him

or her and if payment is not made within thirty days of the date of service, an interest equal to 1% per month or part thereof of such unpaid amount shall forthwith be due and payable: Provided that the interest chargeable under this subsection shall not exceed one hundred percent (100%) of the tax originally due.

Administrative Penalties & Offences for Making Fraudulent Claims

A person who makes a fraudulent claim shall be liable to either a penalty or prosecution as follows:

- A person who fraudulently makes a refund claim shall be liable to a penalty of an amount equal to two times the amount of the claim.
- A person who knowingly claims a refund which he/she is not entitled commits an offence and is liable, upon conviction, to a fine not exceeding ten million shillings and/or imprisonment for a term not more than ten years.

Tax refund utilization by the Commissioner

Finance Act 2021, granted the Commissioner additional rights to utilize the ascertained tax refunds.

According to the Act, where the Commissioner notifies a taxpayer that an application for a refund has been ascertained and applies the refund to the payment of an outstanding tax, interest or penalties shall not accrue on the amount applied to the payment of the outstanding tax from the date of the notification.

For the avoidance of doubt, where the Commissioner has applied a refund to the payment of an outstanding tax, if there is any outstanding tax after such application, the outstanding tax shall accrue interest and penalties in accordance with this Act.

This amendment automatically creates a tax credit which can be used to offset against future tax liabilities in the event where the Commissioner is satisfied that there is an overpayment of tax.

Additionally, the amendment does not seem to limit the type of tax that such tax credit can be offset against.

Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) is 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.

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 Tax Procedures Act, 2015.

ADR was established in the year 2015 by the Tax Procedures Act 2015 to help in solving tax disputes out of the Tax Appeals Tribunal (TAT) or high court and make the two parties agree on the tax and its settlement.

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.

Benefits of ADR in Tax Disputes

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

The objectives of ADR process

- 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
- To provide internal structures and processes which will support tax dispute resolution through oversight, monitoring and management of the ADR processes
- 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
- To provide an additional approach for dispute resolution to complement the existing Internal Dispute Resolution Mechanisms (IDRM).

When to engage ADR

When parties request to be given an opportunity to engage in ADR before issuance of an objection decision.

- This Framework takes into cognizance that the Tax Procedures Act (TP) provides that the Commissioner in charge of Tax Dispute Resolution (TDR), through the Deputy Commissioner, 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.

- 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.
- 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:
 - Amend the assessment in accordance with the objection or,
 - Amend the assessment in light of the objection according to the best of his judgement,
 - Decline to amend the assessment.
- If the Commissioner's decision is to amend the assessment partially or declines to amend the assessment altogether, 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.
- 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.

When the case is pending before the Tax Appeals Tribunals and Courts of Law.

- 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.
- This Framework takes into consideration 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.
- 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.
- 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.
- The Courts may also direct or dictate specific timelines within which a dispute before it may be negotiated under ADR.

Termination of ADR Engagement

ADR discussions may be terminated for the following reasons:

- a) Where either party opts to do so.
- 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 honour 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.

Once the ADR discussions have been terminated, 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.

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.

Tax Due Dates

Withholding Tax | 20th Day of the following month
 Pay as You Earn | 9th Day of the following month
 VAT | 20th Day of the following month
 Balance of Tax on Self-Assessment | 4th Month after year end
 Monthly Rental Income | 20th Day of the following month



Instalment Tax

1st Instalment | 20th day of the 4th month after year end
 2nd Instalment | 20th day of the 6th month after year end
 3rd Instalment | 20th day of the 9th month after year end
 4th Instalment | 20th day of the 12th month after year end
 Kindly note that all the returns must be filed on I tax while the payments e-slips must be generated from the I-Tax platform.

Disclosure of Company Beneficial Ownership

Earliest date to be entered in the register of BOs | 21st day of February 2020
 Deadline date for disclosure of company beneficial ownership | 31st day of July 2021

Digital Service Tax (DST)

20th day of the following month

Minimum Tax

Applicable where minimum tax is higher than instalment tax payable

1st Instalment | 20th day of the 4th month after year end
 2nd Instalment | 20th day of the 6th month after year end
 3rd Instalment | 20th day of the 9th month after year end
 4th Instalment | 20th day of the 12th month after year end

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