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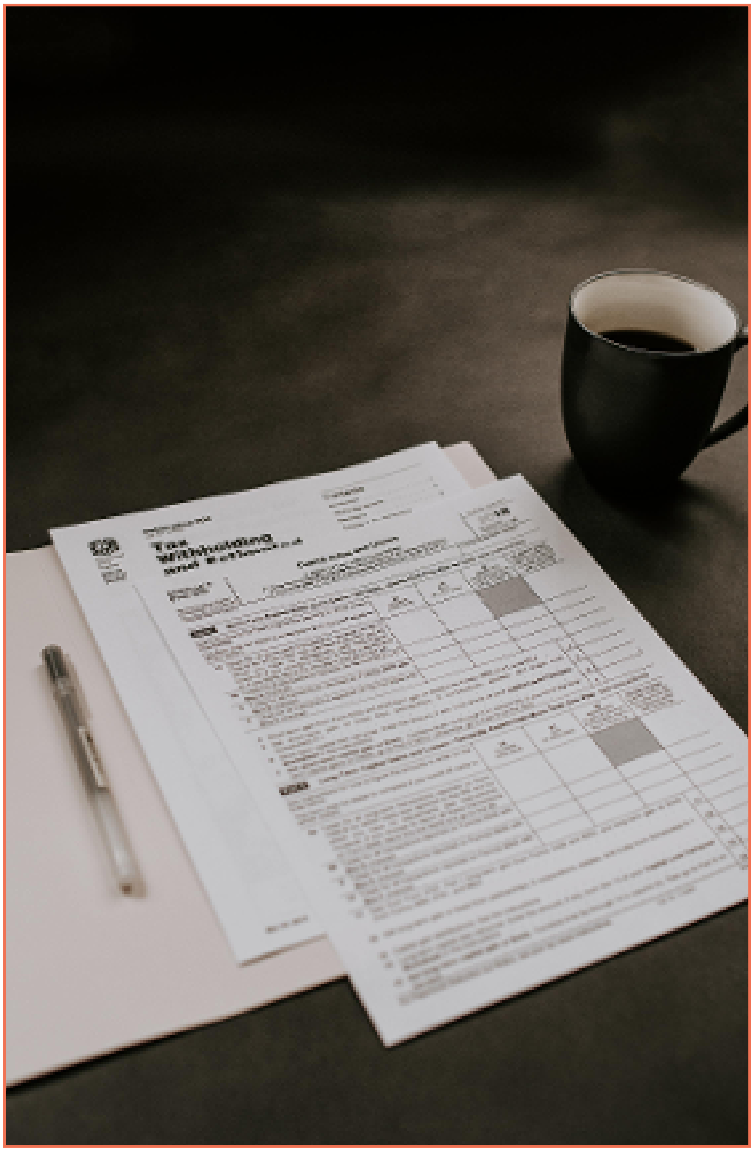
Legal safeguards availed to a tax payer where KRA oversteps its powers in demanding disputed taxes

By Geoffrey E. Odongo



The Tax Procedures Act (TPA) provides for a procedure to be followed by a tax payer who wishes to dispute a tax decision. A tax decision may take a variety of forms including an assessment or determination of the amount of tax to be paid by a taxpayer, a refund decision or a demand requiring a tax payer to pay a penalty. In some instances, even where the tax payer has commenced the statutory legal process challenging a tax decision it is not uncommon to find the Kenya Revenue Authority taking advantage of its statutory powers to the detriment of the tax payer. This is seen where KRA presses on with enforcement aimed at receiving payment in spite of the proceedings commenced by the tax payer challenging a tax decision even in instances where the tax payer has a tax credit which could readily be offset against the payment KRA is pursuing.

In such situations, the law avails a number of safeguards to the tax payer against abuse by KRA of its immense statutory powers under various statutes. These powers allow KRA to among other things, issue Agency Notices under section 42 of the Tax Procedures Act (TPA), issue warrants of distress under Section 41 of the TPA and revoke a Tax Compliance Certificate (TCC) under Section 72 of the TPA.

An agency Notice allows KRA to collect tax from a person that owes money to a defaulting tax payer. Agency Notices are commonly issued by KRA to banks holding deposits on behalf of a tax payer and result in the bank freezing such funds. A warrant of distress is a written order issued by KRA requiring the recovery of an unpaid tax by distress and sale of the movable property of a taxpayer. As regards TCCs, the KRA has powers to revoke an existing TCC or refuse to grant one for transactions where the document is required for a purpose critical to a tax payer's business. It is noteworthy that certain transactions such as the clearance of certain categories of goods at a port require a tax payer to have a valid TCC. It is detrimental to the tax payer where such powers are used to force a tax payer into paying of a disputed tax in spite of the fact that the same is disputed and a process to determine the rights of the tax payer has been commenced.

The foregoing action on the part of KRA may be challenged by relying on Section 18 of the Tax Appeals Tribunal Act, which provides that:

Where an appeal against a tax decision has been filed under this Act, the Tribunal may make an order staying or otherwise affecting the operation or implementation of the decision under review as it considers appropriate for the purposes of securing the effectiveness of the proceeding and determination of the appeal.

In a decided case of **Atta Kenya Limited Vs. Commissioner of Domestic Taxes** (Tax Appeal Tribunal, Misc Application No 6 of 2018), a tax payer obtained reprieve against KRA where it applied for a TCC so as to clear its goods from the port but KRA declined to issue the TCC citing non-payment of a disputed tax. In the case, the Tribunal took note of the fact that a TCC was essential for completion of activities incidental to importation of goods of the nature imported by the tax payer in its business. In the particular instance the TCC was required in order to process licenses and statutory forms together with licenses required by relevant agencies to allow the importation. Having taken note of the detriment to the tax payer's business occasioned by the actions of KRA, the tribunal directed that the tax payer's goods be granted a qualified release upon payment of the relevant duties pending the hearing and determination of the tax payers appeal. The Tribunal made reference to the observations of Justice Odunga who stated in *Republic Vs. Kenya Revenue Authority Ex-parte Cosmos Limited (2016) eKLR* the need for administrative authority when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues.

In addition, the Tribunal made the following observations in reaching its ruling in favour of the tax payer:

1. The tax payer had a history of tax compliance save for the one dispute with KRA that had come before the tribunal for determination.
2. KRA had already issued a warrant of distress against the tax payer so as to recover the taxes it demanded.
3. KRA owed the tax payer in excess of Ksh. 27 billion as VAT credit, which could be offset against the Ksh. 13 billion demanded at the time by KRA.
4. KRA was able to issue a TCC provisionally for the limited purposes of enabling clearance of the tax payer's goods from the port which TCC could be withdrawn pursuant to Section 72(3) of the Tax Procedures Act if the Tribunal went on to rule that the tax payer has outstanding tax.
5. An inordinate delay in clearance of the tax payer's goods at the port would lead to meaningless and unnecessary escalation of costs and possible deterioration and diminution of goods which serve no useful purpose to either KRA or the tax payer.
6. The Tribunal viewed the requirement for a TCC for clearance of goods through customs as an imposition of unauthorized non-tariff barrier, which was likely to have repercussions on international trade between Kenya and other Nations.

The Tribunal, although having the discretion to direct issuance of a TCC pending the hearing of the dispute before it, expressed its reluctance to appear to be usurping the discretion of the Commissioner of Domestic Taxes.

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