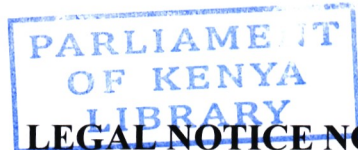


**EXPLANATORY MEMORANDUM FOR THE TAX PROCEDURES
(SETTLEMENT OF TAX DISPUTES OUT OF COURT OR TRIBUNAL)
REGULATIONS 2020**



LEGAL NOTICE NO. 123

PART I

Name of the Statutory Instrument: Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations 2020

**Name of the Parent Act:
Enacted Pursuant to:** Tax Procedures Act, 2015
Section 112 of the Tax Procedures Act, No 29 of 2015

Name of the Ministry/Department: The National Treasury and Planning

Gazetted on: 17th July, 2020

PART II

1. Purpose of the Statutory Instrument

The Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations 2020 are made by the Cabinet Secretary National Treasury pursuant to Section 112 Tax Procedures Act No. 29 of the 2015.

The Regulations are meant to operationalize Section 55 of the Tax Procedures Act and Section 28 of the Tax Appeals Tribunal Act 2013 on the settlement of tax disputes out of Court or Tribunal.

2. Highlights of the Regulations

The Regulations provide for the following: -

- a) the procedures to be followed by taxpayers who dispute decisions of the Commissioner upon confirmation of tax assessments;

- b) specify the tax disputes that are not eligible for settlement out of court of Tribunal;
- c) the manner of appointment of facilitators appointed to mediate tax disputes;
- d) the roles and responsibilities of facilitators;
- e) procedures to be followed when settling tax disputes;
- f) manner of termination of proceedings for settlement of tax disputes out of court or tribunal;
- g) effects of signing of agreement for settlement of tax disputes out of court or tribunal; and
- h) manner of enforcement of the agreement arrived at by the parties in the out of court or tribunal proceedings;

3. Legislative Context

The Tax Procedures Act No 29 of 2015 was enacted in the year 2015.

The Kenya Revenue Authority put in place an administrative framework for settling dispute out of court of Tribunal in July 2015. This administrative framework has been reviewed and adopted in resolving tax matters out court in accordance with Article 159 of the Constitution, Section 55 of the Tax Procedures Act no 29 of 2015 and Section 28 of the Tax Appeals Tribunal Act 2013.

The development of the Regulations is meant to provide a legal framework to ensure that the settlement of tax disputes out of Court or the Tribunal are carried out in a structured manner. This is also coupled with the need to ensure expeditious disposal of cases that have clogged the justice system as well as complement the judiciary's mediation project aimed at reducing the case backlog by engaging in alternative forms of resolving cases other than the adversarial court processes.

4. Consultation Outcome

The development of the Regulations underwent through a public participation exercise wherein members of the public were given an opportunity not only to give

written comments but also an opportunity to elaborate on the comments in a public forum arranged for that purpose as per the attached documents. The comments received were considered and upon review incorporated into the final Regulations to the extent possible.

5. Monitoring and Review

The Regulations will be implemented by the Kenya Revenue Authority and will be reviewed from time to time on a need basis to assess the effectiveness.

6. Contact

The Cabinet Secretary for the National Treasury and Planning

The National Treasury and Planning
29th July, 2020



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AUTHORITY**
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Ref: KRA/M&CD/o8/6

1st November 2019

Ms. Nancy Muhoya
Regional Chief Executive Officer
Ernst & Young LLP - Kenya
P.O. Box 44286 - 00100
Nairobi.

Dear Ms. Muhoya,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the Ernst & Young LLP – Kenya for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholder.engagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the Ernst & Young LLP - Kenya representatives.

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



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Ref: KRA/M&CD/o8/6

1st November 2019

Mr. Benson Ndung'u
Chief Executive Officer
KPMG - Kenya
ABC Towers, Waiyaki Way Westlands,
Nairobi.

Dear Mr. Ndung'u,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the KPMG for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholder.engagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the KPMG representatives.

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



**KENYA REVENUE
AUTHORITY**
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Ref: KRA/M&CD/08/6

1st November 2019

Mr. Eric Kinoti
Director
Tru Quantum Consulting
P.O. Box 72516-00200
Nairobi.

Dear Mr. Kinoti,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the Tru Quantum Consulting for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholder.engagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the Tru Quantum Consulting representatives.

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



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1st November 2019

Mr. Allen Waiyaki Gichuhi
President
Law Society of Kenya
P.O Box 72219-00200
Nairobi.

Dear Mr. Gichuhi,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the Law Society of Kenya for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholder_engagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the LSK members.

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



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Ref: KRA/M&CD/08/6

1st November 2019

CPA Edwin Makori
Chief Executive Officer
Institute of Certified Public Accountants of Kenya
P.O BOX 59963-00200
Nairobi.

Dear Mr. Makori,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the Institute of Certified Public Accountants of Kenya for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholderengagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the ICPAK members

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



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AUTHORITY**
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Ref: KRA/M&CD/o8/6

1st November 2019

Mr. Alpesh Vadher
Chief Executive Officer
PKF East Africa – Kenya
PO Box 14077 - 00800
Nairobi.

Dear Mr. Vadher,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the PKF East Africa – Kenya for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholder.engagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the PKF EA – Kenya representatives.

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



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Ref: KRA/M&CD/08/6

1st November 2019

Mr. Philip Muema
Managing Partner
Andersen Tax – Kenya
Rhapta Heights, St Michael Rd
Nairobi.

Dear Mr. Muema,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the Andersen Tax – Kenya for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholder.engagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the Andersen Tax - Kenya representatives.

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



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Ref: KRA/M&CD/08/6

1st November 2019

Mr. Joe Eshun
Chief Executive Officer
Deloitte & Touche East Africa
P O Box 40092 - 00100
Nairobi.

Dear Mr. Eshun,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the Deloitte & Touche East Africa for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholder.engagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the Deloitte & Touche East Africa representatives.

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



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Ref: KRA/M&CD/08/6

1st November 2019

Ms. Chebet Koske
Chief Executive Officer
Chartered Institute of Arbitrators
P O Box 50163-00200
Nairobi.

Dear Ms. Koske,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the Chartered Institute of Arbitrators for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholder.engagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the CIARB members.

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



**KENYA REVENUE
AUTHORITY**
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Ref: KRA/M&CD/08/6

1st November 2019

Mr. Ashif Kassam
Executive Chairman
RSM Ashvir Consulting Limited
P.O Box 349 - 00606
Nairobi.

Dear Mr. Kassam,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the RSM Ashvir Consulting Limited for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholder.engagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the RSM Ashvir Consulting Limited representatives

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



KENYA REVENUE
AUTHORITY
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Ref: KRA/M&CD/08/6

1st November 2019

Mr. Edward Mwachinga
Partner
Viva Africa Consulting LLP
PO Box 50719 – 00200
Nairobi.

Dear Mr. Mwachinga,

**INVITATION FOR A MEETING ON THE PROPOSED TAX PROCEDURES (ALTERNATIVE
DISPUTE RESOLUTION) REGULATIONS**

Following our public notice date 15th September, 2019 on the Tax Procedures (Alternative Dispute Resolution) Regulations, the Kenya Revenue Authority would like to invite the Viva Africa Consulting LLP for a meeting on Friday, 8th November 2019, to deliberate on the same regulations. The meeting will be held at Times Tower, 5th floor, from 9.am.

We kindly request you to confirm attendance by Wednesday, 6th November 2019 through email stakeholder.engagement@kra.go.ke or contact us on 020 2812045.

We thank you and look forward to your participation, as well as that of the Viva Africa Consulting LLP representatives

Yours Sincerely,

Grace Wandera
Deputy Commissioner, Marketing & Communication



Public Participation Forums

Public Participation Forums for Proposed Tax Regulations

PUBLIC NOTICES 06/11/2019

Following the publication of various draft regulations for public and stakeholder comments, Kenya Revenue Authority is inviting all relevant stakeholders to public participation forums to discuss the proposed regulations.

The forums target tax professionals, manufacturers and importers of excisable products, suppliers of vat-able products and members of the public. The engagements will be held as per the schedule below:

REGULATIONS	VENUE	DATE	TIME
The Excise Duty Regulations, 2019	Times Tower, 5th Floor Convention Centre Thursday,	7th November 2019	9:00 am – 12:00 noon
The Value Added Tax (Electronic Tax Invoice) Regulations, 2019	Times Tower, 5th Floor Convention Centre	7th November 2019	2:00 pm – 4:30 pm
The Tax Procedures (Alternative Dispute Resolution) Regulations, 2019	Times Tower, 5th Floor Convention Centre	Friday, 8th November 2019	9:00 am – 12:00 noon

For confirmation of attendance, kindly email: stakeholder.engagement@kra.go.ke or please call our Contact Centre on Tel: (0)204999999; 0711099999 or Email:

<https://www.kra.go.ke/en/media-center/public-notices/656-public-participation-forums-for-proposed-tax-regulations>



The Tax Procedures (Alternative Dispute Resolution) Regulations, 2019

PUBLIC NOTICES 15/09/2019

Kenya Revenue Authority (KRA) would like to inform the members of the public that the draft Tax Procedures (Alternative Dispute Resolution) Regulations, 2019 have been developed and currently hosted on the KRA's website: www.kra.go.ke.

In order to ensure wide consultation and public participation as stipulated in the Constitution of Kenya, 2010, KRA invites members of the public to submit their views and comments on these draft regulations.

The comments should be addressed in writing to the Commissioner General, Kenya Revenue Authority, P.O. Box 48240-00100, Nairobi or emailed to stakeholder.engagement@kra.go.ke to be received on or before Tuesday, 15th October 2019 to facilitate the review and finalisation of the Regulations.

For clarification please call our Contact Centre on Tel: (0) 20 4 999 999; 0711 099 999 or Email: callcentre@kra.go.ke.

Commissioner General



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STAKEHOLDERS' COMMENTS ON THE DRAFT TAX PROCEDURES (ALTERNATIVE DISPUTE RESOLUTION) REGULATIONS, 2019

PRICEWATERHOUSECOOPERS				
S/NO	Regulation	Issue	Draft Proposal/ Recommendation	Comments
1.	Regulation 2- Interpretation:	The Alternative Dispute Resolution (ADR) consent is not defined.	Define Alternative Dispute Resolution (ADR) consent as, "the primary document executed by the parties to the ADR proceedings and lodged with the Tax Appeals Tribunal or Court to mark a matter as settled. A consent can be used to mark a matter as fully settled or partially settled".	Recommended: A proposed definition of an ADR consent has now been included as follows: A document arising from an ADR agreement executed by parties to mark the matter as settled or partially settled at the TAT.
2.	Regulation 3 (4)- Initiating Alternative Dispute Resolution: (4) Alternative Dispute Resolution shall commence from the date the Court or the Tribunal permits the settlement and shall be concluded within ninety (90) days thereof.	Regulation 3(4) requires ADR to commence upon written communication by the facilitator that a matter is eligible for ADR and the process to be concluded within ninety (90) days. This regulation does not give the implication of not concluding the matter within the 90 days.	Include a further provision to state the effect/implication of not concluding the matter within the 90 days.	Recommended: A new provision 3 (5) has been included to align with the provisions of the Tax Procedures Act as follows: (5) Where parties do not reach a settlement within ninety (90) days, they shall be required to seek an



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3.	<p>Regulation 4 (b) - Eligibility of disputes for Alternative Dispute Resolution:</p> <p>4(b) the matter in dispute regards technical interpretation of the law.</p>	<p>Regulation (4) (b) states that a dispute shall not be eligible for Alternative Dispute Resolution where the matter in dispute regards technical interpretation of the law.</p> <p>It is important to note that most disputes are in respect of a technical interpretation of the law.</p>	<p>Remove this criteria as most disputes are in respect of a technical interpretation of the law.</p>	<p><i>extension of time from the TAT or Court otherwise the matter shall be referred back to TAT or court for a determination.</i></p> <p>Recommended:</p> <p>Regulation 4 (b) has been amended to read as follows:</p> <p>(b) <i>the matter in dispute regards technical interpretation of the law except where there are valid reasons.</i></p>
4.	<p>Regulation 5 - Appointment, role and conduct of the facilitator.</p> <p>5 (1) Upon a dispute being found eligible for alternative dispute resolution, the commissioner shall appoint a facilitator.</p> <p>5(2) Notwithstanding the provisions of Regulation 5 (1) , the taxpayer may also appoint a facilitator, at his own cost , to act as a co-facilitator.</p>	<p>Regulation 5(1) states that upon a dispute being found eligible for Alternative Dispute Resolution, the Commissioner shall appoint a facilitator;</p> <p>Regulation 5(2) gives the taxpayer an opportunity to appoint a facilitator, at his own cost, to act as a co-facilitator.</p> <p>However, there is need to provide more information on the appointment and role of the co-facilitator such as the qualifications or criteria for appointment etc.</p>	<p>Include more guidelines on the appointment and role of the co-facilitator. This will provide clarity.</p>	<p>Recommended:</p> <p>The issue of a co-facilitator has been removed to avoid conflict between the facilitator and co-facilitator. It has also been provided that the Facilitator shall be a person who is knowledgeable in tax matters.</p>



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<p>5.</p>	<p>Regulation 6 - Conduct of the Alternative Dispute Resolution Proceedings.</p> <p>(1) The parties to a dispute shall set the date for an Alternative Dispute Resolution meeting as soon as possible and in any case not later than thirty (30) days from the date of application requesting for Alternative Dispute Resolution.</p> <p>(4) The parties, with the guidance of the facilitator may determine the dispute on the basis of all the evidence submitted by the parties during the Alternative Dispute Resolution including all documents filed or oral evidence given.</p>	<p>Regulation 6(4) requires the facilitator to guide the parties, in determining the dispute on the basis of all the evidence submitted by the parties during the Alternative Dispute Resolution including all documents filed or oral evidence given.</p> <p>This provision gives the facilitator a mere mediation role.</p>	<p>Allow the facilitator to play a role beyond mere mediation. For instance, the facilitators should be allowed to provide non-binding solutions and suggestions for the purposes aiding the parties to the ADR in resolving the dispute.</p> <p>This is premised on the basis that the facilitator is expected to declare any conflict of interest.</p> <p>The words 'as soon as possible' be removed as they appear misplaced and unnecessary given that the provision also gives a 30 day timeline.</p>	<p>Not Recommended:</p> <p>Under 6(4) - The proposal for the facilitator to give non-binding suggestions was not accepted as ADR is a mediation process thus the facilitator cannot make decisions for the parties. The decision should be arrived at by both parties.</p> <p>On the issue of conflict of interest – The same should be declared before ADR discussions and if it arises during ADR discussions the conflict should be declared, the Facilitator should disqualify themselves to give room for another facilitator to be appointed.</p> <p>Recommended:</p> <p>Regulation 6(1) – Number of days before ADR meeting is held was agreed to be 14 to curb unnecessary delays. The regulation has been amended as follows:</p> <p><i>(1) The parties to a dispute shall set the date for an Alternative Dispute Resolution meeting and in any case not later than fourteen days (14) days from the date of application</i></p>
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6.	<p>Regulation 7 - Termination of Alternative Dispute Resolution Proceedings:</p> <p>(1) Alternative Dispute Resolution proceedings may be terminated for the following reasons-</p> <p>(a) where either party opts to terminate the proceedings or both parties mutually agree to terminate the proceedings;</p>	<p>Regulation 7(1) (a) stipulates that an ADR proceedings may be terminated, "where either party opts to terminate the proceedings or both parties mutually agree to terminate the proceedings".</p> <p>This provision gives the parties power to terminate the proceedings. This should not however be the case.</p>	<p>The ultimate decision to terminate the ADR proceedings should lie solely with the facilitator.</p> <p>In the event that the parties are allowed to terminate the process, then the party terminating the ADR proceedings should provide reasons for the termination which reasons should be acceptable to both the facilitator and the co-facilitator.</p> <p>This will ensure that there is no abuse of the right to terminate proceedings for no cause or holding at ransom of the entire ADR proceedings by one party.</p>	<p><i>requesting for Alternative Dispute Resolution.</i></p> <p>Not recommended:</p> <p>ADR process is voluntary and can be terminated by any party.</p> <p>Regulation 7(3) on re-admission of cases to ADR has been amended to include a provision for re-applications where parties must seek leave from the TAT/Court before re-submitting the matter to ADR.</p>
7.	<p>Regulation 8 - Alternative Dispute Resolution Agreement.</p> <p>8(3) The written agreement shall constitute the decision between the parties.</p>	<p>Regulation 8(3) binds the parties to the written agreement.</p> <p>It is important however to allow the parties determine if the written agreement is binding to them.</p>	<p>Allow the parties to determine if the ADR agreement forms a binding precedent between them.</p>	<p>Not recommended:</p> <p>The agreement is binding to the parties in so far as the dispute to which it relates since it will be recorded as an ADR consent in Court/Tribunal. It does not create binding precedent for any future disputes between the parties.</p>



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8.	<p>Regulation 9 - Recognition and enforcement of an Alternative Dispute Resolution Agreement.</p>	<p>The regulation stipulates that where a dispute is resolved wholly or partially, the consent shall be filed and recorded at the Tribunal or Court, as the case may be.</p>	<p>There is need to recognize that a dispute before ADR can be partly or fully settled i.e. not all issues under dispute necessarily need to be resolved under ADR as taxpayers may wish to litigate on some of the issues arising in a matter.</p> <p>Further, there may be need to settle on some issues and make payment while other issues continue to go through the Tribunal, the Court or even ADR.</p>	<p>Recommended:</p> <p>Regulation 8 provides that the ADR Agreement will contain both agreed and non-agreed issues. It has further been amended to provide that it shall state whether the dispute has been wholly or partially resolved.</p>
9.	<p>Other considerations</p>	<p>New</p>	<p>Introduce a provision that allows the TAT on its own volition to screen all cases filed before it and refer parties to first attempt resolving their disputes through ADR.</p> <p>This would be similar to the process Court annexed mediation in the High Court-</p>	<p>Not recommended:</p> <p>This would have to be stipulated under the Tax Appeals Tribunal Act as the ADR team has no powers to prescribe such.</p> <p>This can only be done through a budget proposal to include this in the TAT Act.</p>
INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK)				
10.	<p>Regulation 3- Initiating Alternative Dispute Resolution:</p>	<p>i) The spirit of ADR is facilitated discussion; thus, time is of essence. Since there are no discussions prior to the first</p>	<p>We propose to amend the regulation to read as follows: "Alternative Dispute Resolution shall commence from the date</p>	<p>Not recommended:</p> <p>It is not possible to amend the regulation as it is aligned to section 55(1) of the Tax Procedures Act.</p>



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<p>11.</p>	<p>Regulation 4 - Eligibility of disputes for Alternative Dispute Resolution</p>	<p>The regulations have not provided a guiding principle, a point of reference or an office that will spearhead the process of vetting matters to determine eligibility</p>	<p>i) For the process to be impartial, we recommend that the vetting is done by a person outside the ADR team.</p> <p>ii) The Regulations should provide for an option of conducting a Pre-ADR conference that would address the eligibility of the ADR matters especially for matters found unsuitable for ADR.</p> <p>iii) Where matters are not suitable for ADR, KRA should</p>	<p>Any amendment would need to be done through a budget proposal to amend the Act.</p> <p>Recommended For 3 (4), a new regulation 3 (5) has been introduced as follows: <i>(5) 'Where parties do not reach a settlement within ninety (90) days, they shall be required to seek an extension of time from the TAT or Court otherwise the matter shall be referred back to TAT or court for a determination.'</i></p>
	<p>3(3) - A tax dispute pending before the Tribunal or any Court may be referred to Alternative Dispute Resolution at the request of either party to the dispute, at any stage, pursuant to the relevant legislation.</p> <p>3(4) Alternative Dispute Resolution shall commence upon written communication by the appointed facilitator that a matter is eligible for ADR and shall be concluded within ninety (90) days thereof.</p>	<p>meeting, we propose that the ninety days start counting from the first meeting.</p> <p>ii) The regulation is silent on the effect or implication of not concluding the matter within 90 days? E.g. can one re-apply to restart the ADR process where the Tribunal or Court has granted an extension of time for the matter to be resolved under the ADR process?</p>	<p>of the first meeting and shall be concluded within ninety (90) days thereof."</p> <p>Consider including a further provision as to the effect or implication of not concluding the matter within 90 days?</p>	<p>Not recommended: The ADR process is an internal process that is confidential between two parties, therefore outside parties would not be allowed.</p>



12.	<p>Regulation 8 – Alternative Dispute Resolution Agreement.</p> <p>8 (2) The Alternative Dispute Resolution agreement shall set out:</p> <p>(g) agreed payment plan, where applicable;</p> <p>8 (3) The written agreement shall constitute the decision between the parties.</p>	<p>1) Whether the agreement between the parties forms a precedent should be a matter of agreement between the parties. For instance, the parties may wish that future transactions are treated in a manner similar to the treatment in the settlement agreement. This is one of the attractions of ADR – to provide certainty in respect of future transactions. For example, on technical matters such as customs value for future transaction or tariff classification.</p> <p>2) The timelines for executing the ADR agreement should be definite to avoid instances where the process drags unnecessarily.</p> <p>3) A taxpayer's financial ability should be considered when developing a payment plan.</p>	<p>provide reasons in writing for such a view.</p> <p>iv) Taxpayers should be allowed to make representations in response to KRA's view that a matter is ineligible for ADR.</p> <p>Consider amending 8(2)(g) "<i>agreed payment plan in consideration of taxpayer financial capability</i>"</p> <p>8(3) - consider introducing a timeline for execution of the ADR agreement. Consider amending 8(3)(g) to read: <i>"The ADR agreement should be executed within thirty days form the date of the settlement of the dispute."</i></p>	
13.	<p>Regulation 10 - Violation of the Alternative Dispute Resolution Agreement</p>		<p>Not recommended:</p> <p>8 (2) (g) – This is administrative and the two parties are allowed to come to an agreement as regards a payment plan therefore not necessary to include specific wording on the same.</p> <p>8(3) - Introducing an additional 30days for the execution of the ADR agreement would be extending the ADR process unnecessarily. The law as currently drafted provides that the 90 day timeline for conclusion of ADR cases and this includes settlement of the agreement.</p>	<p>Recommended-</p> <p>Regulation 10 has been amended to include Tribunal in addition to Court.</p>

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	10. Where either party to the proceedings violates the terms of the Alternative Dispute Resolution agreement, the other party may apply to Court for enforcement of such agreement.		application for contempt of orders issued by the Tribunal.	
TRU QUANTUM CONSULTING				
10.	Regulation 8 - Alternative Dispute Resolution Agreement.	Regulation 8(3)(d) states that the written agreement shall constitute the decision between the parties and shall be binding to both parties to the dispute. The regulation is not clear on happens when there is discovery of material errors and omissions after a consent has been filed.	Provide a provision to cover the repeat of the ADR process if there is a material omission which was not known to either party at the time of signing the agreement.	Not recommended: This would interfere with the 90 day period within which ADR disputes are to be resolved.
11.	New	There is no provision containing the affirmation that the ADR framework of 2019 be referenced as a point for further clarification.	A rule or schedule should be attached so that the two be read together. The framework is more detailed compared to the proposed rules and therefore it is only trite that it is referenced as a guide.	Not recommended: The Framework will cease have effect once the Regulations are gazetted. Regulation 13 however provides for a transitional provision for disputes commenced prior to gazette of the Regulations.
KPMG				
12.	General comments	It is not clear how the draft regulations fit in with the existing KRA ADR framework. There are a	Need to synchronize the provisions of the two documents for clarity.	Not recommended:



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13.	<p>Regulation 4 (e) – A dispute shall not be eligible for ADR where;</p> <p>(e) the parties have not complied with the provisions of the relevant tax legislation and there is evidence that the non-compliance is consistent or deliberate;</p>	<p>Determining whether non-compliance is <i>consistent or deliberate</i> is a matter of fact, which in any case may also be in dispute and/or premised on a genuine belief on the part of the taxpayer.</p>	<p>1) The Regulations should provide for option of conducting a pre-ADR conference which will address the eligibility of matters found unsuitable for ADR under the Regulations.</p> <p>2) Where the KRA does not consider the dispute as being appropriate for ADR, the KRA should be required to provide reasons for such a view.</p> <p>3) The taxpayer should be allowed to make representations in response to any concerns or position taken i.e. that</p>	<p>The Framework will cease have effect once the Regulations are gazetted. Regulation 13 however provides for a transitional provision for disputes commenced prior to gazette of the Regulations.</p> <p>In drafting the Regulations, the framework was taken into account.</p>
			<p>Not recommended:</p> <p>The eligibility criteria is already laid down in the regulations and therefore it is not necessary to have a pre-ADR conference.</p> <p>Additionally, as the ADR process is a voluntary process, the parties involved are not required to provide reasons for not agreeing to be involved in ADR.</p>	



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	<p>Regulation 5 (4) - The facilitator(s) shall disclose any conflict of interest existing before the commencement of the alternative dispute resolution proceedings or which may arise during the proceedings.</p>	<p>As currently drafted, if a facilitator is conflicted the only recourse for the facilitator is to walk away from the mediation process in its entirety. This option, which is rendered as the sole option, negates the spirit of the ADR process.</p>	<p>the matter is ineligible for ADR.</p> <p>In the event that parties have to request for a fresh/secondary appointment of a facilitator, the time for the ADR should stop running and resume when the new facilitator assumes his role.</p>	<p>Recommended: New Regulation 5(5) has been introduced as follows: 5 (5) Upon disclosure of conflict of interest, a facilitator shall be required to immediately recuse themselves from the alternative dispute resolution proceedings. Another facilitator shall be appointed to carry on with the proceedings.</p>
ERNST & YOUNG				
15.	<p>Regulation 3: Initiating Alternative Dispute Resolution</p>	<p>The spirit of ADR is facilitated discussion. Since there would have been no discussion yet until the first meeting, the timing should start after the first meeting.</p>	<p>For certainty, amend the regulation to read: ADR shall commence from the date of the first meeting and shall be concluded within ninety (90) days thereof or within such a time as may be extended by the TAT or the Court.</p>	<p>Not recommended: It is not possible to amend the regulation as it is aligned to section 55(1) of the Tax Procedures Act. Any amendment would need to be done through a budget proposal to amend the Act.</p>
CHARTERED INSTITUTE OF ARBITRATORS				
16.	<p>General comment</p>	<p>It is recognized that the Alternative dispute resolution mechanism adopted and applied</p>	<p>Amend the title to read: 1. The Tax Mediation Procedure Regulations 2019</p>	<p>Not recommended:</p>





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		in the process of resolving tax disputes is "MEDIATION ONLY". There is need to therefore make reference to mediation in the regulation instead of ADR.	2. Replace all reference to Alternative Dispute Resolution by Mediation	This is not necessary as it does not change the substance of the ADR process.
GITHUKU MWANGI & KABIA (CPA)				
17.	Regulation 2: Interpretation; Facilitator	Qualifications of the facilitator are not clearly stipulated in the regulation.	Facilitator should have law finance, members of Chartered Institute of arbitrators or poses similar qualification as the chairman of TAT.	Recommended- A clause has been included under Regulation 5(1) to provide for a knowledge in taxation matters as qualifications for a facilitator:
18.	Regulation 3(4) - Alternative Dispute Resolution shall commence upon written communication by the appointed facilitator that a matter is eligible for ADR and shall be concluded within ninety (90) days thereof.	Facilitator can abuse the power to deny taxpayer its right of appeal. Provided tax dispute doesn't contravene regulation 4 of Tax Procedure (ADR) 2019, facilitator does not have power to rule eligibility.	Remove biasness.	Not recommended- The facilitator does not decide on eligibility. Eligibility of matters to be heard at ADR is determined at the start of the process as per the laid down requirements.
19.	Regulation 8: Alternative Dispute Resolution Agreement: 8(2)(g) - agreed payment plan, where applicable;	In some case commissioner tends to put precondition of not executing his part of the agreement if the taxpayer negotiable for payment plan exceeding 6 month.	Payment plan should consider taxpayer ability to pay agreed tax. "Where applicable" to be deleted Amend to read: <i>Regulation 8(2)(g) agreed payment plan in consideration of taxpayer financial capability</i>	Not recommended: This is an administrative process to be agreed on during the settlement of matters in ADR.


















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**Public Participation Fora for Proposed Tax Regulations
The Tax Procedures (Alternative Dispute Resolution) Regulations, 2019**

DATE: 8TH NOVEMBER, 2019 TIME: 9:00AM

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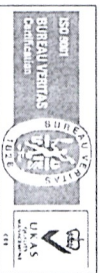
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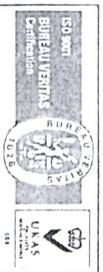
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