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TAX APPEALS TRIBUNAL ACT

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TAX APPEALS TRIBUNAL ACT

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OATH/AFFIRMATION OF OFFICE BY
MEMBERS OF THE TRIBUNAL

NO. 40 OF 2014

TAX APPEALS TRIBUNAL ACT

*[Date of assent: 27th November, 2013.]**[Date of commencement: 1st April, 2015.]*

An Act of Parliament to make provision for the establishment of a Tribunal; for the management and administration of tax appeals, and for connected purposes

[Act No. 40 of 2013, L.N. 32/2015, Act No. 14 of 2015, Act No. 38 of 2016.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Tax Appeals Tribunal Act, 2013.

2. Interpretation

In this Act, unless the context otherwise requires—

“**appeal**” means an appeal to the Tribunal against a decision of the Commissioner under any of the tax laws;

“**Chairperson**” means the Chairperson of the Tribunal appointed under section 4;

“**Commissioner**” means the Commissioner appointed under Kenya Revenue Authority Act;

“**member**” means a member of the Tribunal appointed under section 4;

“**Cabinet Secretary**” means the Cabinet Secretary responsible for matters relating to finance;

“**Secretary**” means the Secretary of the Tribunal appointed under section 7;

“**tax**” includes duty, tax or any imposition levied under any tax law;

“**tax agent**” means a person acting on behalf of another person on matters relating to tax and is registered as such by the Commissioner;

“**tax law**” means—

- (a) the Income Tax Act (Cap 470);
- (b) the Customs and Excise Act (Cap 472); or
- (c) the Value Added Tax (Cap. 476);
- (d) the East African Community Customs Management Act, 2004;
- (e) any other tax legislation administered by the Commissioner;

“**Tribunal**” means the Tax Appeals Tribunal established under section 3.

PART II – ESTABLISHMENT OF TAX APPEALS TRIBUNAL**3. Establishment of the Tribunal**

There is established a Tribunal to be known as the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner.

4. Membership of the Tribunal

(1) The Tribunal shall consist of a Chairperson and not less than fifteen but not more than twenty other members, who shall, subject to this Act, be appointed by the Cabinet Secretary upon such terms and conditions of service as the Cabinet Secretary may determine.

(2) Not more than five members of the Tribunal appointed under subsection (1) shall be advocates of the High Court of Kenya.

(3) A person shall not be appointed a Chairperson or a member of the Tribunal under this section unless that person—

- (a) in case of the Chairperson, is qualified to be appointed as a Judge of the High Court; and
- (b) in case of a member—
 - (i) is of high moral character and integrity in accordance with Chapter six of the Constitution;
 - (ii) hold a degree in law, business, finance, public finance, economics, insurance or related discipline from a university recognised in Kenya or any other relevant qualification from an institution recognised in Kenya;
 - (iii) has at least ten years' experience in matters relating to the discipline referred to in paragraph (b);
 - (iv) is not a public officer or an employee of Kenya Revenue Authority or a tax agent;
 - (v) has met his tax obligations;
 - (vi) has not been convicted of an offence under any law; and
 - (vii) has not been adjudged bankrupt by a court of competent jurisdiction.

5. Tenure of office

(1) The Chairperson or a member of the Tribunal shall hold office—

- (a) in case of the Chairperson, for a term not exceeding five years but shall not be eligible for re-appointment; and
- (b) in case of a member, for a term not exceeding three years but shall be eligible for re-appointment for one further term of three years.

(2) A person appointed under this Act shall cease to hold office if that person—

- (a) resigns from office by notice in writing addressed to the Cabinet Secretary;
- (b) becomes a public servant or an employee of the Kenya Revenue Authority, or a tax agent;
- (c) is absent from three consecutive meetings of the Tribunal without the permission of the Chairperson;
- (d) is adjudged bankrupt by a Court of competent jurisdiction;

- (e) is convicted of an offence under any tax law or of a criminal offence;
- (f) is unable to perform the functions of the office arising by reason of infirmity of body or mind; or
- (g) is otherwise unable or unfit to discharge the functions of the office.

(3) If the Cabinet Secretary is of the opinion that a member of the Tribunal should be removed in accordance with subsection 2(f) and (g), the Cabinet Secretary shall appoint a committee consisting of three persons of reputable character, one of whom shall be an advocate of the High Court, to inquire into the matter or conduct of the member in question and recommend to the Cabinet Secretary.

(4) Where a question of the removal of a member of the Tribunal is referred to a committee under this section, the Cabinet Secretary shall, subject to subsection (6), suspend the member from the Tribunal.

(5) The Cabinet Secretary shall remove a member of the Tribunal if the committee appointed under subsection (2) recommends that the member ought to be removed from office.

(6) A suspension under subsection (3) shall cease to have effect if the committee advises the Cabinet Secretary that the member suspended should not be removed from office.

6. Oath of office

A person appointed as the Chairperson or a member of the Tribunal shall, before assuming office, take or subscribe to the oath or affirmation set out in the Schedule before the Chief Registrar of the Judiciary.

7. Secretary to the Tribunal

(1) The Cabinet Secretary shall provide such staff, including the Secretary, as may be necessary for the proper discharge of the functions of the Tribunal under this Act.

(2) The Secretary referred to under subsection (1) shall—

- (a) be knowledgeable in procedures of a tribunal; and
- (b) have a minimum of five years' experience in finance, economics or legal practice.

[Act No. 38 of 2016, s. 60.]

8. Expenses and payment of allowances

(1) The members of the Tribunal shall be paid such allowances for expenses as the Cabinet Secretary may determine.

(2) The expenses of the Tribunal, including the allowances for expenses of the members of the Tribunal, shall be made out of funds provided by Parliament through the National Treasury.

9. Arrangement of business

(1) The Chairperson shall be responsible for ensuring the orderly and expeditious discharge of the mandate of the Tribunal.

(2) Without limiting the generality of subsection (1), the Chairperson shall—

- (a) constitute a panel to hear any matter before the Tribunal;
- (b) determine the place at which a panel may sit; and

- (c) determine the procedure for the conduct of the business of the Tribunal.

(3) The Tribunal shall submit an annual report to the Cabinet Secretary on its performance in the preceding year.

10. Constitution of a panel

(1) A panel constituted for any proceedings shall have at least three members, at least one of whom shall be an advocate of the High Court.

(2) At a hearing of a matter before the panel—

- (a) if the chairperson is a member of the panel as constituted, the Chairperson shall preside; or
- (b) in any other case, the Chairperson shall designate one of the members of the panel who being an advocate of the High Court or a member of the Institute of Certified Public Accountants of Kenya, to preside over the proceedings.

(3) Where a member of the panel ceases to be such member, or is not available for the proceedings, the proceedings shall be adjourned, and the Chairperson of the Tribunal shall assign another member to the panel and the proceedings shall continue.

11. Clerk of the panel

(1) There shall be a clerk of each panel appointed by the Tribunal, and who shall be the secretary to the panel.

(2) A person shall be qualified to be appointed as a clerk unless that person is qualified to serve as a court clerk.

[Act No. 38 of 2016, s. 61.]

PART III – APPEALS TO THE TRIBUNAL

12. Appeals to the Tribunal

A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal,

Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.

13. Procedure for appeal

(1) A notice of appeal to the Tribunal shall—

- (a) be in writing;
- (b) be submitted to the Tribunal within thirty days upon receipt of the decision of the Commissioner.

(2) The appellant shall, within fourteen days from the date of filing the notice of appeal, submit enough copies, as may be advised by the Tribunal, of—

- (a) a memorandum of appeal;
- (b) statements of facts; and
- (c) the tax decision.

(3) The Tribunal may, upon application in writing, extend the time for filing the notice of appeal and for submitting the documents referred to in subsection (2).

(4) An extension under subsection (3) may be granted owing to absence from Kenya, or sickness, or other reasonable cause that may have prevented the applicant from filing the notice of appeal or submitting the documents within the specified period.

(5) An appellant shall serve a copy of the appeal on the Commissioner within two days after giving notice of appeal to the Tribunal.

(6) The appellant shall, unless the Tribunal orders otherwise, be limited to the grounds stated in the appeal to which the decision relates.

(7) The Tribunal shall hear and determine an appeal within ninety days from the date the appeal is filed with the Tribunal.

Provided that during the period of one year from the date of its first sitting, the Tribunal may extend the period for the hearing an appeal for a period of up to sixty days if there are sufficient grounds to do so.

[Act No. 14 of 2015, s. 61, Act No. 38 of 2016, s. 62.]

14. Exemption from the provisions of Cap. 21

The provisions of the Civil Procedure Act (Cap. 21) shall not apply to the proceedings of the Tribunal.

15. Submission of material documents to the Tribunal by the Commissioner

(1) The Commissioner shall, within thirty days after being served with a copy of an appeal to the Tribunal, submit to the Tribunal enough copies as may be advised by the Tribunal, of—

- (a) a statement of facts including the reasons for the tax decision; and
- (b) any other document which may be necessary for review of the decision by the Tribunal.

(2) The Tribunal may require the Commissioner to submit to the Tribunal additional documents that, in the opinion of the Tribunal, may be in the Commissioner's possession or control.

(3) The Commissioner shall serve the appellant with a copy of the statement of facts and other documents required under this section within two working days from the date of submission to the Tribunal.

(4) The Tribunal may, upon application in writing by the Commissioner, extend the time for submitting and serving the statement of facts and the documents referred to in this section, where it is proved to the satisfaction of the Tribunal, that the delay is not inordinate or other reasonable cause that may have prevented the Commissioner from submitting and serving the statement of facts and the documents within the specified period.

[Act No. 38 of 2016, s. 63.]

16. Hearing

(1) The Secretary to the Tribunal shall advise all parties in writing of the time and place of the hearing at least fourteen days before the commencement of hearing.

(2) Evidence before the Tribunal may be given orally or through affidavits or in such manner as the Tribunal may direct.

(3) If it is proved to the satisfaction of the Tribunal that owing to absence of the appellant from Kenya or due to sickness or any other reasonable cause, the appellant is prevented from attending or the hearing of the appeal on the date and the time fixed for hearing, the Tribunal may adjourn the hearing of the appeal for such reasonable time as it may think appropriate.

17. Witnesses

The Tribunal may call any person to attend at a hearing and give evidence including production of any document if the Tribunal believes such evidence shall assist in its deliberations.

18. Order to stay or affect the implementation of the decision under review

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.

19. Conflict of interest

(1) A member of the Tribunal shall disclose any interest on the matter which is the subject of proceedings that could conflict with the proper performance of the member's functions.

(2) Except with the consent of all the parties, any member who has declared interest under this section shall not take part in the proceedings.

(3) A member who takes part in the proceeding of the Tribunal in contravention of this section commits an offence.

20. Powers of the Tribunal during a proceeding

(1) For the purpose of proceedings before the Tribunal, the Tribunal may—

- (a) take evidence on oath;
- (b) proceed in the absence of a party who has reasonable notice of the proceedings; and
- (c) adjourn the hearing of the proceedings.

(2) For the purpose of hearing proceedings before the Tribunal, the Tribunal shall have powers of a subordinate Court to summon a person to appear before it—

- (a) to give evidence; or
- (b) to produce books, documents or things mentioned in the summons.

(3) Where the Tribunal considers it desirable for the purposes of avoiding expenses or delay, or for any other special reason, it may receive evidence by affidavit and administer interrogations and require the persons to whom interrogations are administered to make a full and true reply to the interrogations.

(4) The Tribunal shall have power to request for examination of witnesses abroad.

21. Contempt of Tribunal

Any person who—

- (a) insults a member or an employee of the Tribunal in relation to the exercise of powers and functions under this Act; or

- (b) interrupts the proceedings of the Tribunal; or
- (c) creates a disturbance, or takes part in creating a disturbance in or near a place where the Tribunal is sitting; or
- (d) does any other act or thing that would, if the Tribunal were a court of law, constitute a contempt of that court,

commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.

22. Disobedience of summons to give evidence, etc

Any person summoned by the Tribunal to attend and give evidence or to produce any records, books of account, statements, or other documents, whether in electronic form or otherwise, or who is required to answer interrogatories, and who without sufficient cause—

- (a) refuses or fails to attend at the time and place mentioned in the summons served on him; or
- (b) refuses or fails to answer, or to answer fully and satisfactorily, to the best of his knowledge and belief, all questions lawfully put to him by or with the concurrence of the Tribunal;
- (b) refuses or fails to produce any records, books of account, statements or other documents, whether in electronic form or otherwise, which are in his possession or under his control, mentioned or referred to in any summons served on him,

commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding three years, or to both.

23. Expert evidence

(1) The Tribunal shall have powers to engage the service of an independent expert in any proceedings as may be appropriate upon such terms and conditions as the Chairperson may determine.

(2) The Tribunal may use the views of the expert referred to in subsection (1) in making decision on an appeal.

24. Procedure of the Tribunal

(1) The proceedings of the Tribunal shall be of a judicial nature.

(2) Chief Justice shall prescribe rules to guide proceedings of the Tribunal.

(3) The Tribunal shall have such assistance in carrying out its lawful writs, processes, orders, rules, decrees or commands as is available to a Court in Kenya.

25. Representation before the Tribunal

(1) For the hearing of proceedings before the Tribunal, the appellant may appear in person or be represented by a tax agent or by an advocate.

(2) If it is proved to the satisfaction of the Tribunal that owing to absence of the appellant from Kenya or due to sickness or any other reasonable cause, the

appellant is prevented from attending, at the hearing of the appeal on the date and the time fixed for hearing, the Tribunal may adjourn the hearing of the appeal for such reasonable time as it may consider appropriate.

[Act No. 38 of 2016, s. 64.]

26. Opportunity to make submissions concerning evidence

The Tribunal shall ensure that every party to proceedings is given a reasonable opportunity to—

- (a) present his case; and
- (b) inspect any documents in relation to the proceedings and make submissions.

27. Discontinuance, dismissal or reinstatement of an appeal

- (1) An appellant may, by notice in writing, withdraw the appeal.
- (2) If an appellant fails, without reasonable cause, to appear for the hearing of the proceedings, the Tribunal may dismiss the appeal.
- (3) If an appellant fails without reasonable cause to proceed with the appeal or comply with a direction by the Tribunal, the Tribunal may dismiss the appeal.
- (4) Where the respondent without reasonable cause fails to appear for the hearing of the proceedings, the Tribunal may uphold the appeal.
- (5) Where the Tribunal dismisses an appeal under subsection (2) or (3), or upholds an appeal under subsection (4), the appellant or respondent may, within thirty days from the date of receipt of the notice of the decision, apply to the Tribunal for reinstatement of the appeal, and the Tribunal may, if it considers it appropriate to do so, reinstate the appeal and give such directions as may be appropriate.

28. Power of the Tribunal where the parties reach agreement

- (1) The parties may, at any stage during proceedings, apply to the Tribunal to be allowed to settle the matter out of the Tribunal, and the Tribunal shall grant the request under such conditions as it may impose.
- (2) The parties to the appeal shall report to the Tribunal the outcome of settlement of the matter outside the Tribunal.

29. Decisions of the Tribunal

- (1) The decision of the Tribunal shall be by majority vote of the members present, and in the case of equality of votes, the Chairperson shall have a casting vote in addition to his deliberative vote.
- (2) The Tribunal shall make a decision in writing—
 - (a) affirming the decision under review;
 - (b) varying the decision under review; or
 - (c) setting aside the decision under review and either—
 - (i) making a decision in substitution for the decision so set aside; or
 - (ii) referring the matter to the Commissioner for reconsideration in accordance with any directions or recommendations of the Tribunal.

(4) The Tribunal shall give reasons in writing for its decision, including its findings on material questions of fact and reference to the evidence or other material on which those findings were based.

(5) The Tribunal shall cause a copy of its decision, including the reasons for the decision, to be served on each party to the proceeding.

(6) Subject to subsection (5), a decision of a Tribunal shall come into operation on date the notice of the decision is given or on such other date as may be specified by the Tribunal in the notice.

(7) A decision of the Tribunal shall have effect as and be enforceable as if it were a decision of a court.

(8) Subject to subsection (10), all decisions of the Tribunal and all evidence received by it, including a transcript of the report of the hearings, are public records open to inspection of the public.

(9) Subject to subsection (10), a Tribunal shall provide for the publication of its decisions, including reasons, in such form and manner as may be adapted for public information and use, and such authorized publication is evidence of the decisions of the Tribunal in all courts of Kenya without any further proof of authentication.

(10) The Tribunal shall ensure that in releasing, or allowing access to, information under subsection (8) or (9) measures are taken to prevent the disclosure of trade secrets or other confidential information.

30. Burden of proof

In a proceeding before the Tribunal, the appellant has the burden of proving—

- (a) where an appeal relates to an assessment, that the assessment is excessive; or
- (b) in any other case, that the tax decision should not have been made or should have been made differently.

31. Enforcement of orders for costs

(1) Where the Tribunal awards costs in any appeal, it shall, on application by the person to whom the costs are awarded, issue to him a certificate stating the amount of costs.

(2) Every certificate issued under subsection (1) may be filed in the High Court by the person in whose favour the costs are awarded and, upon being so filed, shall be deemed to be a decree of the High Court and may be executed as such:

Provided that an order for the costs against the Government shall not be enforced save in the manner provided for by the Government Proceedings Act (Cap. 40).

32. Appeals to the High Court on decisions of the Tribunal

(1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

(2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice.

PART IV – OFFENCES AND EVIDENCE

33. Offences

(1) A person who—

- (a) knowingly makes any false statement, false claim for a refund, produces any false document or information, or makes any false return concerning any material particular relating to any matter under this Act;
- (b) not being a registered person or being a person who has ceased to be a registered person, holds himself out as a registered person;
- (c) fails to keep, retain, or maintain accounts, documents, or records as required under this Act; or
- (d) is knowingly concerned in or involved in the taking of steps with a view to the fraudulent evasion of tax by him or by any other person,

Commits an offence and shall be liable on conviction to a fine not exceeding four hundred thousand shillings or double the tax evaded, whichever is the higher, or to imprisonment for a period not exceeding three years, or to both.

(2) Where a person is convicted of an offence under this section, the court may, in addition to any penalty which may be imposed, order the forfeiture of any taxable supplies which have passed in connection with the commission of the offence or, if the taxable supplies cannot be forfeited or cannot be found, of such sum as the court shall assess as the value of the taxable supplies.

34. Liability of employers and officers of corporate bodies

(1) Where any offence under this Act is committed by an employee or agent, the person by whom that employee or agent is employed shall also be guilty of the offence unless he proves to the satisfaction of the court that he did not know, and could not reasonably be expected to know, that the act or omission constituting the offence was taking place, or that he took all reasonable steps to ensure that the offence was not committed.

(2) Where an offence under this Act is committed by a body corporate, every person who, at the time of the commission of the offence, was a director, general manager, secretary, or other similar officer of the body corporate, or was acting or purporting to act in that capacity, shall also be guilty of the offence, unless he proves that the offence was committed without his consent or knowledge or that he exercised all the diligence to prevent the commission of the offence that he ought to have exercised, having regard to the nature of his functions in that capacity and in all circumstances.

35. Protection of officers

No officer shall be personally liable for any act or omission done or omitted to be done in the performance of his functions under this Act unless, having regard to the circumstances of the case, such act or omission is found to be—

- (a) done or omitted to be done wilfully or dishonestly by such officer;

- (b) attributable to the negligence of such officer; or
- (c) done or omitted to be done by such officer in contravention of any provision of this Act or the Regulations.

36. Disclosure of information

(1) Any person employed in the performance of any function under this Act who, by virtue of the performance of that function, becomes possessed of any information and who directly or indirectly communicates that information to any person otherwise than—

- (a) in the normal performance of his functions under this Act; or
- (b) in the course of any proceedings in a court or the Tribunal; or
- (c) with the express permission of the Commissioner,

commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding twelve months, or to both.

(2) Notwithstanding any other provision of this Act, the Commissioner may disclose information to a person in the services of the Government in a revenue or statistical department where the information is needed for the purposes of the official duties of that person solely for revenue or statistical purposes.

37. General penalty

A person convicted of an offence under this Act for which no other penalty is provided shall be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.

38. Evidence

In any proceedings, whether criminal or civil, under this Act—

- (a) other than upon an appeal, a certificate from the Commissioner stating that any amount is due from any person by way of tax, or other liability under this Act, shall be conclusive evidence that the amount is due and payable from that person;
- (b) the burden of proving that any tax has been paid or that any goods or services are exempt from payment of tax shall lie on the person liable to pay the tax or claiming that the tax has been paid or that the goods or services are exempt from payment of tax; and
- (c) a statement by the Commissioner that a person is registered or is not registered under this Act, shall be conclusive evidence of the fact unless that person proves the contrary.

39. Power of sentence

Where any person is convicted of an offence under this Act by a court of competent jurisdiction presided over by a resident magistrate, the court may, notwithstanding the provisions of section 7 of the Criminal Procedure Code, (Cap. 75) impose the maximum sentence prescribed by this Act for the offence.

40. Power of officers to prosecute

An authorised officer may with the approval of the Director of Public Prosecution appear and prosecute in a prosecution before a subordinate court for an offence under this Act.

PART V – CONSEQUENTIAL AMENDMENTS AND SAVINGS**41. Repeal of section 127E of Cap. 472**

The Customs and Excise Act is (Cap. 472) amended by repealing section 127E.

42. Repeal of sections 82 and 83 of Cap. 470

The Income Tax Act (Cap. 470) is amended as follows—

- (a) by repealing section 82 and any notice made thereunder; and
- (b) by repealing section 83.

43. Repealed by Act No. 38 of 2016, s. 65.**44. Saving provisions**

(1) Despite the provisions of sections 41, 42 and 43, any Tribunal or appeal committee established by any tax law or regulations made thereunder before the coming into effect of this Act shall continue to hear and conclude any appeals filed by a taxpayer for a period of ninety days after the commencement of this Act.

(2) Any appeals referred to in subsection (1) which are not concluded within the period specified, shall be taken over by the Tribunal.

(3) The Tribunal shall hear and determine appeals relating to tax decision made before its first sitting (if it was not concluded by the appeal mechanism that existed before the establishment of the Tribunal) within a period of one year from the date of first sitting.

[Act No. 14 of 2015, s. 62.]

SCHEDULE

[Section 6.]

OATH/AFFIRMATION OF OFFICE BY MEMBERS OF THE TRIBUNAL

I, having been appointed the Chairperson/ a member of the Tax Appeals Tribunal, do swear/affirm that I will be true and faithful to the best of my ability and power in the execution of the trust committed to my charge and inspection in the services of the Appeals Tribunal, and that I shall not acquire, take or receive any fee, perquisite, gratuity or reward whether pecuniary or of any sort or description whatsoever, either directly or indirectly, for any service, act, duty, matter or thing done or performed, or to be done or performed, in the execution or discharge of any of the duties of my office or employment on any account whatsoever, over than my salary and what is, or may be, allowed me by law or by the Cabinet Secretary in writing.

Name: Date

Signature:

Witness:

Name: Date

Signature:
