Tax Assessment, Tax Disputes and Mediation: Making it easier for the Taxpayer and the Commissioner General of the Ghana Revenue Authority

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Introduction

Alternative Dispute Resolution, ("ADR") has been firmly established in commercial relationships as an effective means of resolving disputes. It is also used in other areas of conflict (e.g. family and workplace disputes).¹ In certain jurisdictions, for example, Australia, Canada, China, Netherlands, United Kingdom, United States of America and others, ADR is now being used to resolve tax disputes.² In Ghana, ADR methods refer to: Negotiation, Mediation and Arbitration.³ Negotiation, Mediation and Arbitration as dispute resolution mechanisms have very strong roots in traditional African dispute resolution processes.⁴ Can Mediation be used in resolving tax disputes in Ghana?

There are different types of tax disputes. These include challenges to collection actions or requests for information, constitutional challenges, and miscellaneous

³ The Alternative Dispute Resolution Act, 2010 (Act 798), section 135.
challenges to the exercise of administrative power through judicial review. This paper focuses on: disputes from tax assessments or disputes on what is the right tax at the right time; and appeals from tax assessments, and the problems associated with such appeals.

Structure

This article is in four parts. The first part: gives a brief overview of tax administration; describes the existing procedures for resolution of tax disputes; and states some of the challenges to the existing tax disputes resolution procedures. The second part discusses Mediation as an ADR method, and the advantages and disadvantages of Mediation for the resolution of tax disputes. The third part deals with the appropriateness and applicability of Mediation to the resolution of tax disputes. The final part, which is also the thrust of this article deals with recommendations on how Mediation can be used to make the resolution of tax disputes easier for the taxpayer and the CG in Ghana.

Overview of Tax Administration in Ghana

The Ghana Revenue Authority

The Ghana Revenue Authority, Act, 2009 (Act 791), established the Ghana Revenue Authority, (the “GRA”) as a body corporate with capacity to sue and be sued.5 The GRA has replaced the: Internal Revenue Service, Value Added Tax Service, and Customs, Excise and Preventive Service.6 The GRA is now thus the state entity responsible for the administration of taxes and tax related matters,7 and a reference to the Commissioner for Income Tax, the Commissioner of Customs, Excise and

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5 The Ghana Revenue Authority Act, 2013 (Act 791), section 1(2).
6 Ibid, the Preamble and section 30.
7 Ibid, the Preamble.
Preventive Service or the Commissioner for Value Added Tax Service must be read as a reference to the CG under the Ghana Revenue Authority Act.\textsuperscript{8}

The “CG” is responsible for the day-to-day administration of the GRA,\textsuperscript{9} as well as the administration of the Income Tax Act, 2015 (Act 896), the Value Added Tax Act, 2013 (Act 870), the Stamp Duty Act, 2005 (Act 689) and the CEPS laws.\textsuperscript{10} The CG is answerable to the GRA Board in respect of the performance of his/her functions.

**Tax Administration**

Tax administration deals with *assessment, collection* and *enforcement* of taxes legally due. The key to efficient tax policy or administration, is achieving the above without undue cost to government and the taxpayer in terms of money, time or convenience.\textsuperscript{11} A tax administrator therefore generally sets as his/her goal the efficient *assessment, collection* and *enforcement* of taxes legally due, without undue cost to the government or the taxpayer in terms of money, time or convenience.\textsuperscript{12} To achieve this goal, a tax administrator needs to: facilitate and encourage voluntary compliance with the requirement of the tax laws; deter tax evasion and illegitimate tax avoidance; maintain public confidence in the integrity of the tax system; and administer tax legislation fairly, uniformly and impartially as well as with diligence, courtesy and efficiency.\textsuperscript{13}

**Tax Disputes**

Neither the Ghana tax laws nor the GRA define a ‘tax dispute’. It is however clear from the wording of paragraph 21(1) of the Seventh Schedule of the Income Tax Act, 2015 (Act 896), (a dispute resolution provision) that a dispute includes dissatisfaction with the CG’s assessment of a tax. The section provides inter alia that: “a person who is dissatisfied with an assessment made under this Act may lodge an objection to the assessment with the Commissioner-General”. This writer therefore defines a tax dispute under Ghana law as a disagreement or dissatisfaction between the GRA and a

\textsuperscript{8} Ibid, section 30(3).
\textsuperscript{9} Ibid, section 14.
\textsuperscript{10} The Income Tax Act, 2015, (Act 598), section 113, as repealed/amended by section 30(3)&(5) of Act 791.
\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
taxpayer on tax liability with respect to a particular issue in a tax return, transaction or arrangement, where that disagreement has been raised through an enquiry from either side. Tax dispute however does not include a dissatisfaction or disagreement between the GRA and a taxpayer over issues unrelated to tax liability.

**Tax Appeals**

Disputes between the Ghana Revenue Authority, (the “GRA”) and taxpayers arise when: (i) a taxpayer disagrees with adjustments to his/her tax return proposed by the GRA; (ii) refuses to file a tax return; (iii) refuses to comply with a GRA auditor’s request for information; or (iv) where a taxpayer disagrees with the GRA’s assessment of his or her tax liability.

The dynamics in tax disputes are very different from other civil disputes. Fundamentally, the disagreement is between a private person and the State, rather than between commercial entities or private persons. Although the CG’s actions are subject to the remedy of ‘judicial review’, this remedy is available only when determining whether the CG validly and lawfully exercised a power that the law has conferred on him/her, rather than a disagreement bordering on the right tax at the right time. The remedy for a taxpayer who disputes the CG’s assessment of liability to tax therefore lies in ‘tax appeal’ in accordance with paragraph 21(1) of the Seventh Schedule of the Income Tax Act.

Under the existing tax legislation, a taxpayer cannot appeal a tax assessment until: (i) he/she has raised an objection to the assessment with the CG, and the CG has given or failed to give a decision on such objection within 90 days of its receipt, (“Objection Decision”). This view was echoed in the case of *Argyrou v. Commissioner of Income Tax*. The relationship between HM Revenue & Customs and large corporate taxpayers: The changing role of accountants (London: Centre for Business Performance, 2008).

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Where the GRA does not respond to the objection, the law deems the non-response as a disallowance of the taxpayer's objection, and thereafter instructs the dissatisfied taxpayer to notify the CG of the deemed disallowance, and to proceed to litigate in court within 30 days. Should the taxpayer fail to appeal the disallowance within the statutory 30-day period for appeal, (or such further extension of time as the court may allow on application to the Court for that purpose), the CG’s decision is deemed final, and the taxpayer must pay the tax assessed at the time indicated in the notice of assessment\(^{16}\), whether or not the tax assessed is correct. Tax appeals therefore involve two processes: the objection process and the litigation process.

**Challenges in the Existing Dispute Resolution Procedures under Tax Legislation**

Tax appeals present challenges for both the taxpayer and the CG. Although the Objection process is an opportunity for amicable resolution of the dispute between the taxpayer and the CG, it is common for both sides to take entrenched positions during this process, with neither wanting to yield ground. If a resolution of the dispute is not reached within the 90-day period, ultimately, it is the GRA that has the power to take a unilateral decision on the matter- to allow or disallow partially or wholly the taxpayer’s objections. This certainly cannot be satisfactory for the taxpayer.

Another challenge to the existing tax dispute resolution procedures lies in the rigid application of the tax dispute resolution procedures stipulated in the various legislations. Failure to follow these rigid procedures systematically is fatal to a party’s case. There are many instances where the Court throws out an appeal on technical grounds without any judicial discussion of the merits of the action. For example in the case of *Arghyrou v CIT\(^{17}\)*, the taxpayer among other claims appealed against the tax claims and assessments that the Commissioner levied on him. The facts were that the taxpayer had sent his written objections to the Commissioner, but the Commissioner did not respond to the objection after a period of about one month. The taxpayer therefore appealed against the assessments. The Court held, among others, that the procedure that the taxpayer adopted was wrong. The Court also noted that since the Commissioner had not taken any decision on the objections the taxpayer raised, nor

\(^{16}\) See Republic v. C.I.T. Ex Parte Maatchppij De Fijn Loutlandal N.V. (Fyhnhou) [1974] 1 GLR 283 CA. (Full Bench); and Arghyrou v CIT\(^{16}\)[1965] GLR 58.

\(^{17}\)[1965] GLR 588.
had he taken an unreasonable time to respond to the objection, the taxpayer’s right to appeal the assessment had not yet accrued. So the appeal was dismissed. The Court did not address the merits or otherwise of the assessment. It must also be noted that once a taxpayer loses an appeal, they must pay the amount assessed within 30 days of the Court’s decision\textsuperscript{18}. In a similar fashion, the full bench of the Court Appeal in the case of Republic v. C.I.T. Ex Parte Maatchppij De Fijn Loutlandal N.V. (Fyhnbout)\textsuperscript{19}, (the Fyhnout case) concerned themselves only with procedural and technical matters, and did not discuss the merits of the tax assessments. Furthermore, in the case of Republic v CIT, Ex Parte NEMGIA Ltd,\textsuperscript{20} the court did not hesitate to point out that it would quash (annul) the CG’s assessment where the CG makes a critical procedural or jurisdictional error. In such a situation, the court is most unlikely to go into the merits of the action.

The problem of rigidity is not limited only to the Court’s adherence to the application of rigid dispute resolution legal provisions, but includes the court’s rigid approach to interpretation of tax disputes. Since the 1920s, (or earlier) the Court’s have adopted the strict constructionist approach to interpretation of tax legislation. The strict constructionist approach to interpretation of statutes requires a judge to give each word in the statute an ordinary meaning without applying the provision to a particular situation and without any regard to either the purpose of the statute or the consequences of such interpretation.\textsuperscript{21}

The Court’s preference of the strict constructionist approach in interpreting tax legislation persists, even though Ghana’s Interpretation Act, 2009 (Act 792) has provided expressly that the courts must adopt the modern purposive approach to interpretation.\textsuperscript{22} The modern purposive approach to interpretation is to the effect that the object of statutory interpretation is to as far as possible, construe the text of the statute to effectuate the legislative purpose for such statute. This approach thus requires the Court to retain fidelity to the text of the statute as well as parliament’s

\textsuperscript{18} The Income Tax Act, 2015 (Act 896), paragraph 24(3).
\textsuperscript{19} [1974] 1 GLR 283 CA. (Full Bench).
\textsuperscript{20} [1982-83] 1 GLR 556.
\textsuperscript{22} The Interpretation Act, 2009, (Act 792), section 10(1)(c).
objectives for such statute. To ascertain the purpose and the context of a particular statute in the course of interpretation, Act 972 permits a Court to rely on: (a) the legislative antecedents of the statutory provisions under consideration; (b) the pre-parliamentary materials relating to the provisions of the Act in which it is contained, such committee reports, recommendations and reviews by commissions on the existing law; and (c) parliamentary materials such as the text of a Bill and reports on its progress in Parliament taking note also of explanatory memoranda, proceedings in the committees and parliamentary debates.

This directive notwithstanding, the Supreme Court in the recent case of Multichoice Ghana Ltd v. The Commissioner, Internal Revenue Service, upheld the strict constructionist approach to the interpretation of tax legislation. Wood CJ, in delivering the unanimous decision of the Court noted that her decision

“There has been dictated by the strict constructionist approach to the interpretation of statutes reserved for fiscal legislation. The general principle is that tax statutes are to be construed strictly.”

The Ghana Supreme Court in that case upheld Rowlatt J’s decision on the approach to tax interpretation in Cape Brandy Syndicate v IRC [1921 1 KB 64, 71], and quoted with approval his statement that:

“In a taxing Act one has to look merely at what is clearly said. There is no room for any intention. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

It must, however, be noted, that there is a growing view among revenue authorities, (for instance the HRMC), that the courts must apply the modern purposive approach to interpretation of tax disputes, in view of the global hostility towards tax avoidance schemes, as well as considerable tax avoidance provisions in various legislation. This paper submits that given that the Supreme Court is not bound by its previous decisions, it is possible that the Court may at some point, adopt the modern purposive

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23 Supra note 56, at page 20.
25 Supra note 56, at pages 99-100.
approach in the interpretation of tax disputes rather than the strict constructionist approach. This is more so, given that the history of tax interpretation is riddled with examples of the courts shifting more than once, their attitude towards tax avoidance schemes, and consequently, to tax interpretation, depending on the times.\footnote{Benjamin Kunbour and Abdallah Ali-Nakyea, supra note 24.}

Furthermore, the recent elaborate anti-avoidance legislation in many jurisdictions, Ghana inclusive, may inevitable lead to a move away from the strict constructionist approach in interpretation of tax statutes. The purpose of this paper however is not to discuss whether or not the strict constructionist approach ought to be abandoned. Suffice it to state that there are uncertainties in the area of tax interpretation, in the light of the courts approach to interpretation of tax statutes, anti-avoidance schemes and anti-avoidance legislation. The effect of these uncertainties in a fact-based case, (as is common with most tax disputes) is that a decision of a court is unlikely to add much value in elucidating the law for taxpayers and revenue authorities in other tax disputes on completely different set of facts.\footnote{Carl Islam Barrister, "Mediation Of Tax Disputes" (London: Averose Chancery Chambers, 2014).} This cannot be satisfactory to either the taxpayer or the GRA. This writer therefore submits that it is in the interest and convenience of both the taxpayer and the revenue authority to have an opportunity to amicably resolve most of their disputes on the merits of each case, with the assistance of an impartial and neutral expert, (Mediator). The parties may then have recourse to litigation in specified and compelling cases, (discussed below), where an amicable settlement is improbable and where litigation is the best way to obtain clarity on legal provisions.

### What is Mediation

Mediation is an ADR method. Section 135 of the Alternative Dispute Resolution Act, 2010 (Act 798), defines ADR as “the collective description of methods of resolving disputes otherwise than through the normal trial process”.\footnote{The Alternative Dispute Resolution Act, 2010 (Act 798), section 135.} In this definition, ADR mechanisms refer to all methods used to resolve disputes other than through litigation in court. These methods or processes are Negotiation, Mediation and Arbitration.\footnote{See Brunet, Edward J., and Charles B. Craver. Alternative Dispute Resolution: the Advocate’s Perspective. Michie, 1997.} This paper discusses Mediation, rather than Negotiation and Arbitration.
Section 135 of the ADR Act defines Mediation as a non-binding process in which the parties discuss their dispute with an impartial person who assists them to reach a resolution, in accordance with the relevant sections of the Act on Mediation, (i.e. Part Two of the Act). Consequent on this definition of Mediation, the ADR Act 798 in the same section defines "mediator" to include an impartial person appointed or qualified to be appointed to assist the parties to satisfactorily resolve their dispute and employees and persons hired by that person. The key elements of this definition are that Mediation is: (i) a non-binding process; (ii) a dialogue of the dispute; (iii) with an impartial person; and (iv) who assists the disputants resolve their dispute. These key elements are generally consistent with the conception of mediation in many other jurisdictions, if not globally.  

The definition also captures the fact that the Mediators do not impose a decision on the disputants, rather, it is the disputants themselves who ought to find a solution to their dispute. The above stated definition is not without its definitional problems. However, the focus of this paper is not to critique the definition of Mediation. Rather, the paper defines Mediation in the context of the Ghana legal system, and discusses the use of Mediation for the resolution of tax disputes.

A good mediator proceeds with an “interest-based” rather than a “position-based” view of the issues in dispute. In other words, a good mediator will seek to explore the underlying incentives and financial, institutional, or personal grounds that might be the basis for reaching an agreement among the parties. Often, a solution may suggest itself that is broader or different than that identified by the parties as the immediate subject of a dispute. The mediator will explore with the parties whether the benefits of reaching an agreement exceed the costs of continuing a dispute.

**Advantages of Mediation**

Several aspects of the mediation process make it an effective tool for dispute resolution. Mediation proceedings are confidential, and evidence of compromise proposals cannot be introduced into the record of a pending proceeding before a court.

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or a regulatory body.\textsuperscript{32} Mediation, then, can create space within which parties may contemplate and reconsider their interests and priorities without fear of prejudicing their positions.\textsuperscript{33}

Another important advantage of Mediation over court litigation is the ability of the parties to select neutral and impartial ADR professionals who are qualified to deal with the issues that are specific to their dispute. The ADR professional need not be from a legal background but may be an expert in whatever area the dispute is about.

A third advantage of Mediation over litigation and arbitration is that no third party decides the terms of settlement for the disputants. In Mediation, the mediator works closely with the parties, bringing them together for at least one joint session, facilitating communication, exploring what the disputants want and the reasons why they want it, and examining settlement options. The success of Mediation rests largely on the meeting of the disputing parties and the resultant progress that such contact skillfully facilitated by the mediator can have.\textsuperscript{34} When a settlement agreement is reached, it would be a consensual agreement by the disputants themselves - an agreement they each deem satisfactory for their purposes. This is unlike litigation where it is a judge who decides on the matter, declaring a winner and loser. It is also unlike arbitration where the arbitrator decides the dispute by declaring a winner and/or loser. In Mediation, there are no winners and losers. Rather, there is an amicable resolution of a dispute, a win-win outcome for the disputants. And, where amicable settlement eludes the disputants they may still exercise their right to litigate or arbitrate their dispute.

Furthermore, Mediation offers greater procedural flexibility than litigation. For example, the hearings conducted by a neutral person in Mediation may be held at any place and at any time, subject to the agreement of the disputants. The Mediation process also allows parties to apply their own knowledge and creativity in the process, ensuring that their needs are met more closely than the traditional litigation system is able to do. This in turn promotes party empowerment, as the parties retain control and ownership of their dispute and the process of its resolution.

\textsuperscript{32} Alternative Resolution Act, 2010 (Act 9798), section 79.
\textsuperscript{33} Supra note 17.
\textsuperscript{34} ADR and Commercial Disputes, Ed. Russel D. Caller.
All ADR practitioners agree with the proposition that it is more beneficial for parties to resolve their differences by negotiated agreement rather than through contentious proceedings. This is because among other things, Mediation preserves or enhances personal and business relationships that might otherwise be damaged by an adversarial process. This advantage of Mediation is especially important for the resolution of tax disputes because a good relationship between the taxpayer and the CG needs to be maintained for purposes of compliance with tax laws and regulations. Mediation is however not limited to disputes involving relationships. It is also widely used for issues where there is no relationship.

Mediation is widely encouraged because it is a forum in which parties are helped to adopt a problem solving approach in order to find a win-win outcome, with the mediator exploring the underlying issues in order to understand those that have been presented. This may go hand in hand with supporting a bargaining style of negotiation, seeking trade offs in search of a deal. Mediation therefore does not only reduce the costs and delays associated with litigation, it also helps the parties reach a mutually beneficial settlement or appreciation of their dispute. The specific advantages of Mediation for the resolution of tax disputes are discussed below.

**Disadvantages of Mediation**

One of the main disadvantages of Mediation is that not all types of disputes are capable of being resolved by Mediation. The ADR Act, (Act 798) for instance specifies the disputes that cannot be subject to ADR mechanisms, (i.e. mediation and arbitration). The disputes listed in section 1 of the ADR Act as not capable of resolution by mediation or arbitration are disputes bothering on: national or public interest; the environment; the enforcement and interpretation of the Constitution; and any other matter that by law cannot be settled by an alternative dispute resolution method. It is worth noting that ‘Tax disputes’ is not among the list. Does this therefore mean that tax disputes can be settled through ADR?

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36 Brown, Henry & Arthur L. Marriott, ADR Principles and Practice
Specific Advantages of Mediation for the Resolution of Tax Disputes

There is considerable evidence that Mediation not only solves problems of revenue collection by raising revenue and reducing backlog, but that it has resulted in resolving tax disputes within a maximum of 120 days.\(^{37}\) Recent statistics from the UK on Mediation to resolution of tax disputes between 1 April 2013 and 14 January 2014 show 79% of small and medium enterprise, (“SME”) cases were resolved within 120 days.\(^{38}\) These statistics also indicate that 83% of the large and complex cases that went to Mediation were resolved.\(^{39}\) The evidence further suggests that simply applying for Mediation motivated large companies and their HMRC relationship managers to sort disputes out before the need to get a mediator involved.\(^{40}\) The HMRC saw the pilot as a success after a successful two-year trial of ADR.\(^{41}\) Other jurisdictions where Mediation has been applied successfully to tax disputes are Australia\(^{42}\), Netherlands\(^{43}\), New Zealand\(^{44}\), South Africa\(^{45}\) and United States of America\(^{46}\).

Even where tax disputes remained unresolved after Mediation, the data from pilot

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\(^{37}\) Ibid. See also Dawn Register, Director in the Tax Investigations Team at BDO LLP in London, “Broken Stalemates”, March 2014 STEP Journal..

\(^{38}\) Ibid. See also Jone, Melinda, and Andrew J. Maples. "Mediation as an Alternative Option in Australia's Tax Disputes Resolution Procedures" (2012) 27 Australian Tax Forum at 527.

\(^{39}\) Ibid.

\(^{40}\) Supra note 63.

\(^{41}\) Ibid.


\(^{44}\) see Jone, Melinda Elizabeth. "Refining a proposed tax mediation regime for New Zealand's Tax Disputes Resolution Procedures: A Mixed Methods Study" ( New Zealand, University of Canterbury, 2013).


cases indicates that Mediation of those tax disputes minimised the scope of disputed issues, improved the taxpayer’s experience, helped to maintain or improve personal/business relationships, and increased voluntary compliance with taxation requirements. Other identified benefits of Mediation of tax disputes include Mediation: empowered the participants to speak for themselves and determine the outcome of their own dispute; enabled the participants to reach an outcome that better meets their needs than a judicial decision would; encouraged participants to be informal and therefore more accommodating of direct participant involvement; is cheaper, less stressful and quicker; produces an agreement that is more likely to be complied with and which may be more likely to finally resolve the dispute; and confidentiality of proceedings, thereby facilitating openness; and helping to maintain or improve personal/business relationships.

The pilot cases discussed above show that Mediation of tax disputes reduces time and costs in relation to the dispute resolution, taking between 30 days and 120 days to be wholly or partially resolve the dispute. In Ghana, litigation of a dispute may take several years to be finally resolved, especially where either party decides to use the appeal process from the High Court to the Supreme Court and a possible review of the Supreme Court decision. This locks up taxes for the revenue, and puts a strain on the relationship between the taxpayer and the revenue authorities. There is also the issue of rising costs in legal fees and filing fees, and the requirement that a losing taxpayer must pay the amount disputed within 30 days of the Court’s decision, or risk contempt of court. Litigation of a tax dispute therefore can be very expensive, both in terms of resources and agent/legal fees for both the GRA and the taxpayer. Using Mediation as an option for the resolution of tax disputes would thus benefit both the taxpayer and the revenue authorities, and would go a long way to making Ghana a better place to work and do business. Can Mediation be applied to tax disputes in Ghana?

**Appropriateness of Mediation for the Resolution of Tax Disputes**

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47 This data is discussed in Carl Islam Barrister, "Mediation Of Tax Disputes, supra note 65.
49 Supra note 74.
50 The Income Tax Act, 2015 (Act 896), paragraph 24(1).
Tax is a creature of statute.\(^{51}\) Therefore, whether Mediation can be applied to tax disputes depends on the provisions of relevant tax legislation and the ADR Act. This writer argues that neither the ADR Act, nor the various tax legislations prohibit the use of Mediation for the resolution of tax disputes. Therefore, Mediation can be used to resolve tax disputes. This paper suggests that imbedded in the taxpayers right to object, and the CG’s power to accept or reject such objection, is the opportunity for both the taxpayer and the CG to discuss their dispute in an attempt to reach an amicable settlement.

In practice, the CG and the taxpayer negotiate the dispute during the objection process. This paper submits that in the absence of regulations or guidelines for Mediation, the taxpayer and the CG may use Mediation to resolve their dispute within the 90 day period of the objection process, as Mediation is more or less ‘assisted negotiation’. Should the CG and the taxpayer not reach an amicable settlement within the 90 day period, they may agree to extend the time to mediate the dispute, especially where both parties are of the view that a resolution of the dispute or some of the disputed issues is likely. Should the parties be unable to reach an amicable settlement of any of the disputed issues within this extended period, the taxpayer may then proceed to litigate. This the taxpayer can do by applying for extension of time within which to appeal, citing the attempts at Mediation as the reason for the delay in filing the tax appeal. This paper submits that attempts at Mediation will qualify as a ‘reasonable cause’, for which the Court ought to grant an extension. This is because the Court’s Act 1993, (Act 459) enjoins the courts to promote amicable settlement of disputes, and the Commercial Court mandatorily requires parties to proceed to trial of the case only after they have first attempted amicable settlement of the dispute, (pre-trial). A tax dispute is a commercial matter\(^{52}\). Therefore, delay to appeal as a result of engaging in Mediation with a view to resolving the dispute amicably ought to be considered a ‘reasonable cause’. A reasonable commercial person would first consider an amicable settlement of a dispute before going to court.

The use of a Mediator even at the Objection stage, could be helpful in getting both

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\(^{51}\) The 1992 Constitution, article 174. See also Benjamin Kunbour and Abdallah Ali-Nakyea, supra note 24. at page 7.

\(^{52}\) High Court (Civil Procedure), Rules, 2004 (C.I 47), Order 58 Rule 2xiii.
sides to civilly isolate the disputed issues, and openly discuss those issues with a view
to reaching a binding and satisfactory resolution of all or some of the disputed issues,
without recourse to court litigation. Even where the parties are unable to amicably
resolve all the disputed issues, and need to resort to court litigation, they do so with a
better understanding of their dispute.

**Challenges of Using Mediation to Resolve Tax Disputes**

One of the main challenges to using Mediation to resolve tax disputes is the general
concern relating to principles of legality and equality of taxation. Care must be taken
that Mediation does not undermine the rule of law, for instance, in cases where the
law is clear, neither party ought to be permitted to negotiate away the unambiguous
implications of the law.\(^{53}\)

Another challenge to the use of Mediation in the resolution of tax disputes is technical
expertise.\(^{54}\) Taxation is a specialized area, and so is Mediation. So a tax expert who is
not trained in Mediation may not be competent to mediate a tax dispute.

This paper submits that the above challenges are resolvable, as discussed below.

**Recommendations on how Mediation can be used to Resolve Tax Disputes**

Mediation can apply to a dispute in respect of any of the range of taxes and for any
taxpayer from large multinationals to small and medium sized enterprises, sole
traders, partnerships and private individuals. Mediation may be particularly useful in
circumstances where: the parties are unclear or unable to articulate the points in

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\(^{53}\) See “How Can an Excessive Volume of Tax Disputes Be Dealt With”

\(^{54}\) Ibid.
dispute; the parties have taken entrenched views or relationships have become strained; there is a dispute over facts (particularly in fact heavy cases); there is no dispute over any technical analysis but the parties need to agree the methodology to quantify liability; and there are "non-tax" issues with no precedent value or wider impact.55

The circumstances in which Mediation would not be suitable are where: the resolution of the disputes could only be achieved by departure from an established GRA view on a technical issue; there is doubt over the strength of evidence and GRA wants to test it by cross-examination at a tribunal; an issue needs to be clarified judicially so that the precedent gained can be applied to other cases; and also where the taxpayer does not appear to be working collaboratively with the GRA.56

This paper suggests that, the Minister responsible for finance and the GRA may make regulations specifying the categories of tax disputes that may be resolved by Mediation and those that ought not to be resolvable by Mediation.57 These regulations would include guidelines on the mediation process in resolution of tax disputes, among others. The enactment of such regulations would also serve to address concerns bordering on the legality and equality of taxation.

Some tax law provisions are open to different reasonable interpretations. If a particular ambiguous provision involves numerous cases, litigation may be appropriate so as to arrive at a general resolution of the ambiguity.58 On the other hand, isolated cases might more efficiently be dealt with through Mediation, as long as both parties are ready to find a reasonable solution. This approach ensures that constitutional and statutory basis for taxation are maintained in accordance with the relevant legislation, and taxation is not compromised.59

Mediation must be designed to work better and more swiftly in the public interest and not become a channel for relaxing compliance with the law, or giving unequal treatment to taxpayers. The CG’s consideration of an objection is a quasi-judicial

56 Ibid.
57 Section 27 of Act 791 empowers the Minister responsible for finance to, on the recommendation of the GRA Board, make regulations in respect of domestic taxes, CEPS, among others.
58 Supra note 76.
59 Ibid.
function. This means that it must be based on law, although there is an element of discretion to exercise. This paper takes the view that within the scope of legality, it is feasible for the GRA to incorporate Mediation in arriving at its Objection Decision. This effectively replaces the statutory unilateral decision with a negotiated procedure and a bilateral decision, ensuring that the dispute is resolved at the objection stage without the need for litigation.\(^\text{60}\)

Given that the CG has to give his/her Objection Decision within 90 days of receipt of the objection, the parties can agree to: first attempt negotiation within 30 days of the filing of the objection, proceed to Mediation where the dispute is not resolved within 30 days from the date of the Objection, and extend the time for mediation where the dispute is not resolved within 60 days of Mediation, (where both parties want to continue the mediation process). Should mediation fail and the parties resort to litigation, the taxpayer may apply for an extension of time within which to file the appeal, citing efforts at mediation as the reason for the delay. As noted above, the Court ought to grant an extension of time in such a case as efforts at mediation qualify as a ‘reasonable cause’, or a cause that many a commercial person would reasonably consider before resorting to litigation.

To address the concern of lack of technical expertise in mediating tax disputes, the GRA, tax training institutions and mediation training bodies may collaborate to train tax experts in the skill of mediation and/or mediators in taxation. This way, the GRA and taxpayers would have a pool of qualified assistants to choose from in the event of mediation of a tax disputes.

**Conclusion**

Not only is Mediation widely acknowledged to reduce the costs and delays of litigation.\(^\text{61}\) Pilot studies conducted in the United Kingdom and Australia have confirmed that Mediation can be a timely and effective means of resolving smaller, less complex indirect tax disputes.\(^\text{62}\) In 48 pilot cases selected, 41% of the issues in

\(^{60}\) supra note 80 How Can an Excessive Volume of Tax Disputes Be Dealt With -


dispute were fully resolved. The average timeframe for resolution from first contact about the Pilot to case finalisation was 41 days. The shortest time it took to finalise a case was 30 days and the longest was 59 days. Compared to litigation in Ghana, which takes several years to complete, the pilot cases conducted demonstrate that using Mediation to resolve tax disputes will surely reduce the costs and delays of litigation.

Furthermore, feedback from the above pilot cases, indicated that even in those disputes where an agreement was not reached, not only did the parties make time and/or cost savings, but that there was also an improved relationship between the taxpayer and the Revenue Authority, with the taxpayer viewing the Revenue Authority more favourably than before participating in Mediation.

In addition, the overwhelming feedback from all participants who took part in the pilot cases suggested that they believed the mediation facilitation assisted the dispute resolution process and that they would be happy to engage in the process again. An improved relationship, is one of the cornerstones of efficient and effective tax administration. These pilot cases also give credence to the view that parties using Mediation tend to arrive at settlements that are more creative, satisfactory and lasting than those imposed by the courts, and that Mediation can be used to establish a deal that eludes the parties in bilateral negotiations, either personally or through their lawyers.

The Pilot cases also identified internal process improvements that could be implemented by the Revenue Authority to resolve disputes earlier. This included earlier and more open communication by objection officers when an objection is lodged to facilitate the development of better relationships and earlier provision of

64 supra note 74. See also Jone, Melinda Elizabeth. "Refining a proposed tax mediation regime for New Zealand's Tax Disputes Resolution Procedures: A Mixed Methods Study" ( New Zealand, University of Canterbury, 2013).
66 Supra note 86.
information.\textsuperscript{67} There is therefore empirical evidence that Mediation could result in win win outcomes for both the taxpayer and the CG, not only in time and money, but in improved relationship as well.

In conclusion, this paper submits that from a taxpayers’ perspective, irrespective of the outcome, litigation is costly, time-consuming and stressful. And it is all the more unsatisfactory if you lose. From Revenue Authority’s perspective the tax appeal process is equally costly and time-consuming for an overstretched department, which is under severe external pressure to work smarter and faster. Therefore, although Mediation is not a panacea for all of the problems related with the resolution of tax disputes, it is certainly a step along the road to working together better which confers obvious advantages.\textsuperscript{68} Mediation in tax disputes will contribute to resolving these challenges, and that litigation should be the route of last resort for both sides. It is about time the CG saw the taxpayer as a desirable customer, and Mediation may just help in fostering such a relationship.

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