SIX MONTHS RULE ON OBJECTION DETERMINATION: PRACTICES AND EXPERIENCE

Hitherto 2020, the Commissioner General (the Commissioner) of the Tanzania Revenue Authority (TRA) could take years to determine a taxpayer's objection to a tax assessment or decision. Indeed, this posed a precarious position for the taxpayers as interest continued to accrue for the duration the objection was left indeterminate.

In 2020, the Tax Administration Act, 2015 was amended. It required the Commissioner to determine objection within 6 months of its admission.

It is almost two years now since the six months rule on objection determination started to apply. This has given us sufficient experience worth sharing especially around this period when we expect changes to various tax statutes through this year's Finance Act.

1. Reckoning of time

Reckoning the six months period could be the trickiest part. Superficially, it may seem straightforward but in practice and from our experience it is not.

An objection to a tax assessment or decision is admitted upon payment of the one third of the assessed tax or undisputed tax whichever is greater. For an objection in which the taxpayer is in a tax loss position, no amount is payable for admission of the objection.

Further, the Commissioner is allowed to waive fully or partially the requisite payment for admission of an objection.

Once the payment is made or full waiver is granted or the taxpayer is in a tax loss position, the practice has been for the Commissioner to issue a letter admitting the objection. The letter, however, is not a requirement of the law. And there is no time limit to issue the letter. We have seen in many cases the letter for admission of objection being issued months after paying the required amount or satisfying conditions for admission of objection.

Now the question is at what point should the taxpayer start to count the six months deadline? Should the taxpayer start to count the six months from the date of satisfying the condition for admission of objection or in case the taxpayer is in a tax loss position; from the date of lodging the objection? Or should the taxpayer start to count the six months from the date of receipt of the Commissioner's admission letter?

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That is still a grey area. The law says that objection shall be admitted upon payment of the greater of one third of assessed tax or undisputed tax. The law, however, does not provide for issuance of the admission letter to confirm that the objection is admitted. Ideally, when the Commissioner receives an objection, he must check whether the conditions for admission of objection have been fulfilled and if yes proceed to deal with the objection. If no, then reject the objection.

This is because the law has made it clear that the one third or tax not in dispute must be paid within the period of filing the objection. The waiver must be sought and determined within the period of filing the objection. As such admission of the objection should be within the time of filing the objection. However, in most cases waiver requests are determined way beyond the time of filing the objection and there is no remedy for the Commissioner's failure to determine a waiver application within time. This is a debate for another day.

The admission letter is purely a matter of practice by the Commissioner. It is not provided in the law. Thus, there is a risk in relying on the letter as the basis for counting the six months. The taxpayer could be caught off guard and be out of time to appeal to the Board. This could happen where a taxpayer has fulfilled the condition for admission of the objection and the letter is not forthcoming. And we have seen some cases whereby the admission letter is issued six months after the taxpayer has satisfied the condition for admission of the objection. It could be argued that the letter is not a requirement of the law. The risk is more apparent for an objection against a tax loss assessment which requires no payment for its admission.

Here is one example. We encountered a situation where a taxpayer requested to pay a lesser amount for admission of its objection through its tax credits. The Commissioner granted the request and issued a letter acknowledging the objection and informed the taxpayer that the objection is being attended. Six months down the line the Commissioner did nothing.

The taxpayer filed an appeal to the Board under the six months rule.

Surprisingly, the Commissioner raised an objection that the appeal is premature because the objection was not admitted (no letter of admission was issued). Had the taxpayer not filed the appeal, the Commissioner could argue otherwise i.e., the admission letter is not a legal requirement. And the argument would be right.

2. Deemed confirmation of the assessment

The law says that if the Commissioner fails to determine an objection within six months it shall be deemed that the assessment is confirmed.

This creates uncertainty in tax disputes' resolution. One, it seems the law did not envisage a situation where the six months expire at the later stage of the objection process. We have seen various scenarios where the six months expired before the Commissioner issued its final determination of objection but agreed to amend the assessment significantly in its proposal. In those scenarios, the taxpayer had made further submission on the Commissioner's proposal but before the Commissioner issued its final decision, the six months expired.

The taxpayers had to appeal to the Board. The appeals are currently sitting at the Board for more than a year and there is still no final decision by the Commissioner. The question is what is the position regarding the grounds of objection accepted by the Commissioner in its proposal where the law says after expiry of six months the assessment shall be deemed confirmed? Does it mean the Commissioner's position on the assessment is revived?

The answer to the above question takes us to the second point. Ultimately, it appears the Board is now potentially placed in the Commissioner's position to deal with objections to tax assessment/decision. If the six months expire and the Commissioner has not determined the objection, the taxpayer will appeal to the Board.

The Board will then have to address the grounds of objection instead of dealing with the Commissioner's decision on the objection. In such a scenario the Board will be determining the objection.

Perhaps it would have served the purpose if the objection would be deemed accepted upon failure by the Commissioner to determine the objection within six months of its admission.

This is the position under customs law, and perhaps it would be in order in the objection process as well, because otherwise involving the Board in 'Taxpayer and Commissioner arguments' on the objection in a way distorts the decision-making hierarchy. Essentially the Board becomes the TRA, the Tribunal becomes the Board and the Court of Appeal the Tribunal.

As such the TRA denial against the taxpayer's objection in the appeal renders the law on objection procedures' meaningless. It also limits the taxpayer's right to be heard adequately. Further, it also eliminates the possibility of smooth resolution of tax disputes at the objection level which gives the Commissioner power to demand every kind of evidence and to have easy access to taxpayer's information.

3. Practice at the Board

There has been a torrent of appeals filed at the Board after expiry of six months. Thus, there is a shift for work from the Commissioner to the Board – *see point 2 above*. Thus, the Board has been adjourning these appeals ostensibly pursuant to the provision pertaining to amicable settlement of disputes. This is some sort of amicable settlement in as far as these types of appeals are concerned. A resulting resolution only pertains to admitting the objection, so as to allow the Commissioner to delve into the substantive objection.

This middle ground avoids turning the Board into the Commissioner in the objection process.

We have also seen, surprisingly, a situation where TRA challenges the competence of appeals filed under the six months rule because there is no objection decision.

Therefore, apart from protecting the taxpayers' right of appeal and the risk that the assessment will be confirmed if the six months lapse and the taxpayer does not appeal as directed by law, the appeals do not resolve disputes substantively.

4. Is it a procedural law?

This is one of the questions, which must gain much attention. A procedural law applies in retrospect. One would argue that the six months rule is a procedural law because it sets out the procedure in determining objection. An equally forceful argument can be made that it is a substantive law because it gives a substantive right of appeal to the Board. The question would be does the six months rule applies in retrospect to objections filed before 1st July 2020? This too is a subject for another debate and for now, food for thought. We are aware though that the Boards once ruled that the six-months rule does not apply retrospectively but the Board is not the court of record – its decisions can be overturned.

A takeaway point is that it is better to be safe. Taxpayers should start counting the six months rule from the date of fulfilling the condition for admission of objection. And if the objection is not determined within six months, file an appeal to the Board. This will minimize the risk of paying assessed taxes for failure to appeal against deemed confirmed assessment. The appeal also gives a latitude to opening discussions on amicable settlement of the dispute with the Commissioner.

The experience for the past one year and a half is sufficient for the Parliament to improve the law so as to make it meaningful and practical.