Observatory on the Protection of Taxpayers’ Rights

Below you will find a questionnaire filled in by Brian Njenga Kagunyi, Tax Associate at Iseme, Kamau and Maema Advocates (DLA Piper) and OPTR National Reporter of Kenya.

This set of questionnaires comprise the National Reporter’s assessment on the country practice during 2018 in the protection of taxpayers’ rights (Questionnaire # 1), and the level of fulfilment of the minimum standards and best practices on the practical protection of taxpayers’ rights identified by Prof. Dr. Philip Baker and Prof. Dr. Pasquale Pistone at the 2015 IFA Congress on “The Practical Protection of Taxpayers’ Fundamental Rights” (Questionnaire # 2). These questionnaires were filled in considering the following parameters:

1. For Questionnaire # 1, an assertive assessment (yes/no) was required on the effective implementation in domestic law of 82 legal safeguards, guarantees and procedures relevant in 12 specific areas for the practical protection of taxpayers’ rights, as identified by Baker & Pistone in 2015. This line of questioning aims to get an overview of the state of protection of taxpayers’ rights in the country in 2018.

2. For Questionnaire # 2, an impartial, non-judgmental evaluation was required on the developments, either of improvement or of decline, in the level of realisation of 57 minimum standards and 44 best practices, distributed into 87 benchmarks for the practical protection of taxpayers’ rights. In this regard, a summary of events occurred in 2018 (legislation enacted, administrative rulings, circulars, case law, tax administration practices), that serve as grounds for each particular assessment, was also required.

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# Question | Yes | No
---|---|---
1. **Identifying taxpayers and issuing tax returns**

1. Do taxpayers have the right to see the information held about them by the tax authority? No
2. If yes, can they request the correction of errors in the information? No
3. In your country, is there a system of “cooperative compliance” / “enhanced relations” which applies to some taxpayers only? Yes
4. If yes, are there rules or procedures in place to ensure this system is available to all eligible taxpayers on a non-preferential/non-discriminatory/non arbitrary basis? No
5. Is it possible in your country for taxpayers to communicate electronically with the tax authority? Yes
6. If yes, are there systems in place to prevent unauthorised access to the channel of communication? Yes
7. Are there special arrangements for individuals who face particular difficulties (e.g. the disabled, the elderly, other special cases) to receive assistance in complying with their tax obligations? No

2. **The issue of tax assessments**

8. If a systematic error in the assessment of tax comes to light (e.g. the tax authority loses a tax case and it is clear that tax has been collected on a wrong basis), does the tax authority act ex officio to notify all affected taxpayers and arrange repayment to them? Yes
9. Does a dialogue take place in your country between the taxpayer and the tax authority before the issue of an assessment order to reach an agreed assessment? Yes
10. If yes, can the taxpayer request a meeting with the tax officer? Yes

3. **Confidentiality**

11. Is information held by your tax authority automatically encrypted? Yes
12. Is access to information held by the tax authority about a specific taxpayer accessible only to the tax official(s) dealing with that taxpayer’s affairs? Yes
13. If yes, must the tax official(s) identify himself/herself before accessing information held about a specific taxpayer? Yes
14. Is access to information held by a taxpayer audited internally to check if there has been any unauthorised access to that information? Yes
15. Are there examples of tax officials who have been criminally prosecuted in the last decade for unauthorised access to taxpayers’ data? Yes
16. Is information about the tax liability of specific taxpayers publicly available in your country? No
17. Is “naming and shaming” of non-compliant taxpayers practised in your country? Yes
18. Is there a system in your country by which the courts may authorise the public disclosure of information held by the tax authority about specific taxpayers (e.g. habeas data or freedom of information)? Yes
19. Is there a system of protection of legally privileged communications between the taxpayer and its advisors? Yes
20. If yes, does this extend to advisors other than those who are legally qualified (e.g. accountants, tax advisors)? Yes

4. **Criminal and administrative sanctions**

1. Does the principle no-tax no crime - apply in your country to prevent either (a) the imposition of a tax penalty and the tax liability; (b) the imposition of more than one tax penalty for the same conduct; (c) the imposition of a tax penalty and a criminal liability? Yes
2. If or no in item 1 is recognised, does this prevent two parallel sets of court proceedings arising from the same factual circumstances (e.g. a tax court and a criminal court)? Yes
3. If the taxpayer makes a voluntary disclosure of a tax liability, can this result in a reduced or a zero penalty? Yes

5. **Enforcement of taxes**

4. Does the taxpayer have the right to request a deferred payment of taxes or a payment in instalments (perhaps with a guarantee)? Yes
5. Is there a system in your country by which the courts may authorise the public disclosure of information held by the tax authority about specific taxpayers (e.g. habeas data or freedom of information)? Yes
6. If yes, are there rules or procedures in place to ensure this system is available to all eligible taxpayers on a non-preferential/non-discriminatory/non arbitrary basis? Yes
7. Does the taxpayer have the right to be informed before information is sought from third parties in connection with tax matters? Yes
8. Does the taxpayer have the right to see any information received from another country that relates to him? Yes
9. Does the taxpayer have a right to challenge before the judiciary the exchange of information relating to him with another country? Yes
10. Does the taxpayer have the right to receive information from and to communicate with the tax authorities of other countries officially? Yes
11. Is there a system of protection of legally privileged communications between the taxpayer and its advisors? Yes
12. If yes, does this extend to advisors other than those who are legally qualified (e.g. accountants, tax advisors)? Yes

6. **Cross-border procedures**

1. Is information about the tax liability of specific taxpayers publicly available in your country? No
2. Is there a prohibition on retrospective tax legislation in your country? Yes
3. Does the taxpayer have the right to request a deferred payment of taxes or a payment in instalments (perhaps with a guarantee)? Yes
4. Is there a system in your country by which the courts may authorise the public disclosure of information held by the tax authority about specific taxpayers (e.g. habeas data or freedom of information)? Yes
5. If yes, are there rules or procedures in place to ensure this system is available to all eligible taxpayers on a non-preferential/non-discriminatory/non arbitrary basis? Yes
6. Does the taxpayer have the right to request a meeting with the tax officer? Yes
7. If yes, is there a system in your country by which the courts may authorise the public disclosure of information held by the tax authority about specific taxpayers (e.g. habeas data or freedom of information)? Yes
8. If yes, are there rules or procedures in place to ensure this system is available to all eligible taxpayers on a non-preferential/non-discriminatory/non arbitrary basis? Yes
9. Is information held by your tax authority automatically encrypted? Yes
10. Is access to information held by the tax authority about a specific taxpayer accessible only to the tax official(s) dealing with that taxpayer’s affairs? Yes
11. If yes, must the tax official(s) identify himself/herself before accessing information held about a specific taxpayer? Yes
12. Is access to information held by a taxpayer audited internally to check if there has been any unauthorised access to that information? Yes
13. Are there examples of tax officials who have been criminally prosecuted in the last decade for unauthorised access to taxpayers’ data? Yes
14. Is information about the tax liability of specific taxpayers publicly available in your country? No
15. Is “naming and shaming” of non-compliant taxpayers practised in your country? Yes
16. Is there a system in your country by which the courts may authorise the public disclosure of information held by the tax authority about specific taxpayers (e.g. habeas data or freedom of information)? Yes
17. Is there a system of protection of legally privileged communications between the taxpayer and its advisors? Yes
18. If yes, does this extend to advisors other than those who are legally qualified (e.g. accountants, tax advisors)? Yes

7. **10. Legislation**

1. Is there a procedure in your country for public consultation before the adopting of all (or most) tax legislation? Yes
2. Is tax legislation subject to constitutional review which can strike down unconstitutional laws? Yes
3. Is there a prohibition on retrospective tax legislation in your country? Yes
4. If no, are there restrictions on the adoption of retrospective tax legislation in your country? Yes
5. Does the taxpayer have the right to challenge before the judiciary the exchange of information relating to him with another country? Yes
6. Does the taxpayer have the right to receive information from and to communicate with the tax authorities of other countries officially? Yes
7. Is there a system of protection of legally privileged communications between the taxpayer and its advisors? Yes
8. If yes, does this extend to advisors other than those who are legally qualified (e.g. accountants, tax advisors)? Yes
9. Is information about the tax liability of specific taxpayers publicly available in your country? No
10. Is there a prohibition on retrospective tax legislation in your country? Yes
4. Normal audits

<table>
<thead>
<tr>
<th>#</th>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>21</td>
<td>Does the principle audi alteram partem apply in the tax audit process (i.e. does the taxpayer have to be notified of all decisions taken in the process and have the right to object and be heard before the decision is finalised)?</td>
<td>☑</td>
<td></td>
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<tr>
<td>22</td>
<td>Are there time limits applicable to the conduct of a normal audit in your country (e.g. the audit must be concluded within so many months)?</td>
<td>☑</td>
<td></td>
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<tr>
<td>23</td>
<td>If yes, what is the normal limit in months?</td>
<td>☑</td>
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<tr>
<td>24</td>
<td>Does the taxpayer have the right to be represented by a person of its choice in the audit process?</td>
<td>☑</td>
<td></td>
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<tr>
<td>25</td>
<td>May the opinion of independent experts be used in the audit process?</td>
<td>☑</td>
<td></td>
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<tr>
<td>26</td>
<td>Does the taxpayer have the right to receive a full report on the conclusions of the audit at the end of the process?</td>
<td>☑</td>
<td></td>
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<tr>
<td>27</td>
<td>Does the principle re bis in idem apply to tax audits (i.e. that the taxpayer can only receive one audit in respect of the same taxable period)?</td>
<td>☑</td>
<td></td>
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<tr>
<td>28</td>
<td>If yes, does this mean only one audit per tax per year?</td>
<td>☑</td>
<td></td>
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<tr>
<td>29</td>
<td>Are there limits to the frequency of audits of the same taxpayer (e.g. in respect to different periods or different taxes)?</td>
<td>☑</td>
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<tr>
<td>30</td>
<td>Does the taxpayer have the right to request an audit (e.g. if the taxpayer wishes to get finality of taxation for a particular year)?</td>
<td>☑</td>
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</tbody>
</table>

5. More intensive audits

<table>
<thead>
<tr>
<th>#</th>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>31</td>
<td>Is authorisation by a court always needed before the tax authority may enter and search premises?</td>
<td>☑</td>
<td></td>
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<tr>
<td>32</td>
<td>May the tax authority enter and search the dwelling places of individuals?</td>
<td>☑</td>
<td></td>
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<tr>
<td>33</td>
<td>Is there a procedure in place to ensure that legally privileged material is not taken in the course of a search?</td>
<td>☑</td>
<td></td>
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<tr>
<td>34</td>
<td>Is a court order required before the tax authority can use interception of communications (e.g. telephone tapping or access to electronic communications)?</td>
<td>☑</td>
<td></td>
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<tr>
<td>35</td>
<td>Is the principle nemo tenetur applied in tax investigations (i.e. the principle against self-incrimination)?</td>
<td>☑</td>
<td></td>
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<tr>
<td>36</td>
<td>If yes, is there a restriction on the use of information supplied by the taxpayer in a subsequent penalty procedure/criminal procedure?</td>
<td>☑</td>
<td></td>
</tr>
<tr>
<td>37</td>
<td>If yes to nemo tenetur, can the taxpayer raise this principle to refuse to supply basic accounting information to the tax authority?</td>
<td>☑</td>
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</tr>
<tr>
<td>38</td>
<td>Is there a procedure applied in your country to identify a point in time during an investigation when it becomes likely that the taxpayer may be liable for a penalty or a criminal charge, and from that time onwards the taxpayer’s right not to self-incriminate is recognised?</td>
<td>☑</td>
<td></td>
</tr>
<tr>
<td>39</td>
<td>If yes, is there a requirement to give the taxpayer a warning that the taxpayer can rely on the right of non-self-incrimination?</td>
<td>☑</td>
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</tbody>
</table>

6. Review and appeals

<table>
<thead>
<tr>
<th>#</th>
<th>Question</th>
<th>Yes</th>
<th>No</th>
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</thead>
<tbody>
<tr>
<td>40</td>
<td>Is there a procedure for an internal review of an assessment/decision before the taxpayer appeals to the judiciary?</td>
<td>☑</td>
<td></td>
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<tr>
<td>41</td>
<td>Are there any arrangements for alternative dispute resolution (e.g. mediation or arbitration) before a tax case proceeds to the judiciary?</td>
<td>☑</td>
<td></td>
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<tr>
<td>42</td>
<td>Is it necessary for the taxpayer to bring his case first before an administrative court to quash the assessment/decision, before the case can proceed to a judicial hearing?</td>
<td>☑</td>
<td></td>
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<tr>
<td>43</td>
<td>Are there time limits applicable for a tax case to complete the judicial appeal process?</td>
<td>☑</td>
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<tr>
<td>44</td>
<td>If yes, what is the normal time it takes for a tax case to be concluded on appeal?</td>
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</table>

11. Revenue practice and guidance

<table>
<thead>
<tr>
<th>#</th>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>75</td>
<td>Does the tax authority in your country publish guidance (e.g. revenue manuals, circulars, etc.) as to how it applies your tax law?</td>
<td>☑</td>
<td></td>
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<tr>
<td>74</td>
<td>If yes, can taxpayers acting in good faith rely on that published guidance (i.e. protection of legitimate expectations)?</td>
<td>☑</td>
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<tr>
<td>75</td>
<td>Does your country have a generalised system of advanced rulings available to taxpayers?</td>
<td>☑</td>
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<tr>
<td>76</td>
<td>If yes, is it legally binding?</td>
<td>☑</td>
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<tr>
<td>77</td>
<td>If a binding rule is refused, does the taxpayer have a right to appeal?</td>
<td>☑</td>
<td></td>
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</tbody>
</table>

12. Institutional framework for protecting taxpayers’ rights

<table>
<thead>
<tr>
<th>#</th>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>78</td>
<td>Is there a taxpayers’ charter or taxpayers’ bill of rights in your country?</td>
<td>☑</td>
<td></td>
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<tr>
<td>79</td>
<td>If yes, are its provisions legally effective?</td>
<td>☑</td>
<td></td>
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<tr>
<td>80</td>
<td>Is there a (tax) ombudsman / taxpayers’ advocate / equivalent position in your country?</td>
<td>☑</td>
<td></td>
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<tr>
<td>81</td>
<td>If yes, can the ombudsman intervene in an on-going dispute between the taxpayer and the tax authority (before it goes to court)?</td>
<td>☑</td>
<td></td>
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<tr>
<td>82</td>
<td>If yes to a (tax) ombudsman, is he/she independent from the tax authority?</td>
<td>☑</td>
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<tr>
<td>45</td>
<td>Does the taxpayer have to pay some/all the tax before an appeal can be made (i.e. solva et repete)?</td>
<td></td>
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<tr>
<td>46</td>
<td>If yes, are there exceptions recognised where the taxpayer does not need to pay before appealing (i.e. can obtain an interim suspension of the tax debt)?</td>
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<tr>
<td>47</td>
<td>Does the taxpayer need permission to appeal to the first instance tribunal?</td>
<td></td>
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<tr>
<td>48</td>
<td>Does the taxpayer need permission to appeal to the second or higher instance tribunals?</td>
<td></td>
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<tr>
<td>49</td>
<td>Is there a system for the simplified resolution of tax disputes (e.g. by a determination on the file, or by e-filing)?</td>
<td></td>
<td></td>
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<tr>
<td>50</td>
<td>Is the principle audi alteram partem (i.e. each party has a right to a hearing) applied in all tax appeals?</td>
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<tr>
<td>51</td>
<td>Does the loser have to pay the costs in a tax appeal?</td>
<td></td>
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<tr>
<td>52</td>
<td>If yes, are there situations recognised where the loser does not need to pay the costs (e.g. because of the conduct of the other party)?</td>
<td></td>
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<tr>
<td>53</td>
<td>Are judgments of tax tribunals published?</td>
<td></td>
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<tr>
<td>54</td>
<td>If yes, can the taxpayer preserve its anonymity in the judgment?</td>
<td></td>
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<tr>
<td>55</td>
<td>If there is usually a public hearing, can the taxpayer request a hearing in camera (i.e. not in public) to preserve secrecy/confidentiality?</td>
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<tr>
<td>#</td>
<td>Minimum standard</td>
<td>Best practice</td>
<td>Shift Away</td>
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<td>----</td>
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<td>-------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>1</td>
<td>Implement safeguards to prevent impersonation when issuing unique identification number.</td>
<td>○</td>
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<tr>
<td>2</td>
<td>The system of taxpayer identification should take account of religious sensitivities.</td>
<td>○</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Impose obligations of confidentiality on third parties with respect to information gathered by them for tax purposes.</td>
<td>○</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Where tax is withheld by third parties, the taxpayer should be excluded from liability if the third party fails to pay over the tax.</td>
<td>○</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Where pre/populated returns are used, these should be sent to taxpayers to correct errors.</td>
<td>○</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Provide a right to access to taxpayers to personal information held about them, and a right to correct inaccuracies.</td>
<td>○</td>
<td></td>
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<tr>
<td>7</td>
<td>Where communication with taxpayers is in electronic form, institute systems to prevent impersonation or interception.</td>
<td>○</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Where a system of &quot;cooperative compliance&quot; operates, ensure it is available on a non-discriminatory and voluntary basis.</td>
<td>○</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Provide assistance for those who face difficulties in meeting compliance obligations, including those with disabilities, those located in remote areas, and those unable or unwilling to use electronic forms of communication.</td>
<td>○</td>
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</tr>
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2. The issue of tax assessment

<table>
<thead>
<tr>
<th>#</th>
<th>Minimum standard</th>
<th>Best practice</th>
<th>Shift Away</th>
<th>Shift Towards</th>
<th>Summary of relevant facts in 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>Establish a constructive dialogue between taxpayers and revenue authorities to ensure a fair assessment of taxes based on equality of arms.</td>
<td>○</td>
<td></td>
<td>○</td>
<td>Section 75 of the Tax Procedures Act authorises the use of an electronic tax system. Taxpayers are afforded an opportunity to explain information provided during a revenue authority audit or to give additional information prior to a final tax assessment being issued by the Commissioner.</td>
</tr>
<tr>
<td>11</td>
<td>Use e-filing to speed up assessments and correction of errors, particularly systematic errors.</td>
<td>○</td>
<td></td>
<td>○</td>
<td>Kenya has adopted an e-filing system and has begun issuing tax assessments to taxpayers electronically.</td>
</tr>
</tbody>
</table>

3. Confidentiality

<table>
<thead>
<tr>
<th>#</th>
<th>Minimum standard</th>
<th>Best practice</th>
<th>Shift Away</th>
<th>Shift Towards</th>
<th>Summary of relevant facts in 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>Provide a specific legal guarantee for confidentiality, with sanctions for officials who make unauthorised disclosures (and ensure sanctions are enforced).</td>
<td>○</td>
<td></td>
<td>○</td>
<td>Section 6 of the Tax Procedures Act imposes a requirement for all Kenya Revenue Authority officials to maintain confidentiality of taxpayer’s information. Officials who fail to do so commit an offence under Section 102 of the Act.</td>
</tr>
<tr>
<td>#</td>
<td>Minimum standard</td>
<td>Best practice</td>
<td>Shift Away</td>
<td>Shift Towards</td>
<td>Summary of relevant facts in 2018</td>
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<tr>
<td>13</td>
<td>Restrict access to data to those officials authorised to consult it. For encrypted data, use digital access codes.</td>
<td>Ensure an effective fire-wall to prevent unauthorised access to data held by revenue authorities.</td>
<td>☒</td>
<td>☐</td>
<td>Tax officials are provided with credentials to access taxpayer's information.</td>
</tr>
<tr>
<td>14</td>
<td>Audit data access periodically to identify cases of unauthorised access.</td>
<td></td>
<td>☒</td>
<td>☐</td>
<td>There are no specific local guidelines.</td>
</tr>
<tr>
<td>15</td>
<td>Introduce administrative measures emphasizing confidentiality to tax officials.</td>
<td>Appoint data protection/privacy officers at senior level and local tax offices.</td>
<td>☐</td>
<td>☒</td>
<td>An officer that fails to follow the provisions for confidentiality commits an offence.</td>
</tr>
<tr>
<td>16</td>
<td>Where pre-populated returns are used, these should be sent to taxpayers to correct errors.</td>
<td>Taxpayers are able to amend assessments and any other information on their Tax profile.</td>
<td>☐</td>
<td>☒</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>If a breach of confidentiality occurs, investigate fully with an appropriate level of seniority by independent persons (e.g. judges).</td>
<td>Tax officials who contravene the confidentiality requirements commit an offence under Section 102 of the Tax Procedures Act.</td>
<td>☒</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>Exceptions to the general rule of confidentiality should be explicitly stated in the law, narrowly drafted and interpreted.</td>
<td>Section 6 of the Tax Procedures Act lists the persons that can access a taxpayer's information. However, all these persons are subject to similar confidentiality requirements as the tax officials.</td>
<td>☐</td>
<td>☒</td>
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<tr>
<td>19</td>
<td>If “naming and shaming” is employed, ensure adequate safeguards (e.g. judicial authorisation after proceedings involving the taxpayer).</td>
<td></td>
<td>☐</td>
<td>☒</td>
<td>Kenya does not have “naming and shaming” provisions.</td>
</tr>
<tr>
<td>20</td>
<td>No disclosure of confidential taxpayer information to politicians, or where it might be used for political purposes.</td>
<td>Parliamentary supervision of revenue authorities should involve independent officials, subject to confidentiality obligations, examining specific taxpayer data, and then reporting to Parliament.</td>
<td>☒</td>
<td>☐</td>
<td>Politicians are not on the list of persons who are able to access taxpayer's information.</td>
</tr>
<tr>
<td>21</td>
<td>Freedom of information legislation may allow a taxpayer to access information about himself. However, access to information by third parties should be subject to stringent safeguards: only if an independent tribunal concludes that the public interest in disclosure outweighs the right of confidentiality, and only after a hearing where the taxpayer has an opportunity to be heard.</td>
<td></td>
<td>☒</td>
<td>☐</td>
<td>Section 60 of the Tax Procedures Act states that tax officials shall only have access to a taxpayer’s information once they have obtained a warrant.</td>
</tr>
<tr>
<td>22</td>
<td>If published, tax rulings should be anonymised and details that might identify the taxpayer removed.</td>
<td></td>
<td>☐</td>
<td>☒</td>
<td>The Tribunal’s decisions are public information. However, the Tax Appeals Tribunal Section 29(10) states that the Tribunal shall take measures to prevent disclosure of trade secrets or other confidential information.</td>
</tr>
<tr>
<td>23</td>
<td>Legal professional privilege should apply to tax advice.</td>
<td>Privilege from disclosure should apply to all tax advisors (not just lawyers) who supply similar advice to lawyers. Information imparted in circumstances of confidentiality may be privileged from disclosure.</td>
<td>☐</td>
<td>☒</td>
<td>Section 60 (10) of the Tax Procedures Act states that tax officials may access taxpayer’s information despite any law relating to privilege or contractual duty of confidentiality.</td>
</tr>
<tr>
<td>24</td>
<td>Where tax authorities enter premises which may contain privileged material, arrangements should be made (e.g. an independent lawyer) to protect that privilege.</td>
<td></td>
<td>☒</td>
<td>☐</td>
<td>The Tax Procedures Act provides that tax officials will have access regardless of rules regarding privilege in the Evidence Act.</td>
</tr>
</tbody>
</table>

### 4. Normal audits

<table>
<thead>
<tr>
<th>#</th>
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<tr>
<td>26</td>
<td>Audits should respect the following principles: (1) Proportionality. (2) <strong>Nemo tenetur se detegere</strong> (principle against self-incrimination). Tax notices issued in violation of these principles should be null and void.</td>
<td></td>
<td>☒</td>
<td>☐</td>
<td>In Kenya, Article 47 of the Constitution and the Fair Administrative Action Act provides for expeditious, efficient and lawful administrative action.</td>
</tr>
</tbody>
</table>
27. In application of proportionality, tax authorities may only request for information that is strictly needed, not otherwise available, and must impose least burdensome impact on taxpayers.  

28. In application of ne bis in idem the taxpayer should only receive one audit per taxable period, except when facts that become known after the audit was completed.  

29. In application of audi alteram partem, taxpayers should have the right to attend all relevant meetings with tax authorities (assisted by advisors), the right to provide factual information, and to present their views before decisions of the tax authorities become final.  

30. In application of nemo tenetur, the right to remain silent should be respected in all tax audits.  

31. Tax audits should follow a pattern that is set out in published guidelines.  

32. A manual of good practice in tax audits should be established at the global level.  

33. Where tax authorities have resolved to start an audit, they should inform the taxpayer of information gathering from third parties.  

34. Taxpayers should be entitled to request the start of a tax audit to obtain finality.  

35. There are no specific provisions that provide for disclosure to the taxpayer.  

36. Reasonable time limits should be fixed for the conduct of audits.  

37. Taxpayers may have their tax agents present during the audit.  

38. The completion of a tax audit should be accurately reflected in a document, notified in its full text to the taxpayer.  

39. Following an audit, a report should be prepared even if the audit does not result in additional tax or refund.  

5. More intensive audits

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>40</td>
<td>More intensive audits should be limited to the extent strictly necessary to ensure an effective reaction to non-compliance.</td>
<td></td>
<td></td>
<td></td>
<td>There are no specific local guidelines.</td>
</tr>
<tr>
<td>41</td>
<td>If there is point in an audit when it becomes foreseeable that the taxpayer may be liable for a penalty or criminal charge, from that time the taxpayer should have stronger protection of his right to silence, and statements from the taxpayer should not be used in the audit procedure.</td>
<td></td>
<td></td>
<td></td>
<td>There are no specific local guidelines.</td>
</tr>
<tr>
<td>42</td>
<td>Entering premises or interception of communications should be authorised by the judiciary.</td>
<td></td>
<td></td>
<td></td>
<td>Section 60 of the Tax Procedures Act provides that tax officials should receive a warrant prior to access to a taxpayer's information.</td>
</tr>
</tbody>
</table>
43. Authorisation within the revenue authorities should only be in cases of urgency, and subsequently reported to the judiciary for ex post ratification.

44. Inspection of the taxpayer's home should require authorisation by the judiciary and only be given in exceptional cases. Where tax authorities intend to search the taxpayer's premises, the taxpayer should be informed and have an opportunity to appear before the judicial authority, subject to exception where there is evidence of danger that documents will be removed or destroyed.

45. Access to bank information should require judicial authorisation.

46. Authorisation by the judiciary should be necessary for interception of telephone communications and monitoring of internet access. Specialised offices within the judiciary should be established to supervise these actions.

47. Seizure of documents should be subject to a requirement to give reasons why seizure is indispensable, and to fix the time when documents will be returned; seizure should be limited in time.

48. If data are held on a computer hard drive, then a backup should be made in the presence of the taxpayer's advisors and the original left with the taxpayer.

49. Where invasive techniques are applied, they should be limited in time to avoid disproportionate impact on taxpayers.

### 6. Review and appeals

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<thead>
<tr>
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<tr>
<td>50</td>
<td>E-filing of requests for internal review to ensure the effective and speedy handling of the review process.</td>
<td>The iTax portal provides a platform for taxpayers to file their objections.</td>
<td></td>
<td></td>
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<tr>
<td>51</td>
<td>The right to appeal should not depend upon prior exhaustion of administrative reviews.</td>
<td>Kenyan legislation provides for an appeal process from the point of issuance of a tax decision by the Commissioner which must be adhered to by the taxpayer.</td>
<td></td>
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<tr>
<td>52</td>
<td>Controls at the border and administrative appeals should not exceed two years.</td>
<td>Although the review and appeals are given time limitations, practical implementation has been wanting. Taxpayers may find an appeal going beyond two years.</td>
<td></td>
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<tr>
<td>53</td>
<td>Audi alteram partem should apply in administrative reviews and judicial appeals.</td>
<td>Section 4 of the Fair Administrative Action Act provides that all persons whom administrative action is taken must be afforded an opportunity to be heard.</td>
<td></td>
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<tr>
<td>54</td>
<td>Where tax must be paid in whole or in part before and appeal, there must be an effective mechanism for providing interim suspension of payment.</td>
<td>An appeal should not require prior payment of tax in all cases.</td>
<td></td>
<td></td>
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<tr>
<td>55</td>
<td>An appeal should not require prior payment of tax in all cases.</td>
<td>Section 51 of the Tax Procedures Act provides that a taxpayer that lodges an objection to a tax decision by the Commissioner must pay the entire amount in the assessment that is not in dispute.</td>
<td></td>
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<tr>
<td>56</td>
<td>The state should bear some or all of the costs of an appeal, whatever the outcome.</td>
<td>The Tribunal and Court have discretion on awarding of costs.</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>57</td>
<td>Legal assistance should be provided for those taxpayers who cannot afford it.</td>
<td>Taxpayers may either represent themselves or have a tax agent or advocate represent them.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>58</td>
<td>Taxpayers should have the right to request the exclusion of the public from a tax appeal hearing.</td>
<td>There are no specific local guidelines.</td>
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### 7. Criminal and administrative sanctions

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<tr>
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<tr>
<td>59</td>
<td>All rulings by the Tax Appeals Tribunal, the High Court and Court of Appeal are public records.</td>
<td></td>
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</tr>
</tbody>
</table>

There are no specific local guidelines.
59 Proportionality and ne bis in idem should apply to tax penalties.

Under Section 38 of the Tax Procedures Act, the late payment interest shall not, in aggregate exceed the principal tax liability.

60 Where administrative and criminal sanctions may both apply, only one procedure and one sanction should be applied.

Under Section 80 of the Tax Procedures Act, a person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law.

61 Sanctions should not be increased simply to encourage taxpayers to make voluntary disclosures.

On application under Section 37 of the Tax Procedures Act, the Commissioner may waive penalties accruing to the taxpayer.

62 Voluntary disclosure should lead to reduction of penalties.

The Finance Act 2018 reduced a number of penalties accruing to the taxpayer for non compliance.

### 8. Enforcement of taxes

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<tr>
<td>63</td>
<td>Collection of taxes should never deprive taxpayers of their minimum necessary for living.</td>
<td></td>
<td></td>
<td></td>
<td>Under Section 38 of the Tax Procedures Act, the late payment interest shall not, in aggregate exceed the principal tax liability.</td>
</tr>
<tr>
<td>64</td>
<td>Authorisation by the judiciary should be required before seizing assets or bank accounts.</td>
<td></td>
<td></td>
<td></td>
<td>Section 61 of the Tax Procedures Act states that the officials must have a warrant to have access to the information.</td>
</tr>
<tr>
<td>65</td>
<td>Taxpayers should have the right to request delayed payment of arrears.</td>
<td></td>
<td></td>
<td></td>
<td>Section 33 of the Tax Procedures Act allows a taxpayer to apply in writing to the Commissioner for an extension of time to pay tax due under a tax law.</td>
</tr>
<tr>
<td>66</td>
<td>Bankruptcy of taxpayers should be avoided, by partial remission of the debt or structured plans for deferred payment.</td>
<td></td>
<td></td>
<td></td>
<td>Section 33 of the Tax Procedures Act allows a taxpayer to apply in writing to the Commissioner for an extension of time to pay tax due under a tax law.</td>
</tr>
<tr>
<td>67</td>
<td>Temporary suspension of tax enforcement should follow natural disasters.</td>
<td></td>
<td></td>
<td></td>
<td>There are no specific local guidelines.</td>
</tr>
</tbody>
</table>

### 9. Cross-border procedures

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<tr>
<td>68</td>
<td>The requesting state should notify the taxpayer of cross-border requests for information, unless it has specific grounds for considering that this would prejudice the process of investigation. The requested state should inform the taxpayer unless it has a reasoned request from the requesting state that the taxpayer should not be informed on grounds that it would prejudice the investigation.</td>
<td></td>
<td></td>
<td></td>
<td>There are no specific provisions for Exchange of Information in domestic law. Taxpayers must rely on the provisions contained in the respective Double Tax Agreements (DTA).</td>
</tr>
<tr>
<td>69</td>
<td>Where a cross-border request for information is made, the requested state should also be asked to supply information that assists the taxpayer.</td>
<td></td>
<td></td>
<td></td>
<td>There are no specific local guidelines.</td>
</tr>
<tr>
<td>70</td>
<td>Provisions should be included in tax treaties setting specific conditions for exchange of information.</td>
<td></td>
<td></td>
<td></td>
<td>All relevant DTAs have provisions governing the exchange of information between the states.</td>
</tr>
<tr>
<td>71</td>
<td>If information is sought from third parties, judicial authorisation should be necessary.</td>
<td></td>
<td></td>
<td></td>
<td>There are no specific local guidelines.</td>
</tr>
<tr>
<td>72</td>
<td>The taxpayer should be given access to information received by the requesting state.</td>
<td></td>
<td></td>
<td></td>
<td>There are no specific local guidelines.</td>
</tr>
<tr>
<td>73</td>
<td>Information should not be supplied in response to a request where the originating cause was the acquisition of stolen or illegally obtained information.</td>
<td></td>
<td></td>
<td></td>
<td>There are no specific local guidelines.</td>
</tr>
<tr>
<td>74</td>
<td>A requesting state should provide confirmation of confidentiality to the requested state.</td>
<td></td>
<td></td>
<td></td>
<td>The DTAs provide that requesting states should treat the information received as confidential.</td>
</tr>
<tr>
<td>75</td>
<td>A state should not be entitled to receive information if it is unable to provide independent, verifiable evidence that it observes high standards of data protection.</td>
<td></td>
<td></td>
<td></td>
<td>There are no specific local guidelines.</td>
</tr>
</tbody>
</table>
For automatic exchange of financial information, the taxpayer should be notified of the proposed exchange in sufficient time to exercise data protection rights. There are no specific local guidelines.

Taxpayers should have a right to request initiation of mutual agreement procedure. All existing DTAs provide for a Mutual Agreement Procedure.

There are no specific provisions for MAP in domestic law. Taxpayers must rely on the provisions contained in the respective DTAs.

### 10. Legislation

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<thead>
<tr>
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<tr>
<td>79</td>
<td>Retrospective tax legislation should only be permitted in limited circumstances which are spelt out in detail.</td>
<td>Retrospective tax legislation should ideally be banned completely.</td>
<td>☒</td>
<td>☐</td>
<td>Previously, through the Provisional Collection of Taxes and Duties Act, the Kenya Revenue Authority collected taxes provisionally prior to the Finance Bill becoming an Act. However, in the case <em>Okiyo Omtatah Okoiti v Cabinet Secretary, National Treasury &amp; 3 others (2018) eKLR</em>, the court held that the Provisional Collection of Taxes and Duties Act was unconstitutional as it purported to allow for the collection of taxes retrospectively, that is, the period before the Finance Bill becomes an Act.</td>
</tr>
<tr>
<td>80</td>
<td>Public consultation should precede the making of tax policy and tax law.</td>
<td></td>
<td>☐</td>
<td>☒</td>
<td>Article 118 of the Constitution provides for public participation and involvement in the legislative function of the parliament.</td>
</tr>
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### 11. Revenue practice and guidance

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<tbody>
<tr>
<td>81</td>
<td>Taxpayers should be entitled to access all relevant legal material, comprising legislation, administrative regulations, rulings, manuals and other guidance.</td>
<td></td>
<td>☒</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>82</td>
<td>Where legal material is available primarily on the internet, arrangements should be made to provide it to those who do not have access to the internet.</td>
<td></td>
<td>☒</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>83</td>
<td>Binding rulings should only be published in an anonymised form.</td>
<td></td>
<td>☐</td>
<td>☒</td>
<td>A taxpayer may either apply for a public ruling or private ruling when seeking clarification from the Revenue Authority.</td>
</tr>
<tr>
<td>84</td>
<td>Where a taxpayer relies upon published guidance of a revenue authority which subsequently proves to be inaccurate, changes should apply only prospectively.</td>
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### 12. Institutional framework for protecting taxpayer's rights

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<tr>
<td>85</td>
<td>Adoption of a charter or statement of taxpayers' rights should be a minimum standard.</td>
<td>A separate statement of taxpayers' rights under audit should be provided to taxpayers who are audited.</td>
<td>☒</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>86</td>
<td>A taxpayer advocate or ombudsman should be established to scrutinise the operations of the tax authority, handle specific complaints, and intervene in appropriate cases. Best practice is the establishment of a separate office within the tax authority but independent from normal operations of that authority.</td>
<td></td>
<td>☐</td>
<td>☒</td>
<td>There are no specific local guidelines.</td>
</tr>
<tr>
<td>87</td>
<td>The organisational structure for the protection of taxpayers' rights should operate at local level as well as nationally.</td>
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<td>☒</td>
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</tbody>
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