

**INTERNATIONAL EXCHANGE OF INFORMATION AND TAXPAYERS' RIGHTS:
OPPOSING FORCES OR TWO SIDES OF THE SAME COIN? AN ANALYSIS OF THE
LEGISLATIVE PROTECTION IN KENYA OF TAXPAYERS' RIGHTS TO PRIVACY
AND CONFIDENTIALITY**

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Minor dissertation presented for the approval of Senate in fulfilment of part of the requirements for Master of Laws (LLM) specialising in International Taxation.

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“Vanity of vanities, says the Preacher, vanity of vanities! All is vanity.” Ecclesiastes 1:2

When I embarked on this masters journey, I was desirous of it not only being about me. I did not want it to be another qualification I added to the list of my credentials just for the sake of it. God ensured that this was not the case, so my first acknowledgement goes to Him. Thank you, God, for going before me, following behind me, walking beside me and for never taking Your hand off me. You are the reason that this is not vanity because throughout each day of the past two years of this journey, especially against the backdrop of the global Covid-19 pandemic, you have helped me learn that the world is more significant than me. The revelation of our collective humanity that is only as strong as our most vulnerable are taken care of is one that I hope I will never forget for the rest of my life as I purpose to be a loving neighbour. This Zulu saying sums it up perfectly, *“Umuntu ngumuntu ngabantu”*

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ABSTRACT

Domestic Resource Mobilisation (DRM) has since 2015's Addis Ababa Action Agenda come to the fore as one of the critical avenues for developing countries to raise the resources required to fund the implementation of the Sustainable Development Goals. However, Illicit Financial Flows (IFFs) continue to undermine these DRM efforts, especially in Africa. Increased transparency in tax through mechanisms such as the cross-border collaboration of tax administrations through the exchange of tax information has been put forward as one of the ways the issue of IFFs can be tackled.

The Multilateral Convention on the Mutual Administrative Assistance in Tax Matters (MCAA), as amended by the 2010 protocol, is now the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance. This is because it is possible to establish an assistance relationship with each jurisdiction signed onto the MCAA on sign-up. Regarding tax information exchange, for countries such as Kenya with a lean network of Agreements for the Avoidance of Double Taxation, the utility cannot be overemphasised.

The possibility of this vast amount of information exchange raises the issue of taxpayers' rights in relation to said information. Article 21 of the MCAA provides for the protection of persons and limits to the obligation to assist. However, this protection of rights is pegged on the domestic law provisions of the specific jurisdiction concerned. Thus, by implication, the more robustly taxpayers' rights are protected under a jurisdiction's domestic law, the more confidently requested parties would be in supplying information.

This dissertation seeks to analyse Kenya's legislative framework to determine the protection available for taxpayers' rights. The key finding from this analysis is that, save for provisions on the non-disclosure of confidential information, there is a general lack of explicit provisions promoting the protection of taxpayers' rights within taxation legislation. Protection is imputed through the reading of non-taxation legislation.

Following this finding, this dissertation provides recommendations of legislative reforms that can be undertaken in order to provide more robust protection of taxpayers' rights.

LIST OF ABBREVIATIONS

Abbreviations	Detailed description
AEOI	Automatic Exchange of Information
AI	Africa Initiative
AIA	Access to Information Act, No. 31 of 2016, Laws of Kenya
AOTCA	Asia Oceania Tax Consultants' Association
BoR	Bill of Rights
CFA	Committee on Fiscal Affairs
CFAFSM	Committee of Fiscal Affairs Forum on Strategic Management
CFATFA	Committee of Fiscal Affairs Forum on Tax Administration
CFE	Confédération Fiscale Européenne
COE	Council of Europe
CoK	Constitution of Kenya
CRS	Common Reporting Standard
DPA	Data Protection Act, No. 24 of 2019, Laws of Kenya
DRM	Domestic Resource Mobilisation
DTA	Agreements for the Avoidance of Double Taxation
EOI	Exchange of Information
FAAA	Fair Administrative Action Act, No 4 of 2015, Laws of Kenya
GF	Global Forum on Transparency and Exchange of Information for Tax Purposes
HLP on IFFs	The High-Level Panel on IFFs from Africa
IBFD	International Bureau of Fiscal Documentation
IFA	International Fiscal Association
IFF	Illicit Financial Flows
KRA	Kenya Revenue Authority
MCAA	Multilateral Convention on Mutual Assistance in Tax Administrative Matters
MTC	Model Tax Convention
OECD	Organisation on Economic Co-operation and Development
OTPR	Observatory on the Practical Protection of Taxpayer Rights
PIN	Personal Identification Number
SA	South Africa
SARS	South Africa Revenue Service
SDG	Sustainable Development Goal
STEP	Society of Trust and Estate Practitioners
TAA	Tax Administration Act
TIEA	Tax Information Exchange Agreement
TPA	Tax Procedures Act, No 29 of 2015, Laws of Kenya
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development

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CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE STUDY

1.1. Introduction and background

2015 ushered in a time of renewed commitment to sustainable development by members of the United Nations (UN). This renewed commitment is evidenced by the adoption of the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) in July 2015, followed by the adoption of the Sustainable Development Goals (SDGs) in September 2015. The SDGs form the core of the UN's ambitious yet much needed 2030 Agenda for Sustainable Development (the 2030 Agenda). The 2030 Agenda's main aim is to ensure peace and prosperity for people and the planet, now and into the future.¹

One of the action areas identified under the Addis Ababa Action Agenda is domestic public resources, which, supplemented by international assistance, is crucial in achieving the SDGs.² However, Professor Victor Harison, the African Union Commission's Commissioner for Economic Affairs, expressed as follows, "*Africa wishes to put an end to the policy of the outstretched hand and to take charge of its own destiny by changing the paradigm for the financing of its own development. Africa needs an adequate, predictable, sustainable, and integrated financing mechanism to support its development. The vision of H.E. Nana Akufo-Addo, President of Ghana – "Ghana Beyond Aid" – should inspire all Member States to reach a continental vision of an "Africa Beyond Aid."*³ This sentiment is in line with the first aspiration under Africa's Agenda 2063 of the Africa we want, which is, "*A prosperous Africa based on inclusive growth and sustainable development.*"⁴

In light of this, the importance of domestic resource mobilisation (DRM) cannot be overemphasised. DRM has been broadly defined as the process through which countries raise and spend their funds to provide for their people.⁵ It has been argued that, despite there being

¹ UNDESA. "Transforming our world: The 2030 agenda for sustainable development." (2016), Preamble.

² United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (2015), para 20.

³ Global Forum on Transparency and Exchange of Information for Tax Purposes, Tax Transparency in Africa 2020: Africa Tax Initiative Progress Report 2019 (2020), pg.2.

⁴ African Union. "Agenda 2063: the Africa we want." African Union Commission (2015), pg.2.

⁵ African Union. Domestic Resource Mobilisation: Fighting Against Corruption and Illicit Financial Flows, Advocacy Brief, African Union Commission (2019), pg. 2.

other instruments for the achievement of DRM, tax policy is the most important.⁶ This is also evident through its inclusion as one of the targets within SDG goal 17, whose focus is strengthening the means of implementation and revitalisation of global partnership for sustainable development.⁷

Tax revenues in developing countries in general and Africa in specific face various challenges. One major challenge is their narrow tax bases because most of their economies are informal in nature.⁸ This means that protecting the already existing tax base is paramount even as policy-makers seek to formalise the informal sector and bring it into the tax base.

Illicit Financial Flows (IFFs) have, over time, undermined the existing tax base contributing to the loss of much-needed tax revenues.⁹ The term IFFs has various definitions, but the unifying factor is the element of illegality concerning the funds in question. The High-Level Panel on IFFs from Africa (HLP on IFFs) defines IFFs as 'money illegally earned, transferred or used.'¹⁰

The United Nations Conference on Trade and Development (UNCTAD) provides four broad categories of IFFs, including those resulting from tax and commercial practices, illegal markets, theft-type activities, and terrorism financing and corruption.¹¹ As a result, the HLP on IFFs estimates that Africa loses \$30 billion to \$60 billion every year on account of IFFs.¹²

Considering the cross-border nature of IFFs, any strategy to tackle the problem cannot exclusively involve individual country intervention but rather must involve international co-operation. Additionally, IFFs are complex and are cross-sectoral as per the broad categories identified by UNCTAD above. There is thus a need for a wide range of policies and actions to combat IFFs effectively.¹³

Tax transparency is one of the interventions touted as useful in the fight against IFFs and DRM assistance.¹⁴ Exchange of Information (EOI) forms an essential facet of tax transparency's global

⁶Gandhi, Ved P., Dale Gray, and Ronald McMorran. "A Comprehensive Approach to Domestic Resource Mobilization for Sustainable Development." (1997), pg. 5.

⁷Supra note 1, Target 17.1 at pg. 30.

⁸United Nations Conference on Trade and Development (UNCTAD) Economic Development in Africa Report 2020: Tackling Illicit Financial Flows for Sustainable Development in Africa (2020), pg. 154.

⁹ African Union. "Final report of the high-level panel on Illicit Financial Flows (IFF)." (2015), pgs. 52-53

¹⁰Ibid, pg. 23.

¹¹ Supra note 8, pg. 19.

¹² Supra note 9, pg. 34.

¹³Organisation for Economic Co-operation and Development, Toolkit on Illicit Financial Flows, pg. 1.

¹⁴ Ibid.

movement. There are various avenues for EOI between jurisdictions, which can either be bilateral or multilateral.

Bilateral

- Agreements for the Avoidance of Double Taxation (DTAs)
- Tax Information Exchange Agreements (TIEAs)

Multilateral

- Convention on Mutual Administrative Assistance in Tax Matters (MCAA)
- Regional exchange of information via agreed instruments

The various instruments that make EOI possible provide various options for the exchange. These are:

- Exchange on request
- Automatic exchange
- Spontaneous exchange

The MCAA as a multilateral convention presents a new frontier in international co-operation for EOI. The MCAA is a joint development between the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe (COE), and it was initially opened for signature by members of both organisations in 1988. It was in 2010 amended via a protocol following which the amended MCAA was open for signature by any jurisdiction. This amended Convention came into force on 1 June 2011. The MCAA is currently the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle tax evasion and avoidance.¹⁵

¹⁵ OECD and Council of Europe (2011), The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol, OECD Publishing, pgs. 1 and 9.

There are, 144¹⁶ jurisdictions signed on to the MCAA, including Kenya¹⁷. This vast number of jurisdictions signed on to the MCAA has ushered in an era of unprecedented tax information exchange. While this increased level of tax information exchange has inherent benefits¹⁸, it should not come at the cost of protecting taxpayer rights.¹⁹ This is why a discussion on taxpayer rights in the context of EOI is necessary.

'...tis impossible to be sure of anything but Death and Taxes....'²⁰ This quote essentially summarises the place of taxation in our lives; it is as certain as death. Despite this, historically and to date, the issue of taxation remains unpopular despite its widely accepted necessity.²¹ Perhaps one reason for its lack of popularity is that it is a limitation to the right to the enjoyment of property on the face of it.²² Bentley observed as follows:

*“What seems to be well established from the wisdom literature of the ancients through to the most modern management theory is that if you are going to do something that people do not like and you want them to tolerate or even enjoy it, make sure that you do it with as much **fairness, transparency, consultation and engagement as possible**. If you are going to tax people, make sure they know that they are doing something for the greater good, that the process is as painless as possible and that they do not feel like they are paying more than their fair share.’ ‘...**Without justice and the rule of law, taxation becomes an arbitrary exaction at whim. It remains internally inconsistent and cannot be fully effective and efficient. Unfair taxation imposed outside the rule of law works inevitably towards the self-destruction of its policy intent....**”²³ (emphasis mine)*

The willingness of taxpayers to comply with tax rules goes a long way in ensuring the effectiveness and success of any tax administration in executing its primary role of ensuring compliance with taxation laws. However, this can only happen when trust is established between

¹⁶ As of 22 December 2021. List of signatories available at https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf

¹⁷ The MCAA entered into force in Kenya on 1 November 2020. Kenya has also signed onto the MCAA on Automatic Exchange of Financial Account Information, also known as the Common Reporting Standard (CRS), with the intended date of the first information exchange being September 2022.

¹⁸ Ederly, Caroline, Big Data Serving Tax Compliance, in Data-Driven Tax Administration (IOTA Intra-European Organisation of Tax Administrations 2016), pg. 49.

¹⁹ Debelva, Filip, and Irma Mosquera. “Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions.” Intertax, vol. 45, no. 5, Kluwer Law International, 2017, pp. 362–81, pg. 381.

²⁰ Bullock, Christopher, *Cobbler of Preston*, A Farce as acted at the Theatre-Royal in Lincoln’s-Inn Fields, 5th Ed, initially published in 1716, pg. 21. https://openlibrary.org/books/OL25583734M/The_cobler_of_Preston

²¹ Avi-Yonah, Reuven S. “The Three Goals of Taxation.” Tax Law Review, vol. 60, no. 1, Fall 2006, pg. 1-28. Hein Online., pg.3.

²² Baker, Philip. “Taxation and the European Convention on Human Rights.” European Taxation-Amsterdam- 40.8 (2000): 298-374, pg. 298.

²³ Bentley, Duncan. *Taxpayers’ Rights: Theory, Origin, and Implementation*. Kluwer Law International, 2007, pg.2.

the tax authority and the taxpayer. The OECD's Committee of Fiscal Affairs Forum on Strategic Management (CFAFSM) observed: "... *The ways by which revenue authorities interact with taxpayers and employees impact on the public perception of the tax system and the degree of voluntary compliance. Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply*"²⁴ (emphasis mine)

Ironically, against the backdrop of the fight against IFFs and the implementation of the action plans under the OECD/G20 Base Erosion and Shifting Project (BEPS)²⁵, it would seem that rather than being considered an enabler, taxpayers' rights are viewed as an impediment. For example, in its 2020 Yearbook, the Observatory on the Protection of Taxpayers' Rights (OTPR) observed that as early as 2015, the Global Forum on Transparency and Exchange of Information for Tax Purposes (GF) had started to apply pressure on countries whose domestic law provided for the right to inform taxpayers on any requests for information regarding them prior to the sharing of the requested information, to repeal the said provision.²⁶

On account of the GF's peer review mechanism²⁷ in which low rankings are issued where there is deemed 'non-compliance', many of these countries gave in to the pressure and repealed the provision in their laws.²⁸ This would seem to be at odds with OECD's principles of good tax administration that recognise the importance of fair and efficient treatment of taxpayers.²⁹

Based on the above, it is clear that the success of any taxation policy, the MCAA included, seems directly proportional to the rate of compliance which in turn seems highly dependent on

²⁴ OECD, Principles of Good Tax Administration – Practice Note (1999) para 3, pg.3.

²⁵ The BEPS Action Plan is made up of 15 action items whose main aim is to address the opportunities for non-taxation or shifting away of profits into lower tax jurisdictions made possible by the interaction of different domestic tax rules. For more detailed information on this, see for example, OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing.

²⁶ One such country is Uruguay. See Mosquera Valderrama, I. et al. The Rule of Law and the Effective Protection of Taxpayers' Rights in Developing Countries 2017, pg. 40.

²⁷ The implementation of the two global standards on tax transparency, EOIR and AEIOI, is undertaken by the GF through a process known as peer review. There are two peer review groups responsible for the review of each standard. The Peer Review Group (PRG) reviews the EOIR standard, and the AEIOI Peer Group (APRG) reviews the AEIOI Standard. Following the peer reviews, ratings are assigned to the reviewed jurisdictions. The possible ratings are compliant, largely compliant, partially compliant, and non-compliant.

²⁸ IBFD, Observatory on the Protection of Taxpayers' Rights, The IBFD Yearbook on Taxpayers' Rights 2020, pg. 123.

²⁹ Supra note 24

the voluntary compliance by taxpayers. Voluntary compliance is more likely where a foundation of trust has been established, which cannot exist outside of upholding taxpayers' rights.³⁰

The MCAA works on the basis and understanding of reciprocity, timeliness and protection of the information provided and the persons providing the same.³¹ The MCAA is clear that its provisions do not supersede the rights and safeguards offered to persons under a jurisdiction's domestic law or administrative practices.³²

1.2. Research question

This research seeks to analyse Kenya's legislative framework on the protection of the taxpayer's rights to privacy and confidentiality within the context of the exchange of information under the MCAA.

1.3. Research method

This research study will utilise the qualitative research method, applying a deductive approach. The starting point is that the MCAA is a crucial instrument for Kenya's EOI efforts but that the protection of taxpayers' rights is equally crucial in its implementation.

This will be done through desktop literature review, including but not limited to statutes, journal articles, books, and reports by the various stakeholders in the international tax space such as the UN, the OECD, and the GF.

The findings from the analysis of Kenyan legislation will be contrasted against the International Fiscal Association's (IFA) 2015 general report³³ on the minimum standards and best practices on the protection of taxpayers' fundamental rights. (2015 IFA general report).³⁴

³⁰ Bentley, Duncan. "Revisiting rights theory and principles to prepare for growing globalisation and uncertainty." International Conference on Taxpayer Rights, Washington DC. 2015, pg. 19.

³¹ Supra note 15, part IV.

³² Supra note 15, Article 21.

³³ Pistone Pasquale and Philip Baker, General Report, IFA Cahiers 2015 – 100B: The Practical Protection of Taxpayers' Fundamental Rights

³⁴The 2015 IFA general report is generally lacking in African continent representation. South Africa is the only African jurisdiction out of the 41 jurisdictions surveyed. Ibid, pgs. 90-99. Despite this, it is felt that the report is still useful. However, historically, international tax norms have been developed without input from developing countries. For more on this, see, for example, Hearson Martin, Ndubai W. Joy and Randriamanalina Tovony, The Appropriateness of International Tax Norms to Developing Country Perspectives, FACTI Background Paper, 2020 available here <https://www.ictd.ac/publication/facti-appropriateness-international-tax-norms-developing-countries/>

This analysis will assist in understanding the current status of taxpayers' rights protection in Kenya and points for improvement if any.

1.4. Limitation of scope

The analysis referred to in section 1.3 will be limited to confidentiality, cross-border procedures, and the institutional framework for the protection of taxpayers' rights. Additionally, as some of the evaluation parameters for the minimum standards and best practices in the 2015 IFA general report touch on internal revenue authority procedures, priority will be given to verifiable parameters via legislative analysis. Those relating to internal revenue authority procedures will be addressed subject to the availability of information.

1.5. Chapter Outline

The structure of this minor dissertation is explained and summarised below:

Chapter 1 introduces and provides a background to the research. It then describes the research question, method, and limitation of scope.

Chapter 2 introduces the concept of tax transparency and the international exchange of information. It then discusses the MCAA.

Chapter 3 discusses the concept of taxpayers' rights, their codification and practical protection and the interaction between these rights and the international exchange of information.

Chapter 4 analyses Kenya's legislative framework based on the best practices and minimum standards on confidentiality, cross-border procedures, and the institutional framework for the protection of taxpayer's rights under the 2015 IFA general report.

Chapter 5 concludes the research and provides recommendations.

CHAPTER 2: INTRODUCTION TO TAX TRANSPARENCY, INTERNATIONAL EXCHANGE OF INFORMATION AND THE CONVENTION ON MUTUAL ASSISTANCE WITH TAX ADMINISTRATIVE MATTERS

2.1. Tax transparency: A brief introduction

The English dictionary defines the word transparent as the connotation of an article or object allowing light to pass through it, thus being see-through.³⁵ Transparency can thus be said to be the possession of the quality of being transparent. Opacity, in turn, can be said to be the possession of the quality of being opaque, which quality is synonymous with being transparent.³⁶ From a legal perspective, the Black's Law Dictionary³⁷ defines transparency as follows: *“Openness; clarity; lack of guile and attempts to hide damaging information. The word is used of financial disclosures, organizational policies and practices, law-making, and other activities where organizations interaction with the public.”*

The United Nations Economic and Social Commission for Asia and the Pacific, in turn, describes transparency to mean *“...that decisions taken, and their enforcement are done in a manner that follows rules and regulations. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media.”*³⁸

From a scholarly point of view, the current consensus between scholars is that the term tax transparency is difficult to define comprehensively, especially in the context of international tax.³⁹ Despite this being the case, the availability of information seems to be at the heart of the tax transparency movement. From this small sample of contributions around the term, some

³⁵ Online Cambridge Dictionary definition of transparent available at <https://dictionary.cambridge.org/dictionary/english/transparent> and online Merriam-Webster definition of transparent available at <https://www.merriam-webster.com/dictionary/transparent>

³⁶ Online Cambridge Dictionary definition of opaque available at <https://dictionary.cambridge.org/dictionary/english/opaque> and online Merriam-Webster definition of opaque available <https://www.merriam-webster.com/dictionary/opaque>

³⁷ Black's Law Dictionary 9th Edition, St. Paul MN: West Publishing Company (2009) pg. 1638.

³⁸ ESCAP, UN. "What is Good Governance? United Nations Economic and Social Commissions for Asia and the Pacific." (2006), pg. 2.

³⁹ Turina, Allesandro, "Visible, Though Not Visible in Itself". Transparency at the Crossroads of International Financial Regulation and International Taxation, 8 World Tax J. (2016), Journal Articles & Opinion Pieces IBFD, pg. 380. This article also provides great insight into the nuance around the concept of transparency within the sphere of international taxation and that of international financial regulation.

points of convergence are apparent. These are; openness, availability of information and clarity on rules, regulations, and procedures.

We currently live in a highly digitalised and globalised economy, in significant part because of the continued advancements in technology. This has, however, not always been the case. Several phenomena characterised the state of the world following the end of World War II. According to Alberto et al.:

“... (i) there was little interdependence among national economies, high levels of mistrust among countries and/or blocs, and a relative dearth of multinational companies; (ii) there was no true world financial system as we know it today; (iii) the public mistrusted financial systems and banking; (iv) technology was ill--prepared for global interconnections in real time; (v) the focus was on reconstruction and economic recovery—which, in truth, was extensive and successful: “the thirty glorious years” period that diminished concerns about tax fraud; (vi) in the tax field there was a complete absence of international, inter--institutional collaboration; and (vii) except perhaps in the advanced economies, the paradigm was one of banking secrecy.” When looked at wholistically, said phenomena paint the picture of a general lack of awareness that taxation was increasingly becoming a global phenomenon.⁴⁰

The Global Financial Crisis of 2007-2008 threw the world into disarray, previously only rivalled by the Great Depression that ended in 1941. With the collapse of one of the world’s largest investment banks at the time, Lehmann Brothers, and the need for a large wave of government bail-outs for private enterprises, to mention but a few, the effects of the crisis cannot be underscored. Various scholars⁴¹ have considered reasons for the crisis that led to the Great Recession. However, one of the running themes has been the role of players within the financial industry.

In the recent past, major data leaks such as the Luxembourg Leaks, the Panama Papers, the Paradise Papers, the Mauritius Leaks, the FinCEN Files have dominated the global news cycle and contributed to the continuing global debate on tax transparency. They have and continue to expose the use of the opacity offered by the financial system’s secrecy, which is a significant

⁴⁰Barreix, Alberto, Jerónimo Roca, and Fernando Velayos. "A brief history of tax transparency." Fiscal and Municipal Management Division Discussion Paper (2016): 1-18, pg. 3.

⁴¹ See for example, Eric Helleiner 'Understanding the 2007–2008 Global Financial Crisis: Lessons for Scholars of International Political Economy' (2011) 14 Annual Review of Political Science, Stiglitz, Joseph E. "The Financial Crisis of 2007–8 and its Macroeconomic Consequences 1." Time for a Visible Hand: Lessons from the 2008 World Financial Crisis.: Oxford University Press, 01. Oxford Scholarship Online. <https://oxford-universitypressscholarship-com.ezproxy.uct.ac.za/view/10.1093/acprof:oso/9780199578801.001.0001/acprof-9780199578801-chapter-2>,

feature of the complex corporate and tax structures that have become synonymous with the offshore financial system. These structures have been utilised to aid aggressive tax avoidance on the one hand and outright tax evasion on the other. Legality has retained its position as the distinguishing factor between tax avoidance and tax evasion, with the latter being illegal.⁴² However, the effect of both has been the undermining of tax bases of jurisdictions across the globe, further fuelling the need for increased transparency in the area of taxation.

At the core of the push for tax transparency is the desire by tax authorities to have greater visibility of taxpayers' affairs to verify the accuracy of the tax declared. It has been suggested that "*people conceal facts about themselves in order to mislead others.*"⁴³ The leaks mentioned above demonstrate this, and thus it is no wonder that there is a general scepticism on the part of tax authorities as to the accuracy of declarations made by taxpayers.

2.2. International exchange of information

Many tax regimes the world over operate on a self-assessment basis which means the onus is on the taxpayer to review their affairs, fill out the appropriate self-assessment return and pay the requisite tax.⁴⁴ This being the case, transparency in the field of taxation cannot be said to be a novel idea, especially related to the provision of information to tax authorities by taxpayers.⁴⁵ The provision of this information within the context of an increasingly globalised economy has necessitated collaboration between tax authorities in the area of international EOI. International EOI has gained significant policy momentum as it presents an opportunity to protect the tax bases of all jurisdictions concerned while promoting and protecting tax sovereignty.⁴⁶

This collaboration is made possible through the presence of a legal instrument that jurisdictions desiring to initiate an EOI relationship execute.⁴⁷ The available legal instruments may either be

⁴² Slemrod, Joel, and Shlomo Yitzhaki. "Tax avoidance, evasion, and administration." Handbook of public economics. Vol. 3. Elsevier, 2002. 1423-1470, pg. 1428.

⁴³ Linder, Marc. "Tax Glasnost for Millionaires: Peeking Behind the Veil of Ignorance along the Publicity-Privacy Continuum." NYU Rev. L. & Soc. Change 18 (1990): 951, pg. 970.

⁴⁴ Gordon, R. K., 1996. "Law of Tax Administration and Procedure" in: V. Thuroni (ed.). Tax law design and drafting Vol. 1 Washington, DC: International Monetary Fund, pg. 103.

⁴⁵ Ring, Diane. Article 26: Exchange of Information - Global Tax Treaty Commentaries, Global Topics IBFD, pg. 4.

⁴⁶ Cockfield, Arthur J. "Protecting taxpayer privacy rights under enhanced cross-border tax information exchange: toward a multilateral taxpayer bill of rights." UBC Law Review 42.2 (2010): pg.435.

⁴⁷ Oguttu, Annet. "A Critique on the Effectiveness of Exchange of Information on Tax Matters in Preventing Tax Avoidance and Evasion: A South African Perspective." Bulletin for International Taxation (2014): 2-19, pg. 2.

bilateral, that is, between two jurisdictions, or multilateral.⁴⁸ Multilateral instruments can either be regional or global in reach.

2.2.1 Bilateral EOI instruments

An agreement between the United Kingdom (UK) and Switzerland's Canton of Vaud is reported as the earliest bilateral legal mechanism enabling the exchange of information. The subject matter of this agreement was the prevention of double taxation with respect to death duties.⁴⁹ Despite this early start, international administrative co-operation only came to the fore towards the later part of the 20th century.⁵⁰

The more widely used international tax norms that make the exchange of information possible bilaterally are DTAs and TIEAs. Article 26 of both the OECD⁵¹ and UN⁵² model tax conventions (MTCs) and article 5 of the OECD model TIEA⁵³ provide information exchange by request⁵⁴.

2.2.1.1. EOI under DTAs

Article 26 of the OECD and UN MTCs is intended to provide a bridge somewhat between jurisdictions enabling an extension of their domestic tax laws within the other jurisdiction. The article provides for the broadest extent of EOI, and jurisdictions are thus encouraged to interpret the provisions in a manner that helps achieve this goal.⁵⁵

The provisions of article 26 both the OECD and UN MTCs are mainly similar with the requirement for exchange of only information deemed to be foreseeably relevant being present in both MTCs. Prior to an amendment to article 26 of the OECD and UN MTCs in 2005 and 2011, respectively, the information to be exchanged was that deemed to be, "*...necessary for carrying out the provisions of this Convention or of the domestic laws concerning taxes of every kind and*

⁴⁸ Unilateral mechanisms for EOI exist however the challenge with this is the one-sided nature and thus strictly speaking, an exchange cannot be said to occur. A good example of this is United States of America 2010 Foreign Account Tax Compliance Act (FATCA). Through the enactment of this legislation, the US requires foreign financial institutions to report information on US taxpayers. Failure to comply results in a higher withholding tax rate being levied on payments from the US to the respective jurisdiction.

⁴⁹ Supra note 47

⁵⁰ Stewart, Miranda. "Transnational tax information exchange networks: steps towards a globalized, legitimate tax administration." *World Tax Journal* 4.2 (2012): 152-178., pg. 155.

⁵¹ OECD Model Tax Convention on Income and on Capital (21 November 2017).

⁵² United Nations Model Double Taxation Convention between Developed and Developing Countries 2017 update.

⁵³ OECD Model Agreement on Exchange of Information on Tax Matters (2002).

⁵⁴ The commentary to Article 26 however provides that the three types of information exchange, that is, by request, automatically or spontaneously are covered by the article. See para 9, commentary to article 26.

⁵⁵ Supra note 51 and 52, Commentary on Article 26, para 1. OECD and UN MTC.

description imposed on behalf of the Contracting States...”. Difficulties in interpretation necessitated this change that jurisdictions were facing regarding the term ‘necessary’.⁵⁶

As mentioned above, introducing the ‘foreseeably relevant’ standard allows for the broadest extent of EOI possible but without enabling requesting states to go on fishing expeditions.⁵⁷⁵⁸ Failure by a requesting state to provide details such as a taxpayer’s name or address is not deemed to qualify a request as being a fishing expedition provided other helpful information in identifying the taxpayer in question is provided.⁵⁹ However, where a request involves a group of taxpayers as opposed to an individual taxpayer, it is felt that failure to provide such details could have the request deemed to be a fishing expedition.⁶⁰

Another point to note regarding this standard relates to the point in time used in determining whether or not the requested information is foreseeably relevant. The relevance of the requested information is determined at the time of the request, and it is not relevant if, following the provision of the requested information, the same is found to be irrelevant.⁶¹

Whereas the provisions of article 26 under the OECD and UN MTCs are largely similar, the version in the UN MTC contains some slight variations. Article 26(1) of the UN MTC has an added emphasis that “...*information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes.*” The erosion of any jurisdiction’s tax base is no doubt harmful, however as discussed in the introduction in chapter 1, developing countries are especially vulnerable when it comes to this, and the effects are far-reaching given these economies tend to be less advanced in comparison to those of developed countries. This provision thus demonstrates the UN MTCs goal of empowerment of developing countries.

The UN MTC also contains an additional paragraph that provides for development through consultation between competent authorities of the techniques to be utilised in exchanging information.⁶² The rationale for this is to provide wiggle room for additional collaboration between the competent authorities of the contracting states in establishing EOI mechanisms. This

⁵⁶ Supra note 47, pg. 5.

⁵⁷ Supra note 51, OECD MTC, Commentary on Article 26, para 5.

⁵⁸ Para 5 referenced above describes fishing expeditions as, ‘speculative requests that have no apparent nexus to an open inquiry or investigation’.

⁵⁹ Supra note 51, Commentary on Article 26, para 5.1.

⁶⁰ Supra note 51, Commentary on Article 26, para 5.2

⁶¹ Supra note 51, Commentary on Article 26 para 5

⁶² Supra note 52, article 26(6).

would include but not be limited to automatic and spontaneous exchanges.⁶³ The OECD MTC deems that this collaboration is implicit in the wording of its article 26 and thus does not have an equivalent provision.⁶⁴

2.2.1.2. EOI under TIEAs

TIEAs, similarly offer the opportunity to establish an exchange of information relationship between two jurisdictions, with the difference between TIEAs and DTAs being the scope of their respective subject matter. TIEAs provide the opportunity to establish an information exchange relationship with jurisdictions with which DTAs would typically be signed, like tax havens that tend not to have income taxes.⁶⁵

TIEAs allow for the exchange of information by request.⁶⁶ Like the DTAs, the standard to be met in terms of the requested information is that deemed to be foreseeably relevant. Article 5(4) provides a list of information that the contracting parties should ensure their respective competent authorities have the authority to obtain. There is no such list provided under article 26 of the MTCs.

2.2.2 Multilateral EOI instruments

2.2.2.1 Regional agreements for EOI

Various regional agreements are in place for EOI across the globe. In Africa, for example, the Southern Africa Development Community (SADC)⁶⁷ in 2012⁶⁸ opened for signature the SADC Agreement on Assistance in Tax Matters (AATM). The SADC AATM provides for the exchange of information by request, automatically and spontaneously between the competent authorities of the State Parties.⁶⁹

Europe has had various directives that enable tax co-operation and EOI since the 1970s. The 77/799/EEC directive adopted by the European Council in 1970⁷⁰ concerning mutual assistance

⁶³ Supra note 52, commentary on article 26, para 29.1-29.2.

⁶⁴ Supra note 52, commentary on article 26, para 29.

⁶⁵ Supra note 47, pg. 7.

⁶⁶ Supra note 52, article 5.

⁶⁷ Has 16 member states namely: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia, and Zimbabwe.

⁶⁸ 18th August 2012.

⁶⁹ SADC Agreement on Assistance in Tax Matters, article 4.

⁷⁰ 19th December 1977.

and information exchange was the first. It similarly provides for EOI by request, automatically and spontaneously.⁷¹

2.2.2.2 Convention on Mutual Administrative Assistance in Tax Matters

The COE, together with the OECD, first developed the MCAA in January 1988. It was only open for signature to jurisdictions within Europe at that time. However, in 2010, the MCAA was amended via a protocol and opened up for signature by interested parties, whether in Europe or not.⁷² Prior to this, as seen in the previous section, EOI was made possible mainly through bilateral agreements.

Like the EC Directive, the MCAA also provides for EOI on request, spontaneously or automatically. The standard for EOI is foreseeable relevance⁷³ as discussed under the section EOI under bilateral agreements. In addition to providing for these various types of EOI, the MCAA also provides for other forms of co-operation between competent authorities. These are; simultaneous tax examinations⁷⁴, tax examinations abroad⁷⁵, assistance in the recovery of tax claims⁷⁶ and the service of documents.⁷⁷

Signing onto the amended MCAA establishes an EOI relationship between each signatory to the MCAA. For countries such as Kenya, with only about 15⁷⁸ DTAs in force containing an EOI article, signing onto the MCAA has provided a significant expansion to its EOI network. Additionally, considering the various types of additional co-operation available under the MCAA, the potential benefits that Kenya stands to gain seem quite promising.

2.3. Summary

This chapter first seeks to situate international EOI within the broader tax transparency movement. It also seeks to demonstrate the necessity for increased tax transparency.

⁷¹ Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, articles 3-5.

⁷² Supra note 15.

⁷³ Supra note 15, article 4.

⁷⁴ Supra note 15, article 8.

⁷⁵ Supra note 15, article 9.

⁷⁶ Supra note 15, article 11.

⁷⁷ Supra note 15, article 17.

⁷⁸ Researcher's analysis using data from the IBFD Tax Research Platform. See Appendix I

It commences by providing a brief introduction to the concept of tax transparency and tracing the historical development of its importance. The increased focus on tax transparency over time has been attributed to various factors, including the 2008 global financial crisis and the recent wave of information leaks that exposed the utilisation of the opacity of financial systems to perpetuate tax revenue losses through tax evasion and aggressive tax avoidance.

The chapter then shifts focus to international EOI as an enabler of tax transparency and explores the various mechanisms that enable international EOI. It then concludes by narrowing down to the MCAA and demonstrating the enhanced international co-operation that has resulted following the amendment and continued sign on to the MCAA. It is against this backdrop that the discussion in the following chapter on taxpayers' rights shall proceed.

CHAPTER 3: TAXPAYERS' RIGHTS: BRIEF OVERVIEW, CODIFICATION, PRACTICAL PROTECTION, AND INTERACTION WITH INTERNATIONAL EXCHANGE OF INFORMATION

3.1 A brief overview of the concept of taxpayers' rights

The concept of taxpayers' rights seems to have some divergent understanding. On the one hand, is the school of thought that tends toward demarcating it as a separate sphere where the usual protections of human rights would not apply. The reason behind this is the assertion that tax law implies the exercise of sovereign powers by the state authorities.⁷⁹ On the other hand, is the school of thought that is of the view that rights to non-state actors, which in tax matters would include taxpayers and other private persons involved in the levying of tax, are recognised under public international law. "*Their fundamental rights are human rights, which must be effectively protected even when there is a general interest of the community to the collection of tax.*"⁸⁰

Whichever the case, the connection with human rights is evident, and thus a discussion on taxpayers' rights cannot be had in isolation from the general framework of human rights as they are derived from human rights.⁸¹ One could argue that human rights have existed for as long as the human race has⁸² despite being formally institutionalised within the past century. The wording of the first paragraph of the Universal Declaration of Human Rights (UDHR) reflects this.⁸³ Scholarship on attempts to define human rights⁸⁴ is also reflective of this. Summarising some of these attempts, Juhana Mikael Salojärvi observes as follows: "...*human rights refer to a*

⁷⁹ Guerra, Roberto & Dorigo, Stephano. "Chapter 24: Taxpayer's Rights as Human Rights During Tax Procedures in Human Rights and Taxation in Europe and the World" (G.W. Kofler, M. Poiares Maduro & P. Pistone eds., IBFD 2011), Books IBFD, pg. 1.

⁸⁰ Kokott, Juliane, Pasquale Pistone, and Robin Miller. "Public International Law and Tax Law: Taxpayers' Rights: The International Law Association's Project on International Tax Law-Phase 1." *Geo. J. Int'l L.* 52 (2020): 381, pg. 381.

⁸¹ Bentley, Duncan. "Taxpayer rights and protections in a digital global environment." *Ethics and Taxation*. Springer, Singapore, 2020. 251-294, pg.253.

⁸² Besson, Samantha, and Alain Zysset. "Human rights theory and human rights history: a tale of two odd bedfellows." *Ancilla Iuris* 7 (2012): 204-219, pg. 211.

⁸³ Assembly, UN General. "Universal declaration of human rights." UN General Assembly 302.2 (1948): 14-25. Adopted by the United Nations General Assembly on 10 December 1948.

⁸⁴ The term and/or concept of human rights is one that is said to be heavily nuanced. See for example, Griffin, James. *On Human Rights*. Oxford University Press, 2008, Chapter 1: Human Rights the Incomplete Idea or Buonamano, Roberto. *Rights and Subjectivity: A Pre-History of Human Rights*, Cambridge Scholars Publisher, 2008. ProQuest Ebook Central, <https://ebookcentral.proquest.com/lib/uoct/detail.action?docID=1114306>, Chapter 1: The Problem of the Subject of Rights.

*set of fundamental rights that belong to all human beings simply by virtue of their being human.*⁸⁵

The necessity for the universal institutionalisation of human rights followed the end of the Second World War and the realisation that left to their devices, humans could perpetuate inconceivable atrocities against each other.⁸⁶ This resulted in the preparation and subsequent adoption of the UDHR by members of the United Nations on 10 December 1948.⁸⁷ This would form the basis and type of model for subsequent conventions such as the European Convention on Human Rights⁸⁸, charters such as the African (Banjul) Charter on Human and People's Rights⁸⁹ and even the Bill of Rights included in national Constitutions. These documents were, however, silent on matters to do with taxation.⁹⁰

Despite this, it would seem that discourse around taxpayers' rights has been developing from an international perspective over the past 30 years since the IFA seminar⁹¹ titled 'Taxation and Human Rights'.⁹² The Seminar's Chairman, Professor M. Baltus, remarked that the subject of 'Taxation and Human Rights' was a novel one for the IFA.⁹³ He additionally observed that there were numerous connections between taxation and human rights.⁹⁴ This seemingly set the stage for exploration in this area because, following this, there was an increase in the scholarly exploration of the connection and interaction between human rights and taxation.⁹⁵

3.2 Codification of taxpayers' rights

In 1990 the OECD issued a survey amongst its member countries concerning the legal framework governing taxpayers' rights in those countries. This survey informed the practice note issued by the OECD's Committee of Fiscal Affairs Forum on Tax Administration (CFAFTA) in 2003, whose subject was taxpayers' rights and obligations. It was observed through the survey that most of these countries did not have a codified charter detailing what they considered as

⁸⁵Salojärvi, Juhana Mikael. Human Rights Redefining Legal Thought. Springer International Publishing, 2020., pg.4

⁸⁶ The second paragraph of the preamble to the UDHR is reflective of this.

⁸⁷ For a brief history on the UDHR, see <https://www.un.org/en/about-us/udhr/history-of-the-declaration>

⁸⁸ Adopted on 4 November 1950.

⁸⁹ Adopted on 27 June 1981.

⁹⁰ Supra note 23, pg. 3.

⁹¹ Seminar held in Brussels in 1987 during the 41st Congress of the IFA.

⁹² Ibid, pg. 251.

⁹³ International Fiscal Association. 1988. Taxation and Human Rights. Kluwer Law and Taxation Publishers, pg.75.

⁹⁴ Ibid.

⁹⁵ Supra note 23.

taxpayers' rights within their jurisdiction. However, the survey identified some points of convergence amongst the surveyed jurisdictions. This resulted in the following list of what was identified as the fundamental rights a taxpayer would be entitled to:

- *“The right to be informed, assisted, and heard*
- *The right of appeal*
- *The right to pay no more than the correct amount of tax*
- *The right to certainty*
- *The right to privacy*
- *The right to confidentiality and secrecy.”*⁹⁶

This was reflective of a change in the attitude of tax authorities towards taxpayers.⁹⁷ Historically, the focus of discussions around tax systems was not concerned with the individual rights of taxpayers but rather focussed on the determination of how the system would meet the state's objectives of raising revenue to fund its activities and distributing and redistributing social goods.⁹⁸

3.2.1. Model Taxpayer Charter

In 2013 the Asia Oceania Tax Consultants' Association (AOTCA), the Confédération Fiscale Européenne (CFE) and the Society of Trust and Estate Practitioners (STEP) issued a preliminary report of their joint research project.⁹⁹ The motivation behind this research was the desire to determine the fairness of the tax systems across the 37¹⁰⁰ jurisdictions surveyed. This fairness was measured based on the balance between taxpayers' rights and obligations.¹⁰¹

This research study also culminated in the formulation of a model taxpayer charter that lays out both taxpayers' rights and responsibilities. Input from the Ministers of Finance or equivalents in the surveyed jurisdictions, together with that from other stakeholders such as the OECD, UN, Parliament of the EU, the World Bank, and the IMF, was sought and incorporated before

⁹⁶ OECD, Taxpayers' Rights and Obligations – Practice Note (1990), pg. 3 available at https://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf.

⁹⁷ Supra note 23, pg.4.

⁹⁸ Supra note 23, pg. 15.

⁹⁹ Cadesky, Michael, et al. Towards a Greater Fairness in Taxation: a Model Taxpayer Charter: Preliminary Report. Society of Trust and Estate Practitioners, 2013.

¹⁰⁰ By the time the report was finalized in 2015, the count was 41 jurisdictions representing over 80% of global gross domestic product. See <http://www.taxpayercharter.com/page.asp?id=10>.

¹⁰¹ Supra note 23, pgs. 19 – 20.

finalisation of the model taxpayer charter. It is thus deemed to be reflective of best practice.¹⁰²

The list of taxpayers' rights from this research study was as follows:

- *“Integrity and equality*
- *Certainty*
- *Efficiency and effectiveness*
- *Appeal and the right to dispute resolution*
- *Appropriate assistance*
- *Confidentiality and privacy*
- *Pay correct amount of tax*
- *Representation*
- *Proportionality*
- *Honesty”¹⁰³*

This list does not deviate significantly from that issued by the OECD in its 2003 Practice Note. If anything, it could be said to enhance the OECD's list.

3.2.2. Kenya Revenue Authority service charter

In Kenya, the KRA has prepared a service charter¹⁰⁴ that provides the timelines that taxpayers can expect to be adhered to in the KRA's services delivery. It also provides a list of the rights and obligations of a taxpayer. Some of the rights included are similar to those identified in the model taxpayer charter discussed above. The rights provided under this service charter are the rights to:

- *“Information*
- *Question the KRA*
- *Impartiality*
- *Courtesy and consideration*
- *Presumption of honesty*
- *Privacy and confidentiality*
- *Consistency and equity*

¹⁰² Supra note 99.

¹⁰³ <http://www.taxpayercharter.com/article.asp?id=15>

¹⁰⁴ “KRA - Citizens' Service Delivery Charter.” Kenya Revenue Authority, available at <https://www.kra.go.ke/images/publications/KRA---Citizens-Service-Delivery-Charter.pdf>.

- *Identification*
- *Advance notice in the case of an audit*
- *Representation*
- *Dispute a tax assessment, object against the Commissioner's decision, right of appeal to the Tax Appeals Tribunal, and if dissatisfied, to the High Court up to the highest Court of the land, the Supreme Court.*¹⁰⁵

In addition to this service charter, the KRA also has a tax investigations handbook¹⁰⁶ detailing, among other things, the tax investigation process¹⁰⁷ and providing for the rights of taxpayers who are the subject of investigation.¹⁰⁸ Although these two documents do not enjoy the force of law, they are still helpful in providing information to taxpayers their rights and in so doing, they can take appropriate action where they feel the same have been infringed.

3.3 Practical protection of taxpayers' rights

Until 2015, the conversation around taxpayers' rights had primarily been from a theoretical point of view. The IFA sought to bridge this gap by issuing its 2015 general report on the practical protection of taxpayers' rights.¹⁰⁹ Data from the branch reports of the 41 jurisdictions surveyed were analysed, and the findings categorised into minimum standards and best practices for the practical protection of taxpayers' rights.

According to the report, minimum standards are practices that most of the surveyed jurisdictions had in place whereas best practices are those from one or two jurisdictions considered outstanding.¹¹⁰

The report had a list of what the authors felt were a standard list of taxpayers' rights as a starting point but also distributed the Model Taxpayer Charter by Cadesky et al.¹¹¹ to the branch reporters to further help frame their understanding of the practical dimensions of said rights.¹¹² This list included the following rights:

¹⁰⁵ Appeal to the Supreme Court for cases not relating to the interpretation or application of the CoK can only be made certification of the matter as being of general public importance. See Article 163 CoK

¹⁰⁶ Kenya Revenue Authority, Tax Investigations Handbook, Investigations and Enforcement Department available at <https://kra.go.ke/images/publications/KRA-TAX-INVESTIGATION-FRAMEWORK-1.pdf>

¹⁰⁷ Ibid, pgs. 12-16.

¹⁰⁸ Supra note 104, pg. 19.

¹⁰⁹ Supra note 33, pg. 21.

¹¹⁰ Ibid.

¹¹¹ Supra note 99.

¹¹² Supra note 33, pg. 24.

- *“the right to privacy, including the protection of confidential information from disclosure;*
- *the right to a fair trial, including a fair investigation prior to trial and appeal rights; this includes the rights to an independent and impartial tribunal established*
- *by law, and a determination within a reasonable time;*
- *freedom from discriminatory or arbitrary tax laws or procedures;*
- *freedom from self-incrimination, at least in so far as criminal penalties (including substantial fines) are concerned;*
- *respect for the rule of law in tax legislation and tax procedures.”¹¹³*

The minimum standards and best practices produced by this report¹¹⁴ form the basis of the work by IBFD’s OTPR, which monitors compliance with these minimum standards and best practices across various jurisdictions. The research findings are published in its annual publication, the Yearbook on Taxpayers’ Rights.

The 2015 IFA general report provides the following categorisations against which the evaluation of the practical protection of taxpayer rights can be made:

- *“Identifying taxpayers, issuing tax returns, and communicating with taxpayers*
- *The issue of tax assessments*
- *Confidentiality*
- *Normal audits*
- *More intensive audits*
- *Review and appeals*
- *Criminal and administrative sanctions*
- *Enforcement of taxes*
- *Cross-border procedures*
- *Legislation*
- *Revenue practice and guidance*
- *Institutional framework for protecting taxpayer rights”*

¹¹³ Ibid.

¹¹⁴ Supra note 33, pgs. 74-88.

3.4 Taxpayers' rights and the Exchange of Information under the MCAA

The MCAA, as highlighted in the previous chapter, is one of the most comprehensive instruments in the area of international tax co-operation. Administrative assistance under the MCAA, which is defined to include EOI, is to be provided whether the person concerning whom the assistance is sought is a resident or national¹¹⁵ of the requested Party¹¹⁶ or any other state.¹¹⁷ However, assistance is only available where the person concerned is liable to tax in the Requesting Party.¹¹⁸

In addition to providing a widened scope of the types of administrative assistance available, the MCAA also applies to a widened scope of taxes. Whereas conventional DTAs, which are one way of enabling bilateral EOI, tend to be restricted to taxes on income and capital, the MCAA covers a broader scope of taxes in addition to those on income and capital. These include estate, inheritance or gift taxes, taxes on the use of ownership of moveable property including motor vehicles, excise taxes, taxes on immovable property and consumption taxes such as value added tax.¹¹⁹

The MCAA makes EOI possible multilaterally in three main ways, that is, on request, automatically and spontaneously. EOI on request is, as the name suggests, initiated by the competent authority of requesting Party that is looking into particular taxpayers or transactions. This is usually to assist the requesting Party to verify the accuracy of the information provided by its taxpayers, especially where there is suspicion of the provision of incomplete or incorrect information.¹²⁰

By contrast, spontaneous EOI is initiated by a Party without prior request from the Party to whom the information is supplied. However, there are circumstances set out to guide when spontaneous EOI can occur. This is when:

- a) *“the first-mentioned Party has grounds for supposing that there may be a loss of tax in the other Party;*

¹¹⁵ Defined under article 3 to mean all individuals possessing that Party's nationality and all legal persons, partnerships, associations, and other entities deriving such status from a Party's legislation. See Article 3(1)

¹¹⁶ The States participating in the MCAA are referred to as Parties.

¹¹⁷ Supra note 15, article 1(3).

¹¹⁸ Supra note 15, commentary to article 1(3), para 19.

¹¹⁹ Supra note 15, article 2.

¹²⁰ Supra note 15, commentary to article 5, para 57.

- b) *a person liable to tax obtains a reduction in or an exemption from tax in the first-mentioned Party which would give rise to an increase in tax or to liability to tax in the other Party;*
- c) *business dealings between a person liable to tax in a Party and a person liable to tax in another Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other Party or in both;*
- d) *a Party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;*
- e) *information forwarded to the first-mentioned Party by the other Party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Party.*¹²¹

Automatic EOI entails the automatic periodic exchange of predetermined information (primarily financial information) against predetermined parameters and agreed-upon modes of exchange.¹²² Automatic EOI under the MCAA is enabled by adopting the CRS MCAA, which was signed in October 2014.¹²³ The type of information and the frequency is a matter that should be decided between the two Parties that would like to exchange information automatically.¹²⁴ However, the Model Competent Authority Agreement sheds some light on the possible type of information to be shared on reportable accounts under the AEOI standard. This includes details such as an account holder's name, address, tax identification number¹²⁵, account closing balance, among others.¹²⁶

Each of these various categories of EOI presents its own set of considerations regarding protecting taxpayers' rights.¹²⁷ Whereas the notification of the taxpayer is a primary concern in all the EOI categories, where AEOI is concerned, given the sensitive nature of financial information, the security of the information exchanged becomes a more significant concern.¹²⁸

The protection of taxpayers' rights under the MCAA is placed within the ambit of domestic law, as discussed below. Thus, contextual considerations exist informed by whether a Party is a provider or recipient of information. The requesting/recipient Party will need to keep in mind

¹²¹Supra note 15, article 7.

¹²² Supra note 15, article 6.

¹²³ "About Automatic Exchange - Organisation for Economic Co-Operation and Development." OECD, <https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/>.

¹²⁴ Supra note 15, commentary on Article 6, para 65 MCAA.

¹²⁵ Known as the Personal Identification Number in Kenya

¹²⁶ OECD (2017), Standard for Automatic Exchange of Financial Account Information in Tax Matters, Second Edition, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264267992-en>, Section 2

¹²⁷ Supra note 33, pg. 59.

¹²⁸ Ibid.

what rights are applicable and are required to be complied with in respect to its taxpayers both before it requests the information and after. The concern for the requested/providing Party would equally be what protections are available for the information once it has complied with the request. The information to be supplied under EOI would either be information a competent authority has in its possession or information it would need to source.¹²⁹ Information that is already in a competent authority's possession could include information from routine disclosures by taxpayers, such as during the filing of monthly or annual returns.

Where a competent authority requires additional information to what it already has in its possession, the same could either be sought directly from the taxpayer concerned or from a third party. Depending on the domestic law provisions, notification of the taxpayer could be required before transmission of information already in the competent authority's possession. Where information is sought from the taxpayer, a legitimate expectation exists that the reasons will be provided to the taxpayer. This would present them an opportunity to assert their rights where there is a concern about the same being breached based on the intended disclosure under EOI. Where the information is being sought from a third party, the issue of notification equally arises.¹³⁰

Again, depending on domestic law provisions, notification of the taxpayer concerned may be necessary. Even where this is not the case, in some situations, for example, where the information to be sought is from a financial institution, the financial institution itself would most likely have an obligation to inform the taxpayer before providing the information requested.

The upshot of all this is that the exponential increase in the magnitude of information that can be exchanged with the continued uptake of the MCAA admittedly brings to the fore various concerns from a taxpayers' rights perspective.¹³¹ However, whereas the various standards for EOI have been developed over the years through coordinated international effort, the area of taxpayer rights, especially where EOI is concerned, has not enjoyed the same attention.¹³²

¹²⁹ Supra note 33, pg. 59.

¹³⁰ Supra note 137, pg. 60.

¹³¹ Mosquera, Irma. "Privacy and confidentiality in exchange of information procedures: some uncertainties, many issues, but few solutions." *Intertax* 45.5 (2017), pg. 362.

¹³² Mosquera Valderrama, Irma Johanna, et al. "The Rule of Law and the Effective Protection of Taxpayers' Rights in Developing Countries." *WU International Taxation Research Paper Series 2017-10* (2017), pg. 5.

Undoubtedly, each of the rights highlighted in the previous chapter as the generally agreed upon rights attached to taxpayers is important and requires protection. However, varying levels of attention will be required for the various rights depending on what element of tax administration is in question. Article 21 of the MCAA provides for the protection of persons and limits to the obligation to assist. As highlighted above, the protection of these rights is pegged on the domestic law provisions of the specific jurisdiction concerned.

Thus, by implication, the more robustly taxpayers' rights are protected under a Party's domestic law, the more confidently requested parties would be in supplying information. This article further demonstrates the need for a balance between the achievement of the aims of the MCAA whilst at the same time ensuring taxpayers are not prejudiced in the process.¹³³

3.5 Specific issues of concern

The landmark *Aloe Vera case*,¹³⁴ despite being one that involves EOI under the bilateral agreement between the United States (US) and Japan,¹³⁵ brings to the fore issues that are of concern where EOI under the MCAA is concerned. A brief overview of the case is that the US' Internal Revenue Services (IRS) disclosed information to the Japanese competent authority, which was found to be false. The Court found the IRS liable for this, and the IRS had to compensate the plaintiffs. Additionally, Japan's National Tax Authority (NTA) had a reputation of leaking information to the media of simultaneous tax examinations undertaken, especially where the cases were high profile. This was a tactic by the NTA to shame famous tax evaders in a bid to deter errant behaviour. On the basis of this, the US temporarily suspended EOI with Japan until it put in place measures for the prevention of such unlawful disclosures.

The two main issues that are evident from this case are that of the importance of the protection of information exchanged under any EOI mechanism and the involvement of the taxpayer in the EOI process through notification. In this case, the taxpayer concerned suffered grave harm on account of a lapse in these protections on the side of the competent authorities.

¹³³ Supra note 33, commentary to article 21, para 178.

¹³⁴ *Aloe Vera of America Incorporated, et al. v. United States (Internal Revenue Service)* Case No, CV-99-01794-PHX-JAT

¹³⁵ This is the 1971 income tax treaty which has since been terminated.

3.5.1 Taxpayer involvement in EOI

There is a school of thought that seeks to differentiate the information gathering exercise carried out by a revenue authority, for which EOI would be employed, from the stage where an actual assessment against a taxpayer is made. This is evident from the findings in the *Sabou case*¹³⁶. This case decided by the European Court of Justice (ECJ) was instituted by a former Czech footballer Jiří Sabou who claimed that the Czech revenue authority obtained information about him unlawfully through the EOI process provided for under the Council Directive 77/799/EEC of 19 December 1977 (now repealed). In considering this issue, the ECJ noted as follows:

*“...in tax inspection procedures, the investigation stage, during which information is collected and which includes the request for information by one tax authority to another, must be distinguished from the contentious stage, between the tax authorities and the taxpayer, which begins when the taxpayer is sent the proposed adjustment.”*¹³⁷

This case demonstrates the two seemingly competing interests that are evident where any tax procedure is concerned. On the one hand, is the revenue authority’s duty to enforce taxation legislation in order to collect revenue and on the other hand is the protection of the taxpayers’ rights. The distinction drawn in the case above essentially justifies not notifying the taxpayer concerned of their being the subject of EOI, which seems to contradict the presumption of innocence that is the feature of most legal systems.

Admittedly, there is the risk that the notification of the taxpayer resulting in frustration of the process but is that risk a valid justification for complete exclusion? According to best practice¹³⁸, it does not. Baker and Pistone observe that it is excessive and disproportionate to refuse to inform the taxpayer on account of such a risk.¹³⁹ Considering the *Aloe Vera case* in light of this, had the taxpayer been informed ahead of the information being shared, there is a possibility the false information supplied would have been corrected, possibly averting the damage suffered.

3.5.2 Risk and remedies for breach of taxpayers’ rights in EOI

The *Aloe Vera case* also demonstrates the potential consequences of inadequate protection of confidentiality in that an EOI relationship can be suspended. The protection of the confidentiality

¹³⁶ CZ: ECJ, Grand Chamber, 22 Oct. 2013, Case C-276/12, Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu, IBFD.

¹³⁷ Ibid, para 40.

¹³⁸ Supra note 33, pg. 80.

¹³⁹ Supra note 33, pg. 61.

of the information shared and the protection of taxpayers' personal data thus rightfully remain the main focus points of the tax co-operation, and especially the extensive EOI envisioned under the MCAA, is to succeed.¹⁴⁰

This protection is also to be afforded by the domestic law of the requesting Party, and there is the possibility of the supplying Party providing instructions on how the information it is providing is to be safeguarded.¹⁴¹ Given the dependence on domestic law to provide protections for both the taxpayer and the competent authorities, robust provisions with respect to confidentiality are needed in order to boost confidence in the exchange relationship.¹⁴²

3.6 Summary

This chapter provides an understanding of the concept of taxpayers' rights and their importance. It also illustrates some of the taxpayers' rights concerns brought about by the increased scope of EOI enabled under the MCAA.

This chapter commences by exploring the historical connection between taxpayers' rights and human rights. It then traces the development of taxpayers' rights, which initially had a slow start but has and continues to gain traction. This development is evidenced by the efforts to codify taxpayers' rights, with the most significant being the model taxpayer charter that resulted from the joint research project between AOTCA, CFE and STEP. Another significant milestone was the exploration of the practical protection of taxpayer rights that culminated in the 2015 IFA general report.

The chapter then explores the interaction between taxpayers' rights and EOI under the MCAA. The various types of EOI possible under the MCAA, that is, EOI on request, AEOI and spontaneous EOI, together with the considerations from a taxpayers' rights perspective, are then discussed.

The chapter concludes by exploring the *Aloe Vera case* to illustrate the risks posed by the EOI process. Two significant issues are identified: the involvement of taxpayers in the EOI process and the risk and remedies for the breach of taxpayers' rights in EOI.

¹⁴⁰ Supra note 33, see preface.

¹⁴¹ Supra note 33, article 22.

¹⁴² Supra note 33, commentary to article 22, para 216.

The protection of confidentiality emerges as being key to the success of EOI under the MCAA. In the next chapter, the protection of confidentiality under Kenyan legislation is analysed through a discussion on the constitutional rights to privacy, fair administrative action, and access to information, together with the confidentiality provisions within the tax administration legislation.

CHAPTER 4: ANALYSIS OF KENYA’S LEGISLATION

4.1 Introduction

The Constitution of Kenya¹⁴³ (CoK) is Kenya’s supreme source of law.¹⁴⁴ Any legislation that is enacted through Parliament to give force to the CoK needs to align with the spirit and letter of the CoK and, where found to be inconsistent, would be rendered void to the extent of the inconsistency.¹⁴⁵ Additionally, no State organ may exercise power in any way unless it is done as authorised under the CoK.¹⁴⁶

General rules of international law, together with any treaty or convention ratified by Kenya, are also considered to form part of the laws of Kenya.¹⁴⁷ Despite this being the case, in terms of the hierarchy of laws in Kenya, it would seem that treaty provisions rank below domestic statutes. This was the position in *the Mitu-Bell Welfare Society*¹⁴⁸ case where the Supreme Court held inter alia as follows:

*“On the other hand, Article 2(5) and (6) is inward looking in that, it requires Kenyan Courts of law, to apply international law (both customary and treaty law) in resolving disputes before them, as long as the same are relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement.”*¹⁴⁹

The CoK contains a bill of rights (BoR) which recognises and protects human rights and fundamental freedoms in order to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.¹⁵⁰

4.2 Limitation of rights

Article 19(3)(c) provides that the rights and fundamental freedoms contained in the BoR are subject only to the limitations contemplated in the CoK. The import of this is that whereas the

¹⁴³ Constitution of Kenya, 2010.

¹⁴⁴ *Ibid*, article 2(1).

¹⁴⁵ *Supra* note 143, article 2(4).

¹⁴⁶ *Supra* note 143, article 2(2).

¹⁴⁷ *Supra* note 143, articles 2(5) and (6).

¹⁴⁸ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR.

¹⁴⁹ *Ibid*, para 132.

¹⁵⁰ *Supra* note 143, article 19(2).

BoR guarantees certain rights and fundamental freedoms, the same is not absolute in some instances.¹⁵¹

Thus, before delving into the analysis of Kenya's legislation and the protection offered with respect to the taxpayers' right to privacy, fair administrative action, and access to information, it is essential to first determine how the said rights can be limited.

Any right or fundamental freedom provided for under the BoR cannot be limited except by law. Additionally, this would be only to the extent that the limitation is **reasonable and justifiable** (emphasis mine) in an open and democratic society based on human dignity, equality, and freedom. In the determination of whether the limitation is permissible, the following relevant factors are to be considered:

1. *“the nature of the right or fundamental freedom;*
2. *the importance of the purpose of the limitation;*
3. *the nature and extent of the limitation;*
4. *the need to ensure that the enjoyment of rights and fundamental freedoms by any individual doesn't prejudice the rights and fundamental freedoms of others; and*
5. *the relation between the limitation and its purpose whether there are less restrictive means to achieve the purpose.”*¹⁵²

The CoK goes further to provide as follows with respect to provisions in the legislation that are intended to limit a fundamental right or freedom:

“...a provision in legislation limiting a right or fundamental freedom—

- a) *in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;*
- b) *shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and*
- c) *shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”*¹⁵³

¹⁵¹ Article 25 provides for the fundamental rights and freedoms that shall not be limited. These are: freedom from torture and cruel, inhuman, or degrading treatment or punishment, freedom from slavery and servitude, the right to a fair trial and the right to an order of habeas corpus.

¹⁵² Supra note 143, article 24(1).

¹⁵³ Supra note 143, article 24(2).

The determination of what qualifies as being reasonable and justifiable is left to the Courts. The High Court in Kenya has the jurisdiction to make this, and any other determination required where the enforcement of the BoR is concerned.¹⁵⁴ The onus to demonstrate the reasonability and justifiability of a proposed limitation lies on the State or any person seeking to impose such limitation.¹⁵⁵

However, the test of what is considered to be reasonable and justifiable in an open and democratic society is not one that is precisely formulated and would have to be determined on a case by case basis. This was the finding in the case of *S v Makwanyane*¹⁵⁶ where it was held *inter alia* as follows:

“... The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question....”

Similarly, Kenyan Courts have addressed themselves on this issue and identified proportionality as being one of the key considerations in arriving at the determination of reasonableness and justifiability. In the case of *Jacqueline Okuta & another v Attorney General & 2 others*¹⁵⁷, Mativo J, in delivering his judgement, noted, *“A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate.”* He further noted, *“Proportionality is a fluid test which requires those analysing and applying law and policy to have regard to the surrounding circumstances, including recent developments in the law, current political and policy challenges and contemporary public interest considerations.”*

¹⁵⁴ Supra note 143, article 23.

¹⁵⁵ Supra note 143, article 24(3).

¹⁵⁶ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), para 104.

¹⁵⁷ *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR.

According to Aharon Barak, “*Proportionality is a legal construction. It is a methodological tool. It is made up of four components: proper purpose, rational connection, necessary means, and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right (the last component is also called “proportionality stricto sensu” (balancing)). These four components are the core of the limitation clause.*”¹⁵⁸

The landmark Canadian Supreme Court case of *R vs Oakes*¹⁵⁹ has developed jurisprudence in the area of the determination of reasonableness and justifiability. It is one that Kenyan courts have relied on persuasively in the determination of cases that have to do with the limitation of rights.¹⁶⁰ In this case, Dickson C.J.C. in delivering a judgment in favour of the accused in the case, made the following observations:

*“To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified.”*¹⁶¹

He went on to note that determination of the reasonableness and justifiability of the means chosen would require the application of a proportionality test. Whatever type of proportionality test is applied, it would need to have the following components that he felt were important:

1. *the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective.*
2. *Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom*¹⁶²
3. *Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of ‘sufficient importance’.*¹⁶³

¹⁵⁸ Barak, Aharon, and Doron Kalir. *Proportionality: Constitutional Rights and Their Limitations*. Cambridge: Cambridge University Press, 2012, pg. 131.

¹⁵⁹ *R v Oakes*, S.C.R. 103, [1986].

¹⁶⁰ Syekonyo Patience Maingi, ‘A Critical Analysis of Article 24 on the Limitation of Rights and Fundamental Freedoms under the Constitution of Kenya 2010’ (Unpublished Masters Dissertation) (2017) Strathmore University, pg. 19.

¹⁶¹ *Supra* note 159, para 73. Drawing from the decision in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295

¹⁶² *Ibid.*

¹⁶³ *Supra* note 159, para 74.

From the above, it is clear that whereas the CoK, like many other Constitutions the world over, contemplates and provides for the possibility for the limitation of the rights guaranteed in the BoR, the Courts do not take attempts to limit any rights lightly and careful consideration is given to the facts and circumstances to ensure that ultimately whatever decision is reached upholds the spirit of the CoK.

4.3 Right to privacy

Literature on privacy suggests that it is a difficult concept to define, and that context matters in its definition.¹⁶⁴ Cockfield captures this aptly below:

“Privacy can be a surprisingly difficult concept to define as there are many different definitions within the literature generated by different academic disciplines that examine this concept. With respect to potential government intrusion on an individual or group’s right to privacy, the concept of privacy is sometimes divided into discrete but related categories such as personal privacy (i.e., the right to maintain bodily integrity to not have state agents explore our bodies or force the disclosure of objects or matters that we wish to conceal) and territorial privacy (i.e., the right to maintain privacy within our homes or other property we own such as automobiles). Perhaps the most relevant concept for our present purposes is the concept of information privacy, which has been called ‘the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.’”¹⁶⁵ (emphasis mine)

4.3.1 Right to privacy under the Constitution of Kenya

Article 31 of the CoK provides as follows with respect to privacy:

“Every person has the right to privacy, which includes the right not to have—

- a) their person, home or property searched;*
- b) their possessions seized;*
- c) information relating to their family or private affairs unnecessarily required or revealed; or*
- d) the privacy of their communications infringed”*

The definition of a person as per the CoK includes, *“a company, association, or other body of persons whether incorporated or unincorporated.”¹⁶⁶* The import of this is that both natural and

¹⁶⁴ Supra note 131, pg. 363.

¹⁶⁵ Cockfield, Arthur J. "Protecting taxpayer privacy rights under enhanced cross-border tax information exchange: toward a multilateral taxpayer bill of rights." UBC Law Review 42.2 (2010): pg. 437.

¹⁶⁶ Supra note 143, article 260.

legal persons are entitled to the protection of their right to privacy as per the provisions of the CoK.

4.3.2 Right to privacy under the Data Protection Act

In 2019, Kenya enacted the Data Protection Act (DPA)¹⁶⁷. This Act gives effect to Articles 31(c) and (d) of the CoK. The DPA has the following as its object and purpose:

- a) *“to regulate the processing of personal data;*
- b) *to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;*
- c) *to protect the privacy of individuals;*
- d) *to establish the legal and institutional mechanism to protect personal data; and*
- e) *to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act.”*¹⁶⁸

Under the DPA, the following is considered to constitute processing: *“Any operation or sets of operations which is performed on personal data or on sets of personal data whether or not by automated means, such as:*

- a) *“collection, recording, organisation, structuring;*
- b) *storage, adaptation, or alteration;*
- c) *retrieval, consultation, or use;*
- d) *disclosure by transmission, dissemination, or otherwise making available; or*
- e) *alignment or combination, restriction, erasure, or destruction.”*¹⁶⁹

A data subject is defined as *“...an identified or identifiable natural person who is the subject of personal data.”*¹⁷⁰ Personal data is defined as *“any information relating to an identifiable or identified person.”*¹⁷¹

The Tax Procedures Act (TPA)¹⁷² defines a taxpayer as *“a person liable for tax under a tax law whether or not they have accrued any tax liability in a tax period.”*¹⁷³ The term person is defined as including *“an individual, company, partnership, limited partnership, association of persons,*

¹⁶⁷ Data Protection Act, Act No 24 of 2019, Laws of Kenya.

¹⁶⁸ Ibid, section 3.

¹⁶⁹ Supra note 167, section 2.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Tax Procedures Act, No 29 of 2015, Laws of Kenya.

¹⁷³ Ibid, section 2.

*trust, National Government, foreign government, political subdivision of the National Government or foreign government, or an international organisation.*¹⁷⁴

A comparison of the definition of a data subject as defined under the DPA and a taxpayer as defined under the TPA reveals that any protection provided to the right to privacy under the DPA is only applicable to taxpayers who are natural persons and thus whatever rights accrue under the DPA to data subjects would not cover corporate taxpayers.

4.3.2.1 Rights of a data subject

There are rights that accrue to a data subject under the DPA. These are the right:

- a) *“to be informed of the use to which their personal data is to be put;*
- b) *to access their personal data in custody of the data controller¹⁷⁵ or data processor¹⁷⁶;*
- c) *to object to the processing of all or part of their personal data;*
- d) *to correction of false or misleading data; and*
- e) *to deletion of false or misleading data about them.*¹⁷⁷

Generally, any data that has been collected and processed may not be transferred outside of Kenya, as would be the case under the MCAA, unless a demonstration is made that the destination jurisdiction has appropriate data protection safeguards or consent has been granted by the data subject.¹⁷⁸ The regulations¹⁷⁹ issued under the DPA provide that data protection safeguards are considered appropriate based on two main criteria:

- a) The execution of a binding legal instrument with the intended recipient, providing appropriate safeguards for the protection of the personal data, which protection should essentially be equivalent to those provided under the DPA and its regulations; or
- b) A determination by a data controller that there exist appropriate safeguards to protect the data. This determination is to be made following an assessment of all the circumstances surrounding transfers of that type of personal data to another country or international organisation.¹⁸⁰

¹⁷⁴ Supra note 172, section 2.

¹⁷⁵ A data controller is, “a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purpose and means of processing of personal data”. Section 2 DPA

¹⁷⁶ A data processor is “a natural or legal person, public authority, agency, or other body which processes personal data on behalf of the data controller, section 2 DPA.

¹⁷⁷ Supra note 167, section 26.

¹⁷⁸ Supra note 167, section 25(h)

¹⁷⁹ The Data Protection (General) Regulations, 2021

¹⁸⁰ Ibid, regulation 41(1)

Additionally, where the data to be transferred outside Kenya consists of what would be categorised as sensitive personal data, the following additional provisions of the DPA are to be considered:

- 1) *“The processing of sensitive personal data out of Kenya shall only be effected upon obtaining consent of a data subject and on obtaining confirmation of appropriate safeguards.*
- 2) *The Data Commissioner may request a person who transfers data to another country to demonstrate the effectiveness of the security safeguards or the existence of compelling legitimate interests.*
- 3) *The Data Commissioner may, in order to protect the rights and fundamental freedoms of data subjects, prohibit, suspend, or subject the transfer to such conditions as may be determined.”*¹⁸¹

Under the DPA, sensitive data has the meaning of “*revealing the natural person's race, health status, ethnic social origin, conscience, belief, genetic data, biometric data, **property details** (emphasis mine), marital status, family details including names of the person's children, parents, spouse or spouses, sex or the sexual orientation of the data subject*”¹⁸² The CoK defines property as including inter alia, money, choses in action or negotiable instruments.¹⁸³ Thus, the exchange of information, especially under the AEOI standard, which is primarily concerned with financial information, including cash balances, could be construed as disclosing sensitive personal data.

Kenya operates under a self-assessment tax regime, and as such, the Income Tax Act (ITA)¹⁸⁴ requires submitting an income tax return within a specified time at the end of each tax period.¹⁸⁵ This return is required to be accompanied by specific documentation, such as a copy of signed accounts and an accompanying certificate attesting to the completeness and accuracy of said accounts.¹⁸⁶ When submitting these returns, taxpayers must include their Personal Identification Number (PIN),¹⁸⁷ which is issued to all registered persons.¹⁸⁸

The information supplied during this process of filing returns meets the criteria of being considered personal data as defined under the DPA. This information would form part of the

¹⁸¹ Supra note 167, section 49.

¹⁸² Supra note 167, section 2

¹⁸³ Supra note 143, article 260.

¹⁸⁴ Income Tax Act Kenya, Cap 470, Laws of Kenya

¹⁸⁵ Ibid, section 52.

¹⁸⁶ Supra note 184, section 54.

¹⁸⁷ Supra note 172, section 13.

¹⁸⁸ Supra note 172, section 12.

information that the KRA would share where a request for information is received. The rights accruing to a data subject as provided for under the DPA would thus be applicable.

However, the DPA provides for exemptions from its provisions. These exemptions include, *inter alia*, if the processing of personal data is necessary for national security or public interest.¹⁸⁹ The KRA could argue against the right of notification of a data subject of the processing of their personal data in the context of EOI on the premise that it is in the public interest.

4.3.2.2 Data breach and compensation

If a data breach occurs, a data controller must notify the Data Commissioner and the affected data subject.¹⁹⁰ However, the notification of the affected data subject can be delayed, or information provided restricted where, in the assessment of the data controller, it is necessary and proportionate to enable the relevant body to investigate the breach.¹⁹¹

The DPA provides an avenue for compensation to a person who suffers damage¹⁹² because of the contravention of any of the requirements under the DPA. The data controller or data processor would be liable to compensate the aggrieved person.¹⁹³ It is expected that it would be up to the law courts to determine the extent of compensation the aggrieved person would be entitled to, taking into account the facts, particulars of the contravention and damage suffered.

4.4 Confidentiality

According to the OECD, upholding confidentiality means providing assurance that any information exchanged is not disclosed inappropriately and can only be used for the purposes agreed upon in the information exchange agreement.¹⁹⁴ Upholding the confidentiality of information exchanged via the MCAA is of utmost importance, as discussed under section 3.4. The CoK does not contain a specific provision with respect to the right to confidentiality. However, there are confidentiality provisions included within Kenya's tax administration legislation.

¹⁸⁹ Supra note 167, section 51(2)(b).

¹⁹⁰ Supra note 167, section 43(1).

¹⁹¹ Supra note 167, section 43(4).

¹⁹² Damage is defined to include financial loss and damage not including financial loss, including distress.

¹⁹³ Supra note 167, Section 65.

¹⁹⁴ OECD, *Keeping It Safe*. "The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes." (2012), pg.5.

4.4.1 Confidentiality provisions under the Tax Procedures Act

Section 6 of the TPA stipulates that the Commissioner and any other authorised person shall protect the confidentiality of the documents, or any information obtained while administering a tax law.¹⁹⁵

There are, however, situations contemplated where disclosure would be deemed necessary and thus allowable. These situations include disclosure made to:

- a) *“another authorised officer¹⁹⁶ for the purposes of carrying out any duty arising under a tax law;*
- b) *an authorised customs officer for the purposes of carrying out any duty under a law related to customs;*
- c) *the Tribunal or a court to the extent necessary for the purposes of any proceedings under a tax law;*
- d) *the Director-General of the Kenya National Bureau of Statistics for the performance of the Director-General’s official duties;*
- e) *the Auditor-General for the performance of the Auditor-General’s official duties;*
- f) *a competent authority of the government of a foreign country or an international organization with which Kenya has entered into an agreement which provides for the exchange of information to the extent permitted under that agreement; or*
- g) *the Authority responsible for investigation of corruption and matters related to the integrity of public officers;*
- h) *any other institution of the government of Kenya for the purposes of performance of the duties of that institution;*
- i) *any other person with the written consent of the person to whom the documents or information relate.”¹⁹⁷*

Any one of the above categories of persons to whom disclosure may be made is bound by the duty to uphold the confidentiality of the documents or information provided to them.¹⁹⁸ Failure to uphold these provisions on confidentiality constitutes an offence¹⁹⁹ to which, if convicted, the officer concerned would be liable to a fine not exceeding Kenya Shillings one million and to imprisonment for a period not exceeding three years.²⁰⁰

¹⁹⁵ Supra note 172, section 6 (1).

¹⁹⁶ An authorised officer is defined as including any person engaged by the KRA in any capacity and includes a director or former director of the KRA, or a former authorised officer or employee of the KRA.

¹⁹⁷ Supra note 172, section 6(2).

¹⁹⁸ Supra note 172, section 6(3).

¹⁹⁹ Supra note 172, section 102(2).

²⁰⁰ Supra note 172, section 104(2).

4.4.2 Advocate – client privilege

Section 59 (1) of the TPA authorises the Commissioner or any authorised officer to give notice in writing to any person to provide complete information that will enable the determination of the tax liability of a person or class of persons. This provision requiring the supply of information to the KRA is to be acted upon despite:

- a) *“Any law relating to privilege or the public interest with respect to the giving of information or the production of any documents (including in electronic format); or*
- b) *any contractual duty of confidentiality.”*²⁰¹

Advocate – client privilege is upheld in Kenya and is provided for under section 134 of the Evidence Act.²⁰² The only exceptions to the upholding of this privilege are in cases involving communication made in furtherance of an illegal purpose and where an advocate has knowledge of the commission of any crime or fraud.²⁰³

This section of the TPA that purports to override this privilege was challenged in court in the *Robert Ayisi case*,²⁰⁴ where the court declared the section unconstitutional. In this case, Odunga J noted that advocate-client privilege must be considered within the context of the broader right of access to justice protected under Article 48 of the CoK. Its purpose is to ensure that legal advice can be sought without being hindered or deterred.²⁰⁵ This decision was however stayed pending the outcome of an appeal of the decision by the KRA, who appealed on the grounds that the declaration of unconstitutionality “...effectively stopped the enforcement of tax collection in its entirety including rendering the projected revenue targets for the succeeding financial years uncollectable...”²⁰⁶

4.5 Right to fair administrative action

4.5.1 Right to fair administrative action under the Constitution of Kenya

Article 47 of the CoK provides as follows concerning fair administrative action:

- 1) *“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.*

²⁰¹ Supra note 172, section 59(4).

²⁰² Evidence Act, Cap 80, Laws of Kenya.

²⁰³ Ibid, section 134(1).

²⁰⁴ *Robert K. Ayisi v Kenya Revenue Authority & another* [2018] eKLR.

²⁰⁵ Ibid, para 110.

²⁰⁶ *Kenya Revenue Authority v Robert Ayisi; Nairobi City County Government (Interested Party)* [2020] eKLR, paras 2 and 17.

- 2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
- 3) *Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*
 - a) *provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*
 - b) *promote efficient administration.”*

The Kenyan courts have considered the question of what constitutes administrative action as envisioned under Article 47(1) of the CoK. In the case of *Kenya Human Rights Commission and the Non-Governmental Organisations Co-ordination Board*²⁰⁷, the late Onguto J relied on the decision by the Constitutional Court of South Africa in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*²⁰⁸ where the court held that the principle function of the right to fair administrative action as provided for under the BoR is to ensure compliance with constitutional standards of administrative justice primarily where an administrative action affects or threatens individuals. The principles of common law developed over time would inform the constitutional standards.²⁰⁹

4.5.2 Right to fair administrative action under the Fair Administrative Action Act

The Fair Administrative Action Act (FAAA)²¹⁰ gives effect to Article 47 of the CoK. The FAAA defines an administrative action as including:

- i. *“the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or*
- ii. *any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”*²¹¹

Based on this definition, participation in EOI under the MCAA could be considered an administrative action undertaken by the KRA in its capacity as an administrator and enforcer of taxation legislation.²¹²

²⁰⁷ *Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board* [2016] eKLR

²⁰⁸ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1.

²⁰⁹ *Ibid*, para 136.

²¹⁰ Fair Administrative Action Act, No.4 of 2015, Laws of Kenya.

²¹¹ *Ibid*, section 2.

²¹² Kenya Revenue Authority Act, No.2 of 1995, Laws of Kenya, section 5.

The FAAA provides that every person who is the subject of an administrative action has the right to be given written reasons for the said action.²¹³ In addition to this, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator is required to give the affected person:

- a) *“prior and adequate notice of the nature and reasons for the proposed administrative action;*
- b) *an opportunity to be heard and to make representations in that regard;*
- c) *notice of a right to a review or internal appeal against an administrative decision, where applicable;*
- d) *a statement of reasons pursuant to section 6²¹⁴;*
- e) *notice of the right to legal representation, where applicable;*
- f) *notice of the right to cross-examine or where applicable; or*
- g) *information, materials, and evidence to be relied upon in making the decision or taking the administrative action.”²¹⁵*

The FAAA does not define the term person, and thus it would be appropriate to rely on the meaning provided for in the CoK as Kenya’s supreme law.²¹⁶ Based on the above provisions, it is expected that before carrying out an administrative action, an administrator should decide based on the facts and circumstances as to how the proposed administrative action is likely to affect the person against whom the said action is to be taken. In the *Kenya Human Rights case*²¹⁷, Onguto J observed as follows concerning this obligation:

“Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the Constitution. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The Fair Administrative Action Act, 2015 must be viewed in that light.”²¹⁸

²¹³ Supra note 210, section 4(2).

²¹⁴ This section provides for the right of a person materially or adversely affected by any administrative action to be provided with information that would be useful in preparing an application for appeal or review.

²¹⁵ Supra note 210, section 4(3).

²¹⁶ Supra note 143, article 260.

²¹⁷ Supra note 207.

²¹⁸ Supra note 207, para 42.

In the case of *R v National Land Commission and others*,²¹⁹ the court made similar observations finding that the CoK indeed required the notification of intention to take an administrative action that is likely to adversely affect the subject of the action and reasons as to why the action is to be taken.²²⁰ The court also addressed itself to the long agreed upon position²²¹ that decisions need to consider the rules of natural justice, and failure to do makes a decision defective and thus void.²²²

Based on the highlighted provisions of the FAAA above, it is reasonable to conclude that a taxpayer's right to notification can be asserted because EOI without prior notification of the taxpayer concerned is likely to adversely affect the taxpayers' rights to privacy and confidentiality, as has been discussed in the previous section.

4.6 Right of access to information

4.6.1 Right of access to information under the Constitution of Kenya

Article 35 of the CoK provides as follows concerning access to information:

- 1) *“Every citizen has the right of access to—*
 - a) *information held by the State; and*
 - b) *information held by another person and required for the exercise or protection of any right or fundamental freedom.*
- 2) *Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*
- 3) *The State shall publish and publicise any important information affecting the nation.”*

The importance and purpose of this right was set out in the *Katiba Institute case*²²³ wherein issuing the judgment on the case, Mwita J noted inter alia that:

“The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation

²¹⁹ *Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West)* [2018] eKLR.

²²⁰ *Ibid*, para 52.

²²¹ In cases such as *Onyango Oloo vs. Attorney General* [1986-1989] EA 456, *General Medical Council vs. Spackman* [1943] 2 All ER 337 and *Ridge vs. Baldwin* [1963] 2 All ER 66.

²²² *Supra* note 219, paras 59-60.

²²³ *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR.

*in governance largely depends on the citizen's ability to access information held by public authorities. Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. **And for citizens to protect their other rights, the right to access information becomes critical** for any meaningful and effective participation in the democratic governance of their country. The importance of this right was fully appreciated by the drafters of our Constitution, and they dutifully included Article 35 to make this right attainable as the foundation for an open, responsive, accountable, and democratic government and its institutions. The Constitution, therefore, grants citizens' access to information as a constitutional right and only the same Constitution can limit that access... We must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of Rights. It is integral to the democracy conceptualized by our Constitution, in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused.”²²⁴ (emphasis mine)*

In the same case, the issue of the limitation of the right was also considered. Firstly, the onus to demonstrate that the limitation proposed is justifiable and complies with article 24(1) as discussed under section 4.2 falls to the person purporting to limit the right.²²⁵ Additionally, the learned judge found that the right of access to information is inviolable.²²⁶ The learned judge also relied on the European Court of Human Rights (ECHR) case of *Youth Initiative for Human Rights vs. Serbia*.²²⁷ In deciding this case, the ECHR relied on a section of the Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-operation in Europe's Representative on Freedom of the Media and the Organisation of American States' Special Rapporteur on Freedom of Expression of December 2004 which reads as follows:

“...The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions...”

²²⁴ Ibid, paras 27-28 and 57.

²²⁵ Supra note 223, para 46.

²²⁶ Supra note 223, para 54.

²²⁷ *Youth Initiative for Human Rights vs. Serbia* Application no. 48135/06.

4.6.2 Right of access to information under the Access to Information Act

The Access to Information Act (AIA)²²⁸ was enacted to give effect to article 35 of the CoK. The other objects of the AIA are to:

- a) *“provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;*
- b) *provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;*
- c) *promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;*
- d) *provide for the protection of persons who disclose information of public interest in good faith; and provide a framework to facilitate public education on the right to access information under this Act.”*²²⁹

Section 4 of the AIA provides that subject to its provisions and that of any other written law in Kenya, every citizen has the right of access to information held by the State and any other person where that information is required for the exercise or protection of any right or fundamental freedom.²³⁰ The AIA defines a citizen as *“any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens”*

Unlike the provisions of the DPA, corporate entities would qualify for the protections afforded by the AIA provided said entities are owned by Kenyan citizens. This provision would thus enable a taxpayer to gain access to the information the KRA, as Kenya’s competent authority, holds on them, including any information it may have received through a process of EOI.

However, section 6 of the AIA provides limitations to exercising this right. The exercise of this right is limited where disclosure of the information sought is likely to:

- a) *“undermine the national security of Kenya;*
- b) *impede the due process of law;*
- c) *endanger the safety, health, or life of any person;*
- d) *involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;*

²²⁸ Access to Information Act, No 31 of 2016, Laws of Kenya.

²²⁹ Ibid, section 3.

²³⁰ Supra note 228, section 4.

- e) *substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;*
- f) *cause substantial harm to the ability of the Government to manage the economy of Kenya;*
- g) *significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;*
- h) *damage a public entity's position in any actual or contemplated legal proceedings; or*
- i) *infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.*"²³¹

The AIA also clarifies what information would qualify as relating to national security. This includes:

- a) *“military strategy, covert operations, doctrine, capability, capacity, or deployment;*
- b) *foreign government information with implications on national security;*
- c) *intelligence activities, sources, capabilities, methods, or cryptology;*
- d) *foreign relations;*
- e) *scientific, technology or economic matters relating to national security;*
- f) *vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;*
- g) *information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;*
- h) *information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;*
- i) *cabinet deliberations and records;*
- j) *information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits, or reviews in the performance of its functions;*
- k) *information that is referred to as classified information in the Kenya Defence Forces Act; and*
- l) *any other information whose unauthorized disclosure would prejudice national security.*"²³²

The protection provided under Article 35 of the CoK, and the AIA can provide a mechanism for taxpayers to access information collected on them and verify its accuracy before the same is exchanged, thus averting a situation like that in the *Aloe Vera case* of the exchange of false information. This would also boost a taxpayer's right to a fair hearing as protected under article

²³¹ Supra note 228, section 6(1).

²³² Supra note 228, section 6(2).

50 of the CoK by enabling them to have all the information required to prepare an adequate defence should the EOI process result in the issuance of an assessment. However, it becomes almost impossible for a taxpayer to exercise this right without notification.

4.7 GF Kenya Round 2 Peer Review Report 2021

In 2021, the GF issued its round 2 peer review report on Kenya (the GF report). This report details findings following the review of Kenya's legal and regulatory framework for implementing EOI on request. It analyses the framework as it stood of 31 August 2021.

A few of the observations made in the report seem to be at odds with what the letter of the law provides, as discussed in the preceding sections in this chapter. These are discussed below.

4.7.1 Right to notification

According to the report, there is no requirement for pre or post notification of a taxpayer that they are the subject of an EOI request nor the reason for the EOI request.²³³ Kenya's legislative framework, however, provides for any aggrieved person to appeal against the administrative action to either the High Court or office of the Ombudsman.²³⁴ The analysis of the relevant provisions of the DPA and FAAA in sections 4.3.2 and 4.5.2 respectively, can be relied upon to make a contrary assertion.

4.7.2 Advocate-client privilege

Additionally, the GF report noted that advocate-client privilege is recognised in Kenya by virtue of English common law and the provisions of the Evidence Act.²³⁵ It, however, concluded that on account of the override provided under the TPA,²³⁶ as previously discussed, this does not impede the KRA's ability to access information even if in the possession of an advocate.²³⁷ The provisions relied upon were declared unconstitutional, although the decision that did so is currently under appeal and thus, the order on unconstitutionality has been stayed. Despite this, it is clear that an attempt to interfere with advocate-client privilege in the way sought by section

²³³ OECD (2021), Global Forum on Transparency and Exchange of Information for Tax Purposes: Kenya 2021 (Second Round, Phase 1): Peer Review Report on the Exchange of Information on Request, Global Forum on Transparency and Exchange of Information for Tax Purposes, OECD Publishing, Paris, pgs. 64- 65.

²³⁴ Ibid, pg. 64 para 203.

²³⁵ Supra note 202.

²³⁶ Supra note 172.

²³⁷ Supra note 238, pg. 63, para 199.

59(4) is a gross violation of the right to privacy and also that of access to justice, and the same is hardly justifiable on the application of the requirements of Article 24 (1) of the CoK.

4.7.3 Access to information

On the right of access to information, the GF report notes that access to EOI files by taxpayers is restricted on the premise that the law excludes information pertaining to foreign relations or that obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention, suppression of crime and enforcement of any law.²³⁸ The full wording of one of the sections relied upon in the justification of this limitation is as follows:

*“information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security.”*²³⁹

Two questions arise from this section. The first is whether the KRA is an investigative body within the intended meaning of this section. The second is how exactly taxpayer information would constitute threats to national security. On the first question, the Act establishing the KRA²⁴⁰ provides that the collection and receipt of all revenue is its primary function.²⁴¹ In executing this mandate, the KRA is to administer and enforce the provisions of laws listed in the first and second schedule related to revenue and thus assess, collect, and account for all revenues according to the respective laws.²⁴² This wording can be contrasted with provisions explicitly granting investigative powers to the Ombudsman²⁴³ or the Office of the Data Commissioner.²⁴⁴ It could be argued that investigative powers are implied by the power to administer and enforce laws, but again, rules of legal interpretation have always favoured explicit and clear legislative provisions.

²³⁸ Supra note 238, pg. 75 para 246.

²³⁹ Supra note 228, section 6(2)(g).

²⁴⁰ Kenya Revenue Authority Act, No 2 of 1995, Laws of Kenya.

²⁴¹ Ibid, section 5(1).

²⁴² Supra note 240, section 5(2).

²⁴³ Commission on Administrative Action Act, No.23 of 2011, Laws of Kenya, section 8.

²⁴⁴ Supra note 167, section 8(f).

The discussion in *Katiba Institute case*²⁴⁵ is helpful in considering the second question. Mwita J observed as follows:

“...I must state that it was up to the respondents to show how the information sought affected state security and therefore, falls within section 6 of the Act. From the letter dated 17th August 2017, the information sought is about dates, nature of advertisements and copies thereof, the cost of advertisements and who meets that cost. That, in my view, cannot be information that affects state security. How would for instance dates when advertisements were done, nature and copies of advertisements, cost of advertisements and who meets the cost of those advertisements affect state security” It is trite law that where a party alleges, like the respondents have done, that information sought affects state security, it is the duty of that person to show to the satisfaction of the Court that indeed that is the case. It is not enough for a party to merely allege without showing how, that disclosure of information will affect state security.”²⁴⁶

There seems to be an objective determination to be made by the courts about what constitutes information that would affect national security. In the case of taxpayer information, objectively, it seems to be a reach to claim that the same could affect national security. If anything, it is the taxpayer’s security that could potentially be at risk considering the type of sensitive information that constitutes tax disclosures.

²⁴⁵ Supra note 234.

²⁴⁶ Supra note 233, paras 46-47.

4.8 Comparison of Kenyan legislative provisions against the minimum standards and best practices provided for under the 2015 IFA general report.

Confidentiality

Minimum Standard	In place?	Comments
Provide a specific legal guarantee for confidentiality, with sanctions for officials who make unauthorised disclosures (and ensure sanctions are enforced).	Yes	Confidentiality is guaranteed under the provisions of section 6 of the TPA. Sanctions for breach of confidentiality are provided for under section 102(2) as read with section 104(1). ²⁴⁷
Restrict access to data to those officials authorised to consult it. For encrypted data, use digital access codes.	Yes	Section 6 (2) of the TPA provides a list of situations where disclosure is permissible to officials other than those working at the KRA. The confidentiality provisions are equally binding under such circumstances. ²⁴⁸
Audit data access periodically to identify cases of unauthorised access.	N/A	Not covered.
Introduce administrative measures emphasising confidentiality to tax officials.	Yes	According to the GF report, the KRA has internal policies and procedures that emphasise confidentiality to tax officials, such as signing oaths of secrecy. This emphasis is also placed on any

²⁴⁷ See section 4.4.1.

²⁴⁸ Ibid.

Minimum Standard	In place?	Comments
		contractors engaged by the KRA, as signing a non-disclosure agreement is part of the contracting process. ²⁴⁹
If a breach of confidentiality occurs, investigate fully with an appropriate level of seniority by independent persons (e.g., judges).	Partly	The TPA does not contain explicit provisions on handling breach of confidentiality. However, the DPA provides the procedure to be followed where a data breach occurs. ²⁵⁰
Introduce an offence for tax officials covering up unauthorised disclosure of confidential information.	Partly	Whereas there is no explicit mention of covering up unauthorised disclosure among the offence provided for under the TPA, the offences are worded in a way that would cover this offence. For example, section 102(d) that provides an authorised officer commits an offence if that officer “... <i>fails to do anything that the authorised officer is required to do to give effect to the provisions of a tax law.</i> ”
Provide remedies for taxpayers who are victims of unauthorised disclosure of confidential information.	Yes	Sanctions are available against officials who make unauthorised disclosures under the TPA and DPA. ²⁵¹

²⁴⁹ GF Peer review report, para 247, pg. 75.

²⁵⁰ Supra note 167, section 43 and note 179 regulations 37 and 38.

²⁵¹ See sections 4.3.2.2 and 4.4.1.

Minimum Standard	In place?	Comments
Exceptions to the general rule of confidentiality should be explicitly stated in the law, narrowly drafted, and interpreted.	Partly	Whereas the exceptions are explicitly provided for under the TPA, some of the exceptions, such as that affecting advocate-client privilege, are detrimental to taxpayers' rights. ²⁵²
If "naming and shaming" is employed, ensure adequate safeguards (e.g., judicial authorisation after proceedings involving the taxpayer).	N/A	Not covered.
No disclosure of confidential taxpayer information to politicians, or where it might be used for political purposes.	Yes	Politicians are not part of the list of authorised disclosures provided for under the TPA. ²⁵³
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	Yes	The CoK and the AIA provide taxpayers with a mechanism to access information about themselves. ²⁵⁴ However, the KRA limits this access because of the exceptions provided for in the AIA. ²⁵⁵

²⁵² See section 4.4.2.

²⁵³ Supra 258 4.4.1.

²⁵⁴ See section 4.6.

²⁵⁵ See sections 4.6.2 and 4.7.3.

Minimum Standard	In place?	Comments
in disclosure outweighs the right of confidentiality, and only after a hearing where the taxpayer has an opportunity to be heard.		Disclosure to third parties on account of public interest is subject to determination by a Court. ²⁵⁶
If published, tax rulings should be anonymised and details that might identify the taxpayer removed.	No	Tax rulings in Kenya are not anonymised. ²⁵⁷
Legal professional privilege should apply to tax advice.	Partly	The legal professional privilege applies to tax advice only where an advocate gives it during engagement as an advocate. ²⁵⁸
Where tax authorities enter premises which may contain privileged material, arrangements should be made (e.g., an independent lawyer) to protect that privilege.	Partly	Tax officials need a warrant issued by a court to gain access to premises. ²⁵⁹ Privilege can be claimed as a ground against the issuance of the warrant. However, as the law currently reads, this privilege can be overruled. ²⁶⁰

²⁵⁶ Section 6(4) AIA.

²⁵⁷ Decisions issued by the Tax Appeals Tribunal and the commercial and tax division of the High Court can be accessed via the Kenya Law website accessible at www.kenyalaw.org.

²⁵⁸ See section 4.4.2.

²⁵⁹ Supra note 172 Section 60, TPA.

²⁶⁰ See section 4.4.2.

Best Practice	In place?	Comments
Encrypt information held by a tax authority about taxpayers to the highest level attainable.	N/A	Not covered.
Ensure an effective fire-wall to prevent unauthorised access to data held by revenue authorities.	N/A	Not covered.
Appoint data protection/privacy officers at senior level and local tax offices.	Partly	Whereas this is not provided for explicitly within the wording of either TPA or the KRA Act, this is provided for under the DPA on account of the KRA processing personal data. ²⁶¹
Require judicial authorisation before any disclosure of confidential information by revenue authorities.	Partly	The KRA does not need judicial authorisation for disclosure in line with section 6(2) of the TPA. However, judicial authorisation is required for disclosure to any third party not covered by that provision.
Anonymise all tax judgments and remove details that might identify the taxpayer.	No	Tax judgments are not anonymised. ²⁶²

²⁶¹ See section 4.3.2.

²⁶² Supra note 257.

Best Practice	In place?	Comments
<p>Privilege from disclosure should apply to all tax advisors (not just lawyers) who supply similar advice to lawyers.</p> <p>Information imparted in circumstances of confidentiality may be privileged from disclosure.</p>	No	Privilege from disclosure only applies to advocates acting in their capacity as advocates. ²⁶³

Cross-border procedures

Minimum Standard	In place?	Comments
<p>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.</p>	Partly	Tax legislation does not contain an explicit provision on taxpayer notification. However, the provisions of the CoK, DPA and FAAA can be interpreted as conferring an obligation on the KRA to notify taxpayers who are the subject of cross-border requests for information. ²⁶⁴

²⁶³ See section 4.4.2.

²⁶⁴ See sections 4.3.2.1 and 4.5.

Minimum Standard	In place?	Comments
If information is sought from third parties, judicial authorisation should be necessary.	No	The KRA does not need judicial authorisation to seek information from third parties. ²⁶⁵
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.	Yes	Treaties that Kenya has ratified form a part of Kenya's law. ²⁶⁶ This provision thus exists on account of Article 21 of the MCAA. This is also a requirement under the DPA. ²⁶⁷
Taxpayers should have a right to participate in mutual agreement procedure (MAP) by being heard and being informed as to progress of the procedure.	Yes	The DTAs govern the mutual agreement procedure in force in Kenya. Taxpayers are at liberty to commence MAP proceedings where they consider they are at risk of taxation not in accordance with the DTA. ²⁶⁸

²⁶⁵ Supra note 172, sections 58 and 59.

²⁶⁶ Supra note 143, article 2(6)

²⁶⁷ See section 4.3.2.1.

²⁶⁸ See for example, Kenya – Germany DTA (1977), article 25(1).

Best Practice	In place?	Comments
The taxpayer should be informed that a cross-border request for information is to be made.	Partly	Tax legislation does not contain an explicit provision on taxpayer notification. However, the provisions of the CoK, DPA and FAAA can be interpreted as conferring an obligation on the KRA to notify taxpayers who are the subject of cross-border requests for information. ²⁶⁹
Where a cross-border request for information is made, the requested state should also be asked to supply information that assists the taxpayer.	N/A	Not covered.
Provisions should be included in tax treaties setting specific conditions for exchange of information.	Yes	Kenya's DTAs contain the provision to only exchange either 'necessary' ²⁷⁰ or 'foreseeably relevant' information. ²⁷¹
The taxpayer should be given access to information received by the requesting state.	Partly	The CoK and the AIA provide taxpayers with a mechanism to access information about themselves. ²⁷² However, the KRA limits this access because of the exceptions provided for in the AIA. ²⁷³

²⁶⁹ See sections 4.3.2.1 and 4.5.

²⁷⁰ See for example Kenya – Canada DTA (1983), article XXVII.

²⁷¹ See for example, Kenya -Seychelles DTA (2014), article 26.

²⁷² See section 4.6.

²⁷³ See sections 4.6.2 and 4.7.3.

Best Practice	In place?	Comments
Information should not be supplied in response to a request where the originating cause was the acquisition of stolen or illegally obtained information.	N/A	Not covered.
A requesting state should provide confirmation of confidentiality to the requested state.	Yes	Treaties that Kenya has ratified form a part of Kenya's law. ²⁷⁴ This provision thus exists on account of Article 21 of the MCAA.
For automatic exchange of financial information, the taxpayer should be notified of the proposed exchange in sufficient time to exercise data protection rights.	N/A	Not covered.
Taxpayers should have a right to request initiation of mutual agreement procedure.	Yes	The DTAs govern the mutual agreement procedure in force Kenya. Taxpayers are at liberty to commence MAP proceedings where they consider they are at risk of taxation not in accordance with the DTA. ²⁷⁵

²⁷⁴ Supra note 143, article 2(6).

²⁷⁵ Supra note 268.

Institutional framework for protecting taxpayers' rights

Minimum Standard	In place?	Comments
Adoption of a charter or statement of taxpayers' rights.	Yes	The KRA has a service delivery charter that contains a statement on taxpayers' rights. ²⁷⁶

Best Practice	In place?	Comments
A separate statement of taxpayers' rights under audit should be provided to taxpayers who are audited.	Yes	The KRA has a tax investigations handbook that contains a statement on the rights of taxpayers under investigation. ²⁷⁷
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.	Partly	Kenya does not have a dedicated tax ombudsman. However, an ombudsman office is established to handle all complaints of maladministration in the public sector. This would include complaints against the KRA as it is a State body. ²⁷⁸

²⁷⁶ See section 3.2.2.

²⁷⁷ Ibid.

²⁷⁸ Commission on Administrative Justice Act, No23 of 2011, Laws of Kenya, section 8.

Best Practice	In place?	Comments
The organisational structure for the protection of taxpayers' rights should operate at local level as well as nationally.	N/A	Not covered.

4.9 Summary

This chapter seeks to provide an understanding of what protections are available to taxpayers in the context of EOI based on Kenya's current legislative framework. The chapter commences by exploring how the rights guaranteed under the CoK's BoR can be limited. Following this, the legislative provisions covering privacy, confidentiality, fair administrative justice, and access to information are discussed.

These elements, as covered in the 2021 GF report, are then discussed. From the discussion, the way in which the KRA deals with taxpayers' rights in the context of EOI is at odds with what the letter of the law provides.

The analysis proceeds by comparing the legislative provisions discussed against the minimum standards and best practices on confidentiality, cross-border procedures, and institutional protection of taxpayers' rights.

The key finding from this analysis is that, save for provisions on the non-disclosure of confidential information, there is a general lack of explicit provisions promoting the protection of taxpayers' rights within taxation legislation. Protection is imputed through the reading of non-taxation legislation. For example, the right to notification is implied through the reading of the provisions of the DPA and the FAAA. There is thus a need to address the deficient areas in Kenya's legislation in order to enhance the protection of taxpayers.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The key aim of this dissertation was to determine the level of protection of taxpayers' rights through the analysis of the Kenya's legislative framework. The key findings of this analysis are discussed below.

5.2 Key findings

5.2.1 Inconsistency in the scope of protection

Whereas the provisions in the CoK relating to the protection of the right to privacy cover both natural and legal persons, the provisions of the DPA only apply to natural persons.²⁷⁹ The FAAA does not contain a definition of the term person and as such that from the CoK can be applied as it is the supreme law of the land. Based on this, the provisions of the FAAA will equally apply to both natural and legal persons.²⁸⁰ The right of access to information is limited to citizens. The AIA defines the term to include natural persons and companies that more Kenyan citizens control.²⁸¹ With the definition of a taxpayer also including natural and legal persons, the result is that not all taxpayers enjoy the same level of protection.

The protection under the DPA in terms of notification seems to be more explicit where the KRA is considered a data processor of personal data. However, this protection would only be available to taxpayers who are natural persons.

The FAAA is more expansive in the scope of application however, there is an element of discretion afforded to the KRA in determining whether the taxpayer is likely to be adversely affected by the KRA's administrative action of initiating EOI with respect to the taxpayer.

5.2.2 Non-explicit legislative provisions

Closely related to the finding above is the issue of non-explicit legislative provisions covering taxpayers' rights. Kenya's legislative framework provides relatively commendable protection of rights in a general context as evidenced by some of the case law highlighted in the course of the discussion under the preceding chapter.

²⁷⁹ See section 4.3.

²⁸⁰ See section 4.5.

²⁸¹ See section 4.6.

However, in the context of specific taxpayer protection, save for the non-disclosure of confidential information explicitly provided for within the TPA which forms a part of taxation legislation, the protection of the other areas analysed is imputed through the interpretation of non-taxation legislation.

In the analysis in section 4.8 in the previous chapter, this is captured using the comment ‘partly’ for those protections resulting from implied terms.

5.2.3 Infringement on taxpayers’ rights

The necessity of KRA’s information gathering powers is not disputed. However, the same are currently provided for in law in a way that infringes on taxpayers’ rights. One example of this is the limitation on advocate-client privilege that the TPA imposes.²⁸² The spirit evident from the drafting of some of these provisions is the presumption that all taxpayers tend towards the frustration of tax administration. Given that one of the rights in the service charter issued by the KRA is that of presumption of honesty, there is apparent cognitive dissonance between the provisions of the law and their application in practice.

5.3 Recommendations

Based on the findings, the following are some proposed recommendations:

5.3.1 Enactment of legislation that explicitly codifies taxpayers’ rights

The discussion in chapter 3 of this dissertation demonstrated that taxpayer rights have emerged as a specialised class of rights despite being tied to the broader human rights framework. The issues faced by taxpayers are nuanced and thus require explicit codification of taxpayers’ rights protection. Despite being helpful as a guide, the charters issued by the KRA do not enjoy the force of law and thus cannot be relied upon by taxpayers as a basis for instituting legal action.

Whereas there is protection available within the broader human rights protection framework, the analysis in chapter 4 demonstrates that in most cases, this protection needs to be imputed from the interpretation of the applicable legislation and is sometimes limited in scope. For example, the protection of the right to privacy as provided for under the DPA which is only limited to taxpayers that are natural persons.

²⁸² See section 4.4.2.

Enacting legislation explicitly codifying taxpayers' rights and their protection would thus also address the limited scope of protection by reconciling the protection available to the definition of a taxpayer envisioned under taxation legislation.

5.3.2 Implementation of the existing legislative provisions

Despite the lack of explicit codification of taxpayers' rights within legislation, protection is still available within the broader human rights protection framework. For example, the notification of the taxpayer where EOI is concerned is supported as discussed in chapter 4²⁸³ by the provisions of the DPA and the FAAA. Upholding this right would in addition to allowing the taxpayer to exercise their rights in good time, be beneficial to the KRA by ensuring that whatever information is ultimately exchanged is accurate on account of affording the taxpayer an opportunity to verify said information.

5.3.3 Establishment of a tax ombudsman office

The Commission on Administrative Justice Act²⁸⁴ establishes the Commission on Administrative Justice, also known as the office of the Ombudsman. Its mandate is to ensure the protection of the right to fair administrative action. It is also the office that oversees the administration of the AIA.

In principle, an aggrieved taxpayer could make use of this complaint mechanism. However, due to the technical and heavily nuanced nature of taxation matters, it would be more beneficial to the taxpayer to have a dedicated tax Ombudsman. This aligns with best practice on the institutional framework for protecting taxpayers' rights.

There has been an attempt at this by establishing the Independent Review of Objections Office (IRO)²⁸⁵ at the KRA. Whereas this is admittedly a step in the right direction, two significant concerns come to mind. One is that the office is still within the KRA, which affects the perception of true independence. Again, given that its mandate is primarily the review of objections, it is not relevant to the taxpayer before a formal assessment has been raised.

²⁸³ See sections 4.3 and 4.5.

²⁸⁴ Commission on Administrative Justice Act, No. 23 of 2011, Laws of Kenya.

²⁸⁵ Independent Review of Objections Brochure - Kenya Revenue Authority. Available at <https://www.kra.go.ke/images/publications/IRO-Brochure---Oct.pdf>.

5.4 Concluding remarks

It has been argued that the relationship between taxpayers and tax authorities can be classified as a psychological contract. This can be contrasted from a legal contract whose compliance is based on resultant sanctions where any breach occurs.²⁸⁶ The basis of a psychological contract is trust. Tax authorities expect honest and accurate disclosures from taxpayers. On the other hand, taxpayers expect to be treated with respect and with a presumption of honesty. Thus, the prevailing attitude of most tax authorities to treat taxpayers with the suspicion of tax evasion from the outset serves to erode trust and thus undermine the maintenance of the psychological contract.²⁸⁷

This should be of great concern to revenue authorities because it has been observed that tax compliance is more attributable to taxpayer tax morale than the strategies of deterrence and prevention employed by tax authorities. This tax morale has been found to be more than the result of one's upbringing in the knowledge of right and wrong. It is directly affected by the relationship between taxpayers and tax authorities and the prevailing legal and constitutional framework.²⁸⁸

The upholding of taxpayers' rights is thus one way to boost tax morale and thus tax compliance. The usefulness of the EOI mechanism and especially as provided for under the MCAA in aiding DRM, is not disputed. However, the achievement of this need not be at odds with protecting taxpayers' rights. Perhaps, a more robust framework for protecting taxpayers' rights will have the overall effect of reducing the expenditure in deterrence measures, thus availing more revenue to be channelled towards the achievement of the SDGs.

²⁸⁶ Feld, Lars P., and Bruno S. Frey. "Trust breeds trust: How taxpayers are treated." *Economics of governance* 3.2 (2002): 87-99, pg. 90.

²⁸⁷ Ibid pg. 91.

²⁸⁸ Supra 285 pg. 97.

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APPENDIX I

Region	Country	Status	Treaty Signing Date	Treaty (Entry into force date)	Treaty Effective Date	Covered Tax Agreement?
North America	Canada	In force	27-Apr-83	08-Jan-87	01-Jan-87	Yes
Europe	Denmark	In force	13-Dec-72	15-Mar-73	01-Jan-82	Yes
Europe	France	In force	04-Dec-07	01-Jan-10	01-Jan-11	Yes
Europe	Germany	In force	17-May-77	17-Jul-80	01-Jan-80	No
Asia	India	In force	11-Jul-16	30-Aug-17	01-Jan-17 (KE)	Yes

Region	Country	Status	Treaty Signing Date	Treaty (Entry into force date)	Treaty Effective Date	Covered Tax Agreement?
Middle East	Iran	In force	29-May-12	13-Jul-17	01-Jan-18 (KE)	No
Asia	Korea	In force	08-Jul-14	03-Apr-17	01-Jan-18	No
Europe	Norway	In force	13-Dec-72	10-Sep-73	01-Jan-72	Yes
Middle East	Qatar	In force	23-Apr-14	25-Jun-15	01-Jan-16	Yes
Africa	Seychelles	In force	17-Mar-14	09-Apr-15	09-May-15 (SC)	Yes

Region	Country	Status	Treaty Signing Date	Treaty (Entry into force date)	Treaty Effective Date	Covered Tax Agreement?
Africa	South Africa	In force	26-Nov-10	19-Jun-15	01-Jan-16	Yes
Europe	Sweden	In force	28-Jun-73	28-Dec-73	01-Jan-73	Yes
Middle East	United Arab Emirates	In force	21-Dec-11	22-Feb-17	01-Jan-18	Yes
Europe	United Kingdom	In force	31-Jul-73	30-Sep-77	01-Jan-76 (KE)	Yes
Africa	Zambia	In force	27-Aug-68		01-Jan-64 (KE)	No