



REPUBLIC OF KENYA

*SURCHARGE AND
RESTITUTION
MANUAL*

*INSPECTORATE OF STATE
CORPORATIONS
(OFFICE OF THE DEPUTY
PRESIDENT)*

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ACRONYMS

| | |
|---------------|--|
| IG(C): | Inspector-General (Corporations) |
| ISC: | Inspectorate of State Corporations |
| OIGC: | Office of the Inspector-General (Corporations) |
| PIC: | Parliamentary Investment Committee |
| SCAT: | State Corporations Appeals Tribunal |
| SCSC: | State Corporations Surcharge Committee |

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background

The State Corporations Act, Cap 446, Laws of Kenya under Section 19 (1) (b), (c) and (d) empowers the Inspector-General (Corporations) to surcharge any expenditure disallowed, any sum that has not been duly brought to account or any losses or deficiencies caused through negligence or misconduct.

Over the years the Office of the Inspector-General (Corporations) has carried out the function of surcharge and restitution with minimal challenge. However, with Kenyans becoming more enlightened and with available literature on litigation, the Office of the Inspector-General (Corporations) has faced challenges in the State Corporations Appeals Tribunal (SCAT) as evidenced by recent judgments entered against the Office of the Inspector-General (Corporations). The Office of the inspector-General has also faced some internal limitations in operationalizing the surcharge and restitution processes. It is against this background that the Office of the Inspector-General (Corporations) has developed this Surcharge and Restitution Manual.

1.2 Definition of Terms

For purposes of this Manual the following terms mean:

(i) Surcharge

Surcharge is a charge made by the Inspector-General (Corporations) upon persons responsible for occasioning loss of public resources in a State Corporation.

(ii) Restitution

Restitution is the act of restoring or bringing back or giving back lost funds to a State Corporation.

1.3 Legal Framework

Section 19 (1) (a) of the State Corporations Act, Cap 446 of the Laws of Kenya, empowers the Inspector-General (Corporations) to “disallow any item of account which is contrary to the law or to any direction lawfully given to a state corporation”.

The law further empowers the Inspector-General (Corporations) under subsections 1(b),(c),(d) and (e) to:-

(b) Surcharge the amount of any expenditure so disallowed upon the person responsible for incurring or authorizing the expenditure;

(c) Surcharge any sum which has not been duly brought to account upon the person by whom that sum ought to have been brought into account;

(d) Surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred;

(e) Certify the amount due from any person upon whom he has made a surcharge.

1.4 Purpose/Objectives of ISC Surcharge and Restitution Manual

1.4.1 Purpose

The purpose of this Manual is to provide a framework for the execution of the surcharge function as bestowed upon the Inspector-General (Corporations) by law.

1.4.2 Objectives

The main objectives of this Manual are to:-

- (i) provide guidelines on orderly and expeditious execution of the surcharge function;
- (ii) enhance restitution of lost funds to State Corporations;
- (iii) enhance the quality of surcharge cases submitted to State Corporations Surcharge Committee (SCSC);
- (iv) deterring misappropriation of resources in State Corporations;
- (v) increase the success rate of cases ruled in favour of Inspector-General (Corporations) both at SCAT and High Court

1.5 Overview of the Office of the Inspector-General (Corporations)

The Inspectorate of State Corporations was established as Inspectorate of Statutory Boards in 1966 in the then Ministry of Agriculture and Animal Husbandry. It has evolved over time to become the current Office of the Inspector-General (Corporations) which was established under the State Corporations Act, Cap 446, Laws of Kenya in 1986.

1.5.1 Vision

To be the leading oversight agency in the region.

1.5.2 Mission

To continuously improve public service delivery through promotion of good corporate governance in state corporations

1.5.3 Motto

Supervision with a difference; “Ukaguzi wa Kipekee.”

1.5.4 Core Values

The fundamental core values of the Office of the Inspector-General (Corporations) are:-

Integrity and **I**mpartiality
Professionalism
Customer Focus
Team Spirit
Efficiency and **E**ffectiveness

CHAPTER TWO

2.0 SURCHARGABLE CASES

2.1 Circumstances of Surcharge

The following are the circumstances under which surcharge may be instituted:-

- (i) Misuse of tangible or intangible assets of a State Corporation;
- (ii) Monetary loss through misappropriation or unaccounted for expenditures;
- (iii) Unauthorized expenditures; and
- (iv) Negligence or misconduct leading to losses.

2.2 Categories of Surchargees

Surchargees are categorized into two (2) namely:-

2.2.1 Primary Surchargees

These are persons directly responsible for, and/or principally benefiting from the loss of public resources. For this category of surchargees, 100% of the total loss shall be recovered.

2.2.2 Secondary Surchargees

These are persons who occasion the loss of public resources through negligence/misconduct in the performance of their duties even though they may not have benefited from the loss. For this category of surchargees, 10% of the total loss shall be recovered.

CHAPTER THREE

3.0 PERFORMANCE STANDARDS IN SURCHARGE

For the purpose of this Manual, principles and values against which surcharge function by the Office of the Inspector-General (Corporations) will be measured include:-

3.1 Objectivity and Independence

Inspectors shall be objective and independent when undertaking surcharge and restitution.

3.2 Professionalism

Inspectors shall undertake surcharge and restitution with utmost professionalism and care.

3.3 Transparency and Accountability

Inspectors will carry out surcharge and restitution in a transparent and accountable manner, while ensuring that the information and documents in their custody are safe.

3.4 Quality

Inspectors will ensure that the entire surcharge and restitution process conforms to the highest quality standards.

3.5 Fairness

Inspectors shall ensure fairness while undertaking surcharge and restitution function.

CHAPTER FOUR

4.0 ROLE & RESPONSIBILITY OF STATE CORPORATIONS SURCHARGE COMMITTEE

The Inspector-General (Corporations) shall establish a State Corporations Surcharge Committee (SCSC) whose composition and functions are prescribed hereunder:-

4.1 Composition of the Committee

The Committee shall comprise the following:-

- (i) **Chairman:** Shall be an officer at the level of Senior Deputy Inspector-General or equivalent appointed by the Inspector-General (Corporations).
- (ii) **Secretary:** Shall be an officer for the time being heading the Surcharge and Restitution function. The Secretary may form a Secretariat from among the officers serving under the Surcharge and Restitution function.
- (iii) Five other members appointed in writing by the Inspector-General (Corporations).

The Chairman shall preside over all meetings of the Committee but in the absence of the Chairman, the members present shall appoint one of them to preside.

4.2 Quorum

The quorum for the conduct of business at the Committee shall be two-thirds of the total number of members of the Committee.

4.3 Frequency of the meetings

The SCSC will meet at least once in a month on scheduled dates or any other date agreed upon by the members. Notices to the meetings shall be issued at least one week in advance.

4.4 Resolutions

Resolutions shall be by consensus or otherwise by support of two-thirds of the members present.

4.5 Co-option of members

The SCSC may co-opt members for technical expertise/advice as and when need arises.

4.6 Functions of the Committee

The Committee shall be responsible for advising the Inspector-General (Corporations) on all matters pertaining to surcharge and restitution.

To fulfill this responsibility, the Committee shall:-

- (i) Review recommendations and evidence for surcharge emanating from Special Investigations requested by the State Corporations Advisory Committee (SCAC) or the Controller & Auditor-General, Management Audits, Investigative audits, Routine Inspections, and PIC Reports;
- (ii) Determine the adequacy and reliability of evidence submitted in support of surcharge;
- (iii) Authorize the issuance of show-cause letters/notices to prospective surchargees and review responses thereto;
- (iv) Recommend issuance of surcharge certificates to the Inspector-General (Corporations);
- (v) Advise Inspectorate of State Corporations' (ISC) lawyers and or Investigating officers on matters before the State Corporations Appeals Tribunal (SCAT) or the High Court;
- (vi) Coordinate with lawyers representing the Inspector-General (Corporations) in all legal matters relating to surcharge;
- (vii) Coordinate all matters pertaining to surcharge;
- (viii) Maintain custody of documents relating to surcharge matters; and
- (ix) Advise on the review of this Manual.

CHAPTER FIVE

5.0 SURCHARGE PROCESS AND RECOVERY

5.1 Surcharge process

The process for surcharge and restitution shall be carried out as set out here under:

Step 1: The Investigating Officer prepares a surcharge memo in prescribed format (*Annexed hereto*) and submits it to the State Corporations Surcharge Committee (SCSC) Secretariat with necessary supporting evidence for review.

Step 2: The State Corporations Surcharge Committee (SCSC) Secretariat reviews the surcharge and evidence memo submitted by the Investigating officer

Step 3: If in the opinion of the Secretariat the memo is in order and is backed by sufficient evidence, it is cleared for presentation to the State Corporations Surcharge Committee (SCSC). The case is included in the agenda for the next SCSC meeting to be presented by the Investigating Officer. However, if there is insufficient evidence or the memo is insufficient in any other respect it is referred back to the Investigating Officer with guidance to conduct further investigations, provide additional evidence or undertake any other remedial action.

Step 4: A duly convened State Corporations Surcharge Committee (SCSC) meeting deliberates upon the memos submitted by the Secretariat and assesses the evidence in support thereof:-

- (i) If the Committee finds the case meritorious and supported by sufficient evidence, the Secretariat is authorized to issue a show-cause letter clearly requiring a response within 21 days to the prospective surcharge and attach relevant evidence to allow the prospective surchargee to respond. The show cause letter must either be registered or hand delivered with a delivery book.
- (ii) If the Committee finds the case meritorious but lacking sufficient evidence, it is referred back to the Investigating Officer for further investigation or provision of additional evidence.
- (iii) If the Committee finds the case lacking in merit, the matter is terminated.

Step 5: Where 21 days lapse without receipt of a response from the prospective surchargee, the Secretariat shall report the fact to the State Corporations Surcharge Committee (SCSC) meeting convened immediately

thereafter, in which case the Committee will recommend to the Inspector-General (Corporations) immediate issuance of a Surcharge Certificate to the surchargee.

Step 6: Where a response has been received, the Secretariat shall table the response to the State Corporations Surcharge Committee (SCSC) meeting convened immediately thereafter. The Committee shall deliberate on the same and may take any of the following courses of action:-

- (i) Recommend issuance of Surcharge Certificate by the Inspector-General (Corporations) where the response is adjudged to lack merit or where the prospective surchargee admits the charges.
- (ii) Invite the prospective surchargee, through the Secretariat, to appear before the State Corporations Surcharge Committee (SCSC) in person on a given date which must be between 21 and 30 days from the date of the letter of invitation for further clarification where the response was not clear. The surchargee may be accompanied by a lawyer.
- (iii) Terminate the matter where the response is adjudged to exonerate the prospective surchargee.

Step 7: Where the prospective surchargee fails to honour the invitation to appear before State Corporations Surcharge Committee (SCSC) in person on the given date, the Committee shall recommend to the Inspector-General (Corporations) for immediate issuance of a Surcharge Certificate to the surchargee.

Step 8: Where the prospective surchargee appears before the State Corporations Surcharge Committee (SCSC) in person, the Committee shall interview him/her to obtain the necessary clarifications and thereafter may take either of the following courses of action:-

- (i) Recommend to the Inspector-General (Corporations) immediate issuance of a Surcharge Certificate where the prospective surchargee is deemed to have failed to exonerate him/herself.
- (ii) Terminate the matter where the prospective surchargee is deemed to have exonerated him/herself.

Step 9: Following the recommendation by the State Corporations Surcharge Committee (SCSC), the Inspector-General (Corporations) may issue a Surcharge Certificate in a prescribed format (*Annexed hereto*). The certificate shall be copied to the Chairman of SCAT, Head of Public Service and Secretary to the Cabinet, Permanent Secretary of the Parent Ministry and the State Corporation concerned.

Step 10: The Inspector-General (Corporations) shall respond within 14 days to any application by a surchargee for written reasons for surcharge. For this purpose, the Inspector-General (Corporations) may liaise with the Secretary surcharge committee.

Step 11: Where the surchargee is aggrieved by the decision of the Inspector-General to surcharge him/her and has appealed to SCAT within 30 days from the date of issue of certificate, the Inspector-General may refer the matter to the SCSC Secretariat to prepare a defense in consultation with the Investigating Officer and the ISC panel of lawyers. Such appeals shall be reported to the SCSC for deliberations and further guidance.

Step 12: Where the surchargee elects to settle the surcharged amount without appeal, such payment shall be made to the affected/concerned State Corporation by the surchargee through coordination by the State Corporations Surcharge Committee (SCSC) Secretariat and the Inspector-General (Corporations) shall issue a discharge certificate to the surchargee in a prescribed format (*Annexed hereto*) upon evidence of such payment. Such settlements shall be reported to the SCSC for noting.

Step 13: Where an appeal against surcharge to the State Corporations Appeals Tribunal (SCAT) is ruled against the Inspector-General (Corporations), the ruling shall be tabled before State Corporations Surcharge Committee (SCSC), by the Secretariat for deliberation or review. In this case, the State Corporations Surcharge Committee (SCSC) may take either of the following courses of action:-

- (i) Appeal to the High Court in consultation with the panel of Inspectorate of State Corporations (ISC) lawyers where in the opinion of the State Corporations Surcharge Committee (SCSC), the ruling is unsatisfactory; or
- (ii) Terminate the matter.

Step 14: Where an appeal to the State Corporations Appeals Tribunal (SCAT) by the surchargee is unsuccessful, the process of recovery from the surchargee by the State Corporations Surcharge Committee (SCSC) Secretariat is instituted in consultation with the Inspectorate of State Corporations (ISC) panel of lawyers. This shall be done within the stipulated period of 14 days of the disallowance, abandonment or failure of the appeal. Failure of appeals against surcharge and actions consequent thereto shall be reported to the State Corporations Surcharge Committee (SCSC) for noting.

Step 15: Where an appeal has been referred to the High Court by either the Inspector-General (Corporations) or the surchargee, the ruling by the High Court shall be final. Where the High Court upholds the surcharge, the Inspector-General (Corporations) shall, in consultation with the Inspectorate of State Corporations panel of lawyers, commence recovery

proceedings if the payment is not made within 14 days of the ruling. The fate of all appeals to the High Court shall be reported to the SCSC for noting.

5.2 Recovery of Expenses by the Inspector-General (Corporations)

All expenses incurred by the Inspector-General (Corporations) in the process of surcharge and restitution are recovered from the State Corporations in accordance with Section 25 (1) and (2) of the State Corporations Act, which stipulates that State Corporation shall reimburse:-

- (i) Any expenses incurred by the Inspector-General (Corporations) in the defense of any allowance, disallowance or surcharge in so far as not recovered from any other source.
- (ii) Costs and expenses incurred on legal proceedings.

CHAPTER SIX

6.0 AUTHORITY AND RESPONSIBILITIES

6.1 Inspector -General

The Inspector General shall ensure that the appropriate structures and resources for the purpose of surcharge and restitution are in place. Surcharge notices and surcharge certificates are issued and dispatched in time and with utmost integrity.

6.2 Chairman of State Corporations Surcharge Committee (SCSC)

The Chairman shall ensure that deliberations and resolutions made by the committee are of high quality and will effectively manage time during the surcharge meetings.

6.3 Secretary

The officer will be the secretary to the Committee. He/she shall allocate duties to the secretariat, develop the agenda and convene meetings. The secretary shall maintain a database for all surcharge cases and ensure that resolutions from SCSC and other actors are implemented. He/she will be the custodian of the surcharge files and other documentations. He/she shall liaise with the lawyers, maintain court register, and attend to all correspondences pertaining to surcharge and restitution. The Secretary will also follow up and ensure reimbursement of expenses incurred by the Inspector-General in the surcharge and restitution process.

6.4 Secretariat

The Secretariat will assist the Secretary in carrying out his/her duties which include, analyzing surcharge memos; developing agenda items; drafting minutes, show cause letters and certificates; analyzing responses and appeals; maintain a register on reimbursement of expenses; maintain database of surcharge cases; maintain the attendance register; and the registry on all matters pertaining to surcharge and restitution.

6.5 Inspectors

The Inspectors have a responsibility of carrying out thorough, objective and conclusive investigations on all surcharge cases. They shall submit comprehensive cases accompanied by sufficient evidence and full details of potential surchargees as per the format (**Annex III**). They shall prepare adequately for following up cases in SCAT and High Court.

6.6 Review

This Manual will be subject to regular review in order to take into account emerging issues.

6.7 Effective Date

Issued this.....day of.....2015

Signed by the Inspector-General (Corporations)

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