

Rödl & Partner

A SUMMARY OF THE TAX APPEALS
TRIBUNAL RULES AND PROCEDURES

INTRODUCTION

Kenya operates a self assessment system where the taxpayer files tax returns to the Kenya Revenue Authority (KRA) on the iTax system.

However, the Commissioner General is not bound by a tax return or information provided by, or on behalf of a taxpayer. The Commissioner may assess a taxpayer's liability using the information available to them.

CAUSES OF TAX DISPUTES

There are several reasons why tax disputes may arise, such as:

- Disagreements with the Tax Commissioner on taxable amounts and allowable taxes
- Imposition of penalties and interest as may be provided for by law
- Refusal by the Tax Commissioner or Cabinet Secretary to waive such penalties or interest where a taxpayer has made an application
- Tax overpayment
- Differing interpretation of tax laws
- Dissatisfaction on administrative actions

THE PRE-OBJECTION PROCESS

MANAGEMENT OF KRA AUDIT

KRA AUDIT

KRA undertakes audits on taxpayers based on sections 29 to 31 of the Tax Procedures Act (TPA), which allows the Commissioner to issue a taxpayer with a default assessment, amended assessment or an advance assessment.

OPEN PERIODS FOR KRA AUDIT

Section 31 of the TPA allows KRA to carry out audits on taxpayers for a period of 5 years from the year of assessment.

However, KRA can undertake an audit for any period in the case of gross or willful neglect, evasion or fraud by, or on behalf of the taxpayer.

Depending on the type of taxes under scrutiny, the department handling the audit may vary. An audit for fraud may be led by a different team as compared to an audit for underpayment of income tax.

THE PRE-OBJECTION PROCESS

RETENTION OF TAX DOCUMENTS

Section 23 of the TPA requires taxpayers to maintain documents for a period of 5 years from the end of the reporting period to which the documents relate, or such shorter period as may be specified in a tax law.

ISSUE OF AUDIT FINDINGS

Upon conclusion of the audit, KRA will ordinarily give their findings prior to the assessment.

This is a critical point in resolving audit issues before proceeding to an assessment.

The taxpayer may engage with KRA to settle the issues raised in KRA findings upon conclusion of the audit. This may help manage disputes with KRA.

THE PRE-OBJECTION PROCESS

ISSUE OF ASSESSMENT

Upon the conclusion of the audit, KRA will issue an assessment.

In the assessment, KRA will state the amount of tax that they deem due and payable from the audit of the taxpayer's records.

A taxpayer may decide to accept an assessment by the Commissioner and remit the taxes owed.

Alternatively, a taxpayer is allowed under the TPA to lodge, with the Commissioner, an objection to that assessment.

The additional assessment raised is reflected on the taxpayer's iTax account with KRA. A debit balance in the company's iTax ledger may affect issuance of a Tax Compliance Certificate (TCC) to it.

THE PRE-OBJECTION PROCESS

THE TAXPAYERS OBLIGATION

Lodging a notice of objection:

Section 51 (1) and (2) of the TPA requires a taxpayer disputing a tax decision to lodge a notice of objection within 30 days of being notified of the decision.

A tax dispute is deemed to have commenced when a taxpayer raises a notice of objection against a tax decision issued by the Commissioner under the TPA.

Objection out of time:

Section 51(6) of the TPA allows for a taxpayer to apply in writing to the Commissioner for an extension of time to lodge a notice of objection. The taxpayer will require valid reasons for the request such as illness, being outside of the country or any other reasonable cause. Additionally, the taxpayer will be required to show that they did not unreasonably delay in filing their objection.

Not all decisions made by KRA are tax decisions. Decisions like an application for waiver of fines and penalties WILL NOT fall under this ambit. An objection notice is very critical as the grounds form the basis of appeal to the tribunal and court.

THE OBJECTION PROCESS

CONDITIONS OF A VALID NOTICE OF OBJECTION

1. Taxpayer's Obligation

The following conditions must be met for an objection to be termed as validly lodged in accordance with Section 51(3) of the TPA:

- Grounds of objection, amendments required to correct the tax decision & reason for amendments
- The taxpayer has paid the entire tax not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1) of the TPA, and
- The taxpayer has attached all the relevant documents supporting their objection

THE OBJECTION PROCESS

CONDITIONS OF A VALID NOTICE OF OBJECTION

2. Commissioner's Obligation

Objection decision: Where a notice of objection is validly lodged on time , the Commissioner will consider the objection and give a decision (the “objection decision”). This is in accordance with Section 51 (8) of the TPA.

The Commissioner in charge of Dispute Resolution may give the taxpayer an opportunity to engage in Alternative Dispute Resolution (ADR) if the taxpayer so wishes, before issuing an objection decision. The ADR mechanism available to the disputing parties is a voluntary facilitated mediation process with a timeline of 120 days.

Invalid objection: Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged. The taxpayer has 7 days to provide the missing information specified in KRA's invalidation notice.

Time period for objection decision: If the Commissioner does not give an objection decision within 60 days from the date that the taxpayer lodged a notice of objection, the objection shall be allowed in accordance with Section 51(11) of the TPA.

THE APPEAL PROCESS TO THE TAT

1. The Taxpayer's obligation

Lodging a notice of appeal: Section 52 (1) of the TPA provides that a person who is dissatisfied with an appealable decision may appeal to the TAT in accordance with the Tax Appeals Tribunal Act (TAT Act)

Conditions of a valid notice of appeal: A notice of appeal is valid if, the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice. This is in accordance with Section 52(2) of the TPA.

Time for filing notice of appeal: Section 13(1) of the TAT Aat states that a notice of appeal should be in writing and should be filed within 30 days upon receipt of the Commissioner's decision.

Late filing of appeal: The Tribunal may, upon application in writing, extend the time for filing the notice of appeal and the appeal papers.

THE APPEAL PROCESS TO THE TAT

- The TAT has allowed a filing out of time on the ground that the confirmed assessment was not received by the Appellant in time.
- The TAT has also ruled an appeal to be “incompetent” where a tax dispute has not been paid.
- An objection decision is an “Appealable decision” according to the TPA, along with any other decision made under a tax law. However, a tax decision or a decision made while making a tax decision is not an appealable decision.

THE APPEAL PROCESS TO THE TAT

1. The Taxpayer's obligation

Filing of appeal papers: Section 13(2) of the TAT Act provides that within 14 days from the filing of the notice of appeal the taxpayer should submit enough copies of the memorandum of appeal, statement of facts and the tax decision.

Service of appeal to the Commissioner: Within 2 days of filing the appeal the taxpayer should serve the Commissioner with the appeal papers.

- The filing fee of KES 20,000 should be paid at the point of filing the appeal papers.
- The original receipt should be submitted to the TAT at the point of filing the appeal papers.

1.1 Memorandum of appeal

The memorandum of appeal should:

- Be signed by the Appellant (in practice an agent could sign for the Appellant)
- Set out concisely under the distinct heads, numbered consecutively, the grounds of appeal without argument or narrative,
- Contain an index of all documents in the appeal with number of pages at which they appear, and
- Be accompanied by a copy of the (i) tax decision; and (ii) notice of appeal

While compliance with the specified structure should be key, it is rare for the Tribunal to invalidate an appeal due to the adoption of a wrong structure.

1.2 Statement of facts

Statement of facts should:

- Be signed by the Appellant
- Set out precisely all the facts on which the appeal is based
- Refer specifically to documentary evidence or other evidence which it proposes to adduce at the hearing of the appeal

2. Commissioner's Obligation

Filing of appeal documents: Section 15(1) of the TAT Act requires the Commissioner to file a statement of facts giving the reason for the tax decision and other documents necessary for review of the tax decision within 30 days of being served with the appeal.

Other considerations on appeals

Burden of proof: The burden of proving that a tax decision is incorrect lies with the taxpayer in accordance with Section 56(1) of the TPA.

Grounds of appeal: Section 56(3) of the TPA states that in an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.

Admissibility of evidence: Evidence, however obtained, is admissible.

TAX APPEALS PAPERS – STRUCTURE

KRA in some instances does not file its response within the specified time. This may be raised to the Tribunal. Additionally, KRA's approach has been noted to analyze the taxpayer's grounds of appeal and rebut the same. The Tribunal should not allow KRA to introduce new facts under the law.

OTHER APPEAL PROCEDURES BEFORE THE TAT

Notice of hearing: The clerk of the Tribunal should give the parties notice of hearing at least **14 days** before the hearing date. Subsequent dates may be fixed by the Tribunal.

Hearing of the application: The Tribunal shall set down the hearing date for the application. The Tribunal is required to hear and determine an appeal within **90 days** from the date the Appeal is filed with the Tribunal.

The decision of the Tribunal shall have effect and be binding as if it were the decision of a court. If the parties are unsatisfied with the decision made by the Tribunal, they may appeal to the High Court and subsequently the Court of Appeal.

A party to proceedings before the Tribunal that is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within **30 days** of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court and subsequently the Court of Appeal.

OTHER APPEAL PROCEDURES BEFORE THE TAT

When it comes to relevant dispute timelines, Section 42(1)(d) of the Limitation of Actions Act excludes statutory timelines to recover any tax or duty, the interest on any tax or duty, any penalty for non-payment or late payment of any tax or duty or any cost or expense in connection with any such recovery.

KRA can institute a suit against a taxpayer where there has been a breach of revenue laws.

OTHER APPEAL PROCEDURES BEFORE THE TAT

CONSEQUENCES OF NON-ATTENDANCE OF HEARING

Where both parties do not attend:

The Tribunal may dismiss the appeal or give such orders that it may deem appropriate if satisfied that the notice of hearing was duly served to the parties.

If either KRA or Appellant (taxpayer) do not attend:

- Tribunal may proceed ex parte where KRA does not attend or dismiss the appeal where the taxpayer does not attend, if satisfied that the notice of hearing was duly served.
- It shall direct a second notice to be served if not satisfied that the notice was served.
- Postpone the hearing if satisfied that a notice was not served in sufficient time or for other reasonable cause, the respondent was unable to attend.

OTHER APPEAL PROCEDURES BEFORE THE TAT

Calling of witnesses:

A party to an appeal may call witnesses. The Clerk to the Tribunal will issue witness summons.

Application for review of TAT decision:

Rule 19 of TAT Rules provides that 'upon an application by the applicant, the Tribunal, stating the reasons, may set aside, vary or review a decision made under these Rules.'

The TAT has expressed willingness to review decisions especially where the errors are apparent.

OTHER APPEAL PROCEDURES AFTER THE TAT

A party who is dissatisfied with the appeal decision of the TAT may file an appeal of the decision at the Commercial and Tax Division of the High Court.

The appeal should be filed within 30 days of issuing the other party with a Notice of Appeal.

Further, an appeal of the High Court decision may be done at the Court of Appeal.

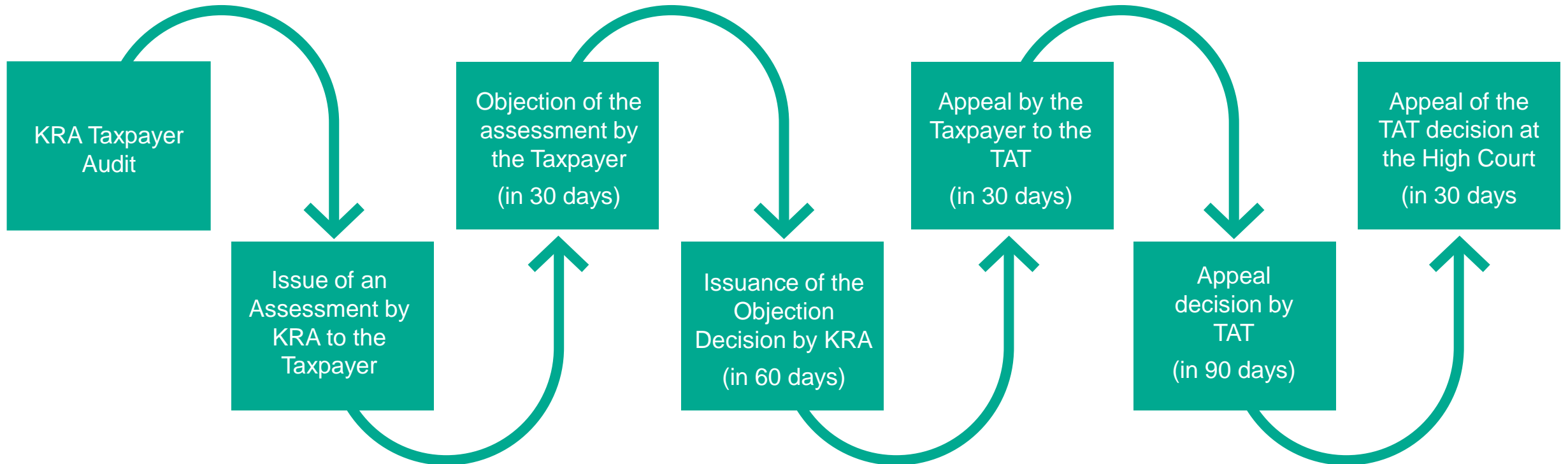
CONTROVERSIAL AREAS IN KRA AUDITS & OBJECTION PROCESS

- Request for extension of time to provide information required by the KRA.
- Delay in KRA concluding audits and issuing assessments.
- Reluctance by KRA to consider information provided during the audit process.
- Novel areas not covered under the law e.g., in oil and gas exploration.
- Date of being notified of a decision has been subject of debate.
- Audits commencing within statute of limitation period but concluded after the expiry.
- Revising of amended assessments by the KRA.

CONTROVERSIAL AREAS IN TAT APPEAL PROCESS

- Objection decisions issued out of prescribed time.
- Payment of tax not in dispute before filing of appeal.
- Rulings on procedural matters.
- The TAT not fixing a hearing date on time.
- Moving directly to Judicial Review or constitutional petitions rather than TAT.
- Referral back to TAT from High Court.
- Settlement of disputes out of TAT like the ADR process.
- Delay in giving of judgements by the TAT.

A SNAPSHOT OF THE TAT APPEAL PROCESS



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