



Tax Appeals Tribunal Rules & Procedures

The rules of the game

February 2017

Glossary of terms

KRA	Kenya Revenue Authority
TAT	Tax Appeals Tribunal
TATA	Tax Appeals Tribunal Act
TPA	Tax Procedures Act
VAT	Value Added Tax

Definition of terms

Tax decision means:

- a) An assessment;
- b) A determination of tax payable made to a trustee-in-bankruptcy, receiver, or liquidator;
- c) A determination of the amount that a tax representative, appointed person, director or controlling member is liable for under specified sections in the TPA;
- d) A decision on an application by a taxpayer to amend their self-assessment return;
- e) A refund decision;
- f) A decision requiring repayment of a refund; or
- g) A demand for a penalty.

Appealable decision means:

- a) An objection decision; and
- b) Any other decision made under a tax law but excludes–
 - A tax decision; or
 - A decision made in the course of making a tax decision.

Tax law means:

- a) The Tax Procedures Act;
- b) The Income Tax Act, Value Added Tax Act, and Excise Duty Act; and
- c) Any Regulations or other subsidiary legislation made under the Tax Procedures Act or the Income Tax Act, Value Added Tax Act, and Excise Duty Act.

Objection decision means:

The Commissioner's decision either to allow an objection in whole or in part, or disallow it.

Pre-objection process; management of KRA Audit

KRA Audit

The TPA allows the Commissioner to issue to a tax payer a default assessment, amended assessment or an advance assessment (Section 29 to 31 TPA).

It is on the basis of these sections that the KRA undertakes audits on taxpayers.

Open periods for KRA Audit

Under the TPA the KRA is allowed to carry out audits for a period of 5 years from the year of assessment (Section 31 TPA).

In cases of gross or willful neglect, evasion, or fraud by, or on behalf of, the taxpayer, the KRA may undertake an audit for any period (Section 31 TPA).

Maintenance of tax documents

The TPA requires that a taxpayer maintains tax documents in any of the official languages (Section 23 TPA).

Notes

- The KRA Audits are undertaken by different departments of the KRA that focus on different taxes. For instance, a Transfer Pricing audit would be different from a Customs audit etc.

Pre-objection process; management of KRA Audit

Retention of tax documents

The TPA provides that documents should be maintained 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 (Section 23 TPA).

Management of KRA Audit

During the audit the KRA will ordinarily require a taxpayer to provide information needed by the KRA to undertake the audit.

The taxpayer should, as far as possible, provide the required information.

Failure to provide documents could lead to issue of additional assessment.

Issue of audit findings

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

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

Notes

- Management of the KRA audit is a key step in the dispute management process.
- On conclusion of the audit the taxpayer may engage with the KRA to settle the issues raised in the KRA findings. This is an opportunity to manage disputes with the KRA.

Pre-objection process; management of KRA Audit

Issue of assessment

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

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

On issue of the assessment a taxpayer is then allowed under the TPA to lodge, with the Commissioner, an objection to the assessment.

Notes

- Ordinarily, the additional assessment is reflected on the taxpayer's statement of account with the KRA.
- Notably, a debit balance in the Company ledger, as per the KRA iTax system, will affect issuance of tax compliance certificate.

The objection process- Tax payers obligation

The Taxpayers obligation

Lodging a notice of objection: A taxpayer disputing a tax decision should lodge a notice of objection within 30 days of being notified of the decision. **Section 51(1) & (2) TPA.**

Objection out of time: taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection (**Section 51(6) TPA**).

The Commissioner may allow an application for the extension of time to file a notice of objection if:

- (a) the taxpayer was prevented from lodging the notice of objection within the specified period because of an absence from Kenya, sickness or other reasonable cause; and
- (b) the taxpayer did not unreasonably delay in lodging the notice of objection.

Notes

- Important to note is that not all decisions by KRA are tax decisions.
- One may not object to a decision that is not a tax decision.
- Date of being notified of a decision has been subject of debates- which date is it?
- Objection notice is very critical as the grounds form the basis of appeal to tribunal and court. All supporting documents should be submitted at this point.

Example

- A assessment following a tax audit amounts to a tax decision.
- The result of an application for waiver does not amount as a tax decision

The objection process- Tax payers obligation

Conditions of a valid notice of objection: the following two conditions must be met for an objection to be termed as validly lodged:

- (a) grounds of objection, amendments required & reason for amendments; and
- (b) for an objection to an assessment the taxpayer has paid the entire tax not in dispute.

Section 51(3) TPA

Application for extension of time to pay tax:

a taxpayer may apply in writing to the Commissioner for an extension of time to pay a tax due under a tax law (Section 33 TPA). When a taxpayer applies for an extension the Commissioner may, if satisfied that there is reasonable cause;

- a) Grant the taxpayer an extension of time for payment of the tax; or
- b) require the taxpayer to pay the tax in such instalments as the Commissioner may determine.

Notes

- KRA has been keen in raising issue with taxpayers failing to pay tax not in dispute prior to lodging the objection.
- A taxpayer may seek for an extension to pay tax if not in a position to pay the entire amount.

The objection process – Commissioners obligation

The 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"). [Section 51\(8\) TPA](#).

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.

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. [Section 51\(11\) TPA](#)

Notes

- The TPA does not provide for the next steps after the Commissioner informs a taxpayer that an objection is not validly lodged.

The Appeal Process to the TAT

The Taxpayers obligation

Lodging a notice of appeal: A person who is dissatisfied with an appealable decision may appeal to the TAT in accordance with the TATA. [Section 52\(1\) TPA.](#)

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. [Section 52\(2\) TPA.](#)

Time for filing notice of appeal: A notice of appeal should be in writing and should be filed within 30 days upon receipt of the Commissioner's decision. [S.13\(1\) TAT Act.](#)

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

An extension of time to file the appeal may be granted owing to absence from Kenya, or sickness, or other reasonable cause that may have prevented the applicant from filing the notice of appeal or submitting the appeal papers within the specified period of 30 days. [S.13\(1\) TAT Act.](#)

Notes

- In the TAT decision *Re:Maxwell Otieno Odongo vs. The Commissioner of Domestic Taxes TAT Appeal 40 of 2015* the TAT allowed late filing of appeal. The ground adduced was that the confirmed assessment was not received by the Appellant in time.
- The date of receipt of the confirmed assessment is very important and the taxpayers should always stamp the document with the date of receipt.

The Appeal Process to the TAT

The Taxpayers obligation

Filing of appeal papers: Within 14 days from the filing of the notice of appeal the taxpayer should submit enough copies (usually 9-10) of memorandum of appeal, statement of facts and the tax decision. **S13(2) TAT Act.**

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

Notes

- The filing fee of KES. 20,000 should be paid at the point of filing the appeal papers. This amount is to be paid to the Tax Appeals Tribunal beneficiary account at National Bank following which an original receipt is obtained.
- The original receipt should be submitted to the TAT at the point of filing the appeal papers.

The structure of TAT appeal papers

Tax Appeals Tribunal (Procedure) Rules 2015

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 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.

Statement of facts

Statement of fact should:

- Be signed by the appellant;
- Shall set out precisely all the facts on which the appeal is based; and
- Shall refer specifically to documentary evidence or other evidence which it is proposed to adduce at the hearing of the appeal.

Notes

- It would be important to comply with the specified structure of the appeal papers although the Tribunal would not invalidate an appeal due to adoption of a wrong structure.

The Appeal Process to the TAT

Commissioner's obligation

Filing of appeal documents: Within 30 days of being served with the appeal the Commissioner is required to file a statement of facts giving the reasons for the tax decision and other document necessary for review of the tax decision. **Section 15(1) TAT Act .**

Other considerations on appeals

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

Grounds of appeal: 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. **S.56(3) TPA**

Admissibility of evidence: Evidence, however obtained, is admissible. **S.57 TPA**

Filing of submissions: At the hearing oral submissions are made. The TAT also ordinarily requests parties to file written submissions within a specified number of days after the hearing.

Notes

- The KRA in some instances does not file its response within the specified time. This may be raised to the Tribunal.
- The KRA's approach has been to analyze the tax payers grounds of appeal and rebut the same. Introduction of new facts by the KRA should not be permitted by the Tribunal or indeed under the law.

Other appeal procedures before the TAT

Application for extension of time to file appeal

An application for extension of time referred to in rule shall be:

- (a) supported by an affidavit stating reasons why the applicant was unable to submit the documents in time; and
- (b) served on the respondent by the applicant within two days of filing with the clerk.

Response by the Respondent

The respondent may respond to the application by filing an affidavit within 14 days from the date of service of the application.

Hearing of the application

The Tribunal shall set down the hearing date for the application.

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.

Notes

- The TAT Act (Section 14) specifically states that the Civil Procedure Act shall not apply to proceedings before the Tribunal.
- Where there is a gap in procedure the Tribunal ordinarily gives directions.

Other appeal procedures before the TAT

Consequence of non-attendance for 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 (tax payer) do not attend:

- a) 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;
- b) It shall direct a second notice to be served if not satisfied that the notice was served; or
- c) Postpone the hearing if satisfied that notice was not served in sufficient time or for other reasonable cause, the respondent was unable to attend.

Notes

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

Calling of witnesses:

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

Application for review of TAT decision:

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

Alternative Dispute Resolution ('ADR') mechanism

Legal basis

Inferred under S.55 of the TPA

Where a Court or the Tribunal permits the parties to settle a dispute out of Court or the Tribunal, as the case may be, the settlement shall be made within **90 days** from the date the Court or the Tribunal permits the settlement.

The process

- The KRA issued the ADR framework that guides the ADR process.
- Generally, either party may initiate the process by writing to the other party.
- KRA would ordinarily ask for a settlement proposal where the taxpayer initiates the process.
- The process is facilitated by the head of Corporate Tax Dispute Resolution Division.

Note

- In our experience the KRA is open to the ADR process.
- Due to facilitation of the ADR by KRA officials issues have been raised on biasness.
- In our experience, the ADR could work in some cases but should be properly managed.

Case Study

Case Study (Part 1)

- Trust Consult ('the Company'), a business strategy consultancy firm, underwent a tax audit by the Kenya Revenue Authority ('KRA') covering Income Tax, Value Added Tax ('VAT'), and Withholding tax.
- On conclusion of the audit, the KRA issued an additional tax assessment for KES 20,000,000, dated 09 September 2016, delivered electronically on 12 September 2016, and via post on 16 September 2016.
- Trust Consult did not dispute liability of KES 8,000,000 of the assessed amount but due to cash-flow challenges on their end, they were unable to clear the undisputed amount.
- The Company however disputes any liability with respect to the balance of KES 12,000,000 and holds documentary proof to show that the liability relating to the amount of KES 12,000,000 is not due from the Company.
- The Company however needs sufficient time to retrieve the information as some of the information has been archived. The Company anticipates that it will need at least two months to gather all the documentary evidence.

Considerations

Within what time should Trust Consult file a notice of objection?

Which is the correct assessment date for the purposes of determining the filing date of the notice of objection?

What recourse did Trust Consult have if they could not file the notice of objection within the required time?

Case Study (Part 2)

- Trust Consult eventually compiled the necessary documents and lodged a notice of objection before the KRA on 20 November 2016.
- The Commissioner however challenged the validity of the notice of objection on the basis that the notice of objection was lodged out of time.
- Further, the Commissioner stated that the Company should have paid the tax not in dispute before filing the notice of Objection.
- The Commissioner then proceeded to issue Trust Consult with a Confirmed Assessment, dated 20 January 2017, that was received on 2 February 2017. The confirmed assessment was for the entire amount of KES 20,000,000.
- Trust Consult is dissatisfied with the Commissioner's decision.

Considerations

Should Trust Consult pay all the taxes not in dispute before filing the notice of objection?

What recourse does Trust Consult have to challenge the Commissioner's decision?

Within what time should Trust Consult challenge the Commissioner's decision?

Case Study (Part 3)

- Trust Consult filed a Notice of Appeal before the Tax Appeals Tribunal on 01 March 2017 but the same was not filed with the Commissioner.
- On 10 March 2017 Trust Consult presented its Appeal Papers, consisting of a Memorandum of Appeal and Statement of Facts, to the Tax Appeals Tribunal. The Tribunal however declined to receive the papers and stated that Trust Consult should have paid a filing fee.
- The papers were eventually filed on 11 March 2017 and the Commissioner was served with the same on 14 March 2017.
- In the appeal papers Trust Consult had included other grounds that had not been stated in the objection which Trust Consult felt would help with their case.
- The Commissioner filed a response to the appeal papers two months after being served with Trust Consult's appeal papers. The Commissioner's response was served on Trust Consult the same day.
- The Commissioner challenged the validity of Trust Consult's appeal on the following basis;
- ❖ The Commissioner did not receive the notice of appeal; and Trust Consult filed its papers out of time.

Considerations

Is Trust Consult under any obligation to file its Notice of Appeal with the Commissioner? Does the same apply to Trust Consult's Appeal Papers?

Must Trust Consult include the Confirmed Assessment in the appeal papers?

Can Trust Consult include in the appeal papers other grounds of appeal that were not initially included in the objection?

At what point should the filing fee payable to the Tribunal be paid?

Does the Tribunal have the authority to consider appeal papers filed out of time? Are procedural technicalities sufficient for the Tribunal to strike out a *bona fide* appeal?

Case Study (Part 4)

- The Commissioner requested the Tribunal to; strike out the appeal and costs of the case to be awarded to the Commissioner.
- Trust Consult upon receiving the Commissioner's response wishes to amend its appeal papers to include the following key issues that were omitted from the appeal papers;
 - ❖ That the Company has since commencement of the case been able to settle the tax of KES.8,000,000 not in dispute.
 - ❖ To introduce some correspondence between the Finance Manager at Trust Consult and a KRA official where Trust Consult sought and obtained consent to file its notice of objection once it had retrieved the archived information.
- After some due considerations Trust Consult would also want to pursue negotiations with the KRA out of the tribunal to settle some of the issues initially included in its appeal.
- While in the process of determining the best course of action Trust Consult is issued with a hearing notice by the Tax Appeals Tribunal. Trust Consult is however not certain that anyone from their side will be able to attend the hearing.

Considerations

Under what circumstances can Trust Consult amend its appeal papers thereby introducing new grounds of appeal that had been omitted previously?

Which rules of evidence apply in relation to adducing evidence before the Tax Appeals Tribunal?

Under what legal basis may Trust Consult pursue alternate forms of settlement with regards the tax dispute before the Tribunal?

What process governs the alternative dispute resolution mechanism for settlement of tax disputes?

What are the repercussions of Trust Consult not attending the hearing?

Case Study (Part 5)

- All the preliminary matters have been determined at the Tribunal and a judgment was delivered on 1st June 2017. Trust Consult has not received a written judgment certified by the Tribunal. Trust Consult is dissatisfied with the decision as it feels that the Tribunal failed to consider its submissions and the evidence provided to it. They contend that the Tribunal misinterpreted various provisions of the law.
- Trust Consult filed a Notice of Appeal to the High Court on 20th June 2017 but did not serve it on the Commissioner.
- On 20th July 2017 Trust Consult filed its Appeal Papers, consisting of a Memorandum of Appeal and Supporting documents. These were not served on the Commissioner.
- Trust Consult upon receiving the written Judgment wishes to amend its appeal papers to include other grounds it considered upon receiving the handwritten decision.
- In the appeal papers Trust Consult included other grounds that had not been raised before the TAT which Trust Consult felt would assist their appeal.

Considerations

Within what time should Trust Consult file a Notice of Appeal?

Is Trust Consult obliged to serve the Notice of Appeal on the Commissioner?

What constitutes the appeal papers to be filed by Trust Consult?

What recourse does Trust Consult have for having filed the appeal without the benefit of the judgment?

Was Trust Consult acting within the law in including new grounds that had not been raised before the TAT?

Case Study (Part 5 Cont;)

- The Commissioner filed a response to the memorandum of appeal within two months of service. The Commissioner's response was served on Trust Consult on the same day.
- The Commissioner challenged the validity of Trust Consult's appeal on the basis that the Commissioner did not receive the notice of appeal.
- Trust Consult is issued with a hearing notice by the Court. Trust Consult is however not certain that anyone from their side will be able to attend the hearing.
- After some due considerations Trust Consult would also want to pursue negotiations with the KRA out of Court to settle some of the issues raised in the appeal.
- Trust Consult wishes to know what action to take if the High Court dismisses its appeal.

Considerations

Within what period is the Commissioner required to respond to the Memorandum of Appeal?

Can the Commissioner challenge the appeal on the basis that no notice was served on the Commissioner?

Is Trust Consult obliged to attend the hearing of the appeal?

Can the court direct parties to an appeal to settle the matter out of court?

Is the High Court determination final?

Case Study (Part 6)

- In the recent past, Trust Consult has been appointed to carry out several projects in the public sector.
- Trust Consult points out to KRA that the Government through 15 of its ministries, state corporations and counties owe Trust Consult sums in excess of KShs. 25 million for work done. This has led to Trust Consult's inability to pay the undisputed taxes of KShs. 8,000,000/-.
- Trust Consult proposes to pay monthly instalments of KShs. 1 million pegged on receipt of money from the Government, to settle the outstanding tax liability. Trust Consult made an initial payment of this sum in September 2017.
- The Medium Taxpayer's Office of KRA agrees to allow Trust Consult to discount its invoices with its bankers to finance its operations and further agrees to collect the outstanding invoices, which were not discounted, from 5 the Government ministries and agencies. It also agrees to stop any enforcement action.

Considerations

What are the other ways that can Trust Consult approach the High Court other than by way of an appeal?

Can the courts quash the demand of Kshs.8,000,000/- in its entirety?

Case Study (Part 6 Cont;)

- KRA's Debt Enforcement Unit disowns the agreement and issues agency notices in respect to the discounted invoices to all its 15 debtors and its accounts with the bankers.
- An employee of Trust Consult has left employment after being implicated in a fraud in the organization and destroyed a large number of documents in a bid to hide his tracks. Trust Consult has requested KRA to avail it documents from its records such as VAT and Withholding tax returns and which documents KRA used in the tax assessment to enable mount the appeal in court. KRA has declined to respond to the numerous requests.

Considerations

Can the courts prohibit the issuing of agency notices if any by the KRA?

Can the court prohibit any form of enforcement action?

Can the courts compel KRA to investigate further or re-examine the books?

Can the courts compel KRA to provide documents in its custody?

Can the court compel the KRA to compensate the tax payer for any losses it may have suffered as a result of its actions?

Q & A



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

"Deloitte" is the brand under which tens of thousands of dedicated professionals in independent firms throughout the world collaborate to provide audit, consulting, financial advisory, risk management, and tax services to selected clients. These firms are members of Deloitte Touche Tohmatsu Limited (DTTL), a UK private company limited by guarantee. Each member firm provides services in a particular geographic area and is subject to the laws and professional regulations of the particular country or countries in which it operates. DTTL does not itself provide services to clients. DTTL and each DTTL member firm are separate and distinct legal entities, which cannot obligate each other. DTTL and each DTTL member firm are liable only for their own acts or omissions and not those of each other. Each DTTL member firm is structured differently in accordance with national laws, regulations, customary practice, and other factors, and may secure the provision of professional services in its territory through subsidiaries, affiliates, and/or other entities.