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).

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).

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.

• 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.

• Ordinarily, the additional assessment is reflected on the taxpayer’s iTax 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.
Pre-objection process
Management of KRA Audit

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).

• Not all decisions by KRA are tax decisions like application for waiver of interest and penalties.
• 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.
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 or has applied for an extension of time to pay the tax not in dispute under section 33(1).  
Section 51(3) TPA; Finance Act, 2018

• KRA has been keen in raising issue with taxpayers failing to pay tax not in dispute prior to lodging the objection.
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

- 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.

• 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 tax in dispute had not been paid.
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.

- 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 TAT 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.

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*

- 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 taxpayers' 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

**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.

• In some cases the TAT is slow in setting the hearing date.
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.

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’.
Controversial areas
Controversial areas in KRA audits & objection process

• Request for extension of time to provide information for required by the KRA.

• Delays 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 & 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 ADR process.
- Delay in giving of judgments by the TAT.