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KENYAN TAX AMNESTY

Frequently asked questions (FAQs) – updated March 2018

1) What is the legal basis of the amnesty?

The amnesty has its legal basis in The Finance Act, 2016 and 2017 which introduce various provisions in the Tax Procedures Act (TPA) and provide that notwithstanding any other provisions of the Tax Procedures Act, the Commissioner shall refrain from assessing or recovering taxes, penalties or interest in respect of any year of income ending on or before 31st December 2016, and from following up on the sources of income under the amnesty where:

- that income has been declared for the year 2016 by a person earning taxable income outside Kenya; and
- the returns and accounts for the year 2016 are submitted on or before 30th June 2018.

The provisions require that Funds voluntarily declared have to be transferred back to Kenya by 30th June 2018. Where the Funds are not transferred during the period of the amnesty, there shall be a 5-year period for remittance, but a penalty of 10% shall be levied on remittance.

Provided the amnesty shall not apply in respect of any tax where the person who should have paid tax:

- has been assessed in respect of tax or any matter relating to the tax; or
- is under audit or investigation in respect of undisclosed income or any matter relating to the undisclosed income on the date The Finance Act, 2016 was assented to (13th September 2016).

The TPA which became effective on 19th January 2016, harmonises and consolidates the procedural rules for the administration of the tax laws in Kenya except where a tax law specifically provides for a procedure that is unique to that tax law. Tax laws are defined to include the TPA, Income Tax Act, Value Added Tax Act, Excise Duty Act and any Regulations or other subsidiary legislation made thereunder.

The Kenya Revenue Authority (KRA) has issued Guidelines on Amnesty in Respect of Foreign Assets and Income, 2017 and Frequently Asked Questions (FAQs), which provide guidance on the declaration of income and submission of tax returns and accounts as provided under Section 37B of the TPA.

2) What is the tax period covered under the amnesty?

The amnesty covers the period for and up to 31st December 2016 provided the person making the application has completed the amnesty return on the iTax platform in the prescribed format using Form A/37B - Amnesty Declaration of Foreign Income, has made full disclosure of the foreign income earned for the year ended 31st December 2016 and has filed the return on or before 30th June 2018.

The return may be amended provided such amendment is made before 30th June 2018.

While 30th June 2018 falls on a Saturday, the TPA provides that where a person submits a tax return in electronic form, the due date shall remain the date as specified in the relevant tax law, which in this case will be 30th June 2018. However, it is important to ensure that the Funds that are required to be remitted, are credited to your local bank account by that day to avoid the 10% penalty.

3) Who qualifies for the amnesty?

The amnesty is available to any resident "person" including an individual, company, partnership, limited liability partnership, societies, association of persons, trusts and international organisations whose members are sovereign powers or governments of sovereign powers.

In addition:

- a person who was resident for tax purposes in Kenya in the year in which he earned taxable income outside Kenya; and
- a non-resident in the year in which he earned taxable income outside Kenya and such income would have been taxable in Kenya if such income had been accrued in or derived from Kenya; would also qualify for declaration.

However, persons who have already been assessed in respect of tax or are under an audit or investigation in respect of undisclosed income or any matter relating to undisclosed income on the date the Finance Act 2016 was assented to (13th Sept 2016) do not qualify for declaration.

4) Why is the amnesty being provided on taxable foreign income which is not taxable in Kenya anyway?

Kenya will in due course join the Common Reporting Standard (CRS) regime which provides for an annual and automatic sharing of financial account information of a person who is tax resident in Kenya and in respect of whom the Kenya Revenue Authority (KRA) can obtain such financial information from another revenue authority that it has signed an agreement with. KRA will also provide the other revenue authority with similar information about tax residents of those countries who have reportable accounts in Kenya.

The following information will automatically be exchanged between the participating revenue authorities:

- Individual – name, address, tax identification number (TIN) and date and place of birth;
- Entity – name, address and TIN of the entity and name, address, TIN and date and place of birth for each controlling person;
- Bank account number and name and identifying number of the reporting financial institution;
- The account balance or value (in case of cash value insurance or annuity contract, the cash value or surrender value);
- Custodial account:
 - total gross interest, total gross dividends, and total gross amount of other income generated with respect to the assets held in the account (both paid or credited); and
 - total gross proceeds from the sale or redemption of property paid or credited where the institution acted as a custodian, broker, nominee, or as an agent;
- Depository account – total gross amount of interest paid or credited; and
- Any other total gross amount paid or credited to the account holder under a custodial or depository account including the aggregate amount of any redemption payments made.

The purpose of the amnesty is therefore to provide such persons who are Kenyan residents for tax purposes and who earn income from assets held or business carried out abroad an opportunity to declare these as part of the amnesty. Such amnesties are not uncommon and many countries including South Africa, France, India and Brazil have introduced such amnesties.

While the wording of the Act states that the amnesty is available to a person who has declared taxable income earned outside Kenya, the Guidelines have defined "income" to mean taxable income earned outside Kenya which would have been taxable in Kenya under Kenyan tax laws if it had been accrued or derived in Kenya or deemed to have been accrued in or derived in Kenya. This means that the amnesty is available on all income earned outside Kenya.

5) After declaration, will foreign income be taxable in Kenya?

Kenya operates on a source-based tax system whereby income tax is only charged upon all the income of a person, whether resident or non-resident, which is accrued or was derived from Kenya. The only exception to this rule is:

- where a business is carried on by a resident person partly within and partly outside Kenya, the whole of the gains or profits is deemed to have accrued in or be derived from Kenya (i.e. the income of a branch of a resident company or of a foreign company whose management and control is exercised in Kenya in a particular year of income);
- in case of employment income, the global employment income of a Kenyan resident and in case of a non-resident, any employment income arising from services rendered to an employer who is resident in Kenya or to a permanent establishment in Kenya of a non-resident employer;
- pension payments received by a resident individual from a pension scheme established outside Kenya to the extent that it relates to employment rendered by the individual, or the husband or parent of the individual, in Kenya;
- gains or profits from deposits, assets or other property held outside Kenya by a branch in Kenya of a foreign bank; and
- payments from cross-border leases.

Therefore, except for the exceptions noted above and subject to any future change in law to tax global income, income that is not accrued in or derived from Kenya is not taxable in Kenya.

6) What is the procedure of declaration?

The TPA requires that the declaration is done through the submission of returns and accounts for the year 2016. The Guidelines have defined this to mean the Statement of Assets and Liabilities made in the Return in the format set out on the iTax Platform as Form A/37B.

The following disclosure is required in the return:

- Name of the person/s making the declaration, address, Personal Identification Number (PIN) and passport number;
- Description of the immovable properties, investments (investment portfolio, insurance policies, shares, treasury instruments or other property), businesses and bank accounts held abroad including assets held under trust arrangements;
- Details of employment abroad;
- Details of bank accounts in Kenya;
- Cost or the best estimate of the market value of the assets as assessed by the applicant; and
- Income earned from the assets and employment for the year ended 31st December 2016.

In the context of the Guidelines, income is defined to include taxable income earned outside Kenya which would have been taxable in Kenya if it had been accrued in or derived from Kenya or deemed to have been accrued in or derived in Kenya.

A person who submits the above information is not required to provide any further details or supporting documentation and the Commissioner is refrained from following up on the source of income. To further emphasise this point, the Commissioner, under the Guidelines, has undertaken to provide every necessary support in the spirit of trust through facilitation to all taxpayers who wish to take advantage of the amnesty.

7) Is the process of application automatic or can the Commissioner reject an application?

The TPA does not provide for a rejection process.

Once the amnesty declaration is submitted using Form A/37B on the iTax platform, an automatic acknowledgement will be generated by the system signifying the acceptance of the declaration.

Thereafter, a certificate shall be issued once all the Funds due for remission are remitted and the proof of remittance is provided to the KRA. Certificate has been defined to mean "certificate issued upon approval of the application".

8) Who will make the declaration?

The declaration is to be made by the taxpayer. However:

- married couples – may file a joint declaration irrespective of whether they file joint or separate self-assessment returns.
- minors or persons under disability – the declaration can be made by the parent or legal guardian.
- assets held under trust – the declaration can be made by either the trustee, settlor or the beneficiary.

A tax agent or representative may also make the declaration on behalf of the applicant.

9) Do the assets declared in the amnesty have to be repatriated and within what period does the repatriation have to take place?

The purpose of the amnesty is to encourage voluntary repatriation of foreign held assets to Kenya and invest in the development of the Nation.

Under Law, only assets that are required to be remitted are Funds which are defined to include "cash declared in the return and accounts for the purpose of transfer back into the country". In our view, this will include cash and bank balances including savings and time deposits that are declared under Section G of Form A/37B.

All other assets including investment portfolios, insurance policies, shares or other properties that are situated outside Kenya and are funded from income derived from or accruing from sources within or outside Kenya including those assets held under trusts are not required to be repatriated.

Funds voluntarily declared under the amnesty shall be repatriated on their maturity and in any case not later than 30th June 2018. Where the Funds have not been transferred to Kenya by this date, there shall be a 5-year extension period up to 30th June 2023 for remittance, but a penalty of 10% will be levied on remittance.

Where Funds voluntarily declared are not repatriated within the 5-year period, then the amnesty application will be void and one will not qualify for the amnesty.

The Funds can be repatriated in instalments, but any repatriation after 30th June 2018 will be subject to the 10% penalty. The Amnesty Certificate will only be issued upon full repatriation.

Moreover, Funds can also be repatriated before the filing of the return, provided that the Funds are subsequently reflected in the return to qualify for the amnesty.

In certain rare circumstances, where the Funds cannot be repatriated for reasons beyond the taxpayer's control, the Commissioner will review and guide on the matter, on a case-by-case basis. Such circumstances include where there is a legal restriction on the repatriation of the Funds due to exchange controls in the country where the Funds are maintained or the Funds have been permanently consumed (e.g. for medical, educational or other personal expenses but not for investment purposes).

Moreover, where Funds are pledged or secured against a liability, funds net of the liability will be repatriated. In such cases, full disclosure of the asset and liability will be required.

10) How is the declaration to be done for trusts?

In the case of trusts, the declaration can be done by the trust (through the trustees), the settlor or beneficiary or through a tax representative or agent.

The declaration for trusts will be done under Section C of the return showing the aggregate of assets and the liabilities held under each individual trust as attributable:

- In case of a beneficiary making the application - to the beneficiary; and
- In case of the trustee or the settlor making the application - to the beneficiaries who are Kenya resident taxpayers and to any other person entitled to make the amnesty application.

The aggregated declaration above should be supported by a breakdown, attributable to the beneficiary (in case where the declaration is made by the beneficiary) or to the beneficiaries who are Kenya residents taxpayers and to any other person entitled to make the amnesty application (where the declaration is made by the settlor or the trustees), giving details of the names, PIN, passport numbers, and details of the assets held based on the broad categories of funds, immovable properties, businesses and investments and less any liabilities.

Funds attributable to the Kenya resident taxpayers and to any other person entitled to make the amnesty application will be remitted back to Kenya as provided in Question 9 above.

The RSM tax team in Kenya headed by Ashif Kassam (akassam@ke.rsm-ea.com) has extensive experience in assisting clients with amnesty declarations including post-declaration transaction and group restructuring. Our tax department is able to assist you in the following areas:

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