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## VOLUNTARY TAX DISCLOSURE PROGRAMME (VTDP)

Frequently asked questions (FAQS)

## WHAT IS THE LEGAL BASIS OF THE VTDP?

The programme has its legal basis in The Finance Act, 2020 which introduced various provisions in the Tax Procedures Act (TPA). VTDP is a program which allows taxpayers to voluntarily disclose any tax liabilities which were previously undisclosed to the Commissioner for the purposes of tax compliance where relief will be granted on penalties and interest on the tax disclosed.

The purpose of the programme is to encourage voluntary disclosure of undeclared taxes and payment of principal taxes by avoiding imposition of punitive penalties and interest. It is aimed at enhancing compliance by also improving revenue collection and bringing more taxpayers under the tax net.

All material facts shall need to be disclosed and this application is voluntary. There is no clarification of what is considered material facts in this context and what exactly needs to be submitted upon declaration. However, the intention appears to be that the taxpayer will review total tax compliance and apply for amnesty on all areas of non-compliance. This programme also appears to protect a taxpayer from any minor errors that could occur while declaring the amnesty.

The disclosure of a tax liability under this programme is confidential.



## WHAT IS THE TAX PERIOD COVERED UNDER THE VTDP?

The programme covers the period from 1st July 2015 to 30th June 2020 where undeclared tax liabilities were accrued by the taxpayer within this period of 5 years.

Under the TPA, the Commissioner may amend an assessment within 5 years of the submission of the return. Any extension to this period is only in the cases of gross or willful neglect, fraud or evasion which, by practice, puts the onus on the Commissioner to prove.

For taxpayers opting for the amnesty, it is unlikely that the Commissioner would go beyond 5 years if the full liability is disclosed. It is also important that if there are any gaps after 1st July 2020, these are also considered and regularized going forward.

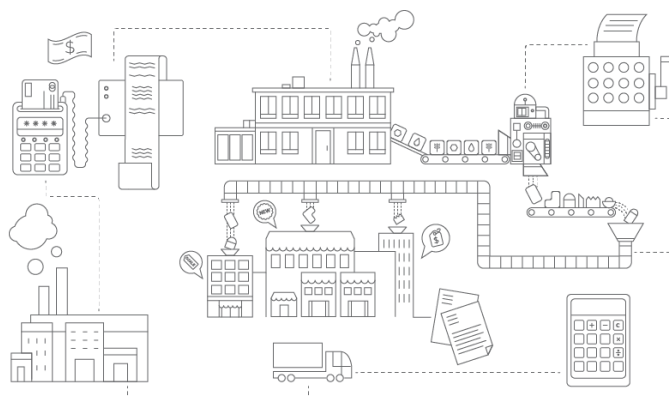
## WHO QUALIFIES FOR THE VTDP?

The programme is available to all taxpayers (with any undisclosed tax liabilities for the period from 1st July 2015 to 30th June 2020) unless:

- The taxpayer is under audit, investigation or is a party to ongoing litigation in respect of the tax liability or any matter relating to the tax liability; or
- The taxpayer has been notified of a pending audit or investigation by the Commissioner.

## WHEN DOES VTDP BECOME EFFECTIVE?

This programme will run from 1st January 2021 to 31st December 2023. Applications need to be made within this period of 3 years.



## HOW MUCH RELIEF IS GRANTED UNDER VTDP?

Any unpaid principal tax declared under VTDP shall need to be paid to the Commissioner.

Provided the Commissioner is satisfied with the facts disclosed under the application, he shall grant relief as follows:

- 100% remission of penalties and interest where the disclosure is made in the year 2021
- 50% remission of penalties and interest where the disclosure is made in the year 2022
- 25% remission of penalties and interest where the disclosure is made in the year 2023

It should be noted that the amnesty shall not result in the payment of a refund to the taxpayer. If there are errors in filing of the returns which need to be corrected, these are covered under a separate provision of the Act.

The taxpayer shall not be prosecuted with respect to tax liability disclosed under this programme. This provides protection against gross or wilful neglect, fraud or evasion which could have occurred during the amnesty period.

A person granted relief under the programme shall not be prosecuted on the same set of facts in respect of the fully disclosed and paid taxes.

## WHICH INCOME IS TAXABLE UNDER THIS PROGRAMME 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.



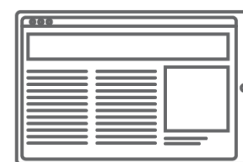
Therefore, except for the exceptions noted above, income that is not accrued in or derived from Kenya is not taxable in Kenya.

## WHAT IS COMMON REPORTING STANDARDS?

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 a 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 VTDP is available to any person who has undeclared taxable liability or may have evaded tax in Kenya. With the introduction of CRS, Kenyan residents with investments and bank accounts in overseas countries may be required to explain their source of funds if they did not take advantage of the foreign amnesty offered by the Kenyan Government previously. It may be beneficial for any persons with undeclared tax liabilities to take advantage of this programme and declare their undisclosed tax liabilities arising on any income accrued or derived from Kenya.

## WHAT IS THE PROCEDURE OF APPLICATION?

The application is made online through the iTax platform in a prescribed form for the specific tax head under disclosure.

An acknowledgment slip is received upon submission of the return.

A VTDP return may be amended once at any time within the payment arrangement period provided that the amendment does not result in refund of tax already paid under the programme.

A certificate shall be issued as evidence that the taxpayer took advantage of the amnesty for the taxes of the period specified on that certificate. The certificate shall only cover the taxes disclosed and the corresponding tax periods.

## HOW WILL THE PAYMENT OF TAXES BE MADE UNDER VTDP?

Where the Commissioner is satisfied with the facts disclosed under the application, relief will be granted for the penalties and interest. An agreement will be entered into with the taxpayer setting out the terms of payment of the principal tax liability and the period within which the payment shall need to be made which shall not exceed 1 year from the date of the agreement.



## WHAT HAPPENS IF THE TAXPAYER FAILS TO PAY THE TAXES UNDER THE AGREEMENT?

Where a person fails to pay the principal taxes under the terms of the agreement granted by the Commissioner, the taxpayer shall be liable to pay the full interest and penalty which had been remitted under the agreement. If the person entered into an agreement with the Commissioner for staggered payment of disclosed taxes but fails to honour the arrangement within the agreement period, the person will lose any relief granted and shall pay the taxes in full.

Where a person makes a disclosure in one period but makes part payment in that period and partly in a subsequent period, the remission rate applicable shall be as prescribed for each period.

No other remedies can be sought by the taxpayer including right of appeal with respect of taxes, penalties and interest remitted by the Commissioner.

## WHAT HAPPENS IF THE TAXPAYER FAILS TO DISCLOSE MATERIAL FACTS?

If the taxpayer fails to disclose all material facts, the Commissioner may not grant any relief from penalties and interest on the tax disclosed.

However, where the Commissioner had entered into an agreement with the taxpayer, and before the expiry of that agreement the Commissioner discovers that the taxpayer had failed to disclose a material fact in respect of the relief granted, the Commissioner may:

- Withdraw any relief granted;
- Assess and collect any balance of the tax liability; or

Commence prosecution of an offence

## WHAT STEPS OF ACTION DOES A TAXPAYER NEED TO TAKE?

- Taxpayer needs to self-assess if there may be any undisclosed tax liabilities. This can be done by having a tax health check on all relevant tax heads. Any undeclared tax liabilities for the period from 1st July 2015 to 30th June 2020 will need to be quantified. The following tax heads may need to be reviewed if applicable:
  - Corporation tax including transfer pricing arrangements, thin capitalisation, investment deductions.
  - Personal income tax
  - PAYE
  - VAT
  - Withholding tax
  - Withholding VAT
  - Capital gains tax
  - Excise duty
  - Turnover tax
  - Monthly rental income tax
- Apply for the VTDP by submitting the application in the prescribed form on iTax for the relevant tax head and period along with the material facts which need to be disclosed along with the application.
- Agree with the Commissioner on the payment plan once relief for penalties and interest have been granted.
- Ensure the iTax ledger reconciliation has been done once application and payment has been processed.

Some taxpayers have received standard communication from KRA to take advantage of the VTDP or they may be subject to KRA audit. The taxpayers will need to analyse their tax status in order to decide whether to take advantage of the VTDP. These taxpayers had been identified by KRA to be subject to KRA audits before the programme was rolled out. We recommend that taxpayers review their tax statuses and decide if there are any non-compliances before the start of the KRA audit, otherwise on the notice of audit they will not be eligible for amnesty.

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## NAIROBI

1st Floor, Pacis Centre,  
Slip Road, off Waiyaki Way, Westlands  
P.O. Box 349, 00606  
Nairobi, Kenya

Tel: +254 20 3614000/4451747/8/9  
Mobile: +254 706 347950/772 786111  
Email: [info@ke.rsm-ea.com](mailto:info@ke.rsm-ea.com)  
Website: [www.rsm.global/kenya](http://www.rsm.global/kenya)  
Contact: Ashif Kassam (Executive Chairman)

## MOMBASA

3rd Floor, Bayview Place,  
Moi Avenue  
P.O. Box 87227, 80100  
Mombasa, Kenya

Tel: +254 41 2311778/2312640/2224116  
Mobile: +254 707 613329  
Email: [infomsa@ke.rsm-ea.com](mailto:infomsa@ke.rsm-ea.com)  
Website: [www.rsm.global/kenya](http://www.rsm.global/kenya)  
Contact: Nihla Mazrui (Partner)

## DAR ES SALAAM

1st Floor, Plot 1040, Haile Selassie Road,  
Masaki  
P.O. Box 79586  
Dar es Salaam, Tanzania

Tel: +255 22 2137314/15  
Email: [info@tz.rsm-ea.com](mailto:info@tz.rsm-ea.com)  
Website: [www.rsm.global/tanzania](http://www.rsm.global/tanzania)  
Contact: Lina Ratansi (Group Chief Executive)

## KAMPALA

6th Floor, DTB Centre,  
Plot 17/19, Kampala Road  
P.O. Box 31704,  
Kampala, Uganda

Tel: +256 414 342780  
Email: [info@ug.rsm-ea.com](mailto:info@ug.rsm-ea.com)  
Website: [www.rsm.global/uganda](http://www.rsm.global/uganda)  
Contact: John Walabyeki (Managing Partner)

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