

Taking Advantage of the Tax Amnesty on Foreign Income

What is it all about?

The Kenyan Government has offered a tax amnesty to persons who earned income and owned assets outside Kenya provided these persons declare (as per the requirements) and repatriate the foreign incomes and/or assets relating to any year of income ending on or before 31st December 2016 by 30th June 2018.

An amnesty serves two main purposes: increased inflows of capital held abroad and broadening of the tax base for future tax collections.

Common Reporting Standards (CRS) regime

Kenya agreed to be part of CRS, an initiative by the Organisation for Economic Cooperation and Development (OECD) to enhance transparency for taxation purposes. Under CRS, countries are required to obtain information from their financial institutions and automatically share that information with other countries.

Every year, Kenya Revenue Authority (KRA) will automatically receive information on bank accounts held by Kenyans abroad. The first exchange of this information is expected to commence in 2018.

This has a huge implication to Kenyans with foreign incomes and assets, making the amnesty timely.

Common foreign earned incomes

These will include:

- Rental income for property owned abroad
- Dividends on shares held in foreign companies
- Insurance policy payments
- Capital gains on sale of properties
- Interest incomes on offshore bank accounts
- Income from offshore investment portfolios
- Incomes on business conducted offshore.

There is need to evaluate the current taxation of each of the above incomes under the Kenyan Tax Laws to first determine the current tax exposure on failure to declare those incomes.

Are the foreign incomes subject to tax in Kenya?

Is Kenya offering amnesty for some foreign incomes that are not taxable in Kenya in the first place?

If taxpayers go ahead and apply for amnesty on foreign incomes that were not taxable in the first place, they are more or less agreeing to pay tax on incomes that were not taxable after the amnesty period.

Section 3(1) of the Income Tax Act states:

Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.

However, where business is carried on partly in Kenya and partly outside Kenya by a resident person, the whole income is taxable in Kenya. So you need to determine if the foreign incomes were subject to tax in Kenya in the first place.

Implication of Double Tax Treaties

Taxpayers could be earning some of these incomes from countries that have double tax agreements (DTAs) with Kenya. DTAs allocate the taxing rights over income earned by resident in one Treaty State in the other Treaty State. Some popular investment destinations for Kenyans include U.K and India, which we have DTAs in force.

Therefore, taxpayers need to evaluate the applicability of DTAs in determining the taxing State. If the DTA requires the income to be only taxable in the source State or where the income is derived, then this amnesty will not confer any benefits to such a taxpayer, since that income is already exempted from being taxed by Kenya under the DTA in force.

For example, under Article 6 of the Kenya – India DTA income from immovable property will only be taxable in the State where the property is situated. Should a Kenyan resident apply for tax amnesty for rental income earned from a house they own in India? Of course not.

Moreover, the foreign tax credit provided by some of the DTAs could also potentially reduce the tax liabilities on these foreign incomes to nil.

KRA guidelines on the amnesty

KRA issued guidelines on the amnesty in March 2017. Some highlights are:

- The income must not be derived from Kenya
- The foreign income has not been declared prior to the amnesty
- The person is not under a tax audit or investigation
- A physical repatriation of the assets
- An amnesty certificate will be generated through iTax when the requirements are met.

What is physical repatriation of assets?

KRA in their amnesty guidelines defined assets to include bank deposits, investment portfolio, insurance policies, shares or other property.

This creates some challenges since repatriation of some of the above assets might not be possible in practice. For example, how do you repatriate a house you own in London?

KRA has subsequently clarified that repatriation will be mainly in the form cash as long as it is accompanied by evidence of remittance.

Let's talk amnesty matters

The implication and approach to the tax amnesty will depend on each taxpayers' peculiar circumstances. It is prudent to evaluate the implication of this amnesty considering not only the past tax exposure, but also the post-amnesty exposure and compliance requirements.

For discussions on the tax amnesty on foreign income, please contact Johnson Ngila on:

- ❖ *Tel: +254722944496*
- ❖ *Email: johnson@stratton.consulting*
- ❖ *Office: 1st Floor, Kaderbhoy Building, Nkrumah Road, Mombasa*