

Kenya

Tax Amnesty on Foreign Income

Kenyan Tax amnesty provisions

The Kenyan tax amnesty program ("the Program") on foreign income, was introduced in the Kenyan law by way of an amendment to the Tax Procedures Act 2015 ("TPA"), through the Finance Act 2016. Further, the Kenya Revenue Authority ("KRA") issued guidelines on the same, termed as the Foreign Income and Assets Tax Amnesty Guidelines 2017 ("The Guidelines"), which came into force on 01 January 2017. Further changes were made to the amnesty provisions in the TPA through the Finance Act 2017.

The Program bars the KRA from assessing or recovering taxes in relation to income declared under the Program, and the related penalties and interest for any year of income ending on or before 31 December 2016. For tax purposes, the year of income for individuals is deemed to be the calendar year (01 January to 31 December) whereas for companies it is the accounting period for which the financial statements are prepared.

Additionally, the Commissioner of Domestic Taxes ("the Commissioner") is also barred from investigating the various sources of income for tax purposes. This however only relates to tax obligations and does not appear to protect one from investigations or prosecution by other authorities under the Kenyan laws for example under the Anti Money Laundering and Anti Bribery law.

Eligibility for the tax amnesty

A person may make an application for tax amnesty by voluntarily declaring their foreign earned income through the iTax platform and thereby regularize their tax accounts. The key criteria for eligibility is as follows:

- The income under the Amnesty is declared in the year of income 2016 by the person earning the taxable income outside Kenya.
- The income under the amnesty is voluntarily declared on or before 30 June 2018.
- The voluntarily declared funds or assets have been repatriated back to Kenya.
- Where no funds or assets have been repatriated by 30 June 2018 (the amnesty period), there shall be a five year period for remittance but a penalty of 10% shall be levied on the remittance.

Assets for repatriation purposes within the purview of the tax amnesty program include bank deposits, investment portfolios, insurance policies, shares or other related property that are situated outside Kenya including assets held under trust.

On declaration, the value of the assets so declared should be the cost or the market value as assessed by the person making the application.

The tax amnesty program is available to individuals, companies, partnerships, limited liability partnerships, associations of persons, trusts, the National Government, foreign governments, political subdivisions of the National Government or foreign governments or international organisations.

Where a person was a Kenyan tax resident at the time of earning the foreign income, he can make the application regardless of the tax residency status at the time of declaration.

Further, an applicant who was not a Kenyan tax resident at the time of earning the foreign income may also apply for amnesty where the income would have been taxable in Kenya if the same was accrued or derived in Kenya.

Where the assets are held under trust, the application for amnesty may be made by the trustee or the settlor or the beneficiary of the trust.

The income covered under the tax amnesty

The tax amnesty relates to taxable income earned outside Kenya which would have been taxable in Kenya under the Kenya tax laws if it had been accrued or derived in Kenya or deemed to have been accrued or derived in Kenya.

The following is not covered under the tax amnesty:

- Income earned in Kenya;
- Income earned outside Kenya but already declared and taxed in Kenya;
- Instances where a taxpayer making an application for amnesty is under a tax audit or investigation by the Commissioner of Domestic Taxes.

How do taxpayers participate in the Tax Amnesty?

To take advantage of the tax amnesty program, the taxpayer is required to make an application through an online form (A/37B), available on the KRA iTax platform.

The Guidelines provide that the taxpayer should make a complete and full disclosure of the foreign income earned on or before 31 December 2016 as well as the underlying assets and liabilities, following which form A/37B is submitted via the iTax platform.

Once completed and submitted, the taxpayer is not required to provide any further details or documentation in support of the application. However, in order to qualify for amnesty, full

physical repatriation of the declared income and/or assets is required.

Following submission of form A/37B, the taxpayer will be issued with a system generated acknowledgement copy of the application. Consequently, the taxpayer will be issued with a system generated certificate once the amnesty has been granted by the Commissioner of Domestic Taxes. However, the Guidelines do not provide a timeline within which the Commissioner will respond to an application for amnesty.

In relation to married couples, the Guidelines note that they may make a joint application for amnesty, regardless of whether they file joint or separate returns. Additionally, in relation to minors, the Guidelines stipulate that foreign income so earned may be declared by the minor's parent or legal guardian.

Important Notice

The information in this document has been prepared by an external consultant and is for general guidance only. The information may not be complete nor suited to your specific circumstances and therefore should not be relied upon. On this basis, each tax payer should evaluate their facts and circumstances to determine whether the Program is appropriate. Further, given the complexity of the Program as well as the various conditions and implications thereof, we highly recommend that taxpayers engage the assistance of an independent legal or tax counsel.