

# Tax Alert

## Tax Amnesty on Foreign Income & Assets – FAQs

### 1. Which taxpayers does the Amnesty apply to?

Based on the KRA issued guidelines, the tax amnesty applies to any person (corporate or natural person) who was or is taxable in Kenya on foreign income which has not been declared or taxed in Kenya. This includes persons who were previously tax resident in Kenya but who are not resident at the time of making the amnesty declaration.

Excluded from the amnesty are persons who have been assessed or who were under audit or investigation with respect to assets, liabilities or incomes that qualify for the amnesty as at the date that the Finance Act 2016 was assented to (13 September 2016).

### 2. Which incomes does the Amnesty apply to?

The amnesty applies to taxable foreign income which has not been declared or taxed in Kenya. The amnesty regulations issued by the KRA are unclear as to what constitutes “foreign income” particularly given that the phrase “foreign income” does not exist in Kenyan law. However, based on our review of the charging provisions in the Income Tax Act, we consider that “foreign income” as envisaged by the amnesty regulation may include:

#### Companies:

- Business income generated outside of Kenya by a tax resident, where the business is partly carried on in Kenya and partly carried on outside Kenya.
- Gains or profits from deposits, assets or other property held outside Kenya by a branch in Kenya of a foreign bank from its banking operations in Kenya and
- Business income which arose in Kenya but which was reduced by potentially unjustifiable or unsupported management fees, technical fees or royalties paid to a related overseas entity i.e. profit stripping.

#### Individuals:

- Foreign employment income earned by a tax resident individual;



- Foreign pension payments which relate to past employment in Kenya;
- Compensation for work performed in Kenya e.g. salaries or consultancy fees which were paid to an individual’s offshore account.

It is important to note that certain “foreign income” such as lease payments in respect of foreign-located movable or immovable assets or foreign non-trading income such as foreign interest or dividends are not necessarily subject to tax in Kenya and the amnesty regulations do not bring such “foreign income” into the Kenya tax net.

The amnesty can only capture income which initially accrued in Kenya but which was never reported or taxed in Kenya and which was subsequently transferred outside the country. Such income would have been Kenya sourced but it is now located outside Kenya. Relocating the income beyond Kenya’s borders does not alter its original source hence such amounts should be reportable under the amnesty.

### 3. What is the benefit of applying for the Amnesty?

Under the terms of the amnesty, the Commissioner will refrain from assessing or recovering taxes, penalties and interests in respect of any year of income ending on or before 31st December 2016 and from following

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up on the sources of income declared under the amnesty. In short, there is a clear financial benefit to the amnesty as well as an opportunity to start on a clean slate from January 2017 onwards.

Please note that the amnesty only provides immunity from the KRA with regard to taxes due on the income that is specifically disclosed under the amnesty.

#### **4. What is the requirement for repatriation of funds?**

According to the KRA guidelines, the funds declared under the amnesty must be repatriated to Kenya – this is a condition of the amnesty and the tax amnesty certificate cannot be issued prior to such repatriation, unless it is impossible to repatriate the funds in which case the Commissioner will review the situation on a case by case basis. “Funds” have been defined as cash declared in the amnesty return. Where the funds are secured against a liability, only the funds ‘net’ of the liability will have to be repatriated.

The KRA has clarified that funds transferred to Kenya would need to be supported by evidence of bank transfers which need to be uploaded under Section H of the Amnesty return. For those who are unable to repatriate the funds before 30 June 2018, they have an additional 5 year period (up to 30 June 2023) to repatriate the funds but a penalty of 10% will apply to funds repatriated after 30 June 2018.

There are no written guidelines that impose any restriction on the use or re-investment of the repatriated funds. There is also no specified “lock-in” period during which the funds must be held in Kenya after repatriation. However, it is clear that

for the government, one objective of the amnesty was to spur the local economy (through the investment of the repatriated funds into local enterprises). The question is therefore whether the retention of the funds in Kenya could be a consideration when granting amnesty.

#### **5. How much time do I have to apply for Amnesty?**

The deadline for the amnesty application is 30 June 2018 and it must be done on the specific amnesty form in iTax. The 30th of June falls on a weekend so the deadline should be the last working day prior which is Friday 29 June 2018.

As this deadline coincides with the deadline for submitting the 2017 individual self-assessment tax returns, applicants may experience the system congestion and slow down which typically accompanies eleventh hour attempts to file returns online.

#### **6. Is there a risk of applying for Amnesty and not receiving it?**

The KRA has been categorical about reviewing the amnesty application to verify that all the conditions have been satisfied before issuing a tax amnesty certificate.

#### **7. How confidential is my Amnesty application?**

According to Section 6 of the Tax Procedures Act, the KRA is required to maintain taxpayer confidentiality. However, they can disclose taxpayer information to another government institution for the performance of its duties or to a foreign government in terms of an information exchange or similar agreement.

#### **8. Can someone apply for Amnesty on behalf of another person?**

The KRA guidelines have anticipated scenarios where a trust arrangement exists – in such cases, the amnesty application can be lodged by: (1) the settlor who established the trust; (2) the legal owner of the funds (trustee); or (3) the beneficial owner of the funds (beneficiary). This arrangement opens up the amnesty to legatees of a deceased estate where they are beneficial owners of the funds.

Where there is no trust structure, the question is whether a person who inherits foreign income has any obligation to file for amnesty (where their father or grandfather who originally earned the income is deceased) i.e. can a son be held responsible for the tax sins of the father? This issue would need to be reviewed on a case by case basis. In the case of a company, the taxpayer (the company itself) remains the same hence it can still apply for amnesty even if the current directors/managers were not party to the non-payment of tax which potentially occurred many years previously.

Where the beneficiary is a minor or under disability (which likely includes the very elderly or infirm), the legal guardian can lodge the amnesty application. Where a taxpayer does not have a Kenyan PIN number, they can apply for a PIN and lodge the amnesty application before the deadline. It is also acceptable for a tax agent to make the declaration on behalf of the applicant. For married couples, they can opt to file a joint declaration, even if they usually file separate returns.

#### **9. How can we help?**

At PwC, we offer the tax expertise to answer your questions on the amnesty and to support you with your amnesty declaration. Please contact us for more information.

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