



## **SHOULD KENYAN RESIDENT PERSONS WITH FOREIGN SOURCED INCOME TAKE ADVANTAGE OF THE PROPOSED TAX AMNESTY?**

The Finance Bill, 2016 has now been published following the reading of Kenya's Budget Statement for the fiscal year 2016/2017, on 8 June 2016. Enshrined in the Bill is a rather unanticipated provision seeking to amend the Tax Procedures Act, 2015 by introducing section 37B to this Act (which is intended to come into effect on 1 January 2017).

The proposed amendment seeks to grant a tax amnesty to Kenyan resident persons with taxable foreign sourced income, on all taxes, penalties and interest for the years ending on or before 31 December 2016. Such income should be declared as arising in the year ended 31 December 2016 and declared in the returns and accounts for the same submitted on or before 31 December 2017. Under the proposed amendment, the Commissioner is restrained from following up on the source of the undeclared income. Further, there is no indication that the income declared needs to be repatriated to Kenya.

What does this proposed amendment mean for Kenyan resident persons with undeclared foreign sourced income that is taxable under the Kenya's tax laws? The first question that arises is with regard to instances in which foreign sourced income would be taxable in Kenya. Section 3 which brings to tax income states as follows, "**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". Consequently, in as much as the general provision is to tax income accrued in or derived from Kenya, other provisions of the Act must be considered.

A consideration of the other provisions of the Act reveals that Kenyan resident persons are taxable on their worldwide business and employment income. For this reason, foreign sourced business income and employment income earned by Kenyan resident persons

would be taxable in Kenya.

Having established the above, the big question is then, “should Kenyan resident persons with undeclared foreign income proceed to declare the same and take advantage of the propose tax amnesty?” One may argue that declaring the same would bring the person within the “net” of the Kenya Revenue Authority (KRA) going forward. In simple terms, it may be argued that one may benefit from the tax amnesty in relation to years of income ending on or before 31 December 2016 but would then have to pay taxes going forward as the person is now brought within the radar of the KRA. This would especially be the case where the existing arrangement subsists after the voluntary declaration, and the person is either under the scrutiny of the KRA or does not wish to incur penalties and interests for non-compliance.

“Why then would one want to risk triggering the adverse consequences of the voluntary declaration?” Other than for moral reasons, the answer is that information sharing between tax authorities will soon catch up with Kenyan resident persons with undeclared foreign income. This is because of the existence of a global initiative known as the Common Reporting Standard (CRS), which many countries have been called upon to adopt, and which has been a long-awaited development for many tax authorities. The CRS is aimed at increasing the reporting requirements in all jurisdictions, and allows jurisdictions to automatically exchange information with other jurisdictions.

CRS became effective on 1 January 2016 in 56 countries and in total more than 90 jurisdictions have signed up to the new regime. The first reporting under CRS will occur in 2017. Kenya has now signed the Multilateral Convention on Mutual Administrative Assistance on Tax Matters (MCMAA) which provides for various matters including exchange of information on request, spontaneous exchange, automatic exchange, tax examinations abroad, simultaneous tax examinations and assistance in tax collection. CRS falls under automatic exchange. Despite having signed the MCMAA, this is yet to be ratified, which is a pre-condition for adopting the CRS. This notwithstanding, it is evident that Kenya is keen on completing this process, and although we cannot comment on the estimated timelines for the same, it will not be long before the process is finalized.

As soon as Kenya adopts the CRS, the KRA will for the first time be able to obtain information in respect of Kenyan resident persons (both individuals and corporates) with overseas investments which may include interests held via foreign companies and trusts. The information will be obtained through collaboration with financial institutions in other CRS participating jurisdictions, and such financial institutions will be mandated to provide information on Kenyan resident persons with overseas interests. Having provided such information, persons under investigation will be required to explain their sources of funds.

In light of the above, it is advisable for Kenyan resident persons with overseas interests, to take advantage of the opportunity presented by the Kenyan government and proceed to conduct their tax affairs in a transparent manner, going forward. Taking the opportunity could have either of two consequences, being:

- Taxes, penalties and interest for years of income ending on or before 31 December 2016 are not recovered or assessed, and going forward, the person conducts their tax affairs in a transparent manner such that the requisite taxes are paid and no penalties or interest arises, or
- Taxes, penalties and interest for years of income ending on or before 31 December 2016 are not recovered or assessed, and going forward, the person does nothing to clean up their tax affairs in which case potential tax liabilities, penalties and interest arise only for years of income from 1 January 2017.

Failure to take advantage of the opportunity on the other hand is likely to have one major consequence, which is that the adoption of the CRS by Kenya reveals the undeclared foreign sourced income, and taxes, penalties and interest are imputed for all the years in question, both before and after 31 December 2016.

Based on the foregoing, we would urge Kenyan resident persons with undeclared foreign income to give serious consideration to the proposed tax amnesty. The voluntary declaration would also mean that persons are now able to freely use the declared income for making investments in Kenya, as the Commissioner is restrained from investigating the sources of income, under the proposed provision.



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