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How Effective are the Guidelines issued by the KRA on the Tax Amnesty?

The Finance Bill, 2016, which was published on 8 June 2016, introduced into the Tax Procedures Act (“TPA”), section 37B, aimed at granting a tax amnesty to Kenyan resident persons with taxable income earned outside of Kenya relating to all years of income up to 31 December 2016. This amnesty came into effect on 1 January 2017, and was affirmed by the Finance Act, 2016, which was later published on 20 September 2016. This amnesty must be taken advantage of by 30 June 2018, according to the Finance Act, 2017, which extended the deadline from 31 December 2017 (as previously provided for by the Finance Act, 2016).

Undoubtedly, the introduction of the tax amnesty brought a lot of excitement to taxpayers who are keen on cleaning up their tax affairs, and more so during this era of global exchange of tax information. However, section 37B of the TPA is not very clear on the manner in which the same should be applied. Many taxpayers and tax advisors have therefore been looking forward to some guidance from the relevant authorities, before they can proceed to take advantage of the same or advise their clients as the case may be. On the 8th day of March 2017, KRA issued draft guidelines cited as “Foreign Income and Assets Tax Amnesty Guidelines, 2017 (the “Draft Guidelines”). The Authority thereafter invited stakeholders to give their feedback on the Draft Guidelines, and a meeting was convened on the 14 March 2017, where varied views were expressed with regards to the Draft Guidelines. The KRA committed to issuing new guidelines, having taken into consideration the feedback from the stakeholders, to the extent possible. Recently, the KRA issued revised guidelines titled “Guidelines on amnesty in respect of foreign assets and income” (“Guidelines”), dated 10 July 2017. The Guidelines provide that an application for amnesty should be made in the format set out in KRA’s iTax portal, and we

note that the KRA has now made the same available on the portal. This is a step in the right direction as previously, taxpayers were not in a position to make an amnesty application despite the enabling legislation having taken effect on 1 January 2017.

Notably, the Guidelines as compared to the Draft Guidelines present a more simplified version which is much easier to decipher. This notwithstanding, there are still some areas that are not clear and may need to be re-looked into. These are analyzed as follows:

First and foremost, the Guidelines seek to define "income" within the context of the tax amnesty to mean taxable income outside of Kenya which would have been taxable in Kenya under Kenyan laws **if it had been** accrued in or derived in Kenya or deemed to have been accrued in or derived in Kenya. Such a definition with no doubt, widens the taxing rights of the Kenyan government, beyond those that have been granted under the Income Tax Act of Kenya (the "Act"). As a general rule, income is taxable in Kenya only if it is accrued in or derived from Kenya and there are only few instances provided in the Act, where income earned from outside of Kenya is deemed to have been accrued in or derived from Kenya. The two (2) key of the few instances are: where a Kenyan resident person earns employment income from services rendered outside of Kenya, and where a Kenyan resident person earns business income from business conducted outside Kenya, where such person is conducting business partly within and partly outside Kenya. Any income earned outside of Kenya that is not deemed, by virtue of the provisions of the Act, to have been accrued in or derived from Kenya does not fall within the ambit of the Act, and would therefore not form the subject of the tax amnesty, as it is not taxable in Kenya in the first place. A good example would be dividends earned from companies resident outside of Kenya (commonly known as "foreign dividends").

The definition of income in the Guidelines seems to introduce a worldwide system of taxation on all income. This is by alleging that all income earned from outside of Kenya would be taxable in Kenya provided that such income would be taxable in Kenya if it had been accrued in or derived in Kenya or deemed to have been accrued in or derived in Kenya. Using the example of dividends, this means that as dividends from a Kenyan resident company (unless exempt) would be taxable in Kenya, even foreign dividends are taxable in Kenya. Undoubtedly, this could not have been the intention of the legislators of

section 37B of the TPA. This section was aimed at granting an amnesty on income earned outside of Kenya, that is taxable under the Act. For this reason, one would not be expected to declare under the tax amnesty income that is not taxable under the Act, for instance, foreign dividends. From this respect, the Guidelines are therefore grossly misaligned with the provisions of the Act.

Further to the above, under clause number 12, and in line with section 37B of the TPA repatriation (transfer) of funds, not later than 30 June 2018, has been made a requirement under the amnesty, with a five (5) year extension being granted, up until 30 June 2023, subject to a 10% penalty on the late repatriation (remittance). Funds have been defined to mean the cash declared in the returns and accounts for purposes of transfer back into the country. The term “cash” has not been defined in the Guidelines and this can therefore only be interpreted in line with its natural/literal meaning, being cash in hand and/or cash in bank. Consequently, one is only required to repatriate cash assets meaning that if a person has invested all their income in foreign non-cash assets, they would not be required to repatriate any funds/cash into Kenya. One wonders whether this would really have been the intention of section 37B of the TPA.

In addition to the above, and as part of the definitions in the Guidelines, the term “assets” has been defined, and defined to mean assets (including bank deposits, investment portfolio, insurance policies, shares or other property) that are situated outside of Kenya and are funded from income derived from or accruing from sources within or outside Kenya including those held under Trust. Although the term “assets” has been used in a number of clauses in the Guidelines, for instance within the context of trust assets, the interplay between “income” and “assets” is not very clear. To elaborate further on this, section 37B of the TPA refers only to income (assets are not mentioned), and it would therefore mean that “assets” have no place in the context of the amnesty. The Guidelines do not also link the two very clearly. Admittedly, the term assets may have been introduced within the context of repatriation but then again, “assets” have been given a broad meaning, with only cash assets forming the subject of repatriation, and the definition of “funds” (that ought to be repatriated) not featuring the term “assets”. The relevance of “assets” within the context of section 37B therefore remains unclear, and declaration of the same, and more so the non-cash assets, may be irrelevant.

Besides the foregoing, we note that the Guidelines have made reference to section 2 of the TPA in defining the word “person”. In the TPA, “person” has been defined under section 3, and not 2, and this should therefore be corrected.

The preceding analysis implies that despite the Guidelines presenting an improved version of the Draft Guidelines, there are still areas of uncertainty that need to be re-looked into/clarified/re-drafted. At this point, it would therefore be fair to form an opinion that the Guidelines have not quite met the desired objective of offering the much required guidance on the tax amnesty under section 37B of the TPA. Further to this, the legal standing of the Guidelines still remains unclear. This is because under the provisions of the TPA, and more specifically, section 112, only the Cabinet Secretary (National Treasury) is empowered to make Regulations under the Act. For this reason, any Regulations/Guidelines made otherwise than by the Cabinet Secretary, are effectively null.



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