

CRS & AMNESTY IN KENYA

KENYA

International Tax Developments

Introduction

The global tax transparency wave, which was triggered in 2009 by the global economic recession and a subsequent exposure of massive tax planning by multinationals, is catching up with Kenya. The movement, led by OECD and G20, is aimed at providing tax authorities with greater financial, accounting and ownership information on cross-border transactions, businesses and investments.

The original goal was to stem tax evasion and shifting of income to low tax jurisdictions. But now the appetite is primarily driven by the need to facilitate tax audits and generate tax revenues.

In African, Kenya has been the champion for transparency, reduction in shifting of taxable profits from the continent and adoption of OECD standards. There are two critical initiatives in that Kenya Revenue Authority (“KRA”) has put in the works: Tax Amnesty on Foreign Income (“Amnesty”) and OECD-led Common Reporting Standards (“CRS”).

Also in February 2016, Kenya signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention), a treaty of 116 countries where governments commit to assist each other on exchange of information, assistance in recovery of tax and service of documents relating to tax

Kenya has been a forefront African country in championing greater access to information, combating profit shifting and adoption of OECD standards.

There are two critical initiatives that Kenya Revenue Authority (“KRA”) aims to achieve this objective: Tax Amnesty on Foreign Income (“Amnesty”) and OECD-led Common Reporting Standards (“CRS”).



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Common Reporting Standards

CRS is a framework developed by OECD to guide tax authorities on obtaining financial information from financial institutions in their jurisdictions and automatically exchanging the same with other jurisdictions. Similarly, they would enjoy a reciprocal service from revenue authorities in countries which have committed to CRS either on a multilateral or a bilateral basis.

CRS is adopted under the Multilateral Competent Authority Agreement (“MCAA”) and as at 13th December 2017, 97 countries had committed to it.

The CRS platform requires participating governments to domesticate MCAA and establish the mechanism for sharing information on a confidential basis.

Kenya has not fulfilled the requirements for CRS. But it has shown an interest in enlisting. KRA’s International Tax Office (“ITO”) is leading the process of fulfillment of requirements which is expected to come to a conclusion in 2019.

The countries on CRS are as outlined:

Albania	Bulgaria	Finland	Italy	Montserrat	Samoa
Andorra	Canada	France	Japan	Nauru	San Marino
Anguilla	Cayman Isl.	Germany	Jersey	Netherlands	Saudi Arabia
Antigua	Chile	Ghana	Korea	New Zealand	Seychelles
Argentina	China	Gibraltar	Kuwait	Nigeria	Singapore
Aruba	Colombia	Greece	Latvia	Niue	Slovak Republic
Australia	Colombia	Greenland	Lebanon	Norway	Slovenia
Austria	Cook Isl.	Grenada	Liechtenstein	Pakistan	South Africa
Azerbaijan	Costa Rica	Guernsey	Lithuania	Poland	Spain
Bahamas	Croatia	Hungary	Luxemburg	Portugal	Sweden
Bahrain	Curacao	Iceland	Malaysia	Romania	Switzerland
Barbados	Cyprus	India	Malta	Russia	Turkey
Belgium	Czech Rep	Indonesia	Marshall Isl.	Saint Kitts	Turks & Caicos
Belize	Denmark	Ireland	Mauritius	Saint Lucia	UAE
Bermuda	Estonia	Isle of Man	Mexico	Saint Maarten	United Kingdom
Brazil	Faroe Isl.	Israel	Monaco	Saint Vincent	Uruguay
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CRS- Who reports?

- Financial Institutions
 - Depository institution
 - Custodial institution
 - Specified insurance company
 - Investment entity
- Entities which primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer:
 - trading in money market; foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading
 - Individual and collective portfolio management, or otherwise investing, administering, or managing funds or money on behalf of other persons.

- An entity the gross income of which is primarily attributable to investing, reinvesting, or trading in financial assets, if the entity is managed by another entity that is a Depository Institution, a Custodial Institution, a Specified Insurance Company, or an Investment entity.

CRS- Who is reported?

- Individuals and Non Financial Entities (“NFE”)s which are resident in a participating jurisdiction
- Controlling Person who is a resident in a participating jurisdiction of passive Non Financial Entity

CRS- What information is reported?

- Identification of the account holder, the account and which financial institutions hold the account and amounts credited and balance.
- Account holder details:
 - Name
 - Address
 - Jurisdiction(s) of residence
 - PIN(s) & date/place of birth
- Controlling person details:
 - For each of the Controlling Person who is Reportable Person
 - Name
 - Address
 - Jurisdiction(s) of residence
 - PIN(s) & date/place of birth

The term Investment Entity does not include an Entity that is an Active Non Financial Institution (i.e. holding company of active subsidiaries, finance company in active group).

4. For the Passive Non Financial Entities:

- Name
- Address
- Jurisdiction(s) of residence
- PIN(s)

5. Account information:

- Account number (or functional equivalent in the absence of an account number)
- Name of the Reporting Financial Institution
- Identifying number (if any)

6. Account balance

a) For all Accounts

- Account balance or value as of the end of the relevant calendar year
- If the account was closed during such year or period, the closure of the account
- The information of the closure of the account itself
- No financial data / balance or value to disclose

b) For Custodial Accounts

Total gross amount of

- Interest
- Dividends
- Other income generated with respect to the assets held in the account
- Total gross proceeds from the sale or redemption of property

c) For Depository Accounts

- Gross amount of interest paid or credited to the account

d) For Other Accounts

Total gross amount paid or credited including the aggregate amount of any redemption payments

- if he is a national of both or of none of them, the competent authorities shall settle it by mutual agreement.

What of multiple/dual residence?

CRS is based on a treaty, which is an instrument of international law domesticated in a given country. The OECD has clarified in the CRS portal that where an account holder is resident in two countries, it should be inquired if the two have a Double Tax Agreement (“DTA”).

The tie breaker provisions in that DTA will guide as to where the person is regarded as resident.

Example applicable when Kenya ratifies CRS:

Under UAE law, resident individual is a person who is either a UAE national or is an individual who is resident in UAE with a valid Emirates ID or residence visa.

Under Kenyan law an individual is resident if he that has a permanent home in Kenya and visits Kenya even for even a day or he has no permanent home but was present in the country for at least 183 days in a year or was present in Kenya in a year of income and two preceding years for periods averaging at least 122 days.

A person may be a resident of both Kenya and UAE. To break the tie, the Article 4 of Kenya-UAE DTA provides that the country of residence would be:

- He shall be deemed a resident only of the country in which he has a permanent home available to him;
- if he has a permanent home in both, he shall be deemed to be a resident only of the country with which his personal and economic relations are closer (centre of vital interests);
- if the country in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either countries, he shall be deemed to be a resident only of the country in which he has an habitual abode;
- if he has an habitual abode in both or in neither of them, he shall be deemed to be a resident only of the country of which he is a national;

What about dormant accounts?

The CRS Implementation Handbook provides that dormant accounts are Low-risk Excluded Accounts, and may be therefore exempt from reporting, when the annual balance does not exceed USD 1,000,- or its equivalent in another currency. The others don't form this classification.

Which other accounts qualify as excluded?

1. Retirement and pension accounts;
2. Non-retirement tax-favored accounts;
3. Term life insurance contracts;
4. Accounts created by court order;
5. Estate accounts;
6. Escrow accounts;
7. Low-risk excluded accounts (i.e. pension schemes, home savings schemes, complementary pension schemes)

What is the interplay between CRS and Amnesty?

Once Kenya adopts CRS, KRA will receive information on accounts held by Kenyan residents in other countries. This would aid tax audits on both current and back taxes. If this risk exists, it is advisable to seek amnesty on back taxes under the amnesty program which closes on 30th June 2018.



Amnesty

This program was launched in 2016 and later revised in 2017, through the Finance Act 2017 (“FA 2017”). It grants a blanket amnesty on any taxable income earned before the year of income ending on or before 31st December 2016, on the following conditions:

- The income earned outside Kenya is declared for the year 2016;
- The returns and accounts for the year 2016 are filed with KRA by 30th June 2018;
- The applicant has not been assessed in respect of that income;
- As at time of making the application, the taxpayer is not under a KRA audit or investigation in respect of the income;
- The voluntarily declared funds are repatriated to Kenya;
- Where no funds have been transferred by the deadline, there shall be a 5 year period for remittance but a penalty of 10% shall be levied on the remittance;

Amnesty is targeted at those who earned incomes deemed in law as taxable in Kenya but they did not declare them fully for income tax purposes. The incomes and assets covered are those existing as at 31st December 2016. Not factoring later developments.

The tax amnesty does not provide immunity from other civil or criminal procedures that may be instituted by other government bodies. KRA however is charged with a legal obligation to not disclose any information in their possession, except where a court order directs otherwise.

KRA, through a power conferred under Sections 62-64 of the Tax Procedures Act (“TPA”) for making Public Rulings, issued two Amnesty Guidelines. Public Rulings are binding upon KRA, but not taxpayers. The summary of their details is as outlined:

Targeted Income:

- Kenya does not operate a worldwide taxation system. Only income which is “derived from or accrued” in Kenya is taxable.
- KRA have clarified that only “foreign income” deemed under the law to be derived in Kenya are the target of the Amnesty. For example:
 - Business income of a resident person, where such business is undertaken partly in and partly outside Kenya.
 - Global employment income of a resident person or income earned by a non-resident person from services rendered to a PE of a non-resident.
 - Income earned from assets/deposits of a Kenyan branch of a foreign bank where such assets and deposits were sourced from Kenya.
 - Lease payments from cross-border leases (where property is situated in Kenya).



Trusts:

- Trustees, settlors or beneficiaries may make application in regard to assets held under trust.

Value:

- Value of assets shall be either the cost of the best estimate of market value.

Residence:

- A person may file a declaration in regard to income earned during his residence in Kenya, regardless if his residence has since changed.
- The income which was deemed to be accrued in or derived from Kenya is eligible for declaration regardless of the residence of the person when such income was earned.

Couples and Minors:

- Married persons may file jointly if they so wish. Parents or guardians to declare for minors.

Repatriation:

- Disclosure has to be “full and accurate”;
- Funds have to be repatriated. But only cash is referred to as funds;
- Where funds are a security for liability, funds net of liability shall be repatriated;
- Repatriation by installment attract the 10% penalty and Tax Amnesty Certificate is issued upon completion or repatriation;
- Failure to repatriate funds disqualify someone from Amnesty; and

- Commissioner may review circumstances where funds cannot be reasonably repatriated and give a private guideline on a case by case basis.

Filing:

- Filing shall be done via Itax. A certificate shall be issued upon successful verification that requirements have been met;
- A filed return may be amended before 30th June 2018.

The procedure of filing is as captured below:

How we can help

CRS and Amnesty reviews require a combination of international tax, handling matters with revenue authority and understanding of international tax and investment planning. Our team is well suited and experienced to provide you with the following help:

- Assessment of CRS and Amnesty risk and opportunity;
- Undertaking an Amnesty-CRS health check and advisory;
- Preparation, application and negotiation of Amnesty application;
- Tax planning and restructuring; and
- Advisory to financial institutions on risk and readiness for CRS

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Itax Amnesty Filing Steps

1. Login to the KRA website <https://itax.kra.go.ke> and enter your PIN number, click on continue and enter your password
2. Click on the tab named returns and go to Foreign Amnesty
3. Select on whether the application is for self/minor/wife/trust and click on add button to add the details and click next
4. Go to section B and fill in the details for immovable property held abroad then click on add to add the details and click next
5. Go to section C and add details of investment property held abroad including shares and then add the details by clicking add and click on next
6. In section D fill in the details businesses carried abroad including the value as at December 2016 and income earned, add the details and click on next
7. In section E, enter details of employment held abroad including the earnings, click on add then next
8. Confirm in a summary sheet, the details entered from sections B to E on foreign income and assets owned, and click next
9. Fill in the bank details for bank accounts held abroad and the account balance as at 31st December 2016. Add the details and click on next.
10. In the last section, H, enter details of bank accounts owned in Kenya and the amounts held as at 31st December 2016. Click on add, you can add several bank account details, clear when you have made a mistake, after adding and there is an error, you can click on modify to edit or delete and add the details afresh (This applies to all sections above).
11. Click on submit, you will receive an acknowledgement receipt.

