KENYA REVENUE AUTHORITY

ISO 9001:2015 CERTIFIED

CAPITAL GAINS TAX – WHAT YOU NEED TO KNOW…

1. What is Capital Gains Tax?

Capital Gains Tax (CGT) is a tax chargeable on the whole of a gain which accrues to a company or an individual upon transfer of property situated in Kenya, whether or not the property was acquired before 1st January, 2015.

It took effect on 1st January 2015.

2. What is the rate of tax?

The rate of tax is 5% of the net gain. It is a final tax and cannot be offset against other income taxes. Capital losses however, can be carried forward against future capital gains transactions.

3. What is property?

Property is defined in the law (Eighth Schedule to the Income Tax Act). It includes land, buildings, securities and intangible assets (for companies) as defined in Section 3 of The General Provisions & Interpretation Act e.g. patents, copyrights…

Marketable securities are defined to include a security capable of being sold and stock as defined in Section 2 of the Stamp Duty Act.

However, transfer of securities listed and traded on the Nairobi Stock Exchange is not chargeable to tax.

4. Who is liable to pay the tax?

The tax is to be paid by the person (resident or non-resident) transferring the property, that is, the transferor. The transferor can either be an individual or a corporate body.

5. What constitutes a transfer?

A transfer takes place: -

a) where a property is sold, exchanged, conveyed or disposed of in any manner (including by way of gift); or
b) on the occasion of loss, destruction or extinction of property whether or not compensation is received; or
c) On the abandonment, surrender, cancellation or forfeiture of, or the expiration of rights to property.

6. How do you determine the net gain?

The net gain is the excess of the net transfer value over the adjusted cost of the property that has been transferred. It is this gain that is subjected to tax at 5%.

The Net ***Transfer value*** of the property is the amount or value of consideration or compensation for transfer of the property less incidental costs on such transfer.

The ***Adjusted cost*** is the sum of the cost of acquisition or construction of the property; expenditure for enhancement of value and/or preservation of the property; cost of defending title or right over property, if any; and the incidental costs of acquiring the property.

The adjusted cost shall be reduced by any amounts that have been previously allowed as deductions under Section 15(2) of the Income Tax Act.

The transferor has the responsibility of proving the cost of acquisition of the property. However, in instances where this information is not available, then the amount of the consideration for the acquisition of the property shall be deemed to be equal to the market value of the property at the time of the acquisition or to the amount of consideration used in computing stamp duty payable on the transfer by which the property was acquired, whichever is the lesser as per ***Paragraph 9 of the Eighth Schedule.***

7. How will related party transactions be treated?

Two parties are related if:-

a.) Either person participates directly or indirectly in the management control or capital of business of the other; or b.) A third person participates directly or indirectly in the management control or capital of business of both.

Where there is concern that a related party transaction may have led to reduction in the transfer value with a view to minimizing the capital gains tax, the Commissioner will make necessary adjustments and/or revaluation to determine the market price

8. What is the due date/tax point?

The due date for tax payable in respect of property transferred under this Part shall be on or before the 20th of the following month after the transfer date.

The Tax shall be paid through designated Commercial Banks using *i*Tax generated Payment Registration Numbers. Penalties and interest charges will apply in cases of default.

9. How is the tax to be declared?

The transferor shall declare the return using their *i*Tax Portal and make the payments thereon. **CGT 1 & 1P** will be used upon transfer of land and buildings; **CGT 2 & 2P** will be used in the case of marketable securities while **CGT 3** will be used to declare exempted/excluded transactions.

CGT for non-residents will be assessed and charged in line with ***Section 47 of the Income Tax Act.***

10. What happens when a loss is made?

Capital losses are deductible against Capital Gains in the year of income the losses are made and if not exhausted may be carried forward and deducted from Capital Gains in subsequent years of income - ***Section 15(3)(f) of the Income Tax Act.*** The limitation for carrying forward of losses is applicable for a maximum of 10 years.

11. What documents/information will be required?

a) iTax active PIN
b) Copy of Sale/Transfer Agreement of the property.
c) Proof of the incidental costs related to the acquisition and transfer of the property.
d) A copy of the title deed or ownership document for the property
e) Report from a registered valuer for property transactions between related parties
f) Any other document/information that the Commissioner may require.

12. Are there any exemptions/exclusions from capital gains tax?

Certain transactions are

Exempted as follows: -

a) Shares in the stock or funds of the Government, the High Commission or the Authority established under the Organization or the Community;
b) shares of a local authority;
c) A private residence if the individual owner has occupied the residence continuously for the three year period immediately prior to the transfer concerned;
d) Property (being land) transferred by an individual where –
    i. the transfer value is not more than three million shillings;
    ii. agricultural property having an area of less than fifty acres where that property is situated outside a municipality, gazetted township or an area that is declared by the Minister, by notice in the Gazette, to be an urban area for the purposes of this Act;
e) Land which has been adjudicated under the Land Consolidation Act or the Land Adjudication Act when the title to that land has been registered under the Registered Land Act and transferred for the first time;
f) Property (including investment shares) which is transferred or sold for the purpose of administering the estate of a deceased person where the transfer or sale is completed within two years of the death of the deceased or within such extended time as the Commissioner may allow in writing.

Excluded as follows: -

a) In the case of the transfer of property for the purpose only of securing a debt or a loan, or on a transfer by a creditor for the purpose only of returning property used as a security for a debt or a loan;
b) In the case of the issuance by a company of its own shares or debentures;
c) By the vesting in the personal representative of a deceased person by operation of law of the property of that deceased person;
d) By the transfer by a personal representative of property to a person as legatee in the course of the administration of the estate of a deceased person; and

"legatee" includes a person taking under a devise or other testamentary disposition or an intestacy or partial intestacy whether her takes beneficially or as a trustee;

e) By the vesting in the liquidator by an order of a court of the property of a company under section 240 of the Companies Act;
f) By the vesting in the official receiver or other trustee in bankruptcy of the property of a bankrupt under section 57 of the Bankruptcy Act; or
g) By the transfer by a trustee of property, which is shown to the satisfaction of the Commissioner to be subject to a trust, to a beneficiary on his becoming absolutely entitled thereto.
h) By the transfer of assets:-
   i. between spouses;
   ii. between former spouses as part of a divorce settlement or a *bona fide* separation agreement;
   iii. to immediate family;
   iv. to immediate family as part of a divorce or *bona fide* separation agreement; or
   v. to a company where spouses or a spouse and immediate family hold 100% shareholding.

"Immediate family" mean children of the spouses or former spouses.

a) income that is taxed elsewhere as in the case of property dealers;
b) issuance by a company of its own shares and debentures;
c) transfer of machinery including motor vehicles;
d) disposal of property for purpose of administering the estate of a deceased person;
e) vesting of property in the hands of a liquidator or receiver;
f) Exchange of property necessitated by : incorporation, recapitalization, acquisition, amalgamation, separation, dissolution or similar restructuring involving one or more companies which is certified by the Cabinet Secretary to have been done in public interest;
g) transfer of securities by a body exempted under Paragraph 10 of the First Schedule;
h) transfer of securities by retirement benefits scheme registered with Commissioner (this does not include foreign registered retirement schemes);

13. **Treatment of Extractive Industry**

The net gain on disposal of interest in a person owning immovable property in the mining and petroleum industry is taxable.

The applicable rate of tax is as per the **Ninth Schedule to the Income Tax Act – 30% for residents** and **37.5% for non-residents with permanent establishments.**

The taxable gain is the net gain derived on the disposal of an interest in a person, if the interest derives its value from immovable property in Kenya.

Immovable property means a mining right, an interest in a petroleum agreement, mining information or petroleum information.

14. Worked Example – CGT on Land and Buildings

Transfer Value Computation

Assume that the sale proceed was Kshs. 3,000,000 and the incidental costs were Legal fees- Kshs. 100,000; Advertisement – Kshs. 50,000; Agent's commission – Kshs. 200,000 and Valuation fees – Kshs. 150,000.

Sales proceeds		*Kshs. 3,000,000*
Less Incidental Costs:		
legal fees	*Kshs. 100,000*	
Advertisement	*Kshs. 50,000*	
Agents commission	*Kshs. 200,000*	
Valuation fees	*Kshs. 150,000*	*Kshs. 500,000*
Transfer Value		***Kshs. 2,500,000***

Adjusted Cost computation

Assume the cost of acquisition/construction was Kshs. 1,200,000 and the other relevant/incidental costs were as follows: Legal cost on acquisition - Kshs. 60,000; Valuation – Kshs. 70,000; Costs to change the roof of property – Kshs. 130,000; Legal cost to defend title Kshs. 50,000; IBD had been allowed totaling Kshs. 450,000 over the years.

Cost of acquisition		*Kshs.1, 200,000*
Add:		
legal cost on acquisition	*Kshs. 60,000*	
Changing roof	*Kshs. 130,000*	
Valuation	*Kshs. 70,000*	
Defending title	*Kshs. 50,000*	*Kshs 310,000*
		Kshs. 1,510,000
Less: IBD		*Kshs. 450,000*
Adjusted cost		***Kshs. 1,060,000***

Computation of Gain & Tax thereon:

Transfer Value less Adjusted Cost (Kshs. 2,500,000 – Kshs. 1,060,000)
= Kshs. 1,440,000

Tax at 5% of Gain (5% x Kshs. 1,440,000) = **Kshs.72,000**

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15. Information on Capital Gains Tax

Taxpayers can obtain further information/clarifications from our contact persons as follows:-

a. **Margaret Ogega – CGT (Head Office)** Tel: 020 281 7093 / 070901 2770 or Email: Margaret.Ogega@kra.go.ke
b. **Desterious Shilabukha - CGT (Head Office)** Tel: 070901 2771 or Email: Desterious. Shilabukha@kra.go.ke
c. **Rose Kiendi– CGT (Head Office)** Tel: 070901 2772 or Email: Rose.Kiendi@kra.go.ke

COMMISSIONER OF DOMESTIC TAXES
KENYA REVENUE AUTHORITY

17th April, 2019