KENYA REVENUE AUTHORITY

ISO 9001:2008 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 on or after 1st January, 2015 on the transfer of property situated in Kenya, whether or not the property was acquired before 1st January, 2015.

It is not a new tax. It was suspended in 1985 and has now been re-introduced effective 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.

3. What is property?

Property is defined in the law (Eighth Schedule to the Income Tax Act). It includes land, buildings and marketable securities.

Marketable securities are defined to include a security capable of being sold and stock as defined in Section 2 of the Stamp Duty Act. CGT therefore applies to transfer of both listed and unlisted securities.

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.

For investment shares, while the tax incidence is on the transferor, the responsibility to collect and account for the tax will be on the stockbrokers. ***(Paragraph 18 of the Eighth Schedule)***

For transfer of discountable securities like Commercial Paper and Treasury Bills, CGT will be collected and accounted for by the Central Bank of Kenya.

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

The ***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 and should therefore provide this information. 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.***

For listed securities, where the consideration for the acquisition of the investment shares cannot be ascertained by the transferor: -

a) For securities acquired from the year 2005, the cost of acquisition will be the actual cost as per the CDS account statement.

b) The cost of acquisition of shares acquired between 1998 and 2004, shall be the highest price of those shares in the year they were acquired, as obtained from the Nairobi Securities Exchange.

c) Where the shares were acquired before 1998 the cost of acquisition of shares shall be the highest price of those shares in 1998, as obtained from the Nairobi Securities Exchange.

d) For securities acquired from the year 2005, the cost of acquisition will be the actual cost as per the CDS account statement.

Where a pool of securities acquired at different dates and at different prices are sold, the adjusted cost will be computed on a ***First in – First out (FIFO)*** basis. However, the Commissioner may give further guidance on case by case basis.

Please refer to a worked example on the computation of CGT under item 14 below:

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?

It is a transaction based tax and should therefore be paid upon transfer of property but not later than the 20th day of the month following that in which the transfer was made.

Where a transfer date is different from the settlement date then the transfer date will be the tax point in line with International Accounting Standards.

The Tax shall be paid through Commercial Banks into the **Capital Gains Collection Account No. 1000223577** at the Central Bank of Kenya. Penalties and interest charges will apply in cases of default and in accordance with the provisions of the Income Tax Act, Cap 470.

Stockbrokers and other agents should ensure that CGT is withheld/collected before releasing the sale proceeds to their clients.

9. How is the tax to be declared?

The taxpayer will do a self-assessment to determine the gain upon which tax is computed. The computations are subject to Commissioner's confirmation of correct gain as the basis of tax computation.

The transferor shall complete the relevant declaration form (CGT form), upon transfer of any property, compute the gain and pay the tax thereon accordingly. **Form CGT 1** will be used upon transfer of land and buildings while **Form CGT 2** will be used in the case of marketable securities. The Forms are available for download from the KRA website, **www.kra.go.ke.**or any nearest Office of Domestic Taxes Department.

For investment shares, the stockbrokers have the responsibility to do the declarations for their clients in line with ***Paragraph 18 of the Eighth Schedule.***

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 4 year limitation for carrying forward of losses is applicable. A taxpayer may apply for extension of the period for carrying forward of losses upon expiry of the 4 years. The application will be considered by the Commissioner and a recommendation made to the Cabinet Secretary.

11. What documents/information will be required?

a) Completed CGT form by the seller.
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 from capital gains tax?

Certain transactions are exempted as follows: -

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) transfer of individual residence occupied by the transferor for at least three years before the transfer;
g) compensation by Government for property acquired for infrastructure development;
h) transfer of asset between spouses as part of divorce settlement;
i) sale of land by an individual where the proceeds is less than Kshs. 30,000;
j) sale of agricultural land by individuals outside gazetted townships where the property is less than 100 acres
k) 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 the public interest
l) transfer of investment shares by a body exempted under Paragraph 10 of the First Schedule
m) transfer of investment shares 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. 2,000,000 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. 2,000,000*
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. 1,500,000***

Adjusted Cost computation

Assume the cost of acquisition/construction was Kshs. 1,500,000 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, 500,000*
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. 1,810,000
Less: IBD		*Kshs. 450,000*
Adjusted cost		***Kshs. 1,360,000***

Computation of Gain & Tax thereon:

Transfer Value less Adjusted Cost (Kshs. 1,500,000 – Kshs. 1,360,000)
= Kshs. 140,000

Tax at 5% of Gain (5% x Kshs. 140,000) = **Kshs.7,000**

15. Information on Capital Gains Tax

Taxpayers can obtain further information/clarifications from the following dedicated weblink: **http://www.kra.go.ke/index.php/capital-gains-tax** and from our contact persons as follows:-

a. **James M. Ojee – Policy Unit (Head Office)** Tel: 020 281 7012 or Email: James.Ojee@kra.go.ke
b. **Moses Maina – Large Taxpayers Office** Tel.020 281 5076 or Email: Moses.Maina@kra.go.ke
c. **Michael Murambi -** Medium Taxpayers Office Tel.020 271 5540 ext 3011/3070 or Email: Michael.Murambi@kra.go.ke
d. **Patrick Ngoku** – Medium & Small Taxpayers Office Tel. 020 281 5027 or Email: Patrick.Ngoku@kra.go.ke

COMMISSIONER OF TECHNICAL SUPPORT SERVICES,
KENYA REVENUE AUTHORITY

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