

TAX & EXCHANGE CONTROL ALERT

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CLIFFE DEKKER HOFMEYR

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Renewed efforts by the taxman to collect rental income tax

The Kenya Revenue Authority (KRA) will soon be knocking on your tenant's door to find out how much the tenant pays as rent and who is the owner of the property. On 18 October 2022, the KRA issued a notice to the public of its intent to undertake a data collection exercise on rental properties within Nairobi City County and the Nairobi Metropolis as part of its tax base expansion programme. The taxman's move to get information about landlords from tenants represents a change in approach on the KRA's part as it has previously collected similar information through the Kenya Power and Lighting Company (KPLC) and other agencies.



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WHAT IS RENTAL INCOME TAX?

Rental income tax (RIT) is charged on gains or profits from any right granted to any other person for use or occupation of property. RIT is charged on both commercial and residential premises. A taxpayer can pay RIT either monthly or annually subject to conditions set out in the Income Tax Act. Monthly RIT applies for residents whose rental income per year is between KES 288,000 and KES 15 million. A flat tax rate of 10% is applied on the gross amount. An individual subject to monthly RIT can apply to the KRA to account for rental income tax on an annual basis.

Taxpayers whose rental income is above KES 15 million are required to account for RIT on an annual basis. The RIT rate is 30% for individuals and 30% for local companies, however, in this case the taxpayer will be allowed to reduce the tax liability with expenses that were incurred to derive the rental income for example cost of repairs and insurance.

THE KRA'S POWER TO COLLECT INFORMATION FROM TENANTS

The KRA is empowered by current tax laws in Kenya to inquire into the affairs of a person and have full and free access to all lands, buildings, equipment, devices, and records, and to obtain extracts from or make copies of those records.

Specifically, section 59 of the Income Tax Act empowers the KRA to require any person who is the occupier of premises to furnish the KRA with details on:

- the name and address of the owner or lessor of such premises; and
- a full and true statement of the rent or any other consideration payable for the occupation.

ENFORCEMENT

The KRA has several mechanisms to enforce payment of RIT. Among these are raising assessments to collect the principal tax, accrued penalties and interest, and issuing agency notices.



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The Finance Act of 2022 introduced another enforcement mechanism by empowering the KRA to dispose of taxpayer's property for tax liabilities. From 1 July 2022, the KRA can now issue a notice to the Land Registrar to hold a taxpayer's property as security for unpaid RIT and later dispose of the property if the taxpayer fails to settle the tax liability within two months.

OPTIONS FOR LANDLORDS

Landlords can undertake a self-assessment, pay the tax due and seek a waiver of penalties and interest. Under the Voluntary Tax Disclosure Programme, landlords can declare and pay RIT that accrued five years prior to 1 July 2020 and obtain a 50% waiver of penalties and interest. The waiver is not, however, available to any landlord who is under audit or has a pending case with the KRA.

In all other instances, and particularly from 2020 onwards, taxpayers can pay the principal tax and seek a waiver of penalties and interest in the usual way. The waiver of penalties and interest for 2020 onwards is not guaranteed.

It is not a must for the taxpayer to pay all accrued rental income tax at once. Landlords can negotiate with the KRA to pay their accrued taxes in instalments.

Landlords also have an option to object to any erroneous or excessive tax assessments from the KRA and have this resolved through the Tax Appeals Tribunal, the courts or alternative dispute resolution mechanisms.

OPTIONS FOR TENANTS

Tenants are urged to co-operate with KRA officers lest they are found liable for offences under the current tax laws. Issuing false or misleading statements, refusing to give any required information or obstructing the KRA in the performance of its duties can attract a fine of up to KES 1 million or imprisonment for a term not exceeding three years, or both.

DATA PROTECTION CONCERNS

In conducting the data collection exercise, the KRA should consider its obligations under the Data Protection Act (DPA). The DPA is the law regulating the handling of any data about an identified or identifiable natural person (i.e. personal data). Details such as the names and location data of landlords would constitute personal data. Other details which may be collected, such as the landlord's property details, would constitute a special category of personal data known as sensitive personal data.

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While the KRA has lawful grounds for collecting such data under the DPA, it will be required to carry out a data protection impact assessment (DPIA) and to prepare a report on the same prior to commencing the data collection exercise. As part of the DPIA, the KRA would need to assess, among other things, the necessity and proportionality of the collection of the data and the risks involved in relation to the rights and freedoms of the landlords as data subjects. If the DPIA reveals that the data collection exercise would result in a high risk to the rights and freedoms of the landlords as data subjects, the KRA would be required to consult the Office of the Data Protection Commissioner (ODPC) before proceeding with its intended data collection exercise, and in any

event within 60 days of receiving the DPIA report. The ODPC may offer the KRA advice on the lawful procedures for such collection if it emerges from their consultations that the intended data collection exercise is likely to infringe the DPA.

OTHER ISSUES TO CONSIDER

In carrying out the intended data collection exercise, the KRA ought to consider a number of key issues that will come to bear on this process. Firstly, the KRA should educate the public on the exercise through physical public forums. It is not sufficient to issue a notice on this and circulate it through print media.

Secondly, the KRA should encourage its officers to shun corruption as some taxpayers may prefer to collude with unscrupulous officers to evade rental income tax.

Thirdly, the KRA should be fair in enforcing the collection of rental income tax so that the measures are applied to everyone equally, regardless of their status in society or political affiliation.

Finally, the KRA should only rely on accurate and corroborated data to raise assessments for rental income tax.

[Click here](#) to view the KRA's schedule for the data collection exercise, on rental properties.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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