

DOMESTIC TAXES DEPARTMENT

CAPITAL GAINS TAX

**PRESENTED BY:
KRA - CGTMU**

Scope

Capital Gains Tax

1. Introduction
2. Charging Section
3. Rate of Tax
4. Computation
5. CGT on Non- residents
6. Exemptions and Exclusions

Introduction

- 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 (**Finance Act No. 16 of 2014**)



Charging Section

Imposition of Capital Gains Tax is provided for in **Section 3 (2) (f)** of the Income Tax Act, Cap 470 Laws of Kenya.



Rate of Tax

The rate of tax upon the capital gains of a person chargeable under **Section 3 (2) (f)** of the Income Tax Act is provided for in **Section 34 (1) (j)** of the Act at **five percent (5%)** and shall **not** be subject to further taxation.



Computation of CGT

Definition of Terms

P.1 of the Eighth Schedule to the ITA:

- **Property:**

- i. In the case of a **company** has the meaning assigned thereto in the Interpretation and General Provisions Act (money, goods, choses in action, land and every description of property, whether movable or immovable; and also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as herein defined;), and includes property acquired or held for investment purposes but does not include a road vehicle;
- ii. In the case of an **individual** means **land** situated in Kenya and **any right or interest in or over that land**, and a marketable security situated in Kenya, other than an investment shares defined in Part II of the Eighth Schedule.

- **Consideration**; means consideration in money or money's worth.
- **Individual**; includes more than one individual or an unincorporated association or body of individuals including trustees and partners;
- **marketable security**; includes a security capable of being sold and stock as defined in Section 2 of the Stamp Duty Act.

When does a transfer occur?

There is a **transfer** (*Paragraph 6 (1) Eighth Schedule*) where:

- a) Property is sold, exchanged, conveyed or otherwise disposed of in any manner (including by way of gift), whether or not for consideration;
- b) On the occasion of the loss, destruction or extinction of property whether or not a sum by way of compensation is received in respect of the loss, destruction or extinction unless that sum is utilized to reinstate the property in essentially the **same form** and in the **same place within one year or** within a longer period of the time approved by the commissioner.
- c) On the abandonment, surrender, cancellation or forfeiture of, or the expiration of substantially all rights to, property, including the surrender of shares or debentures on the dissolution of a company.

Transfer value (Paragraph 7 (1) Eighth Schedule):

- a. Amount of or value of the consideration for the transfer of the property;
- b. Sums received in return for the abandonment, forfeiture or surrender of the property;
- c. Sums received as consideration for the use of exploitation of the property;
- d. Sums received by way of compensation for damage or injury to the property or for the loss of the property;
- e. Sums received under a policy of insurance in respect of injury, or loss or damage to the property.

Paragraph 9(1)(i): Deemed Transfer Value:

For the purposes of paragraph 7, where a property is transferred;

- by way other than a bargain at arms length,
- way of gift,
- a consideration that cannot be valued or
- transaction between related parties;

the amount of consideration for the transfer of the property shall be deemed to be **equal to the market value** of the property **at the time of transfer**.

Paragraph 9(1)(ii):Deemed Acquisition Cost:

For the purposes of paragraph 8, where a property is acquired;

- by way other than a bargain at arms length,
- way of gift,
- a consideration that cannot be valued or
- transaction between related parties;

the amount of consideration shall be deemed to be **equal to the market value** of the property **at the time of acquisition** or amount of consideration used in computing **stamp duty** payable, whichever is **lesser**.

Incidental costs to the transfer:

- **P.7(2):** Incidental costs to the transfer shall be deducted from the transfer value to obtain **net transfer value** of the property.

Where there is no transfer value:

- **P.7(3):** In the case where transfer value amount can not be ascertainable it shall be the **market value of the property** as determined by the Commissioner. (Amended by 16 of 2014 s.23)

Adjusted Cost of Property Def:[Paragraph 8(1)]

- a) Amount /value of consideration for the acquisition or construction of the property.
- b) Expenditure wholly & exclusively incurred on the property at any time after its acquisition by or on behalf of the transferor for the purpose of enhancing /preserving value of the property at the time of the transfer.
- c) Expenditure wholly and exclusively incurred at any time after the acquisition of the property by the transferor establishing, preserving or defending the title to, or a right over, the property, and
- d) Incidental costs incurred on acquisition of the property.

Adjusted Cost of Shares [Paragraph 8(3)]:

Where a company issues to its shareholder shares:

- a) that do not constitute a dividend
 - i. Shall be the sum paid for the shares;
 - ii. If no sum is paid, shall be deemed to be nil.
- b) That constitute, wholly or partly, a dividend under either of those paragraphs, amount that constitutes as a dividend shall be treated as part of the cost of the shares.

Paragraph 10; Allowable Incidental Costs:

For purposes of paragraph 7(2) and 8(1)(d), incidental costs on acquisition or transfer may be;

- a) Fees, commission, remuneration for professional services of a surveyor, valuer, accountant, agent or legal adviser
- b) Transfer cost (including stamp duty)
- c) Acquisition cost (including mortgage) and the cost of advertising to find a seller / buyer
- d) Any other costs the Commissioner may allow as being just and reasonable.

Paragraph 11; Disallowable Costs:

For purposes of incidental costs on transfer (P.7) or adjusted costs on acquisition (P.8) no amount shall be allowed if that amount has been or is otherwise allowed as a deduction in computing gains or profits chargeable to tax under Section 3(2)(a).

Method of computing CGT

- **Net gain** is the **excess** of the transfer value over the adjusted cost of the property that has been transferred.
- **NetTransfer value** is the amount/value of consideration or compensation for property transferred **less** incidental costs
- **Adjusted cost** is the cost of acquisition/construction, expenditure for enhancement of value/preservation of the property; cost of defending title/right over property, **and** the incidental costs of acquiring the property.

Computation of Net Transfer Value:

Assume the sale proceed was Kshs. 3,000,000 and the Incidental costs were:

	Ksh
▪Legal fees	100,000
▪Advertisement	50,000
▪Agent's commission	200,000
▪Valuation fees	150,000

Description	KSHS	KSHS
Sales proceeds/ Transfer Value		3,000,000
Less Incidental Costs:		
Legal fees	100,000	
Advertisement	50,000	
Agents commission	200,000	
Valuation fees	150,000	500,000
<u>Net Transfer Value</u>		<u>2,500,000</u>

Computation of Adjusted Cost

Assume the cost of acquisition/construction was Kshs. 1,200,000 and the other relevant/incidental costs were as follows:

	Kshs
Legal cost on acquisition	80,000
Valuation	10,000
Costs to change the roof of property	150,000
Legal cost to defend title	60,000

Description	KSHS	KSHS
<i>Cost of acquisition/construction</i>		1,200,000
Less: Legal cost on acquisition	80,000	
Valuation	10,000	
Legal cost to defend title	60,000	
Costs to change the roof of property	150,000	300,000
<i>Adjusted Cost</i>		<u>1,500,000</u>

Computation of Gain & Tax thereon:

	Kshs.
Net Transfer Value	2,500,000
Less Adjusted Cost	1,500,000
Gain on transfer	1,000,000

$$5\% \text{ of Gain } (5\% \times 1,000,000) = \mathbf{50,000}$$

CGT on Non-residents (ITA Sec 47(1))

The income of a Non-resident person shall be assessed on, and the tax thereon charged on, that person either in his name or in the name of his trustee, guardian, curator or committee, or of any attorney, factor, agent, receiver or manager.

- CGT is payable on gains derived from sale of property situated in Kenya.
- Double Tax Agreements guide on certain circumstances where applicable between the specific countries.

Exemptions/Exclusions

- Income that's taxed elsewhere e.g property dealers;
- Issuance by a company of its own shares/debentures;
- Transfer of machinery including motor vehicles;
- Transfer by a personal representative of any property to a person as legatee in the course of the administration of the estate of a deceased person.
- Property transferred/sold for the purpose of administering the estate of a deceased person: within two years of the death of the deceased/court decision – Paragraph 36 (f) First Schedule
- Vesting of property to a liquidator or receiver;
- Individual residence occupied at least three years immediately before the transfer;

Exemptions/Exclusions...

- Sale of land by individual where the proceeds is Kshs. 3 Million or less
- Agricultural land that is less than 50 acres;
- Exchange of property during reorganization/restructuring by companies approved by Treasury to be in public interest;
- Transfer of securities by a body expressly exempted under the Income Tax Act.
- Transfer of securities by retirement benefits scheme registered with Commissioner

Exemptions/Exclusions...

- Transfer of securities traded at NSE .
- Transfer of property for securing a debt/loan
- Transfer of an asset between spouses or former spouses or their immediate family or to a company where spouses or a spouse and immediate family hold 100% shareholding.

“Immediate family” means children of spouses or former spouses

Exemptions/Exclusions...

- 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

Recent Changes in CGT Law

- The Finance Act, 2015 amended Paragraph 36 of First Schedule to the Income Tax Act as follows;

CGT Exemptions

- i. The exemption of **“thirty thousand shillings”** on transfer of property was replaced with **“three million shillings”**;
- ii. Exemption on transfer of property below **“one hundred acres”** was substituted with **“fifty acres”**;
- iii. Provision of Property transferred/sold for the purpose of administering the estate of a deceased person where there is a court case : Provided that where there is a court case regarding such estate the period of transfer or sale shall be **two years from the date of the finalization of such court case.**

Recent Changes in CGT...

- The Finance Act, 2016 amended Paragraph 6 of the Eighth Schedule to the Income Tax Act as follows:

Substituted a new subparagraph as follows -

- (CGT is excluded on transfer of Property;)
 - (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*” means children of spouses or former spouses

Questions and Answers Session

End
Thank you