

Demystifying Tax Exemption 2020

Presentation by:-

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Secretary-General

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Administrators of Kenya (APTAK).

3rd July 2020

The APTAK

- Formed by like-minded persons who are players in the Pensions Industry.
- A non-profit organization.
- Registered under the Societies Act.
- Managed under the guidance of its Constitution.
- Council Membership of XXX Members.
- Executive Committee = The President, Vice President, Treasurer and Secretary-General.
- Under the general direction of Council, Secretary-General runs daily operations.
- Secretariat – 12th Floor; Pension Towers; Loita Street; NAIROBI.

Main Objective of APTAK

- Main objective is to promote and develop:-
- (a) Prudent trusteeship and administration of retirement benefits schemes within the Republic of Kenya and matters incidental thereto; and
- (b) Best practice in trusteeship and administration of retirement benefits through regular training, education and partnership with key national and regional players in the industry.
- NO political objective or affiliation with any political party.

Sample Benefits of Membership - 1

- (a) Collate Member views and representation at various forums where matters relating to pension administration are being discussed.
- (b) Research and bring forth topical issues relating to pension administration and seek suitable solutions.
- (c) Advice in dispute resolution mechanisms, namely litigation, arbitration, negotiation and mediation.
- (d) Independent advise on topical issues.
- (e) Personalized attention to individual concerns.

Sample Benefits of Membership - 2

- (f) Ready availability as issues arise.
- (g) Advise on regulatory, compliance, legal and pension administration issues.
- (h) Advice in approach to choice of representation in event of litigation and dispute resolution.
- (i) Guidance and Consultancy at subsidized cost in drafting, interpretation and training in understanding trust instruments, finance and governance of schemes.
- (j) Availability of resource persons for consultation in your meetings, member education and training; etc.

Eligibility to Membership - 1

- Category - Individual and Corporate.
- Access – Application in approved Form and Fees.
- Registration - Number and Issuance of Certificate.
- **(a) Corporate Members of the Association.**
 - Trust Corporation = Corporate Trustee.
 - Body corporate = Trustees (Perpetual Succession) Act.
 - Corporate Administrator.
 - Retirement Benefits Scheme.

Eligibility to Membership - 2

➔ (b) Individual Members of the Association.

- Person approved as trustee (including former) by the Retirements Benefits Authority.
- Natural Person approved as an Administrator (including former) by the Retirement Benefits Authority.
- Person who has made exemplary contributions to the retirement benefits sector through membership, sponsorship, trusteeship or administration work.
- Student in trusteeship or administration studies who registers with the Association.

Pursuit of Mandate - Research

- Budget Speech delivered on 11th June, 2020.
- Finance Bill 2020 proposals to delete Part I of the First Schedule of Income Tax Act paragraphs:-
 - (a) 44 -
 - (b) 45 -.
 - (c) 53 - .
- Caused back and forth clamor on the alleged tax exemption in respect of payment of retirement benefits to persons who are 65 years of age and above.
- We say “alleged” because it is misinformation.
- **Truth** - Such a provision does not exist in our laws.

Research Findings - 1

- 1. The 65 year old tax exemption became law in the year 2007.
- 2. The Income Tax Act was revised in the year 2012.
- The revision took care of the amendments commencing 1996.
- 3. Section 13 of the Income Tax Act (2012 Edition) states that the income specified in Part I of the First Schedule which accrued in or was derived from Kenya shall be exempt from tax to the extent so specified.

Research Findings - 2

➤ In this First Schedule then (2012) provision was made where income accrued in, derived from or received in Kenya is exempt from tax and the following 3 paragraphs appear:-

(a) 44 = The income of a registered home ownership savings plan.

(b) 45 = Income of the National Social Security Fund provided that the Fund complies with such conditions as may be prescribed.

(c) 53 = Monthly or lump sum pension granted to a person who is sixty five years of age or more.

Research Findings - 3

- 4. The Income Tax Act was again revised in the year 2018.
- The revision took care of the amendments commencing 2012.
- 5. Section 13 of the Income Tax Act (2018 Edition) states that the income specified in Part I of the First Schedule which accrued in or was derived from Kenya shall be exempt from tax to the extent so specified.
- It is in this Schedule where income accrued in, derived from or received in Kenya is exempt from tax and the following paragraphs appear:-
 - (a) 44 - The income of a registered home ownership savings plan.

Research Findings - 4

(b) 45 - Income of the National Social Security Fund provided that the Fund complies with such conditions as may be prescribed.

(c) 53 - Income from employment paid in the form of bonuses, overtime and retirement benefits:

➤ Provided that this paragraph shall only apply to employees whose taxable employment income before bonus and overtime allowances does not exceed the lowest tax band provided under Head B of the Third Schedule.

➤ We have engaged a tax expert to advice on the meaning and effect of the tax bands to retirement benefits schemes.

Research Findings - 5

- 7. Noticeable that the 2018 Revised Edition (paragraph 5(c) above) of the Income Tax Act which is the current law does not have the 65 years age or other alleged exemption.
- Instead, it introduces tax on retirement benefits without placing an age subject to expressed threshold of income.
- It is not clear how and when the 65 year age provision was removed from the law.
- But it is clear that from the year 2018 in our laws there is:-
 - (a) No exemption on payment of retirement benefits based on age 65 or any other from collection of taxes; and

Research Findings - 6

- (b) A requirement for collection of taxes on payment of retirement benefits irrespective of the age of the person being paid.
- 8. In Clause 8 of the Finance Bill, 2020 the Cabinet Secretary seeks to amend the Income Tax Act by, among others, deleting all the three (3) paragraphs 44, 45 and 53.
- Given that the paragraphs appear in the most recent 2018 Revised Edition, it is safe to ignore any reference to previous amendments (2012 to 2017 or the unknown date when 65 years age may have been removed from our laws) and focus on the Finance Bill, 2020 versus the 2018 Revised Edition of the Income Tax Act.

Research Findings - 7

- 9. Paragraph 44 is derived from Section 30 of the Income Tax Act.
- It gives tax relief to an individual in receipt of taxable income on account of a registered home ownership savings plan.
- Section 38A of the Retirement Benefits Act as read together with the Retirement Benefits (Mortgage Loans) Regulations, 2009 give permission for pension funds to be used to buy a house.
- If the paragraph is deleted as proposed, it would necessitate taxation of home owners who have used pension funds to acquire the homes.

Research Findings - 8

- 10. Paragraph 45 seeks to tax the income of the National Social Security Fund provided that the Fund complies with conditions prescribed.
- If the paragraph is deleted as proposed, it would necessitate taxation of investment income of the meagre contributions made to the NSSF thereby reducing the benefits payable at retirement.
- 11. Paragraph 53 makes provision for taxation of retirement benefits without qualification by age or other.
- If the paragraph is deleted as proposed, there will be no tax applied on retirement benefits irrespective of age.

Research Findings - 9

- ❖ 12. Alternatively, if the proposed deletion of paragraph 53 is withdrawn or rejected by the Members of Parliament, the effect would be to continue with the present provision requiring taxation of retirement benefits without qualification by any age.
- 13. Going by these provisions, you will appreciate the danger trustees, auditors and administrators of pension schemes have been placed.
- ❖ It is for real that claims may arise, among others, relating to:-
 - ✓ (a) Uncollected tax in respect of all the payments made depending on the alleged 65 year age exemption from tax since 2018.

Research Findings - 10

- ✓ (b) Improper calculation of tax by not applying the 2018 tax bands.
 - ✓ (c) Breach of contract and professional negligence where it is the administrator who calculated the pension paid from 2018.
 - ✓ (d) Breach of contract and professional negligence on the auditor who audited accounts of the scheme from 2018.
- ➡ 14. These are weighty matters which may require deliberations and action taken.

Proposed Course of Action

- Consultation.
- Target – KRA, Parliament, Kenya Law Reports; etc.
- Objective – Correct error.
- Protection – No loss or penalty to Trustee, Pension Scheme, Member or Administrator; etc.
- Legislation – Retrospective.

Discussion

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- **Note:-** *“The most terrifying thing, is being in action when ignorant! & That a lie does not live”*
- *Asante.*