

Reports & Insights series

CHALLENGES OF VOLUNTARY TAX DISCLOSURE
PROGRAMME: WHICH WAY FORWARD?

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Recently, President Uhuru Kenyatta assented to The Finance Act 2020, which augmented some of the requirements in the Tax Amendment Act 2020. The Finance Act 2020 introduced amendments related to Income Tax Act, Value Added Tax Act, Exercise Duty Act, Tax Procedure Act, and Tax Appeals Tribunals Act among others. Collectively, these changes are set to impact Kenya's business sector in significant ways.

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For instance, the Finance Act 2020 introduced the Voluntary Tax Disclosure Program (VTDP), which offers a tax amnesty for those who may not have declared tax liabilities over a period of the previous five years. The amnesty is valid for three years from this year. The VTDP envisages that taxpayers who have undisclosed tax liabilities may take advantage of the amnesty period to disclose their liabilities and regularize their tax compliance with Kenya Revenue Authority.

At the core of it, therefore, the programme offers protection against legal consequences of tax non-disclosure, provided the taxpayer takes advantage of the three-year amnesty period to disclose previous tax defaults.

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However, there are indications that not many Kenyans are likely to take up the offer. This is partly seen in the fact that ever since the programme was launched, there has not been a single voluntary declaration of outstanding tax dues reported by KRA in any of its official Communication channels including but not limited to their website. Clearly, the programme is undermined by a lukewarm reception by those who are deemed to be its target beneficiaries.

And while the lacklustre uptake of this amnesty may derive from many reasons, among the most critical ones include the lack of guarantees for those who volunteer to make their belated declarations. To appreciate this concern, it is necessary to understand how the programme works.

So, how does the Voluntary Tax Disclosure Programme work? The programme is open to all tax liabilities that may have accrued within five years prior to 1st July, 2020, thus from 1st July, 2015. Under the programme, a concerned taxpayer may voluntarily apply to the KRA Commissioner for Domestic Tax, by filling a prescribed form in which the taxpayer discloses all material facts relating to the undisclosed tax liabilities.

In this programme, it is expected that only the principal tax will become due and waiver of penalties and interests to be granted to the taxpayer at the rate of 100%, 50%, and 25%, respectively, for the disclosures made within the first, second and third year of the programme. It is also envisaged that taxpayers' disclosures under the program shall not result to any prosecution on the same set of facts.

However, there are conditions attached to such declarations, including that the relief from such belated declaration shall not result in refund to the taxpayer.

Other conditions applicable include, first that the program is only applicable to a disclosure resulting to payment of taxes and not refunds and, second, that the taxpayer granted relief in accordance with the provisions of the program shall not appeal or seek any other remedy with respect to the taxes, penalties, and interests remitted to the Commissioner.

There is also the condition of non-eligible taxpayers who may not benefit from the programme. These are in three groups. First, taxpayers who are currently under audit or Investigation; second, those who have been notified of a pending audit or investigation by the Commissioner and, third, taxpayers who are party to an ongoing litigation in respect to the tax liability or any matter relating to the tax liability.

"So, on the overall, the programme has benefits both ways – for the tax payer and for KRA. The benefits, among others, include providing an avenue for taxpayers who had not disclosed their incomes previously to disclose the same without the imposition of the punitive penalties and interests, providing a trail for improved revenue collection through enhanced compliance by bringing more taxpayers from the underground economy into the tax net and, if properly implemented, enabling KRA to enhance its revenue collection by reducing the cost of compliance, costly audits, and legal disputes."

However, the programme risks failure because of some inherent weaknesses, which need to be addressed if the same is to achieve its intended objectives. For instance, KRA has for long been misconceived by the general public as a callous institution that does not care much about tax payers. This mistrust informs the way the public receives even the most well-meaning of initiatives. Thus, KRA needs to embark on a long term and multifaceted charm offensive to ensure that it wins back the trust of its clients, thus the tax payers. Only then can it attract the kind of reception that it envisages in such initiatives as the VTDP.

The need for a charm offensive also speaks to another weakness within the programme as currently designed. Specifically, the programme provides that upon granting of relief, the commissioner and the taxpayer will enter into agreement setting out terms of payment. The commissioner will have the right to withdraw the relief if he establishes that not all material facts have been disclosed, and this will lead to prosecution. There is no provision for determining whether the omissions thus detected were innocent or deliberate. One wonders, where do we draw the line of innocent non-disclosure and deliberate non-disclosure?

This challenge is also related to suspicion that the programme does not guarantee taxpayers that they will not be victimized in future non-compliance. In other words, some taxpayers are apprehensive that they may be profiled within KRA circles as habitual tax defaulters and thus attract undesirable surveillance from the KRA compliance officers. This is a slippery issue that relates to the generally suspicious relationship that exists between KRA and tax payers.

All these challenges, among others, point at the need to change tact; while the programme on its own is laudable, its proponents within KRA and other government agencies need to appreciate the historical and other contexts in which the programme has to be implemented. These contexts should then inform the secondary support measures to ensure that; first, many Kenyans are aware of the programme and its promises and, second, offer guarantees rather than mere promises of protection from subsequent victimization or even profiling. More importantly, KRA needs to work on its historical baggage and worm its way into spaces of trust in the eyes of tax payers. This will ensure that in future Kenyans can take up some of its initiatives, which will contribute to greater revenue collections.