

DEMISTIFYING STAMP DUTY AND THE EXEMPTIONS ALLOWED UNDER THE ACT

A scrutiny of the Stamp Duty Act

Introduction

Stamp Duty is an Agency Revenue collected by the Collector of Stamp Duty attached to the Ministry of Lands and Physical Planning. The collection of this duty has however been seconded to the Kenya Revenue Authority.

Section 5 of the Act establishes the liability of Stamp Duty; the effect of which ALL instruments drafted in execution of transactions of property situated in Kenya and listed under the Act's Schedule attract Stamp Duty save for those specified under Section 117.

It is generally a duty/tax payable by the recipient/beneficiary of the transaction, e.g. in a sale of real property transaction, the stamp duty payable on the valuation of the property is imposed upon the purchaser.

Exemption & Relief

The Act, does provide for certain exemptions and reliefs that may be relied on by parties to a transaction to reduce the stamp duty implication or avoid it completely. In this Article, we shall examine some of the exemptions and reliefs provided in the Act and the procedure for obtaining such exemptions. At this point, it is important to mention that the power to exempt instruments from stamp duty lies with the Cabinet Secretary in charge of the lands docket as per Section 106(1) of the Act.

The Cabinet Secretary, states the Act, however having such power shall not exempt an instrument upon which such a tax/duty has already been paid and stamped. From the foregoing, we can therefore conclude that the law on application for stamp duty exemption therefore

presents a useful strategy for avoiding unwarranted incurrence of tax. One notable example of a transaction exempt from Stamp Duty under the law is where property held by a family has to be transferred to a limited liability company wholly owned by members of the same family, for instance, to enable the company have access to credit facilities for business expansion.

In such circumstances, requirement for payment of stamp duty would be an extra and unwarranted burden on family property without any material consideration to either party on the transfer as the transferor and the transferee are basically the same. However, as per Section 117, Stamp Duty exemption is not the preserve of family property transactions only, and exemption may also be obtained for various transactions, *inter alia*: -

- 1) *transfer of land to charitable organizations as gifts;*
- 2) *transfer of property between spouses;*
- 3) *transfer of family property to the members on demise of a family member in whose name the property was registered; and*
- 4) *Transfer of land from a Holding Company and its Subsidiaries where the holding company owns not less than ninety percent (90 %) of the shares of the subsidiary, etc.*

Also, transactions entailing the transfer/conveyance of property amongst spouses are exempt from such duty as per paragraph 12B of the Schedule to the Act. Another noteworthy of an exempted transaction was the amendment of Section 117 of the Stamp Duty Act by the ascension of the Tax Law Amendment Act of 2018 which added to the list of exemptions transactions entailing the purchase of houses by first time home owners.

We are yet to understand how the Collector shall identify such transactions.

It is also paramount to note that under *Part iv* of the Act (sections 95-97), the following transaction are subject to Relief from Stamp Duty: -

- 1) *Reconstruction/Restructuring of Corporate entities. (90% or more shareholding belongs to either company)*
- 2) *Transfer/conveyance of property between Associated parties/companies.*
- 3) *Exemption of documents relating to building societies.*

Procedure for Application for Exemption

The exemption from Stamp Duty does not accrue as of right/automatically and must be applied for. The application for exemption should be made to Minister of Lands through the Collector of Stamp Duty, and must be supported by evidence, which includes *inter alia*:

1. *Certified copy of List of Directors/Shareholders of the Transferee (Form CR 12);*
2. *Statutory Declaration by the Transferor swearing that the authorized and the issued Share Capital of the Company (the "Transferee") is owned by the relevant family members;*
3. *Certified copy of Certificate of Incorporation of the Transferee;*
4. *Certified copy of the Transferee's PIN Certificate;*
5. *Certified copies of documents evincing degree of consanguinity, for instance, Birth Certificates for the Transferor and the shareholders of the Company;*
6. *Certified copy of the duly executed transfer for the Property; and*
7. *Certified copy of Title of the Property.*

The **statutory declaration must state the section of the Act and the Legal Notice relied upon in the application for exemption**. The Minister, if satisfied with the evidence on record, would then issue a certificate exempting the relevant transaction from payment of Stamp Duty. Thereafter, the transfer may be presented at the relevant land registry for registration without payment of stamp duty, subject only to payment of the minimal registration charges payable to the registry.

Adjudication

It is noteworthy that exemption is not only limited to the transactions enunciated under Section 117. Section 17 of the Act allows for adjudication of instruments by the Collector of Stamp Duties. When adjudicating, the Collector will decide whether an instrument is chargeable with duty or not and if not chargeable a special stamp indicating that it is not chargeable has to be affixed on the instruments.

Applications under this section are submitted to the Collector of Stamp Duty. Such a provision provides an opportunity to explore an option to reduce the stamp duty implications on certain transactions even if a specific exemption has not been provided in the Act. This section however in no way offers a guarantee that the Collector shall grant the application. The applications made under this Section should be accompanied by the documents aforementioned in the preceding subheading & an Adjudication Form and the requisite adjudication fee of KES 100.

Conclusion

The rate of stamp duty payable is stipulated by statute, the Stamp Duty Act, Chapter 480 of the Laws of Kenya, i.e. 4% for transfer of property situated within a municipality/urban area and 2% on agricultural land. Non-payment of the duty results in the invalidity of the relevant transaction and any agreement signed between the parties

becomes null and void, and the same is inadmissible in a Court of Law as evidence as was held by Justice Farah in a Ruling issued on 23rd of May 2017 **In re the Estate of Daniel Ngacha Muta (Deceased) [2017] eKLR (Succession Cause no. 2718 of 2013).**

Let's Talk

For further information on how Stamp Duty and other Agency taxes affect/impact on your commercial transactions, or assistance on any other matter kindly contact your regular Taxwise Africa Analyst or the contacts below.



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