# Tax Alert: VAT Regulations on Digital Services and Electronic Tax Invoices

## Background

In 2019, the Government through the Finance Act 2019 amended the Value Added Tax Act, 2013 (VAT Act) to tax certain supplies made through a digital marketplace. The VAT Act defines a digital marketplace as *"a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means."*

The tax was to take effect after publication of regulations to guide its implementation. On 10 September 2020, the Cabinet Secretary, National Treasury (CS) gazetted the Value Added Tax (Digital Marketplace Supply) Regulations, 2020 (the Regulations). The Regulations were issued a few months after the government requested for public comments on the draft regulations.

Below are key highlights on the new Regulations:

## VAT Regulations on the Digital Marketplace

The Regulations provide a list of digital supplies which will now be subject to VAT when supplied from outside Kenya under a business to consumer transaction. The Regulations do not cover transactions under business to business arrangements. Registered or unregistered businesses procuring digital services from outside Kenya are expected to account for VAT on the services under the imported services regime.

The Regulations will mainly affect digital supplies made to individual consumers who are not registered for VAT. These include the supply of:

a) Downloadable digital content including downloadable mobile applications, e-books and films;
b) Subscription-based media including news, magazines and journals;
c) Over-the-top services including streaming television shows, films, music, and podcasts;
d) Software programmes including software, drivers, website filters and firewalls;
e) Electronic data management including website hosting, data warehousing, file-sharing and cloud storage;
f) Music and games;
g) Search engine and automated helpdesk services including customisable search engine services;
h) Tickets for live events, theatres or restaurants;
i) Distance teaching through pre-recorded media or e-learning including online courses and training;
j) Digital content for listening, viewing or playing on any audio, visual or digital media;
k) Services that links the supplier to the recipient including transport hailing services or platforms;
l) Electronic services under section 8 (3) of the VAT Act. This includes services listed above together with the remote maintenance of programs and equipment, updating of software, access to databases and betting; and
m) Any other service provided through a digital marketplace.

A person will be deemed to be supplying taxable digital services in Kenya where:

a) the supplies are made by a person from outside Kenya to a recipient in Kenya in a business to consumer transaction;
b) the person is conducting business in Kenya and any of the following circumstances apply:
(i) the recipient of the supply is in Kenya;
(ii) the payment for the services is made to the supplier in a country outside Kenya from a bank registered under the Banking Act; or
(iii) the payment for the services that to the supplier outside Kenya is authorised in Kenya.

Foreign companies which provide eligible supplies are expected to register and account for VAT in Kenya. There are two options to register for tax. One option is through a proposed simplified online tax registration framework for declaration and payment of taxes. The other option is for foreign companies to appoint a local tax representative, who can file returns and remit payments on their behalf.

Suppliers of digital services are expected to register within six months of the publication of the Regulations. Once registered, the monthly tax returns and payments will be due on or before the twentieth day of the subsequent month.

## Electronic Tax Invoices Regulations

Alongside the Digital Marketplace Regulations, the CS also gazetted The Value Added Tax (Electronic Tax Invoices) Regulations, 2020. This is expected to be an enhancement of the existing Electronic Tax Receipt (ETR) and the Electronic Signature Device (ESD) program to allow real time relay of business transactions details of the Kenya Revenue Authority (KRA).

The Regulations apply to persons registered for VAT under the VAT Act. All registered persons are expected to comply with the Regulations within twelve months of publication of the Regulations. This gives the KRA and taxpayers up to 9 September 2021 to replace the current fiscal devices with new devices capable of relaying data to the KRA.

Where a user of a register cannot use the register for any reason, the user is expected to:

a) notify the Commissioner in writing within twenty-four hours of the user's inability to use the register;
b) record sales using any other means as may be specified by the Commissioner; and
c) Input the sales recorded using other means into the system once it becomes available.

The user's responsibilities include ensuring availability of the register at the point of sale, facilitating inspection of the register by an authorised officer and ensuring the register is regularly serviced for proper functioning.

A tax invoice generated from a register shall contain:

a) the PIN of the registered user of a register and the buyer
b) the time and date of issuance and serial number of the invoice;
c) the total gross amount, tax rate applied and total tax
d) the item code of supplies (for exempt, zero-rated and other rate supplies)
e) a brief description of goods and services, quantity of supply and the unit of measure;
f) the unique register and invoice identifier;
g) a quick response (QR) code; and
h) any other requirement as may be specified by the Commissioner.

Through the Regulations of the electronic tax invoice system (register), input and output declarations as well as their reconciliations are to be enhanced thereby speeding up the processing and receipt of VAT refunds.

## Our opinion on the Regulations

The KRA views VAT as one of the critical areas for growing tax revenues. The implementation of the digital supplies and the electronic tax regulations are some of the measures that the KRA is implementing to grow the tax base and close tax leakage loopholes.

Enforcement of VAT on digital services will not be easy considering the fluid nature of digital transactions and the fact that the suppliers are based out of KRA and largely out of reach of the KRA. Digital services will continue to be an area of focus in Kenya as the KRA concludes the imposition of VAT and starts the imposition of digital services tax. Already the National Treasury has published draft regulations for the implementation of income tax on digital services.

The implementation of electronic invoice regime presents a great opportunity for the KRA to seal loopholes in VAT collections. If implemented well it will eliminate the current reconciliation challenges facing taxpayers, help to eliminate input VAT fraud and hopefully allow the KRA to expeditiously process VAT refund claims.

**KPMG is happy to assist on any matters arising from the above. Feel free to reach out to the undersigned.**

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