

Digital Services Tax

Tax Alert

January 2021



Background

In 2019, the Government through the Finance Act, 2019 amended the Income Tax Act (ITA) to introduce a Digital Services Tax (DST) regime to tax certain supplies made through a digital marketplace. The ITA defines a digital marketplace as “a platform that enables direct interaction between buyers and sellers of goods and services through electronic means.”

Regulations on the Digital Marketplace

In December 2020, the Cabinet Secretary, National Treasury issued final DST Regulations, 2020 (the Regulations) to guide the implementation of DST. DST is expected to take effect on 2 January 2021 with the first return and payment covering January 2021 due for submission to the Kenya Revenue Authority by 20 February 2021.

The DST rate is 1.5% of the gross transaction value. The gross transaction value is the payment received as consideration for the digital service. In the context of a digital marketplace provider, it is the commission or fee paid for the use of the platform.

DST is payable on the following services:

- a) Downloadable digital content including downloadable mobile applications, e-books and films;
- b) Over-the-top services including streaming television shows, films, music, podcasts and any form of digital content;
- c) Sale of, licensing of, or any other form of monetising data collected about Kenyan users which has been generated from the users’ activities on a digital marketplace;
- d) Provision of a digital marketplace;
- e) Subscription-based media including news, magazines and journals;
- f) Electronic data management including website hosting, online data warehousing, file-sharing and cloud storage services;
- g) Electronic booking or electronic ticketing services including the online sale of tickets;

- h) Provision of search engine and automated held desk services including supply of customised search engine services;
- i) Online distance training through pre-recorded media or e-learning including online courses and training; and
- j) Any other service provided through a digital marketplace.

According to the Regulations, DST is payable by the digital service provider. The services of a licensed financial service provider carrying out online services which facilitate payments, lending, or trading of financial instruments, commodities or foreign exchange carried out by a financial institution specified under the Fourth Schedule to the Income Tax Act or a financial service provider authorised or approved by the Central Bank of Kenya are not subject to DST. Further, online services provided by Government institutions are not subject to DST.

It also important to note that DST shall not apply to income derived from Kenya by non-resident persons from the business of transmitting messages by cable, radio, optical fibre, television broadcasting, Very Small Aperture Terminal (VSAT), internet, satellite or by any other similar method of communication. Similarly, DST shall not apply to income which are subject to withholding tax in Kenya. Some of these incomes include management and professional fees earned through a digital marketplace.

Foreign companies which provide digital marketplace services to consumers in Kenya will be subject to DST. A foreign company will be deemed to have provided services in the Kenyan digital marketplace where:

- a) The user accesses the digital interface from a terminal (computer, tablet or mobile phone) located in Kenya;
- b) Payment for the digital services is made using a credit or debit facility provided by a financial institution or company in Kenya;
- c) Digital services are acquired using an internet protocol address registered in Kenya or an international mobile phone country code assigned to Kenya; or



- d) The user has business, residential or billing address in Kenya.

The Regulations provide that DST will be an advance tax for a resident or non-resident person with a permanent establishment in Kenya who provides digital services through a digital marketplace. The DST will be available for offset against the corporation liability for that year of income for resident companies. For non-resident companies it is a final tax.

A non-resident person without a permanent establishment in the country may appoint a tax representative to account for DST on their behalf. Where a person appoints a tax representative to account for DST, the tax representative must do so by the twentieth day of the month following the end of the month that the digital service was offered. The Regulations also provide the Commissioner with powers to appoint a DST agent on behalf of the taxpayers for both resident and non-resident persons in accordance with Section 15 of the Tax Procedures Act.

Alternatively, a non-resident person without a permanent establishment in the country may opt to apply to the Commissioner for DST registration under a simplified tax registration framework.

A person who applies for registration under the simplified tax registration framework shall do so through an online registration form prescribed by the Commissioner. The application shall include the following information:

- a) The name of the applicant's business including its trading name;
- b) The name, telephone number and email address of the contact person responsible for tax matters;
- c) The postal and registered address of the business and its contact person;
- d) The websites or uniform resource locator of the applicant through which business is conducted;
- e) The national tax identification number issued to the applicant in the country of residence;
- f) The certificate of incorporation issued to the applicant's business; and
- g) Any other information that the Commissioner may require.

Upon registration, the Commissioner shall issue the applicant with a Personal Identification Number for the purpose of filing returns and payment of the digital service tax.

Our opinion on the Regulations

Prior to the release of the Regulations, there was speculation on the mechanics of the DST regime. The Regulations have clarified some of these issues even through some concerns remain.

There are also concerns around the lack of a turnover threshold for the DST, leading to significant administrative burdens for companies with few low value transactions. Many jurisdictions that have introduced DST have set thresholds to align the expected tax collections to the cost of compliance.

In absence of updates to the existing double tax agreements (DTAs), it is likely that digital services payments to countries that have signed DTAs with Kenya will not be subject to DST given the reliance on the concepts of residency and permanent establishment as a basis for determining the jurisdiction with the taxing rights.

Finally, the short timeframe provided between the publication of the final regulations and the coming into force of the DST regime leaves little time for taxpayers to put in place the infrastructure to comply with the DST.

KPMG is available to assist you navigate through the DST regime and prepare for compliance in January 2021. Feel free to reach to your contact at KPMG or the undersigned.

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