

The Value Added Tax (Digital Marketplace Supply) Regulations, 2020



Digital Marketplace Supply Regulations, 2020



The regulations were published in accordance with the provisions of Section 5(8) of the VAT Act 2013 (VAT Act) which required the Cabinet Secretary of the National Treasury and Planning (the CS) to publish regulations providing a mechanism for the implementation of VAT charge on supplies made through a digital market place.

Introduction

VAT on digital market place was introduced by the Finance Act 2019, which amended the Value Added Tax Act No. 35 of 2013 (VAT Act) to tax supplies made through a digital market place.

The Act defines a digital market place to mean “a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means”.

The regulations came into effect following public consultations on the draft regulations that were released towards the end of May 2020. The regulations address key issues such as services that fall under the scope of digital market place, registration, consideration of place of supply, accounting and payment of tax etc.

Global Compliance on taxation of the digital economy

Growth of the digital economy has necessitated the taxation of the digital supply of services. Governments and tax authorities are scrambling to keep up with the increasing digitization of the economies.

Individual countries are filling the vacuum with their own varied set of tax measures, which continues to create uncertainty and heightens the risk and complexity of tax management for multinational enterprises (MNEs).

What this means for you as a taxpayer

• Business to Business transaction (B2B)

Businesses receiving the services in Kenya will be required to account for VAT on importation of a service as per section 10 of the VAT Act.

• Business to Consumer transaction (B2C)

A non-resident person in a B2C transaction will be required to either register in Kenya under the simplified tax framework or appoint a tax representative to account for the VAT in Kenya.

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Regulation 2 - Definition

Regulation

“business-to-business transaction” means a transaction between a supplier from an export country to a tax registered or non-registered business entity in Kenya that is required to account for tax on imported services under section 10;

“business-to-consumer transaction” means a transaction between a supplier from an export country and a consumer in Kenya;

“digital marketplace supply” means the supply of a service made on a digital marketplace;

“digital marketplace” has the meaning assigned to it in section 5 (9);

“export country” means any country other than Kenya and includes any place which is not situated in Kenya;

“intermediary” means any person who facilitates the supply of services through the digital marketplace and is responsible for issuing invoices or collecting payments for the supply;

“Personal Identification Number” or “PIN” has the meaning assigned to it in section 2 of the Tax Procedures Act, 2015;

“recipient”, in relation to any supply of services, means the person to whom the supply is made;

“tax” has the meaning assigned to it under section 2 (1); and

“tax period” means a calendar month.

Comment

This regulation captures key definitions that are vital in interpretation of the regulations.



	Regulation	Comment
Regulation 3 - Scope of taxable supply through a digital marketplace	<p>Taxable supplies made through a digital marketplace include</p> <ul style="list-style-type: none"> • downloadable digital content including downloadable mobile applications, e-books and films; • subscription-based media including news, magazines and journals; • over-the-top services including streaming television shows, films, music, podcasts and any form of digital content; • software programmes including software, drivers, website filters and firewalls; • electronic data management including website hosting, online data warehousing, file-sharing and cloud storage services; • music, and games; • search engine and automated helpdesk services including customisable search engine services; • tickets for live events, theatres or restaurants; • distance teaching through pre-recorded media or e-learning including online courses and training; • digital content for listening, viewing or playing on any audio, visual or digital media; • services that links the supplier to the recipient including transport hailing services or platforms; • electronic services under section 8 (3); and • any other service provided through a marketplace that is not exempt under the Act 	<p>The regulation highlights the type of services that qualify as digital services where suppliers will be liable to account for VAT.</p> <p>E-learning and online courses are provided as some of the services that are taxable when provided in a digital marketplace.</p> <p>This contradicts the exemption provided in the first schedule of the VAT Act. E-learning platforms have gained prominence in the error of covid-19 and the trend is likely to continue in the near future as more people shy away for the traditional classroom. There is need to align the regulations to the provisions of the VAT Act.</p> <p>The software industry is fast expanding and the digital distribution of applications and software is increasing. The ever expanding supply and transaction chains could lead to challenges for the revenue authority in determining who is responsible to account for the tax.</p> <p>Streaming media has also changed the way media services are being delivered to customers. Content is now readily available to consumers at home and through personal devices which might be more difficult to track, making the VAT process hard to follow and stay compliant.</p> <p>The main tax challenge relating to VAT on the digital economy will particularly be on sales to private consumers, on which services are of low value and less frequent as</p>

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Regulation 4 – Application of tax

- 1) Tax shall apply to taxable supplies specified under regulation 3 when supplied in Kenya.
- 2) Where the supply under regulation 3 is made in a business-to business transaction, the provisions of section 10 shall apply.
- 3) A business entity that is required to account for the value added tax on taxable supplies made on a digital marketplace under section 10 shall notify the supplier from the export country that the supplier is not required to account for the tax in Kenya for the supply.
- 4) Where the supplier from an export country is notified as provided under paragraph (3), the supplier shall not be required to charge the tax on the supply to the business entity.
- 5) Where a business entity fails to notify the supplier under paragraph (3) and the supplier charges tax, the business entity shall not be allowed to deduct the tax charged.

Businesses receiving digital service are liable to account for reverse VAT as per section 10 of the VAT Act which governs applicability of VAT on importation of services.

Where the recipient who is a Kenyan business entity accounts for reverse VAT on the imported service, the supplier from the export country will not be required to account for VAT.

Regulation 5 - Registration

- (1) A person supplying the taxable services specified in regulation 3 shall register for tax in Kenya if —
 - a) the supplies are made by a person from an export country to a recipient in Kenya in a business-to-consumer transaction; and
 - b) the person is conducting business in Kenya in accordance with section 8 (2) 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 the export country from a bank registered under the Banking Act; or
 - (iii) the payment for the services that is made to the supplier in the export country is authorised in Kenya
- (2) A person from an export country who makes a business-to consumer supply of services to a recipient who is in Kenya shall register for tax through a simplified tax registration framework in accordance with regulation 7.

This section applies to a B2C supply

The supplier of services in a B2C supply will be required to have presence in Kenya through registration

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	Regulation	Comment
Regulation 5- cont'd Registration	(3) A person registered under paragraph (2) shall declare and pay tax on the supplies made on the digital marketplace at the rate specified in section 5 (2) (b).	
Regulation 6- Appointment of tax representative	Despite regulation 5 (2), a person from an export country making a business-to-consumer supply to a recipient in Kenya who elects not to register in accordance with regulation 7 shall appoint a tax representative in accordance with section 15A of the Tax Procedures Act, 2015.	A non-resident supplier who does not wish to set up an office in Kenya may elect to have a tax representative who will handle tax matters on their behalf. Registration of tax representative. will be done through the online filing platform iTax .
Regulation 7- Simplified tax registration framework	<p>(1) A supplier from an export country who makes supplies on a digital marketplace shall register under the simplified tax registration framework specified under this regulation.</p> <p>(2) An application for registration under the simplified tax registration framework shall be done through an online registration form prescribed by the Commissioner.</p> <p>(3) The information required for registration under paragraph (2) shall include —</p> <ul style="list-style-type: none"> (a) the name of the business including the business's trading name; (b) the name of the contact person responsible for tax matters; (c) the postal address or registered address of the business and its contact person; (d) the telephone number of the contact person; (e) the email address of the contact person; (f) the websites or uniform resource locators (URLs) of the supplier through which business is conducted; (g) the national tax identification number issued to the supplier in the supplier's jurisdiction; (h) the certificate of incorporation or registration issued to the business in the country where the business is incorporated; and (i) any other information that the Commissioner may require. 	<p>Where in a B2C supply, the supplier decides to register in Kenya without using a tax representative, there shall be a simplified tax registration framework under which the supplier from the export country should register.</p> <p>The simplified tax regime will ease the administration burden and net in more foreign taxpayers into the income bracket.</p> <p>It is however unclear what measures the KRA will put in place in order to encourage registration of foreign digital service providers to either appoint tax representatives or register under the simplified tax registration framework.</p>



	Regulation	Comment
Regulation 7- Simplified tax registration framework	<p>(4) An applicant under paragraph (2) may be required to submit to the Commissioner additional documents that may be necessary to substantiate the information provided in the application.</p> <p>(5) Upon registration under this regulation, the Commissioner shall issue the applicant with a PIN for the purpose of filing returns and the payment of tax.</p> <p>(6) A person registered under this regulation who ceases to make taxable supplies on a digital marketplace shall apply to the Commissioner for deregistration in accordance with section 36.</p>	
Regulation 8- Place of supply	<p>(1) A supply on a digital marketplace shall be deemed to have been made in Kenya where the recipient of the supply is in Kenya.</p> <p>(2) In determining whether the recipient of a supply is in Kenya, the Commissioner shall consider—</p> <p>(a) whether the payment proxy including credit card or debit card information and bank account details of the recipient of the digital supplies is in Kenya; or</p> <p>(b) whether the residence proxy including the billing or home address or access proxy including internet address, mobile country code of the SIM card of the recipient is in Kenya.</p>	<p>Under this regulation, the revenue authority has pegged the place of supply on the residency of the recipient.</p> <p>The fundamental policy issue in relation to the international application of VAT is whether the levy should be imposed by the jurisdiction of origin or by the jurisdiction of destination.</p> <p>Under the destination principle, tax is ultimately levied only on the final consumption that occurs within the taxing jurisdiction. As such the place of residence of the recipient is fundamental in determining applicability of VAT.</p>

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	Regulation	Comment
Regulation 9 – Time of supply	<p>The time of supply on a digital marketplace shall be the earlier of —</p> <ol style="list-style-type: none"> the date on which the payment for the supply is received in whole or in part; or the date on which the invoice or receipt for the supply is issued. 	<p>The regulations do not include the date in which services are performed as a criteria of determining the place of supply.</p>
Regulation 10 - Exemption from issuing an electronic tax invoice	<p>A business-to-consumer supplier on a digital marketplace from an export country who is registered under these Regulations shall not be required to issue an electronic tax invoice:</p> <p>Provided that the supplier shall issue an invoice or receipt showing the value of the supply and the tax deducted thereon.</p>	<p>B2C suppliers will not be required to raise an electronic tax invoice which is expected to simplify the administration tax.</p>
Regulation 11 - Claim for input	<p>A deduction of input tax by a supplier shall not be allowed for business-to-consumer transactions for a supply on a digital marketplace.</p>	<p>The regulation is punitive and goes against the fundamental principles of VAT. Upon registering in Kenya, the non-resident entity becomes resident for tax purposes and hence is eligible to claim the input VAT.</p> <p>Treasury should therefore consider including a provision where suppliers who are registered for VAT are allowed to claim the input tax where it is incurred in making the taxable supplies in Kenya.</p>
Regulation 12 - Accounting for and payment of tax	<ol style="list-style-type: none"> The tax for a supply made on a digital marketplace from an export country to a recipient in Kenya in a business-to-consumer transaction shall be paid by the supplier or the tax representative of the supplier. A registered person shall submit a return in the prescribed form and remit the tax due in each tax period to the Commissioner on or before the twentieth day of the month following the end of the tax period. 	<p>The regulations have maintained the timelines for payment to the 20th of the following month.</p>

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	Regulation	Comment
Regulation 12 – cont'd	3) Where an intermediary makes a supply on a digital marketplace on behalf of another person, the intermediary shall be required to charge and account for the tax on the supply whether such other person is registered for tax or not.	The intermediary will be required to account for VAT whether or not the suppliers meet the VAT registration threshold, in our view, this provision should be amended to only apply to suppliers who have met the registration threshold of KES 5 million per annum.
Regulation 13 – Amendment of returns	1) Any amendments to a return submitted in accordance with these Regulations shall be made in accordance with section 31 of the Tax Procedures Act, 2015. 2) Where an amendment under paragraph (1) results in the overpayment of tax, the amount overpaid shall be retained as a credit in favour of the person who overpaid and offset against the tax payable in the subsequent tax period.	Overpayment of taxes will only be carried forward as a credit and will not be legible for refund.
Regulation 14 - Penalties	A person who fails to comply with the provisions of these Regulations shall be liable to the penalties prescribed under the Act or the Tax Procedures Act, 2015.	Penalties for non- registration, late filing, non-payment etc will be in line with provisions provided under the VAT act or the TPA which are: <ul style="list-style-type: none">• Late filing - higher of KES 10,000 or 5%.• Late payment penalty – 5% of the tax due and payable
Regulation 15 – Transitional provision	A supplier on a digital marketplace from an export country who is required to register under these Regulations shall apply to the Commissioner for registration within six months from the date of publication of these Regulations.	Suppliers are required to register within 6 months from 25 th of September, 2020. Owing the uncertainties and ambiguities plaguing the digital supplies, Treasury ought to consider extending timelines to net in more taxpayers and ensure compliance.



Conclusion

The transaction chain is becoming increasingly complicated owing to the various ways in which services are being monetized. The complexity of transactions shall no doubt make it difficult for revenue authorities to determine where the value of a transaction has been created and the responsibility of the parties to the transaction as far as accounting for VAT.

While it is necessary to extend the tax base from the traditional physical presence to online presence, the expansion comes with a lot of uncertainty in areas such as marketing and data-driven profiling where the place of value creation is not clear cut. This uncertainty shall make both compliance from the taxpayers perspective and enforcement by the revenue authorities difficult as businesses will grapple with whether or not they ought to register and what elements of their businesses are covered. On the other hand revenue authorities run the risk of double taxation and endless disputes with disgruntled taxpayers.

Get in Touch

Please get in touch with us to find out more about how this affects you.



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