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Indirect Tax Alert

Kenya introduces VAT regulations on supply of digital services

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Executive summary

The Kenyan Cabinet Secretary for National Treasury and Planning has issued draft Value-Added Tax (VAT) (Digital Marketplace Supply) Regulations, 2020 (the Regulations) for public commentary and subsequent approval by Parliament. The Regulations are intended to offer guidelines on the taxation of a "digital marketplace" following the introduction of taxation of such services under the *Finance Act, 2019*. These Regulations detail: (i) the scope of taxable supplies; (ii) registration requirements; (iii) simplified registration for nonresidents; (iv) rules on place and time of supplies; and (v) invoice and record-keeping requirements, among others. Generally, the new rules apply to Business to Consumer (B2C) supplies. Business to Business (B2B) supplies are treated as imported services, which are subject to reverse charge.

Detailed discussion

The Regulations aim at ensuring that VAT is charged on taxable services supplied in Kenya through a digital marketplace under a B2C transaction.

Scope of taxable supplies

The Regulations provide that the scope of taxable supplies shall include electronic services under Section 8(3) of the *VAT Act* as follows:

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- Downloadable digital content including downloading of mobile Applications, e-books and movies
- Subscription-based media including news, magazines, journals
- Streaming of TV shows and music, podcasts and online gaming
- Software programs including downloading of software, drivers
- Website filters and firewalls
- Electronic data management including website hosting, online data
- Warehousing, file-sharing and cloud storage services
- Supply of music, films and games
- Supply of search-engine and automated helpdesk services including; supply of customized search-engine services
- Tickets bought for live events, theaters, restaurants etc. purchased through the internet
- Supply of distance teaching via pre-recorded medium or e-learning including supply of online courses and training
- Supply of digital content for listening, viewing or playing on any audio, visual or digital media
- Supply of services on online marketplaces that links the supplier to the recipient, including transport hailing platforms
- Any other digital marketplace supply as may be determined by the Commissioner

Registration requirements

The Regulations require that a person supplying taxable services through a digital marketplace should register for VAT in Kenya where:

- The digital marketplace supplies are supplied by a person from a place of an export country to a recipient in Kenya in a B2C transaction
- The person is conducting business in Kenya as provided under Section 8(2) of the *VAT Act* and any of the following circumstances are present:
  - The recipient of the supply is in Kenya
  - The payment made to the supplier in the export country, for the supply of digital marketplace supplies, originates from a bank registered or authorized in Kenya, under the *Banking Act*, Cap 488
  - The recipient of that digital marketplace supply has a business, residential or postal address in Kenya

Registration

A nonresident person who makes B2C supplies of taxable services to a recipient who is in Kenya is required to register for VAT through a simplified VAT registration framework and declare and pay VAT at the standard rate of 14%. Such a person will be required to register within 30 days from the publication of the Regulations. If such person is not able to register under the simplified VAT registration framework, they can appoint a tax representative to account for the VAT on their behalf. The Regulations do not provide for any registration threshold.

The simplified VAT registration will be done online, using a format to be prescribed by the Commissioner. Upon registration, the applicant will be issued with a Personal Identification Number (PIN) for the purpose of filing and payment of VAT. If the applicant ceases to make taxable supplies, they can apply for deregistration to the Commissioner.

Determination of place of supply

The Regulations deem a digital marketplace supply to have been made in Kenya where:

- The recipient of the supply is in Kenya.
- The payment proxy including credit card information and bank account details of the recipient of the digital supplies is in Kenya.
- The residence proxy including: the billing or home address or access proxy including Internet Proxy address, mobile country code of SIM card of the recipient is in Kenya.

Tax returns and payment of tax

The Regulations require all registered persons to submit a return in the prescribed form and remit the tax due on a monthly basis. The due date for return filing and payment of tax is on or before the 20th day of the month following a tax period. The Regulations allow for amendments to tax returns where an over/under declaration has been made. Where these amendments result in a tax overpayment, such a credit can be used to offset against VAT payable in subsequent tax periods.

For B2C transactions, the Regulations require the supplier to issue an invoice or receipt showing the value of the supply and tax deducted.

Claim for input tax

The Regulations do not allow deduction of input tax under the simplified VAT registration framework. This therefore implies that the supplier incurs the VAT cost or passes it on to the final consumer making the supply more expensive than it currently is.

Penalties

In addition to the penalties prescribed under the VAT Act, restrictions of access to the digital marketplace in Kenya will be applied for failure to comply with the provisions of these Regulations.

Next steps

These Regulations will be key in understanding the taxation of digital supply, its operational requirements and its effect to the parties involved in the transactions.

It is important that these Regulations align with the broader Government policy on the digital economy and data protection laws to ensure smooth implementation and also ensure that Kenya does not lose its position as an innovation and tech hub in Africa.

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