26 October 2020

Indirect Tax Alert

Kenya gazettes VAT regulations on digital marketplace supply

Executive summary

Kenya's Cabinet Secretary for the National Treasury and Planning gazetted the *Value Added Tax (Digital marketplace supply) Regulations 2020* on 10 September 2020.[1] These Regulations aim at ensuring that Value Added Tax (VAT) is charged on taxable services supplied in Kenya through the digital marketplace by Business to Customer (B2C) transactions. The Regulations provide for a transition clause of six months from the date of publication (10 September).

The *Finance Act, 2019* amended the *VAT Act, 2013* to bring into the ambit of vatable supplies, supplies made through a digital marketplace. A digital marketplace is defined as a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means. Further, the amendment required that the Cabinet Secretary issue regulations to provide the mechanisms for implementing the provision.

A prior EY Global Tax Alert, *Kenya introduces VAT Regulations on supply of digital services*, dated 19 June 2020, highlighted these Regulations in the draft format, when the Cabinet Secretary for National Treasury and Planning had issued the same for public commentary.

Accordingly, this Alert focuses on the Regulations as published and highlights the changes from the draft format.

Detailed discussion

Scope of taxable supplies

The Regulations provide that the scope of taxable supplies includes:

- 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 programs 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 customizable search engine services
- Tickets for live events, theaters 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 link the supplier to the recipient including transport hailing services or platforms
- Electronic services under section 8(3)
- Any other service provided through a digital marketplace that is not exempt under the Act

The draft regulations had listed "any other digital marketplace supply as may be determined by the Commissioner" as one of the supplies subject to these Regulations. The gazetted Regulations substituted this item with "any other service provided through a digital marketplace that is not exempt under the Act." This is seen as confining digital services to transactions recognized by the Act rather than giving the discretion to the Commissioner as had been envisaged in the draft regulations.

The regulations have listed electronic services under section 8(3) as a digital service subject to tax. In the draft regulations, the electronic services had formed the preamble of the scope of taxable supplies and the rest were an inclusion to it. It appears that the rationale for this revision is to create clarity in the services involved. The draft position would have required the reading of the other listed services alongside electronic services.

Application of tax

VAT shall apply to the above listed taxable supplies in scope when supplied in Kenya. Where the supply is made in a business-to-business transaction, the concept of reverse charge VAT shall apply.

A business entity that is required to account for VAT on taxable supplies made on a digital marketplace under reverse charge is to notify the supplier from the export country that the supplier is not required to account for the tax in Kenya for the supply.

Where the supplier from an export country is notified as provided, the supplier is not required to charge the tax on the supply to the business entity. Where a business entity fails to notify the supplier and the supplier charges tax, the business entity is not allowed to make a claim/deduct the tax charged from its output tax on other taxable supplies.

Registration requirements

A person supplying the taxable services specified under a digital market place shall register for tax in Kenya if the following conditions are met:

a) The supplies are made by a person from an export country to a recipient in Kenya in a B2C transaction.

b) The person is conducting business in Kenya in accordance with section 8(2) of the Act and any of the following circumstances apply:
   - The recipient of the supply is in Kenya.
   - The payment for the services is made to the supplier in the export country from a bank registered under the *Banking Act*.
   - The payment for the services that is made to the supplier in the export country is authorized in Kenya.

A person from an export country who makes a B2C supply of services to a recipient who is in Kenya is to register for tax through a simplified tax registration framework.

A registered person shall declare and pay tax on the supplies made on the digital marketplace at the rate specified in section 5(2)(b) of the *VAT Act*, i.e., the current standard rate of 14%.

While the draft Regulations required the recipient of that digital marketplace supply to have a business, residential or postal address in Kenya" as one of the circumstances to qualify for registration, the final Regulations excluded it.

This seems to make the determination of the recipient's presence in Kenya subjective as this criterion would have formed the basis for consideration in terms of geographical location.

Simplified tax registration framework

A supplier from an export country who makes supplies on a digital marketplace must register under the simplified tax registration framework. An application for registration under the simplified tax registration framework is made through an online registration form prescribed by the Commissioner.

The information required for registration includes:

a) Name of the business as well as the business's trading name

b) Name of the contact person responsible for tax matters

c) Postal address or registered address of the business and its contact person

d) Telephone number of the contact person

e) E-mail address of the contact person

f) Websites or uniform resource locators (URLs) of the supplier through which business is conducted

g) National tax identification number issued to the supplier in the supplier's jurisdiction

h) Certificate of incorporation or registration issued to the business in the country where the business is incorporated

i) Any other information that the Commissioner may require

An applicant may be required to submit to the Commissioner additional documents that are necessary to substantiate the information provided in the application.

Upon registration under this Regulation, the Commissioner will issue the applicant with a PIN for filing returns and the payment of tax.

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.

This regulation has been enhanced to indicate the information required for registration, the time within which the registration should be made and also not restrict the provision of additional documents called for by the commissioner.

A person from an export country making a B2C supply to a recipient in Kenya who elects not to register, shall appoint a tax representative in accordance with section 15A of the *Tax Procedures Act, 2015*.

Deregistration

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 of the *VAT Act*.

Determination of place and time of supply

A supply on a digital marketplace shall be deemed to have been made in Kenya where the recipient of the supply is in Kenya.

In determining whether the recipient of a supply is in Kenya, the Commissioner shall consider whether:

a) The payment proxy including credit card or debit card information and bank account details of the recipient of the digital supplies is in Kenya.

b) 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.

As to the time of supply on a digital marketplace, it shall be the earlier of:

a) The date on which the payment for the supply is received in whole or in part.

b) The date on which the invoice or receipt for the supply is issued.

Claim for input tax

The Regulations do not allow deduction of input tax for the B2C transactions for a supply on a digital marketplace.

This therefore implies that the supplier incurs the VAT cost or passes it on to the consumer.

Exemption from issuing an electronic tax invoice

A B2C 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 provided that the supplier shall issue an invoice or receipt showing the value of the supply and the tax deducted thereon.

Payment of tax

The Regulations require registered persons to submit a return in the prescribed form and remit the tax due, in each tax period, to the Commissioner on or before the 20th day of the month following the end of the tax period.

Returns

The Regulations provide that 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*, and where an amendment results in the overpayment of tax, the amount overpaid shall be retained as a credit in favor of the person who overpaid and offset against the tax payable in the subsequent tax period.

Penalties

A person shall be liable to the penalties prescribed under the Act or the *Tax Procedures Act, 2015* for failure to comply with the provisions of these Regulations.

Impact of the Regulations

The Authority's intention of bringing to charge supplies done through the digital marketplace is to broaden the tax base and realize more revenue. These Regulations, therefore, as required by the Act, form the basis of the application and the requirements of taxation of digital supply, and its effect to the parties involved in the transactions. The application transcends the transnational digital economy to apply the regulations to international market players.

In the absence of a threshold for registration for a B2C transaction, it becomes unclear as to the efficiency and ease of doing business in the Kenyan market especially in ensuring that Kenya maintains its position as an innovation and tech hub in Africa.

Endnote

1. The Cabinet Secretary acted through Legal Notice No.190 of 2020, and pursuant to section 5(8) as read with section 67 of the *Value Added Tax, Act (the Act) 2013*.

For additional information with respect to this Alert, please contact the following:

Ernst & Young (Kenya), Nairobi

- Francis Kamau francis.kamau@ke.ey.com
- Christopher Kirathe christopher.kirathe@ke.ey.com
- Hadijah Nannyomo hadijah.nannyomo@ke.ey.com
- Nancy Ngetich nancy.ngetich@ke.ey.com
- Samuel Ngatia samuel.ngatia@ke.ey.com
- Kefa Kioge kefa.kioge@ke.ey.com

Ernst & Young Société d'Avocats, Pan African Tax – Transfer Pricing Desk, Paris

- Bruno Messerschmitt bruno.messerschmitt@ey-avocats.com
- Alexis Popov alexis.popov@ey-avocats.com

Ernst & Young LLP (United Kingdom), Pan African Tax Desk, London

- Byron Thomas bthomas4@uk.ey.com

Ernst & Young LLP (United States), Pan African Tax Desk, New York

- Brigitte Keirby-Smith brigitte.f.keirby-smith1@ey.com
- Dele Olagun-Samuel dele.olaogun@ey.com

EYG no. 007285-20Gbl

1508-1600216 NY
ED None