

LEGAL NOTICE No. 190

THE VALUE ADDED TAX ACT

(No. 35 of 2013)

THE VALUE ADDED TAX (DIGITAL MARKETPLACE SUPPLY)
REGULATIONS, 2020

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THE VALUE ADDED TAX ACT

(No. 35 of 2013)

IN EXERCISE of the powers conferred by section 5 (8) as read with section 67 of the Value Added Tax Act, 2013, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE VALUE ADDED TAX (DIGITAL MARKETPLACE SUPPLY) REGULATIONS, 2020

14. These Regulations may be cited as the Value Added Tax (Digital Marketplace Supply) Regulations, 2020. Citation.

15. In these Regulations, unless the context otherwise requires— Interpretation.

“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.

16. Taxable supplies made through a digital marketplace include— Scope of taxable supply through a digital marketplace.

(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, podcasts and any form of digital content;
- (d) software programmes including software, drivers, website filters and firewalls;
- (e) electronic data management including website hosting, online data warehousing, file-sharing and cloud storage services;
- (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); and
- (m) any other service provided through a digital marketplace that is not exempt under the Act.

17. (1) Tax shall apply to taxable supplies specified under regulation 3 when supplied in Kenya.

Application of tax.

(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.

18. (1) A person supplying the taxable services specified in regulation 3 shall register for tax in Kenya if— Registration.

- (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.

(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).

19. 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.

Appointment of
tax
representatives.

20. (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.

Simplified tax
registration
framework.

(2) An application for registration under the simplified tax registration framework shall be done through an online registration form prescribed by the Commissioner.

(3) The information required for registration under paragraph (2) shall include—

- (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.

(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.

(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.

(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.

21. (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.

Place of supply.

(2) In determining whether the recipient of a supply is in Kenya, the Commissioner shall consider—

- (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
- (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.

22. The time of supply on a digital marketplace shall be the earlier of—

Time of supply.

- (a) the date on which the payment for the supply is received in whole or in part; or
- (b) the date on which the invoice or receipt for the supply is issued.

23. 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:

Exemption from issuing 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.

24. A deduction of input tax by a supplier shall not be allowed for business-to-consumer transactions for a supply on a digital marketplace.

Claim for input tax.

25. (1) 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.

Accounting for and payment of tax.

(2) 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.

(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.

26. (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.

Amendment of returns.

(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.

27. 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.

28. 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.

Transitional provisions.

Dated the 10th September, 2020.

UKUR YATANI,
Cabinet Secretary for National Treasury and Planning.