

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

TAX LAW



MA LAW AFRICA

Think Different, BEE Different

Physical Address: 7th Floor,
Pinetree Plaza
Kaburu Drive off Kindaruma
Road, Kilimani
Email: contact@malawafrika.com
Website: www.malawafrika.com



The Finance Act, 2019 made amendments to the Value Added Tax Act, 2013 (hereinafter, “the VAT Act”) by adding that any supplies made through the digital marketplace would be subject to Value Added Tax (hereinafter, “VAT”). This addition was made under Legal Notice Number 190, where we saw the gazetting of the Value Added Tax (Digital Marketplace Supply) Regulations, 2020 (hereinafter, “the VAT DMS Regulations”).

What is “**Digital Marketplace**”? It has been defined under the VAT Act as, “a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means”.

What is “**Digital Marketplace Supply**”? It has been defined by the VAT DMS Regulations as “the supply of a service made on a digital marketplace”.

What Digital Services are subject to this VAT?

Pursuant to Clauses 8(2)(d) and 8(3) of the VAT Act and Clause 16 of the VAT DMS Regulations, the following services are subject to VAT, **as long as they are supplied by a non-resident digital service provider to a consumer based in Kenya**.

- ✓ 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 customizable 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 such as; websites, software, information, broadcasts, music, films and games; and
- ✓ Any other service provided through a digital marketplace that is not exempt under the VAT Act.

Who is required to pay this VAT?

This tax is chargeable on a non-resident person to a consumer that is based in Kenya in a **business to customer transaction** (defined as, “transaction between a supplier from an export country and a consumer in Kenya”). The obligation to charge and remit the VAT is the responsibility of the non-resident supplier of the Digital Services.

The non-resident supplier will not be required to issue an electronic tax invoice. However, the non-resident supplier will be required to issue an invoice or receipt showing the value of the supply and the amount of tax deducted. Of note however is that non-resident suppliers are not eligible to claim input VAT.

In a **business to business transaction** (defined as, “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 of the VAT Act”) however, they are considered imported services and Kenyan businesses importing the services will be liable to account for VAT through the reverse VAT charge mechanism pursuant to section 10, VAT Act. Therefore, the Kenyan business that is the recipient of the services is expected to advise their supplier from an export country that they will not be required to charge VAT on the supplies. If the Kenyan business fails to do so and they are charged VAT on the supplies by the non-resident supplier, then the Kenyan business recipient will not be allowed to deduct or credit the input VAT incurred.

VAT Registration for Non-Resident Suppliers

Under Section 34(1)(a) and (b) of the VAT Act, there is a legal obligation for VAT registration for a legal person who in the course of business has made or is about to commence making taxable supplies or expects to make taxable supplies of at least Kenya Shillings Five Million only (KShs. 5,000,000/=) (currently approximately USD. 44,955.01). Of note however is that the VAT DMS Regulations is not specific as to whether the same (KShs. 5,000,000/=) threshold

hereinbefore, applies to non-resident providers. In the absence of this specificity, it has been argued that it can be implied that non-resident suppliers who do not meet the KShs. 5,000,000/= threshold, may not be required to register for VAT.

For the avoidance of doubt, the non-resident person who have met the at least the KShs. 5,000,000/= threshold and undertake the business to customer transaction (*earlier described*) are required to register for VAT if they meet the following circumstances:

- ✓ The recipient of the supply is in Kenya;
- ✓ The recipient of the services makes payment for the services from a bank registered in Kenya; or
- ✓ The payment of the services is authorized in Kenya.

Non-Resident providers are required to register for VAT through the online Kenya Revenue Authority (hereinafter, “KRA”) ITax Portal and they can do so without creating a legal presence in Kenya. The information required for registration of VAT by the non-resident provider includes:

- ✓ The name of the business including the business’s trading name;
- ✓ The name of the contact person responsible for tax matters;
- ✓ The postal address or registered address of the business and its contact person;
- ✓ The telephone number of the contact person;
- ✓ The email address of the contact person;
- ✓ The websites or uniform resource locators (URLs) of the supplier through which the business is conducted;
- ✓ The national tax identification number issued to the supplier in the supplier’s jurisdiction;
- ✓ The certificate of incorporation or registration issued to the business in the country where the business is incorporated; and
- ✓ Any other information the Commissioner may require.

Once the registration is complete, a Personal Identification Number (PIN) shall be issued to the non-resident supplier to enable filing returns and payment of VAT.

It is pivotal to advise that non-resident suppliers required to register under the VAT DMS Regulations are required to do so within six (6) months from the date of publication of the VAT DMS Regulations. the VAT DMS Regulations

Alternative to registering the Online KRA ITax Portal by the Non-Resident Suppliers

In the alternative to registering for VAT on the online KRA ITax Portal, non- resident suppliers can appoint a tax representative in Kenya to undertake compliance obligations on their behalf.

Place & Time of Supply and Payment of VAT

The place for supply is pegged on the fact that the recipient is in Kenya. One is considered to be in Kenya when:

- ✓ Their payment proxy (including debit/credit card information) and bank details are in Kenya; or
- ✓ Their residence proxy (including billing/home address) or access proxy (including internet address or mobile country code) is in Kenya.

The time of supply (date on which VAT should be accounted for), will be determined as the earlier of:

- ✓ The date the payment for the supply was received whether in whole or in part; or
- ✓ The date of the invoice or receipt issued.

The supply rules regarding time require that VAT be accounted for on an accrual basis, which in some cases could be before payment is received. In the unfortunate event of a bad debt (payment not received on credit sales), the VAT DMS Regulations do not provide for a refund mechanism, instead the VAT payment would have been funded by the non-resident supplier.

The non-resident supplier will be required to submit returns in the prescribed forms provided by KRA and remit any VAT due to KRA on or before the twentieth day of the following month from when the transaction took place.

However, in the event where there is an intermediary that makes a supply on behalf of the non-resident supplier to Kenyan consumers, the obligation for VAT will lie with the intermediary regardless of whether or not the non-resident supplier is registered for VAT.

In conclusion, it is worth noting that failure to comply with the provisions of the VAT (Digital Market Supply) will subject a legal person to penalties under the Tax Procedures Act, Laws of Kenya. These penalties range from payment of fines, imprisonment or both, upon conviction.

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