

THE INCOME TAX ACT

(Cap. 470)

IN EXERCISE of the powers conferred by section 3 (2A) as read with section 130 of the Income Tax Act, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE INCOME TAX (DIGITAL SERVICE TAX) REGULATIONS,
2020

1. These Regulations may be cited as the Income Tax (Digital Service Tax) Regulations, 2020 and shall come into force on the 2nd January, 2021. Citation and commencement.

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

“digital marketplace” has the meaning assigned to it in section 3 (3) (ba);

“digital marketplace provider” means a person who provides a digital marketplace platform;

“digital service” means any service that is delivered or provided over a digital marketplace;

“digital service provider” means a person who provides digital services through a digital marketplace; and

“platform” means any electronic application that allows digital service providers to be connected to users of the services, directly or indirectly, and includes a website and mobile application.

3. (1) Digital services for which digital service tax shall apply include— Digital services.

- (a) downloadable digital content including downloadable mobile applications, e-books and films;
- (b) over-the-top services including streaming television shows, films, music, podcasts and any form of digital content;
- (c) sale of, licensing of, or any other form of monetising data collected about Kenyan users which has been generated from the users’ activities on a digital marketplace;
- (d) provision of a digital marketplace;
- (e) subscription-based media including news, magazines and journals;
- (f) electronic data management including website hosting, online data warehousing, file-sharing and cloud storage services;
- (g) electronic booking or electronic ticketing services including the online sale of tickets;
- (h) provision of search engine and automated held desk services including supply of customised search engine services;

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- (i) online distance training through pre-recorded media or e-learning including online courses and training; and
 - (j) any other service provided through a digital marketplace.
- (2) Digital service tax shall not apply to income taxed under section 9 (2) or section 35 of the Act.
- (3) The following services shall not be digital services for the purposes of these Regulations—
- (a) online services which facilitate payments, lending or trading of financial instruments, commodities or foreign exchange carried out by—
 - (i) a financial institution specified under the Fourth Schedule to the Act; or
 - (ii) a financial service provider authorised or approved by the Central Bank of Kenya; and
 - (b) online services provided by Government institutions.
4. (1) Digital service tax shall apply to the income of a resident or non-resident person derived from or accrued in Kenya from the provision of services through a digital marketplace. Application of digital service tax.
- (2) Digital service tax paid by a resident or non-resident person with a permanent establishment in Kenya shall be offset against the tax payable by that person for that year of income.
- (3) Digital service tax paid by a non-resident person without a permanent establishment in Kenya shall be a final tax.
5. (1) A person shall be subject to digital service tax if that person provides or facilitates the provision of a digital service to a user who is located in Kenya. User location.
- (2) A user of a digital service shall be deemed to be located in Kenya if—
- (a) the user receives the digital service from a terminal located in Kenya, where terminal includes a computer, tablet and mobile phone;
 - (b) the payment for the digital service is made using a debit or credit facility provided by a financial institution or company located in Kenya;
 - (c) the digital service is acquired through an internet protocol address registered in Kenya or an international mobile phone country code assigned to Kenya; or
 - (d) the user has a business, residential or billing address in Kenya.
6. (1) Digital service tax shall be imposed on the gross transaction value of the digital service which shall be— Gross transaction value.

- (a) in the case of the provision of digital services, the payment received as consideration for the services; and
- (b) in the case of a digital marketplace, the commission or fee paid to the digital marketplace provider for the use of the platform.

(2) The gross transaction value of a digital service shall not include the value added tax charged for the service.

7. (1) A non-resident person without a permanent establishment in Kenya who provides a digital service to a user in Kenya may register under the simplified tax registration framework specified in regulation 9.

Registration.

(2) A resident person, or a non-resident person with a permanent establishment in Kenya, who provides a digital service in Kenya shall be required to apply to the Commissioner for digital service tax registration in the prescribed form.

8. A non-resident person without a permanent establishment in Kenya who elects not to register in accordance with regulation 9 shall appoint a tax representative in accordance with section 15A of the Tax Procedures Act, 2015.

Appointment of a tax representative.
No. 29 of 2015.

9. (1) A person who applies for registration under the simplified tax registration framework shall do so through an online registration form prescribed by the Commissioner.

Simplified tax registration.

(2) The application under paragraph (1) shall include the following information—

- (a) the name of the applicant's business including its trading name;
- (b) the name of the contact person responsible for tax matters;
- (c) the postal and registered address of the business and its contact person;
- (d) the telephone number of the contact person;
- (e) the electronic address of the contact person;
- (f) the websites or uniform resource locator of the applicant through which business is conducted;
- (g) the national tax identification number issued to the applicant in the country of residence;
- (h) the certificate of incorporation issued to the applicant's business; and
- (i) any other information that the Commissioner may require.

(3) The applicant may be required to submit to the Commissioner any documents necessary to substantiate the information provided in the application under paragraph (2).

(4) Upon registration, the Commissioner shall issue the applicant

with a Personal Identification Number for the purpose of filing returns and payment of the digital service tax.

(5) A person registered under these Regulations who ceases to provide digital services in Kenya shall apply to the Commissioner for deregistration in the prescribed form.

10. (1) Digital service tax shall be paid by—

Accounting and
payment.

(a) the digital service provider or digital marketplace provider;
or

(b) the tax representative appointed under regulation 8.

(2) A person liable to pay digital service tax under paragraph (1) shall submit a return in the prescribed form and remit the tax due by the twentieth day of the month following the end of the month that the digital service was offered.

11. (1) Any amendment to a return submitted under these Regulations shall be in accordance with section 31 of the Tax Procedures Act, 2015.

Amendment of
returns.
No. 29 of 2015

(2) Where an amendment under paragraph (1) results in the overpayment of tax—

(a) in the case of a non-resident person without a permanent establishment in Kenya, the amount overpaid shall be retained as a credit and offset against the digital service tax payable in the subsequent tax period; and

(b) in the case of a resident person, or a non-resident person with a permanent establishment in Kenya, the amount overpaid shall be refunded in accordance with section 47 of the Tax Procedures Act, 2015.

12. A person liable to digital service tax shall keep records in accordance with section 23 of the Tax Procedures Act, 2015.

Records.
No. 29 of 2015.

13. A person who fails to comply with the provisions of these Regulations shall be liable to the relevant penalties prescribed under the Tax Procedures Act, 2015.

Penalties.

No. 29 of 2015.

Made on the 23rd November, 2020.

UKUR YATANI,
Cabinet Secretary for National Treasury and Planning.