

Tax & Legal Alert
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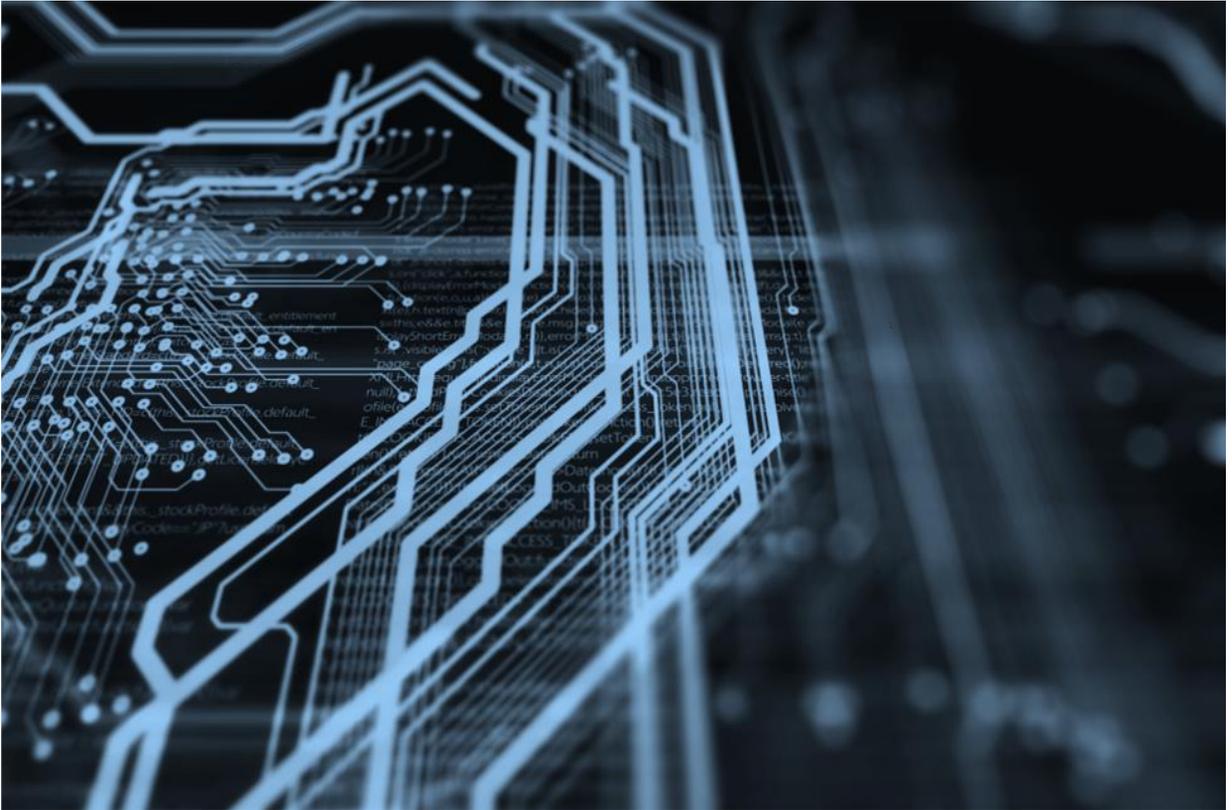
Kenya Tax Alert

The Government amends the VAT (Digital Marketplace Supplies) Regulations, 2020

Background

The Finance Bill, 2022 proposed to amend Section 10 of the VAT Act, 2013 to exclude services provided through digital marketplace platforms from the purview of VAT on imported services (reverse charge VAT). The intention of the proposed change was to bring Business to Business (B2B) transactions under the ambit of VAT on digital marketplace supplies which shifts the liability to account for VAT on such transactions to the non-resident provider of the services.

The Government has now, through Gazette Notice dated 27 May 2022, amended the applicable Regulations to operationalize the Bill's proposed changes as and when it is passed into law. This Tax Alert highlights the changes to the Regulations and their potential implications.



The following are the changes contained in the VAT (Digital Marketplace Supplies) (Amendment) Regulations, 2022:

#	Amendment	Status prior to amendment	Impact
1	Deletion of the definition of business-to-business (B2B) transaction from Regulation 2 of the VAT (Digital Marketplace Supplies) Regulations, 2020 (hereinafter referred to as the Principal Regulations).	Regulation 2 defines a B2B transaction as 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’.	The deletion seeks to align with the changes proposed through the Finance Bill, 2022 which remove all digital marketplace supplies from the purview of reverse charge VAT.
2	Deletion of the definition of business-to-consumer (B2C) transaction from Regulation 2 of the Principal Regulations.	Regulation 2 defines a B2C transaction as a ‘transaction between a supplier from an export country and a consumer in Kenya’.	Similar impact as above is expected from this amendment.
3	Deletion of sub-regulation 2 from Regulation 4 of the Principal Regulations	Regulation 4(2) of the Principal Regulations required that VAT on B2B transactions be accounted for through the reverse charge VAT mechanism.	This amendment removes B2B digital marketplace supplies from the purview of VAT on imported services and instead places liability to account for such VAT on the non-resident supplier.

The following are the changes contained in the VAT (Digital Marketplace Supplies) (Amendment) Regulations, 2022:

#	Amendment	Status prior to amendment	Impact
3			This may necessitate registration through the simplified VAT registration framework for non-resident suppliers who may previously have been precluded from registration by the workings of the reverse charge VAT mechanism. Additionally, already registered non-resident suppliers of services within scope will now be liable for VAT on B2B transactions.
4	Deletion of sub-regulation 3 from Regulation 4 of the Principal Regulations	Regulation 4(3) required business entities that were liable to reverse charge VAT on B2B transactions to notify the non-resident supplier of the same to avert the likely double incidence of VAT. Effectively, the non-resident suppliers were precluded from charging VAT on such transactions.	The impact of this amendment aligns with the above impact. The change also removes the administrative task of Kenyan businesses having to notify non-resident suppliers that they are subject to reverse charge VAT. It also eliminates risk of double payment of VAT where a Kenyan business fails to notify the non-resident supplier of its reverse VAT charge obligation.
5	Deletion of sub-regulation 5 from Regulation 4 of the Principal Regulations	Regulation 4(5) barred deduction of input tax by a business entity (recipient) that suffered VAT charged by a non-resident provider of B2B digital marketplace supplies owing to failure on the part of the recipient to notify the supplier as required under Regulation 4(3).	This amendment seeks to align the Principal Regulations with the above amendments to the regulations.
6	Amendment of Regulation 3(i) to exclude educational services exempted under the First Schedule to the Act from the purview of digital marketplace supplies.	<p>Regulation 3(i) places within scope 'distance teaching through pre-recorded media or e-learning including online courses and training'.</p> <p>However, the amendment now excludes, from the ambit of digital marketplace supplies, education services provided by:</p> <ol style="list-style-type: none"> pre-primary, primary, or secondary school, a technical college or university, and an institution established for the promotion of adult education, vocational training or technical education. <p>These services are currently exempt from VAT under the VAT Act.</p>	<p>This amendment aims to ensure that the Principal Regulations do not subject to VAT, education services that are expressly exempt from VAT under the VAT Act where such services are offered through digital platforms.</p> <p>This is a well-timed change and aligns with various Government measures to fight Covid-19 pandemic which include providing education services virtually.</p>

Our comments

The changes contained in the VAT (Digital Marketplace Supplies) (Amendment) Regulations, 2022 pose several implications especially for non-resident suppliers of digital marketplace supplies. These include the following:

1. Subjecting B2B transactions to VAT under the Principal Regulations would require that non-resident suppliers consider registering for VAT through the simplified VAT registration framework. This specifically applies to suppliers who may not have previously registered for VAT on account of engaging in B2C transactions. Simply, should the proposed changes contained in the Finance Bill, 2022 pass into law, B2B transactions will be subject to VAT in the hands of the supplier;
2. Though not specifically stipulated in the amended Regulations, these changes may necessitate the onboarding of non-resident suppliers into the new Tax Invoice Management System (TIMS), a likely departure from the current modus operandi where non-resident suppliers are only required to issue receipts or invoices which need not meet Electronic Tax Register (ETR) requirements. A move to TIMS will allow VAT registered recipients of B2B supplies to claim a deduction of input tax. It is still not clear whether and how TIMS will be implemented for non-resident suppliers; and
3. Administratively, the number of transactions within scope for non-resident suppliers are likely to increase. In effect, this may come with additional compliance costs.

The above said, we hold the view that there is need for further clean up of the Regulations if the amendments will be implemented within the pre-existing compliance framework. For instance, there is need to clarify whether the exclusion of non-resident suppliers from ETR requirements will continue to apply and, if so, whether the receipt or invoice envisaged in Regulation 9 of the Principal Regulations suffices for purposes of input tax deduction.

Should you wish to discuss this further, kindly feel free to contact any of the contacts below or your usual Deloitte contact who will be more than glad to offer you guidance and assistance.



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