



# Value Added Tax Regulations 2017 Analysis

**April 2017**



Regulation	KPMG Comments
Effective Date	<p>The VAT Regulations, 2017 were gazetted on 30 March 2017 pursuant to provisions of Section 67 of the VAT Act, 2013 which gives the Cabinet Secretary of the National Treasury (CS Treasury) the power to make regulations to give effect to the provision of the VAT Act.</p> <p>Section 67 of the VAT Act requires the CS Treasury to table the Regulation before the national Assembly for approval before they can take effect. Therefore, the Regulation are not in effect until they are approved by the National Assembly.</p>
Regulation 3 – Determination of the open market value of a supply	<p>The taxable value of a supply is based on the open market value of the transaction which is determined as:</p> <ol style="list-style-type: none"> <li>a) The consideration that the supply would reasonably be expected to fetch in a transaction between two parties dealing on an arm’s length basis; or</li> <li>b) Where an arm’s length price is not available, an approximate value as determined by the Commissioner based on generally accepted principles of valuation.</li> </ol> <p>This regulation provides guidelines on determination of market value and for some related party transactions it will now be necessary to obtain independent valuation.</p>
Regulation 4 - Supply of telecommunications services	<p>The supply of telecommunications services is deemed to be made in Kenya if the person initiating the supply is in Kenya at the time of the supply where:</p> <ol style="list-style-type: none"> <li>a) the supply is made from a place of business outside Kenya; and</li> <li>b) the recipient of the supply is not a registered person.</li> </ol> <p>However, the supply is not deemed to be made in Kenya if:</p> <ol style="list-style-type: none"> <li>a) it is initiated by a telecommunications supplier; or</li> <li>b) it is initiated by a person to a person on global roaming while temporarily in Kenya</li> </ol> <p>The person who initiates supply is the person:</p> <ol style="list-style-type: none"> <li>a) who controls the commencement of the supply;</li> <li>b) who pays for the supply;</li> <li>c) who contracts for the supply; or</li> <li>d) to whom the invoice for the supply is sent.</li> </ol> <p>Telecommunication services are defined to include the transmission, emission and receipt of signals, writing, images, sounds or information of any kind by wire, radio, optical or other electromagnetic systems including the transfer or assignment of a right to use capacity for such transmission or the provision of access to global or local information networks.</p> <p>This regulation provides clarity to the taxation of electronic services such as radio and television program, educational programs. Non-residents who supply telecommunication services will be expected to register and account for VAT in Kenya. It is important for the Kenya Revenue Authority (KRA) to make arrangements for the registration of tax representatives to allow non-resident telecommunication companies to register and account for the VAT. This provision alone is unlikely to bring to tax electronic services and the KRA will need to do more to tap into e-commerce.</p>
Regulation 5 – VAT inclusive supplies	<p>Where an invoice does not provide for a separate VAT amount, the invoice amount will be deemed to be inclusive of VAT.</p>
Regulation 6 – Taxable supplies used by a person outside their business	<p>The use of taxable supplies by a person outside their business is not deemed to be a taxable supply unless the person has claimed input VAT on the supplies. Where the person has claimed input on the supply, the taxable value is determined as follows:</p> <ol style="list-style-type: none"> <li>a) for trading stock acquired, the consideration paid or payable in respect of the stock;</li> <li>b) for any other case, the higher of – <ul style="list-style-type: none"> <li>— the consideration paid or payable on acquisition of the goods or services; or</li> <li>— the open market value of goods or services on the date the supply is first used outside the business.</li> </ul> </li> </ol> <p>Previously use of taxable supplies outside a person’s business (self-supply) was not subjected to tax. This change limits the exemption to instances where the tax registered person has not claimed the input VAT related to the supply. For goods, it also eliminates the inclusion of a mark-up on taxable goods used outside the business.</p>

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Regulation 7 - Deduction of input tax on registration or change in use	<p>A person who has stock in hand before registration or change of use resulting to deductibility of input VAT may on application to the Commissioner, take an input VAT credit for the goods in stock provided that the input would have been deductible if incurred after registration.</p> <p>The application has to be done within three months of the change in status and is subject to approval by the commissioner before the input is included in the VAT return.</p>
Regulation 8 – VAT Refunds	<p>In conformity to the VAT Act, input VAT shall only be refundable on input VAT resulting from zero-rated supplies. Where a registered person makes mixed taxable supplies (general and zero rate), the refundable input VAT shall be limited to the proportion of zero rated supplies to total supplies.</p> <p>Previously there were no clear guidelines on refunds arising from taxpayers that had both general rated and zero-rated supplies with the result that taxpayers generally made claims for the entire excess input VAT.</p> <p>Refunds arising from taxes paid in error or resulting from bad debts written off, will first be allocated to:</p> <ol style="list-style-type: none"> <li>a) VAT owed by the taxpayer; and</li> <li>b) any other taxes owed by the taxpayer.</li> </ol>
Regulation 9 – Tax invoice	<p>A tax invoice issued by a registered person should prominently indicate that it is a 'TAX INVOICE'. In addition to the general requirements, a tax invoice must have the name, address and PIN, if any, of the recipient.</p> <p>Simplified electronically generated tax invoices for cash sales by retail premises need not contain the name, address and PIN of the recipient. However, it should contain all other details as the normal tax invoice, including a brief description of the supply.</p> <p>Other than the PIN requirement for the recipient for non-cash sales and the removal of the ETR requirements. The invoice requirements are generally straight forward. The VAT Regulations if approved will sound the death knell to the fiscal registers. It is likely that the KRA will utilise the iTax capabilities to mitigate the potential risks to revenue as a result of demobilisation of the fiscal registers. The elimination of tax registers will significantly reduce the administration burden of complying with the VAT regulations.</p>
Regulation 10 – Tax invoice for supplies of imported services	<p>A registered person who is liable to pay reverse charge VAT in full or in part is required to prepare a tax invoice for the taxable value of the imported services. The invoice shall include the general requirements of a normal tax invoice other than the PIN of the supplier. In addition, it will include a description of the extent to which the imported service has been applied other than to make taxable supply.</p> <p>Previously there were no requirements for the taxpayer to issue invoices for their reverse VAT payments. Only those persons whose proportion of exempt supplies to total supplies exceeds 10% of their total supplies will be affected by this regulation.</p>
Regulations 11 & 12 – Debit notes and credit notes	<p>These Regulations provide guidelines for the generation of debit and credit notes including labelling the respective document either as a 'DEBIT NOTE' or 'CREDIT NOTE' and including the PINs of supplier and recipient; serial numbering and brief description of circumstances leading to their issue.</p>
Regulation 13 – Export of goods and services	<p>Under this regulation, goods shall be deemed to have been exported if entered for export under EACCMA and delivered to a recipient at an address outside Kenya. On the other hand, services shall be deemed to have been exported where they are provided to a recipient outside Kenya for use, consumption, or enjoyment outside Kenya.</p> <p>An export of service does not include:</p> <ul style="list-style-type: none"> <li>● taxable services consumed on exportation of goods unless they are in relation to transportation of goods which terminates outside Kenya; or</li> <li>● taxable services provided in Kenya but paid for by a person who is not a resident in Kenya.</li> </ul> <p>The regulation provides clarity on the taxation of services provided in respect of goods in transit which is now zero-rated. However, the implementation of this regulation will terminate the zero-rating of export of services since it excludes services paid for from outside Kenya from the ambit of export of services. This regulation is inconsistent with the provision of the Section 2 of the VAT Act and international best practice on taxation of exports of services. Unfortunately instead of addressing current challenges in determination of what constitutes an export of services it will intensify existing disputes between the KRA and taxpayers. With the regulation in place, it is unlikely that Kenya will develop a viable business process outsourcing (BPO) industry.</p>
Regulation 14 – Documents relating	<p>A supply to an EPZ or SEZ must be supported by:</p> <ol style="list-style-type: none"> <li>a) a recipient's EPZ or SEZ licence; and</li> </ol>

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to supply to an EPZ or SEZ	<p>b) a certificate from the recipient acknowledging that supply have been received and that are for use in in approved operations.</p> <p>In addition, goods supplied to an EPZ or SEZ must have a duly certified export entry.</p>
Regulation 15 – Tax inclusive pricing of taxable supplies to unregistered persons	<p>A registered person who is a retailer or who makes tax inclusive supplies to unregistered persons should:</p> <p>a) state prominently on invoice that the taxable supplies are made inclusive of tax; and</p> <p>b) disclose prominently whether supply is taxable (including the rate) or exempt.</p>
Regulation 16 – Submission of documents	<p>Returns, applications, notices, or other documents to be lodged or submitted under the VAT Act shall be lodged or submitted in accordance with the Tax Procedures Act</p>
Regulation 17 – Application of changed tax rate to successive supplies	<p>Provides for the application of a change in the VAT rate to successive supplies which are defined under Section 5 of the VAT Act as:</p> <p>a) goods supplied under a rental agreement; or</p> <p>b) goods or services made by metered supplies, or under an agreement or law that provides for periodic payments.</p> <p>Regulation 17 requires that a reasonable apportionment method be used to apportion the supply between the period before and that after the change in the tax rate and the application of the applicable tax rate to the respective period.</p>
Regulation 18 - Revocation	<p>Provides for the revocation of existing VAT Regulations including:</p> <p>a) The Value Added Tax Regulations, 1994 (and as subsequently amended);</p> <p>b) The Value Added Tax (Appeals) Rules, 1990;</p> <p>c) The Value Added Tax (Distraint) Regulations, 1990;</p> <p>d) The Value Added Tax Order, 2002;</p> <p>e) The Value Added Tax (Tax Withholding) Regulations, 2004;</p> <p>f) The Value Added Tax (Electronic Tax Registers) Regulations, 2004 (effectively removing the current ETR provisions)</p> <p>However, the following Orders are still in force until others are put in place:</p> <p>a) The Value Added Tax (Remission) (Official Aid Funded Projects) Order, 2003 shall continue to apply until another Regulation relating to official aid funded project is put in place.</p> <p>b) The Value Added Tax (Remission) (Low Income Housing Projects), Order 2008 shall continue to apply to a remission granted before the commencement date while the remission remains in force.</p> <p>The requirement to purchase and use the electronic tax registers will cease immediately upon the coming into force of the regulation affording taxpayers a welcome relief on what has been an administrative nightmare.</p> <p>It will also be interesting to see if following the revocation of the withholding VAT regulations, the Government will go ahead and do away with withholding VAT which has become a major headache for businesses.</p>

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