

# Digital Services Tax

## Tax Alert



### Background

In 2019, the Government through the Finance Act, 2019 amended the Income Tax Act (ITA) to introduce a Digital Services Tax (DST) regime to tax certain supplies made through a digital marketplace. The ITA defines a digital marketplace as "a platform that enables direct interaction between buyers and sellers of goods and services through electronic means."

### Regulations on the Digital Marketplace

In August 2020, the Cabinet Secretary, National Treasury issued draft DST Regulations, 2020 (the draft Regulations) to guide the implementation of DST. DST is expected to take effect on 1 January 2021 after publication of the final regulations.

The DST rate is 1.5% of the gross transaction value. The gross transaction value is the payment received as consideration for the digital service. In the context of a digital marketplace provider, it is the commission or fee paid for the use of the platform.

DST is payable on the following services:

- a) Streaming and downloadable services of digital content, including but not limited to movies, videos, music, applications, online games and e-books;
- b) Transmission of data collected about users which has been generated from such users' activities on a digital marketplace, however monetized;
- c) Provision of a digital marketplace, website or other online applications that link buyers and sellers;
- d) Subscription-based media including news, magazines and journals; electronic data management including website hosting, online data warehousing, file-sharing and cloud storage services;

- e) Supply of search-engine and automated helpdesk services including supply of customized search engine services;

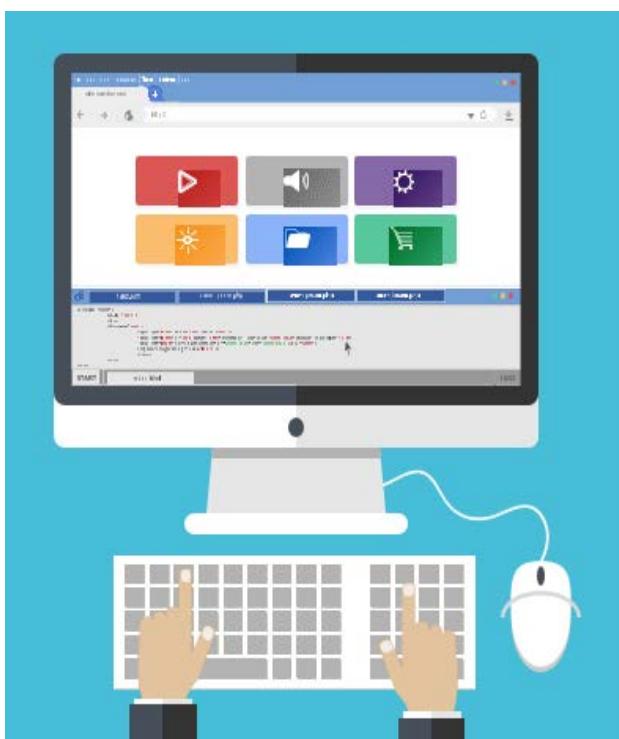
Tickets bought for live events, theatres, restaurants etc. purchased through the internet:

- f) Online distance teaching via pre-recorded medium or eLearning, including online courses; and
- g) Any other service provided or delivered through an online digital or electronic platform excluding any service whose payment is subject withholding tax under section 35 of the ITA.

According to the Regulations, DST is payable by the digital service provider or any person that collects the payments for digital services when transferring payment for the service to the service provider. The services of a licensed financial service provider carrying out online services which facilitate payments, lending, or trading of financial instruments, commodities or foreign exchange are not subject to DST.

Foreign companies which provide digital marketplace services to consumers in Kenya will be subject to DST. A foreign company will be deemed to have provided services in the Kenyan digital marketplace where:

- a) The user accesses the digital interface from a terminal (computer, tablet or mobile phone) located in Kenya;
- b) Payment for the digital services is made using a credit or debit facility provided by a financial institution or company in Kenya;
- c) Digital services are acquired using an internet protocol address registered in Kenya or an international mobile phone country code assigned to Kenya; or
- d) The user has business, residential or billing address in Kenya.



The Regulations provide that DST will be an advance tax for a resident or non-resident person with a permanent establishment in Kenya who provides digital services through a digital marketplace. The DST will be available for offset against the corporation liability for that year of income.

A non-resident person without a permanent establishment in the country may appoint a tax representative to account for DST on their behalf. Where a person appoints a tax representative to account for DST, the tax representative must do so by the twentieth day of the month following the end of the month that the digital service was offered. The draft Regulations also provide the Commissioner with powers to appoint a DST agent on behalf of the taxpayers for both resident and non-resident persons in accordance with Section 15 of the Tax Procedures Act.

## Our opinion on the Regulations

Prior to the release of the Regulations, there was speculation on the mechanics of the DST regime. The Regulations have clarified some of these issues even though several concerns remain.

There is need for clarification on the due date for the returns and remittance of the payments to the KRA. The current regulations appear to separate the return filing from the payment which is not the norm with the other taxes.

There are also concerns around the lack of a turnover threshold for the tax, leading to significant administrative burdens for companies with few low value transactions. Many jurisdictions that have introduced DST have set thresholds to align the expected tax collections to the cost of compliance.

In the absence of updates to the existing double tax agreements (DTAs), it is likely that digital services payments to countries that have signed DTAs with Kenya will not be subject to DST given the reliance on the concepts of residency and permanent establishment as a basis for determining the jurisdiction with the taxing rights.

Finally, the short timeframe provided between the publication of the final regulations and the coming into force of the DST regime leaves little time for taxpayers to put in place the infrastructure to comply with the tax.

KPMG is available to assist you navigate through the DST regime and prepare for compliance in January 2021. Feel free to reach to your contact at KPMG or the undersigned.

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