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VERY URGENT

Ref. ZZ/TS/GP/30 Michael Sialai, EBS Clerk of the National Assembly Parliament Building NAIROBI

December 15, 2020

Dear Sialai,

Handwritten notes: (1) LSP register and use table. CMR 20/12/20

RE: THE INCOME TAX (DIGITAL SERVICE TAX) REGULATIONS, 2020

The above-mentioned Regulations were Gazetted on 11th December, 2020.

In compliance with Section 11 of the Statutory Instruments Act, 2013, I hereby submit the above-mentioned Income Tax (Digital Service Tax) Regulations, 2020, Explanatory Memorandum for the same, and evidence of public participation for tabling in the National Assembly.

Yours Sincerely,

Handwritten note: (2) Head, Table Office to cause tabling register and response to committee 22/12/20

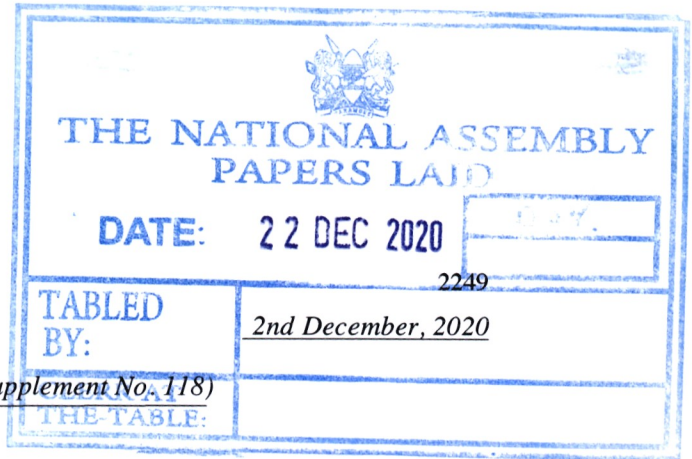
Signature of Hon. (AMB.) Ukur Yatani, E.G.H.

HON. (AMB.) UKUR YATANI, E.G.H CABINET SECRETARY/THE NATIONAL TREASURY AND PLANNING

Encl.

Copy to: Justice (Rtd) P. Kihara Kariuki, E.G.H. The Attorney General State Law Office NAIROBI

NATIONAL ASSEMBLY RECEIVED 22 DEC 2020 CLERK'S OFFICE P. O. Box 41842, NAIROBI



SPECIAL ISSUE

Kenya Gazette Supplement No. 214

(Legislative Supplement No. 118)

LEGAL NOTICE No. 206

THE VALUE ADDED TAX ACT

(No. 35 of 2013)

IN EXERCISE of the powers conferred by section 6 (1) of the Value Added Tax Act, 2013, the cabinet Secretary for the National Treasury and Planning makes the following Order—

THE VALUE ADDED TAX (AMENDMENT OF THE RATE OF TAX) ORDER, 2020

1. This Order may be cited as the Value Added Tax (Amendment of The Rate of Tax) Order, 2020, and shall come into force on the 1st January, 2021. Citation.

2. Section 5 of the Value Added Tax Act, 2013 is amended in paragraph (b) of subsection (2) by deleting the word “fourteen” and substituting therefor the word “sixteen”. Amendment of the rate of tax.

Made on the 25th November, 2020.

UKUR YATANI,

Cabinet Secretary for the National Treasury and Planning.

LEGAL NOTICE No. 207

THE INCOME TAX ACT

(Cap. 470)

**THE INCOME TAX (DIGITAL SERVICE TAX) REGULATIONS,
2020**

ARRANGEMENT OF REGULATIONS

Regulation

- 1—Citation and commencement
- 2—Interpretation
- 3—Digital services
- 4—Application of digital service tax
- 5—User location
- 6—Gross transaction value

- 7—Registration
- 8—Appointment of tax representative
- 9—Simplified tax registration framework
- 10—Accounting and payment
- 11—Amendment of returns
- 12—Records
- 13—Penalties

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;

- (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.

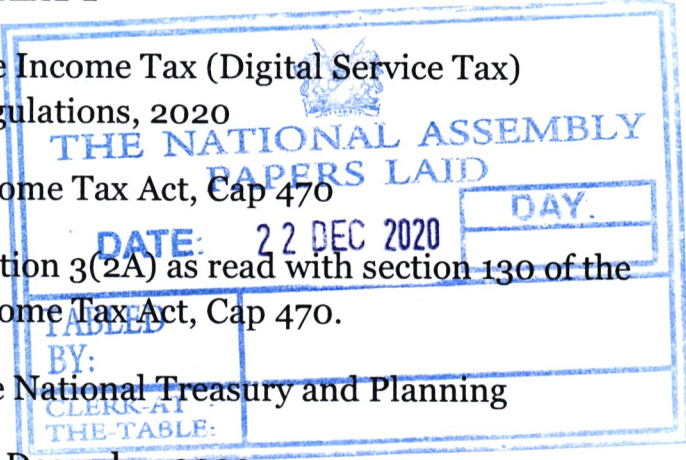
UKUR YATANI,
Cabinet Secretary for National Treasury and Planning.

EXPLANATORY MEMORANDUM TO THE INCOME TAX (DIGITAL SERVICE TAX) REGULATIONS, 2020

LEGAL NOTICE NO. 207 of 2020

PART I

Name of Statutory Instrument	: The Income Tax (Digital Service Tax) Regulations, 2020
Name of Parent Act	: Income Tax Act, Cap 470
Enacted Pursuant to	: Section 3(2A) as read with section 130 of the Income Tax Act, Cap 470.
Name of the Ministry	: The National Treasury and Planning
Gazetted on	: 11 th December 2020



PART II

1. Purpose of the Statutory Instrument

The objective of the Income Tax (Digital Service Tax) Regulations, 2020 is to guide the taxation of income earned through the digital marketplace that was introduced through the Finance Act, 2020.

2. Legislative Context

- 1.1. The Legal Notice on the Income Tax (Digital Service Tax) Regulations, 2020 was published so as to guide the implementation of the Digital Service Tax.
- 1.2. It provides the scope of digital services, user location and who is subject to the tax. The Regulations defines the gross transaction value as well as registration requirements, appointment of tax representatives, simplified tax registration, accounting and payments in addition to penalties under the Regulations.

3. Policy Background

- 3.1. Digital technologies are quickly changing the way people conduct business. Businesses have moved from the traditional brick and mortar method to the digital space.
- 3.2. Due to this, businesses especially multinational corporations are able to earn income from jurisdictions in which they have no or limited physical presence, this makes difficult to tax such business using the current tax system. Overtime, this has resulted into low revenue collection due to tax revenue leakages and erosion of the traditional physical tax base.
- 3.3. In response to this, Section 3(2) (ca) of the Income Tax Act, Cap 470 was amended, through the Finance Act 2019, to clarify that income accruing through a digital marketplace is chargeable to tax.
- 3.4. To further strengthen the taxation of the digital economy, the Income Tax Act, Cap 470 was amended through the Finance Act, 2020 to introduce digital service tax.
- 3.5. Digital Service Tax is payable by both resident and non-resident persons whose income from the provision of services is derived from or accrued in Kenya through a digital marketplace.
- 3.6. Digital Service Tax seeks to level the playing field between businesses conducting trade through traditional brick and mortar methods and those carrying out business over digital platforms.

4. Consultation Outcome

- 4.1. In developing the Regulations, key stakeholders provided their input. The Kenya Revenue Authority published the draft Income Tax (Digital Service Tax) regulations, 2020 and issued Public Notice requesting for public and stakeholders' comments (*copy attached*) on **Tuesday, 11th August, 2020**. Feedback was received from various stakeholders including: America Chamber of Commerce –Kenya (AMCHAM-K), Pricewaterhouse Coopers (PwC)/Jumia, KPMG, Deloitte & Touche, Institute of Certified Public Accountants of Kenya (ICPAK), Law Society of Kenya (LSK), Cellulant Kenya Ltd, Kenya Bankers Association (KBA), ECart Services (Jumia), Ernst & Young LLP, Anjarwalla & Khanna, Uber BV, Netflix e.t.c.
- 4.2. The Kenya Revenue Authority also held online meetings with some key stakeholders to further review their comments. The stakeholders included Anjarwalla & Khanna/AMCHAM-K (2nd September 2020), ICPAK (11th September 2020), PwC/Jumia (3rd September 2020). All stakeholders' comments were reviewed and their feedback incorporated, where appropriate, to improve the regulations.

4.3. Please find attached the following documents: -

- a) Copy of Legal Notice No. 207 of 2020;
- b) Copy of the gazette notice dated 11th December 2020;
- c) The public notice issued calling for stakeholder comments on the Income Tax (Digital Service Tax) Regulations;
- d) A summary of the feedback received from stakeholders during the public participation process.

5. Impact

The Regulations are expected to facilitate the Government collect revenue from companies deriving or earning income from Kenya but have no physical presence

6. Monitoring and review

The Legal Notice will be implemented by the Kenya Revenue Authority and will be operational from 2nd January 2020.

7. Request to the National Assembly

The National Assembly is invited to:

- a) Note the contents of this memorandum.
- b) Adopt Legal Notice No. 207 of 2020.

8. Contact

Cabinet Secretary,
National Treasury & Planning,
NAIROBI

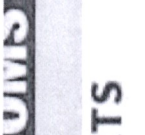
DST Regulations: Stakeholder Forum with AMCHAM Members

2 September 2020

- 10:00** **Opening**
ALN Kenya | Anjarwalla & Khanna
- 10:05** **Introduction**
AmCham
- 10:10** **Overview of AmCham Submissions**
ALN Kenya | Anjarwalla & Khanna
- 10:30** **Sector Specific Submissions by Digital Taskforce Members:**
1. Ride Hailing - Uber
2. Payments - MasterCard/Visa
3. Platforms - Facebook
4. Technology - IBM
- 11:00** **Presentation**
Kenya Revenue Authority
1. Status of Draft VAT (Digital Marketplace Supply) Regulations, 2020
2. KRA's Perspective on the DST Regulations/Objectives in Relation to Taxation of the Digital Economy
- 11:20** **Q&A**
- 11:30** **Closing Remarks**

CLICK HERE TO JOIN

MEETING ID: 862 8035 2627 | PASSCODE: 460673



"The virus does not move, people move it. We stop moving, the virus dies"



Public Notice

Licence for Conveyance of Goods under Customs Control

The Commissioner of Customs and Border Control notifies all shippers, clearing agents, transporters and stakeholders in the conveyance of goods under customs control that pursuant to regulation 210 and 211 of The East Africa Community Customs Management Regulations 2010 that goods subject to customs control may only be conveyed by a vessel or vehicle licenced by the Commissioner for that purpose.

All stakeholders under this category are therefore urged to familiarise themselves with the provisions of the said sections and ensure compliance within 14 days from the date of this notice.

Please note that vehicles conveying transit goods and licenced under regulation 104 of the said regulations are exempted from this directive.

For clarification please call our Contact Centre on
Tel: (0) 20 4 999 999; 0711 099 999 or Email: callcentre@kra.go.ke

Commissioner of Customs and Border Control

www.kra.go.ke

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KENYA VISION 2030



Public Notice

Call for Public and Stakeholder Comments on the Proposed Income Tax (Digital Service Tax) Regulations, 2020

Following the introduction of Digital Service Tax (DST) through the amendment to the Finance Act, 2020, the Kenya Revenue Authority would like to inform members of the public that the proposed Income Tax (Digital Service Tax) Regulations, 2020 have been hosted on the Kenya Revenue Authority website.

To ensure wide circulation and public participation as stipulated in the Constitution of Kenya and the Statutory Instruments Act, 2013, Kenya Revenue Authority invites sector players, tax professionals and members of the public to submit comments on the proposed regulations.

The comments should be addressed in writing to the Commissioner General Kenya Revenue Authority, P.O Box 48240-00100, Nairobi or emailed to: stakeholder.engagement@kra.go.ke to be received by Monday 24th August, 2020 to facilitate the review and finalization of the Regulations.

For clarification please call our Contact Centre on
Tel: (0) 20 4 999 999; 0711 099 999 or Email: callcentre@kra.go.ke

Commissioner General

www.kra.go.ke

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KENYA VISION 2030

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p><i>courses</i>" will have a negative impact on the development of the education sector, which is currently adversely affected by Covid-19.</p> <p>4. The introduction of DST conflicts section 9(2) of the ITA which already covers content transmitted through the internet.</p>	<p>3. Delete Regulation 3(h).</p> <p>4. Revise the scope of services considering Section 9(2) of the ITA.</p>	<p>3. To spur economic Growth associated with investment in education.</p> <p>4. For simplicity and certainty and harmonize with the ITA.</p>	
3.	Reg. 4-Digital Service Tax	<p>This proposal for DST to be paid by both resident and non-resident leaves the resident or a non-resident with a PE conflicted, in that their operations will be subject to different tax regimes (Gross Turnover Tax through DST and normal Corporate Income Tax Act).</p> <p>There is likelihood of such entities reporting perpetual tax refundable position if the operations results in taxable loss.</p> <p>Such position would also lead to entities paying minimum tax since there is no clear guidance on the convergence of various tax regime affecting a single taxpayer.</p>	<p>Amend Regulation to the effect that: <i>'DST is payable by non-resident persons who has no PE in Kenya and who derives income from Kenya through provisions of Digital Services. This should be on interim basis as the government introduces the concept of virtual PE in the Income Tax Act'.</i></p>	<p>This will minimize conflicts with international tax laws and DTA's in Kenya.</p>	<p>This is already addressed in the law. It also provides procedure in leu of overpaid tax.</p> <p>The proposed amendment, furthermore has to be done through the main law</p>
4.	Reg. 5- Determination of user location	<p>Regulation (b) provides that a user will be deemed to be located in Kenya where the payment for Digital Service is made through a credit or debit facility provided by any financial</p>	<p>Deletion of Regulation 5(b).</p>	<p>For simplicity.</p>	<p>There are various parameters provided for use in determination of user location. This is in line with best practice.</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
1.	General comment-Impact to Bilateral Income Tax Treaties	<p>Kenya has signed a few tax treaties with countries. These treaties were negotiated without much thought on digital economy and therefore may fail to address the challenges associated with taxation of this economy.</p> <p>The implementation of Digital Service Tax (DST) by Kenya may be challenged by the other contracting states if it is deemed that Kenya is violating the treaty terms. Again, DST may be seen to discriminate entities of the other contracting state.</p>	<p>1) Consider having a conversation with the treaty partners.</p> <p>2) Introduce a clause to the effect that DST is not payable by entities resident in country with which Kenya has a DTA.</p>	To Harmonize with DTA.	<p>1. This can be considered going forward</p> <p>2. This is noted, in case of dispute then provisions in the treaty will apply</p>
2.	Reg. 3- Scope of Taxable Services	<p>1. The scope of services is extremely wide, and this may be prone to ambiguity and thereby diverse interpretation. Again, important definitions have been left unclear, while others are overlapping.</p> <p>2. The Scope has not addressed circumstances where the owner of the product uses their own platform/ website to advertise/ sell the merchandise. Generally, such providers are exempt from DST.</p> <p>3. Imposing DST on, "online distance teaching via pre-recorded medium or e-learning, including online</p>	<p>1. Revision of the scope of services and offer explanatory notes for clarity. DST should at first be introduced on easy to understand services such as e-hailing cabs and digital marketing.</p> <p>2. Include an exception clause to the extent that, "digital interface" provider (i.e., a company operating a website) who sells to a user goods or services that it owns, are exempt from DST.</p>	<p>1. For simplicity.</p> <p>2. For clarity.</p>	<p>1. The comment is noted.</p> <p>2. DST targets services not on goods</p> <p>4. S 9 (2) shall be considered for exclusion for DST</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p>institution or company in Kenya. This is unclear on following aspects:</p> <p>(a) The burden of categorizing payment for DS for all holders' credit/ debit in Kenya.</p> <p>(b) This is the basic mode of payment for services/ goods and should not be used to determine user's location.</p> <p>(c) The regulation has left out other mode of payments such as M-pesa, and it's not clear why the debit/credit facility has been singled out.</p> <p>It's noteworthy that countries that have implemented DST have not used such a criterion to determine user location.</p>			
5.	Reg.6-Gross Transaction Value	<p>The Regulation has not set a threshold for income that will be liable to digital service tax. Digital Service transactions may in some instances involve low values and since there is no minimum threshold set on the taxable amount, such low value transactions will be subjected to DST. This will be administratively expensive for the tax authority.</p>	<p>Introduce the minimum threshold for DST to be KES 1 million or above.</p>	<p>For certainty.</p>	<p>This cannot be done through the regulation but rather through change of the main law</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
6.	Reg. 7- Accounting and Payment	<p>The regulation, 7(2), provides that, "Digital service tax shall be due and payable at the time of the transfer of the payment for the service to the service provider."</p> <p>Regulation 7(4) provides that, non-resident without a PE in Kenya who has appointed a tax representative is required to pay the tax monthly. On the other hand residents and non-residents with a PE are required to account for tax upon transfer of payment to them. This creates inequality and is not in line with other tax legislations, VAT and ITA which generally provide for remittance of tax by 20th of the following month.</p> <p>Reg. 7(5) places the onus of remitting DST to either a tax representative or a DST withholding agent.</p> <p>For effectiveness and borrowing from countries that have implemented DST, DST is declared and paid by the subject entity.</p>	<p>1) Delete paragraph 4 and include the following under 7(2) below: <i>"Provided that the tax collected shall be remitted to the Commissioner by the 20th day of the month following the end of the month that the digital service was offered"</i>.</p> <p>2) Delete regulation 7(5).</p>	<p>For simplicity and enhanced compliance.</p> <p>For certainty.</p>	<p>This has been noted for review.</p>
7.	New-Amendment of Returns	<p>The Regulations have not provided a remedy in instances where the taxpayer over/under declared Gross Turnover value and thereby DST.</p>	<p>We recommend introduction of a new regulation to read as follows: <i>"(1). Where a person has made an over declaration or an under</i></p>	<p>Certainty.</p>	<p>This is already provided for in the TPA. However, elements of this proposal shall be considered</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANT OF KENYA (ICPAK)					
1.	Reg. 2- Interpretation	<p><i>Definition of digital service.</i></p> <p>(a) The use of the term “any” expands the scope significantly and this may result to services being captured which were not the target for DST.</p> <p>(b) What happens where the delivery of the service is not automated? Do these services fall out of the ambit of DST?</p>	<p>Amend definition to read as:</p> <p>“digital service” means service that is delivered or subscribed over the internet or other electronic network that is not subjected to tax.</p>	<p>To provide clarity as to what a digital service is.</p>	<p>This is noted.</p>
		<p><i>Definition of digital service tax agent</i></p> <p>TPA 2015 Sec. 42B does not exist.</p>	<p>Define a Digital Service Tax Agent</p>	<p>Requirement for clarity of the law</p>	<p>There is a provision for section 42b</p>
		<p><i>Definition of “digital service tax collection service”</i></p>	<p>Amend to read:</p> <p>“digital service tax collection service” means a tax collection service that deducts and remits</p>	<p>To provide clarity as to the definition of a digital service tax collection service.</p>	<p>Noted</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p>The use of the word "identifies" in the definition.</p> <p>Definition of "payment service provider"</p> <p>It is important to clarify if this definition includes both resident and non-resident providers</p>	<p>digital service tax to the Commissioner.</p> <p>Amend to read ' "payment service provider" means an entity in Kenya that accepts. Authenticates and processes payment transactions for merchants operating in the digital market place.</p>	<p>To provide clarity</p>	<p>Noted</p>
2.	<p>Reg. 3-Scope of Taxable services.</p>	<p><i>Scope of Taxable services.</i></p> <p>The substantive legislation defines a digital marketplace as a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means.</p> <p>There is a conflict between the definition of a digital Marketplace and the scope of services outlined under paragraph 3 of the regulations.</p> <p>The scope under paragraph 3 broadens the definition of a 'digital marketplace' to include services that are not offered on a digital platform that brings in buyers and sellers together.</p>	<p>Consider a review of the services captured under 3.</p>	<p>To ensure there is no conflict of the Regulations with the substantive Legislation</p>	<p>This is already addressed</p>
		<p>3(1)(a) streaming and downloadable services of digital content, including but not limited to movies, videos,</p>	<p>Review clause (3a) to remove products that are sold in electronic form.</p>	<p>To ensure that DST is not applied to a good/product.</p>	<p>DST applies to the streaming/download service</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p><i>music, applications, online games and e-books;</i></p> <p>This sub-regulation attempts to tax the good/product transacted on the digital platform.</p>			
		<p><i>3(1)(b) transmission of data collected about users which has been generated from such users' activities on a digital marketplace, however monetized;</i></p> <p>Sub-regulation 3(b) potentially conflicts with Sec 9(2) of the ITA on transmission.</p>	Delete 3 (b)	To avoid instances of double taxation	This is already addressed
		<p><i>3(1)(e) electronic data management including website hosting, online data warehousing, file-sharing and cloud storage services;</i></p> <p>These services are already captured under management, professional or technical fees under sec 35 of the ITA.</p>	Delete 3(e).	To avoid instances of double taxation	The Regulations already provide that where WHT applies, DST shall not.
		<p><i>3(1)(g) tickets bought for live events, theatres, restaurants e.t.c purchased through the internet;</i></p> <p>Clause 3(g) as it attempts to tax the good/product transacted on the digital platform and not the digital platform service provided by the platform owner.</p>	Delete 3(g).	To ensure DST is not applied on products.	This is noted for review

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p><i>3(1)(h) online distance teaching via pre-recorded medium or e-learning, including online courses;</i></p> <p>This will have a negative impact on the development of the education sector which is currently adversely affected by covid-19. The government as well as the private sectors are adopting e-learning to circumvent the impact of covid-19 and therefore introduction of tax on e-learning is ill-timed.</p>	Delete 3(h).	To ensure the legislation takes into account the current learning developments.	We cannot give an exemption under the regulations.
		<p><i>(i) any other service provided or delivered through an online digital or electronic platform excluding any service whose payment is subject to withholding tax under section 35 of the Act.</i></p> <p>The withholding tax exclusion only appears to apply to services falling under category (i).</p>	Add clause (3) after (2): (3) Notwithstanding any other provision of these Regulations, any services subject to tax under Section 35 of the Income Tax Act shall not be subject to digital services tax.	To avoid instances of double taxation	This is noted for review
3.	Reg. 5- Determination of user location	<p><i>(b) Payment for the digital services is made using a credit or debit facility provided by any financial institution or company in Kenya;</i></p> <p>This would lead to taxation of income not accrued/derived from Kenya where a foreign investor makes payment for a digital service from a</p>	Delete sub-regulation 5(2)(b).	DST may inadvertently be applied on payments that do not relate to provision of digital services through a digital platform.	There are various parameters provided to determine user location.

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p>bank account they have in Kenya for investment purposes only.</p> <p>Return on such investments which are purely interest in nature are already subject to withholding tax (WHT) in Kenya.</p>			
		<p><i>(c) Digital services are acquired using an internet protocol address registered in Kenya or an international mobile phone country code assigned to Kenya;</i></p> <p><i>(d) The user has business, residential or billing address in Kenya.</i></p> <p>These parameters are very broad which will create further complexity and ambiguity around DST.</p>	<p>Delete sub-regulation 5(2)(c) as sub-regulation 5(2)(d) is sufficient.</p>	<p>Simplicity and clarity</p>	<p>Its not harmful for the commissioner to have several options for user location determination.</p>
4.	<p>Reg. 6-Gross transaction value.</p>	<p><i>(b) in the case of a digital marketplace provider, the commission or fee paid for the use of the platform.</i></p> <p>It will be a challenge for the payment aggregators to determine the commission the digital market-place provider is charging a vendor for the use of the platform where a Kenyan customer buys a product online.</p>	<p>Review provision on assessing the tax base for services rendered by a market place provider or the platform owner.</p>	<p>This is critical to ensure compliance with the provision of the law</p>	<p>Noted and will be addressed.</p>
5.	<p>Reg. 7- Accounting and Payment</p>	<p><i>Sub-regulation 7(2) and 7(4)</i></p> <p>Non-residents without a PE in Kenya who has appointed a tax representative is required to pay the tax by the 20th</p>	<p>Need to align payment dates to be by 20th of the month following month of delivery of digital services for any service</p>	<p>Equality and harmonization with other tax legislations.</p>	<p>This is noted and shall be addressed</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
6.	Reg. 9-Offences and Penalties	<p>of the month following the month of delivery of digital services. However, residents and non-residents with a permanent establishment are required to account for tax upon transfer of payment to them</p> <p><i>.....be liable to restriction of access to the digital marketplace in Kenya until obligations are fulfilled. A regulation cannot prescribe a penalty not captured under the substantive law.</i></p> <p>A regulation cannot prescribe a penalty not captured under the substantive law</p>	<p>provider located in/outside Kenya.</p> <p>Consider deletion and or alignment with the main Act.</p>	To avoid conflict with other provisions of the law.	We shall consider aligning with the main law
ANJARWALLA AND KHANNA/AMCHAM/Uber B.V					
1.	Reg. 1-Citation and Commencement	<p><i>These Regulations shall come into effect on 1 January 2021.</i></p> <p>With less than four months to the effective date for DST, it may not be easy for taxpayers to effectively comply.</p>	<p>1) Extend the effective date for the DST Regulations by at least three months (to be effective from April 2021).</p> <p>2) Develop and publish publicly available FAQs after the gazettement of the DST Regulations to provide guidance to taxpayers on the administrative processes that will be involved.</p>	Taxpayers will need to re-configure their systems, train employees on the new compliance requirements and review billing and invoicing structures.	The effective date has been fixed in the main law and cannot be varied via regulations.
2.	Reg. 3-Scope of Taxable Services	<p><i>Sub-regulation 3(1)(i)</i></p> <p>(a) It is not clear which services are intended to be captured under</p>	(a) Delete sub-regulation 3(1)(i).	Clarity and certainty and to avoid unnecessary disputes with the taxpayers.	Agreed and noted for review

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p>Regulation 3 (1)(i) as it is drafted in very broad terms. As currently drafted, this provision would bring uncertainty and lack of clarity and is ultimately likely to result in tax disputes with taxpayers.</p> <p>(b) The withholding tax exclusion only appears to apply to services falling under category (i).</p>	<p>(b) If it is to be retained then amend to read as: <i>“The income accrued in or derived from Kenya in relation to the services set out under section 9 (2) and section 10 as read with section 35 of the ITA when provided or delivered through an online, digital or electronic platform is not subject to digital service tax under the Act and these Regulations”.</i></p>		
	<p><i>Sub-regulation 3(1)(h)- educational services</i></p> <p>Online education has become increasingly necessary in light of the COVID-19 pandemic as schools are moving their courses fully online.</p>	<p><i>Sub-regulation 3(2))-</i></p> <p>The exclusion of the services of licensed financial service providers is a welcome move and is consistent with global best practice in relation to unilateral DST regimes.</p> <p>However, there is need for clarity in the language to provide clarity and consistency to the financial and payments sector, which is very broad and has varied business models.</p>	<p>Amend to read as follows: <i>“The services of a financial service provider carrying out online services which facilitate payments, lending, or trading of financial instruments, commodities or foreign exchange, including the services listed in Paragraph I of Part II of the Value Added Tax Act, 2013 when provided through an online platform, shall not be</i></p>	<p>This will increase the cost of education and disadvantage many Kenyans who already find these online services inaccessible.</p>	<p>Such an exemption can only be given under the main law. An exemption cannot be given through the regulations</p>
				<p>Clarity</p>	<p>Noted and agreed for further review</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
3.	Reg. 4-Digital Service Tax	The Regulation does not clarify that DST is a final tax for non-resident persons without a PE in Kenya.	<p>digital services for the purposes of these Regulations’.</p> <p>We propose to include a proviso to Regulation 4 (2) to read as follows:</p> <p><i>Provided that for non-resident persons without a permanent establishment in Kenya, digital service tax shall be a final tax on income accrued in or derived from Kenya through an online, digital or electronic platform and such income shall not be subject to any other tax under the provisions of the Act and these Regulations.</i></p>	This will provide clarity and will avoid the likelihood of conflict with other provisions of the ITA.	Noted and accepted for review and adoption
4.	Reg. 5- Determination of User Location	As currently drafted, this provision could result in DST being applied on services which are not received by a customer in Kenya. For example, a residential address could be in Kenya but the recipient of the services or the person making payment for the services could be in another jurisdiction and Kenya should therefore not have the taxing right in such circumstances. A person can also use a credit/debit facility offered by a Kenyan financial institution outside the country to make payments for the services or use their locally registered	<p>Amend the regulation to clarify that a user will be deemed to be located in Kenya for purposes of the Regulations if at least two of the tests set out in the Regulation have been satisfied.</p>	This will ensure that transactions which fall within the scope of the DST have a clear nexus with Kenya and Kenya is therefore entitled to the taxing right.	This proposal poses a revenue risk due to tax planning. However, the regulation shall be subject to review

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
5.	Reg. 6-Gross Transaction Value	The gross transaction value should be calculated as the net value/the actual income that is received by the digital marketplace operators exclusive of discounts that may be given to their customers to reflect the commercial realities of transactions undertaken on digital marketplace.	Amend Regulation 6 (2) is to read as: "The transaction value of the service in paragraph (1) shall not include any discounts granted in relation to the service and Value Added Tax charged as part of the service".	It is common for discounts to be granted as a mechanism of incentivizing service providers	This is well explained in reg 6 and does not include discounts
6.	Reg. 7- Accounting and Payment	<p>Issue 1 – Obligation to account for DST</p> <p>Reg. 7 (1) provides that payment of the DST shall be the liability of the digital service provider (which is a new definition) or any person that collects the payments for digital services.</p> <p>The responsibility to account for DST should only apply where the person that collects the payments has been appointed as a digital service tax collection agent pursuant to section 42B of the TPA. This would avoid a scenario where a non-resident payment service provider who may not understand the compliance requirements in Kenya is required to comply with Kenyan tax obligations</p>	<p>1. Replace the phrase "any person that collects the payments for digital services" in sub-regulation 1 with the following phrase: "or any person in Kenya that collects the payments for digital services and has been appointed as a digital service tax collection agent by the Commissioner in accordance with section 42B of the Tax Procedures Act. Provided that, where a person has been appointed as a digital service tax collection agent by the Commissioner, the digital service tax collection agent shall be indemnified by the taxpayer in respect of any payments made</p>	None	Simplified Registration and monthly remittance to be provided for. Non-resident to only appoint tax representative if not applying for simplified registration. DST agent to be used for non-compliant persons.

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p>outside the scope of the engagement with the principal.</p> <p>Issue 2 - Time of payment</p> <p>The real-time payment of the DST to the KRA as envisaged by this provision is unlikely to be achieved due to the volume of online transactions that occur at any given time.</p> <p>Monthly remittance has been provided but only in the case for non-resident digital service providers where they appoint a tax representative.</p> <p>Issue 3 – Mandatory appointment of Tax Representatives.</p> <p>The mandatory appointment of tax representatives by non-resident entities has not always been a preferred option as it results in increased costs of doing business as these tax representatives charge exorbitant fees to provide this service, since their fees are not regulated.</p> <p>Issue 4-Appointment of DST Agents</p> <p>The appointment of a DST agent should only be undertaken where a non-resident person has not appointed a local tax representative and has not</p>	<p><i>to the Commissioner by virtue of their role as a digital service tax collection agent’.</i></p> <p>2. Monthly remittance should be made available to resident providers of digital services as well as non-resident providers who do not appoint a tax representative in Kenya.</p> <p>3. <i>Amend regulation 7(4) to read as:</i></p> <p><i>“where a non-resident person appoints a tax representative to account for the digital service tax or has registered for the digital service tax obligation on iTax, the tax representative or the non-resident person (as the case may be) shall remit the tax due to the Commissioner by the twentieth day of the month following the end of the month that the digital service was offered”.</i></p> <p>4. <i>Amend Regulation 7(5)(b) to read as follows:</i></p>		

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		registered for the DST obligation on iTax.	<p>“a non-resident who has not appointed a tax representative under paragraph (3) and has not registered for the digital service tax obligation on iTax”.</p> <p>Online Registration and Remittance</p> <p><i>The simplified registration process on the KR4 iTax platform in relation to VAT which was proposed by the Value Added Tax (Digital Marketplace Supply) Regulations should also apply to DST, with no requirement to provide any additional documents on registration.</i></p>		
7.	New>Returns	Not provided for in the DST Regulations	<p>A form of return should be provided by KRA. The following information should be provided: supplier's registration number; tax period; currency and exchange rate used; taxable amount; and tax payable.</p> <p>The return should be filed on a monthly basis by the 20th day of the subsequent month that the digital service was provided and</p>	Purposes of clarity	Agreed to provide for this similarly to the provisions in VAT

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
8.	Reg. 9-Offences and Penalties	<p>The Regulation provides that in case of breach the person shall be liable to restriction of access to the digital marketplace.</p> <p>However, the Statutory Instruments Act provides that the maximum penalty which can be imposed for breach of a Statutory Instrument is KES 20,000 or imprisonment for a period of six (6) months. Any penalty which prescribes a higher threshold would be deemed to be void.</p>	<p>the payment should also be made on the same date.</p> <p>Delete the provision and introduce it by amending the TPA, which should specify that the restriction of access to a digital market place should only be imposed by the TAT or a Court.</p>	To prevent conflict with the Statutory Instrument Act	To be reviewed in line with penalties under the TPA
9.	New-Withholding tax credits	Kenya has a limited double tax treaty network and in addition, many jurisdictions globally are introducing similar unilateral digital tax regimes. For these reasons, there is a high likelihood of double taxation on the income derived from Kenya by operators of digital platforms.	<p>Provide that:</p> <p>i) where a non-resident person who is subject to DST in Kenya has paid foreign DST or other foreign taxes on the same income in their country of residence, the foreign tax paid should be available as a unilateral tax credit against DST due in Kenya.</p> <p><i>In the alternative,</i></p> <p>ii) the Regulations should provide that where foreign DST or other foreign taxes have been paid on the same</p>	To avoid double taxation	There's no provision in the main law that allows us to provide unilateral relief.

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
10	Sunset Provisions	The OECD issued a statement earlier this year that the Unified Approach is the basis to address the taxation of the digital economy and changes to the international tax rules. Member countries affirmed their commitment to reach an agreement on a consensus-based solution by the end of 2020. The statement by the OECD also proposed that any consensus-based agreement will include a commitment by members to withdraw unilateral actions on Digital Tax.	Insert a Sunset Provision which would result in the automatic repeal of the DST once the OECD reaches consensus on the taxation of digital economy.	To avoid conflict with OECD recommendations	Noted, the provisions will be reviewed once a unified approach is agreed upon. However, this does not need to be put in the regulations.
LAW SOCIETY OF KENYA					
1.	Reg. 2 Interpretation	Regulation 2 defines “platform” to mean an application, website, or other internet-based content service used to transact or facilitate trade through an electronic system.	Whereas this may be an adequate definition, we recommend that the definition be aligned with the recently published OECD Model rules for reporting by Platform Operators with respect to Sellers in the sharing and Gig Economy, set out below. “A “Platform” means any software, including a website or a part thereof and applications,	No justification	Noted. Definition to be reviewed.

NO.	Relevant Section	Issue/Comment	Recommendation <i>including mobile applications, accessible by users and allowing Sellers to be connected to other users for the provision of digital Services, directly or indirectly, to such users.</i>	Justification	Comments
2.	Regulation 3- Scope of Taxable Services	<p>The ITA defines a digital marketplace. However, the chargeable services under the Draft Regulations do not entirely encompass a digital market place and are beyond the scope envisaged under the ITA.</p> <p>In addition, sub regulations 3(a) and 3(g) attempt to subject to DST goods, whereas the scope of DST should be on digital services.</p>	<p>Review the scope of the chargeable digital services.</p>	<p>To align the scope with the provisions of the ITA.</p>	<p>The scope is aligned to the Section 12E and only captures services provided through a digital marketplace.</p>
		<p>Sub-regulation 3(1)(i) affords the Commissioner wide discretion on what would constitute a chargeable service for purposes of DST assessments and may not provide certainty to service providers who are unable to determine whether the services they offer are within the scope of the regulation.</p> <p>Secondly, whereas the exclusion of the services whose payment is subject to withholding tax under Section 35 of the Act is aimed at avoiding double taxation at source with respect to such</p>	<p>i. Engage Parliament to pass an amendment to the ITA subjecting all digital service providers to the DST or provide the providers with an option to choose the tax basis.</p> <p>ii. That sub regulation 3(1)(i) be amended to require that any other service shall only be a chargeable service upon publication of a legal notice by the Commissioner.</p>	<p>i. To avoid being discriminatory.</p> <p>iii. This is to allow further engagement and a window for digital service providers to implement compliance mechanisms in their organizations.</p>	<p>It is not discriminatory and the law targets the services that have been hard to tax. Services falling under the ambit of WTH shall not be subject to DST</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p>services, it could be considered discriminatory.</p> <p>Equity and fairness dictate that all digital services be subject to the same tax rate.</p>			
3.	Reg. 4- Determination of user location	<p>The parameters given to determine user location are <i>discriminative</i> and provided any of them is present, the user will be deemed to be located in Kenya and the service payment subject to the DST.</p> <p>The requirement that only one of the parameters needs to be present to determine user location has the potential to result in double taxation of</p>	<p>Amend the sub-regulation as follows:</p> <p>(i) that a user's business or residential address in Kenya only be applied in addition to the other parameters;</p> <p>(ii) that the sub-regulation be amended to state that a user's business or residential address in Kenya may be used by the</p>	Clarity	<p>This proposal poses a revenue risk due to tax planning. However, the regulation shall be subject to review</p>
		<p>Regulation 3 (1)(h) proposes that digital services upon which digital service tax shall be applicable shall include online distance teaching via pre-recorded medium or e-learning, including online courses. The Regulation appears to contradict the Income Tax Act (Paragraph 10 of Part I of the First Schedule) as educational institutions in Kenya provide online classes, which students pay for.</p>	<p>(i) Delete the sub-regulation; or</p> <p>(ii) sub-regulation should be clear that DST on online distance teaching will only be payable where it is provided by a non-resident entity; or</p> <p>(iii) The sub-regulation should make it clear that it excludes any service whose payment is exempt under Paragraph 10 of Part I of the First Schedule to the Income Tax Act</p>	To align the regulation with the ITA.	Exemption is already provided for upon application under the ITA.

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p>payments for services made to non-resident digital service providers.</p>	<p>Commissioner to determine the user's location for purposes of the regulation; or (iii) that a user's business or residential address in Kenya may be used to determine their location provided it is established that they accessed the digital services from that address.</p>		
4.	Reg. 6-Gross transaction value	<p>Regulation 6(1) distinguishes between the gross transaction value of services provided by a digital service provider and that received by a digital market place provider. Whereas this provides the clarity that was lacking in the ITA with respect to the definition of gross transaction value, it does not take into consideration digital service providers that are <i>both the owners of platforms and suppliers of digital services</i> on those platforms.</p>	<p>Amend to read as follows: <i>“Where a person is both a digital service provider and a digital marketplace provider, the gross transaction value shall be considered separately as follows:</i> <i>(i) in the case of payments made in consideration for the digital services, the payment received; and</i> <i>(ii) in the case of payments made for the use of the platform, the commission or fee paid.</i></p>	<p>To provide for what would constitute gross transaction value for such hybrid players in the digital sector.</p>	<p>What the stakeholder is proposing is already captured in the regulation.</p>
5.	Reg. 7- Accounting and Payment	<p>Regulation 7(1) proposes that payment of digital service tax shall be the liability of the digital service</p>	<p>Amend reg. 7(1) to read as: <i>“Payment of a digital service tax shall be the liability of the digital</i></p>	<p>This is to align the obligations and liabilities of a DST agent with those of an appointed tax</p>	<p>This, is agreed and noted for review. The revised</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p>provider or any person that collects the payments for digital services.</p> <p>While there is some flexibility in having the option of pursuing either person, this creates uncertainty as to who the buck stops with. This is important because section 95 of the TPA makes it an offence to not pay tax.</p> <p>In addition, there is need to provide for the indemnification of the appointed DST agents.</p>	<p><i>service provider or any person that collects the payments for digital services where such a person has been appointed as a digital services tax agent or tax representative”.</i></p> <p>(i) Where a DST agent is appointed and remits the DST to KRA, the DST agent shall be indemnified by the taxpayer in respect of that payment.</p> <p>(ii) That the appointed of a DST agent does not relieve the taxpayer from performing any obligation imposed on the taxpayer under a tax law that the DST agent fails to perform.</p>	<p>representative under the Tax Procedures Act, 2015.</p>	<p>regulations do not use DST agents</p>
		<p>Sub-regulation 7(4) is allowing for the remission of the tax other than at the time of the payment transfer is inconsistent with the ITA. This is contrary to the law that requires DST to be due at the time of the transfer of the payment for the services to the service provider.</p>	<p>Delete sub-regulation 7(4).</p>	<p>Contrary to the law.</p>	<p>This is noted and we shall pursue amendments in the main law</p>
		<p>A reading of sub-regulation 7(5) and 7(6) suggests that the KRA shall develop and implement a digital</p>	<p>Amend the regulations to provide that the data collected by the service shall only be used</p>	<p>To protect such data</p>	<p>Section 6 of the TPA already provides for Confidentiality of such</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p>service tax collection service for purposes of the assessment and collection of the DST. A digital service tax collection service is an innovative enforcement mechanism in enforcing the DST. However, the transaction information collected by the service has the potential to be used against taxpayers for purposes other than the enforcement of the DST.</p>	<p>for purposes of determining the DST payable, and shall be collected and processed in accordance with the provisions of the Data Protection Act, 2019.</p>		
		<p>Regulation 7(7) proposes that the digital service provider or their tax representative shall submit a return on the 20th day of the month following the end of the month that the service was offered. It is unclear why the date of submission of the tax return is pegged to the date of the provision of the service rather than the date of payment for the service.</p>	<p>(i) Sub-regulation 7(7) should provide that tax returns should be submitted on the 20th day of the month following the end of the month that the digital service was paid for. <i>In the alternative,</i> (ii) The regulations prescribe time of service provision rules to clarify the date the service will be deemed to have been provided.</p>		<p>This is already provided for in reg 7</p>
6.	<p>Implication on Businesses subject to the Turnover Tax (ToT) Regime</p>	<p>Businesses whose annual revenue is between KES 1,000,000 and KES 50,000,000 can opt to pay 1% of their monthly revenues under the simplified ToT regime. The introduction of the DST will mean that small businesses</p>	<p>(i) Engage Parliament to carve out small businesses in the digital services sector from the obligations of paying the DST.</p>		<p>This will be inefficient as of now. Furthermore this can be dealt with administratively. The digital service tax has been introduced to ensure</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		in the digital services sector that fall under the ToT regime, may find themselves in a position where their tax rate is higher than the prescribed 1% as the rate for digital service tax is 1.5% of the revenue.	<i>Alternatively,</i> (ii) the regulations could provide for a revenue threshold above the upper threshold of the ToT.		fairness by all people who derive income from Kenya.

NETFLIX

1.	Sunset Provisions	The OECD issued a statement earlier this year that the Unified Approach is the basis to address the taxation of the digital economy and changes to the international tax rules. Member countries affirmed their commitment to reach an agreement on a consensus-based solution by the end of 2020. The statement by the OECD also proposed that any consensus-based agreement will include a commitment by members to withdraw unilateral actions on Digital Tax.	Insert a Sunset provision, which would result in the automatic repeal of the DST once the OECD reaches consensus on the taxation of digital economy.	To avoid conflict with OECD recommendations	We will repeal the law based on our policy direction also as guided by the OECD, however, this can be dealt with administratively
2.	Reg. 4- Scope of Taxable Services	The services set out in Regulation 4 of the draft VAT Regulations will be subject to 14% VAT under the proposed VAT regime in Kenya. For “B2C” model, such as Netflix will be required to account for VAT on the services provided. Though VAT is a tax ultimately paid by consumers, it is often not fully possible to pass on the VAT fully to consumers and often	N/A	The introduction of DST particularly in relation to B2C transactions is likely to result in multiple layers of taxation in Kenya and will significantly increase the cost of doing business for such companies in Kenya.	This is noted, however, The digital service tax has been introduced to ensure fairness by all people who derive income from Kenya.

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		businesses absorb (a portion of) VAT as a cost.			
		PWC/ ECART SERVICES KENYA LIMITED			
1.	Regulation no. 3(1)(i)	To avoid misinterpretation, exclusion from DST for services subject to WHT should be a stand-alone proviso and not nested under any scope of DST.	<p>Regulation no. 3(1)(i) be re-worded to read as follows: <i>“any other service provided or delivered through an online digital or electronic platform”</i>.</p> <p>Add a proviso to Regulation 3 to read as follows: <i>“Notwithstanding the above, digital service tax shall not be charged on any service whose payment is subject withholding tax under section 35 of the Act”</i>.</p>	Separation of these two provisions will bring clarity that DST is not applicable on services which are subject to WHT.	This is noted for review
2.	Regulation no. 7 (2) Accounting and Payment	<p>This Regulation proposes that DST shall be due and payable at the time of the transfer of the payment for the service to the service provider.</p> <p>This may be administratively cumbersome owing to the numerous transactions carried out at a time.</p> <p>It is also discriminatory since the payment date for DST by a person using an agent or a tax representative is 20th of the following month.</p>	<p>We propose that Regulation no. 7 (2) be re-worded to read as follows: <i>“Where a person is liable to digital service tax and does not use a digital service tax agent or a tax representative, that person shall self-declare the digital service tax and the digital service tax shall be payable by the twentieth day of the month following the end of the month that the service was offered.”</i></p>	Whilst DST will be due at the time of the transfer of the payment for the service to the service provider, the payment date should be the following month to allow collation and payment of the requisite tax. This will also be administratively easier and will harmonize the payment date for DST with other taxes.	This is noted and already addressed

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
3.	Reg. 9 -Offences and Penalties	The proposal to restrict access of the digital marketplace may be difficult to implement given that the domains are owned by the owner of the digital marketplace. Further, the restriction of the access rights is not a penalty imposed under the Tax Procedures Act. According to Section 13(n) of the Statutory Instruments Act, a statutory instrument should not impose a fine or penalty without express authority having been provided for in the enabling legislation.	Amend Regulation no. 9 to read as follows: <i>“A person who fails to comply with the provisions of these Regulations is liable to the penalties and interest prescribed under the Tax Procedures Act, 2015.”</i>	This is an illegality.	To be reviewed in line with penalties under the TPA
DELOITTE & TOUCHE					
1.	New-Minimum threshold of income subject to DST	Unlike the other countries across the globe, the proposed regulations do not provide for a minimum threshold of income below which DST will not apply	The regulations should be amended to include a minimum threshold of qualifying income below which DST will not apply. Introduce a proviso under Regulation 4 to read as follows: <i>“Provided that Digital service tax shall only apply to a person who has provided digital services or expects to make digital services, the value of which is five million shillings or more in any period of twelve months”</i>	Exempting income below a given threshold from DST will cushion small and emerging entrants into the market as the DST may take up a significant part of the revenues of such nascent players. In addition, the effort to administer DST on revenues below a certain threshold may not be commensurate to the tax yields thereon.	Already addressed The digital service tax has been introduced to ensure fairness by all people who derive income from Kenya.

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
2.	Regulation 2- Interpretation	The regulations do not define the term "user"	Introduce under regulation 2 the definition of "user" as: <i>"user" means the person, located in Kenya as per Regulation 5, who is charged for provision of digital services.</i>	This will ensure clarity on where income subject to DST is derived or accrued from	
		The regulations do not define the term "licensed financial service provider"	Introduce under regulation 2 the definition of "licensed financial service provider" <i>has the same meaning assigned to a Financial institution under the Fourth Schedule to the Income Tax Act, Cap 470.</i>	Failure to include a clear definition of who a licensed financial service provider is may lead to multiple interpretations that result in conflict between taxpayers and the Kenya Revenue Authority (KRA).	Noted. Clarity to be provided
3.	Reg. 7 (2), (4)&(7)- Accounting and Payment	The DST due date should be very clear to all the taxpayers and the Digital Tax Service agents.	Amend as follows: 1. Regulation 7 (2) – replace the following; <i>"In instances where the Digital Service Tax is accounted for by a Digital Service Tax Agent, the Digital Service Tax shall be deducted at the time of transfer of the payment for the service to the service provider. The Digital Service Tax shall be due and payable to the Commissioner not later than the twentieth day of the month following that in</i>	Clarity of the due date will ensure compliance with the law and minimize the administrative cost. This will eliminate the ambiguity that the tax is due and payable at the time of transfer. This provision is unnecessary. This can be accommodated as part of the Regulation 7 (7) as proposed. This will allow the taxpayers time to finalize financial	This is noted and amendments done

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
4.	Reg. 7(3),(5)(a) and 5 (b)- Appointment of tax agent	The appointment of a tax agent as currently provided for under Regulation 7(5) creates confusion on who is supposed to account for DST. It should be very clear under what circumstances the Commissioner may appoint a DST agent otherwise there is likely to be an overlap where the Commissioner appoints an agent while at the same time a digital service provider or a digital marketplace provider is accounting for tax through a self-assessment regime, the regime which Kenya subscribes to.	<p>which the digital service tax was deducted".</p> <p>2. Regulation 7(4) – Delete.</p> <p>3. Regulation 7(7) - replace with the following;</p> <p><i>A digital service provider or their tax representative shall be required to submit a return in the prescribed form indicating the value of transactions and remit the tax due by the twentieth day of the month following the end of the month that the digital service was offered.</i></p> <p>Add the following proviso after regulation 7(5)(a);</p> <p><i>For avoidance of doubt, appointment of a Digital Service Tax agent under Paragraph (5) (a) shall only be done in instances where the resident persons or non-resident persons with a permanent Establishment fail to comply with these regulations or in instances where the Commissioner deems it fit to collect the tax using a DST agent. The Commissioner shall notify the persons within</i></p>	<p>reporting, file and pay accurate DST to the government.</p> <p>To eliminate the confusion and provide the much needed clarity on where the responsibility of accounting for DST rests and clarifies the circumstances under which the Commissioner may appoint a DST agent.</p>	<p>This has already been addressed. Furthermore, there is no conflict</p>

NO.	Relevant Section	Issue/Comment	Recommendation <i>thirty days of such an appointment.</i>	Justification	Comments
5.	Regulation 7 (6) Digital service tax collection service	<p>The regulations allude to connecting payment service providers to a digital service tax collection service which is defined to mean a tax collection service that identifies, deducts and remits digital service tax to the Commissioner.</p> <p>Given the sensitivity of data and the laws around data privacy, there is will be need to engage with the respective payment service providers ahead of the move to integrate.</p>	<p>We recommend that the Commissioner engages the “would be” appointed DST agents and payment service providers ahead of the implementation of the regulation.</p>	<p>These regulations should align with international best practice and data protection laws to ensure realization of full benefits and a smooth implementation.</p>	<p>This is noted and in agreement.</p>
KENYA BANKERS ASSOCIATION					
1.	Reg. 3(2)- Exclusion of a licensed financial service provider from DST	<p>The exclusion is welcome. However, there is need to extend this to local and foreign card companies.</p>	<p>Amend regulation 3(2) to read as: 3(2) “The services of a licensed financial service provider or card company carrying out online services which facilitate payments, lending, or trading of financial instruments, commodities or foreign exchange shall not be digital services for the purposes of these Regulations”.</p>	<p>They are integral in the facilitation of card payments</p>	<p>Noted for consideration.</p>

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
2.	Reg. 5(2)- Determination of user location	Regulation 5(2) provides that user location may be determined if the payment for digital services is done using credit or debit facilities provided by a financial institution licensed to operate in Kenya. The card payments system involves many players all linked through the card networks established by various card companies such as Visa, Mastercard and American Express. There are established protocols governing the card settlements.	It is important that the card companies are included in the definition of payment service providers.	This is to ensure that KBA members do not fall foul of the card network agreements when required to withhold and remit tax on digital services.	The determination of user location are comprehensive.
3.	Reg. 7- Accounting and Payment	1) There are no provisions on who qualifies to be appointed as a DST agent, there obligations and responsibilities. This is a critical omission given that where the DST Agent is not party to the transaction, they will not have critical details on the transaction, for instance of the commissions payable. 2) The legislation and regulations have not made provisions for the compensation of a DST collection service.	1) Clarify the obligations and responsibilities of a DST Agent. 2) Provide for the compensation of DST collection service.	1) To avoid disputes and litigations. 2) To enable the success of DST.	This is noted. However, the matter will be addressed administratively.

LAWYERS HUB

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
1.	General comment- unilateral action	Kenya's action is considered a unilateral approach. The approach is likely to be disrupted once the OECD begins implementation of pillar 1 on profit allocation and new taxing rights in market jurisdictions.	No recommendation		This is aa sovereign right and most jurisdictions have taken same directions as they await direction from OECD. The measures taken are on short-term
2.	General comment- Threshold	Countries like the UK and other EU countries have set thresholds for the purpose of DST with minimum turnover, focusing their efforts on taxing multinational corporations. The DST regulations as currently have no threshold and thus exposes small entrepreneurs.	Set a threshold. In the UK for example, the threshold is 25 million pounds.	Putting a threshold creates a distinction between small enterprises and MNEs.	This has already been addressed
3.	General comment- Regulation forum and tax nexus rules	The regulations do not provide rules on how to address non-resident services for whom there is no nexus with Kenya for the purpose of taxation. These rules give authority to tax income. The concept of PE is a complex one as it does not account for the digital marketplace.	No recommendation	No justification	This is noted and will be addressed moving forward
4.	General comment- Increase of prices for services	Non-resident persons offering digital services within Kenya are likely to transfer this cost to consumers in order to maintain their margins and thus not bear the cost. This is because their non-resident status denies them the	No recommendation	No justification	This is an advanced payment and is not expected to cause additional burden to the consumer

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
5.	General comment- Multiple tax obligations	DST will be levied alongside other taxes under the ITA such as withholding, instalment and minimum taxes. With this multiplicity of obligations, DST further serves to reduce the profits being made in Kenya, which is an undesirable outcome.	No recommendation	No justification	Services subject to WTH are not subject to DST
6.	General comment-effect on US FTA negotiations	Kenya is in negotiations with the US to enter into a bilateral trade agreement. The US has made its trade policy known with countries that have attempted to levy taxes against American digital service providers, responding with investigations and sanctions. Introduction of DST will jeopardise the current negotiations.	Kenya should adopt the guidance given by ATAF on how to define the DST without associating it with income.	No justification	DST is a govt policy just as the FTA, so this will proceed to the extent that it can.
7.	Reg. 4-Definition of digital service taxes	ATAF released a policy brief on digital services tax discouraging the levy of DST as an income tax instead referring to it as a levy. Reg. 4 is the opposite of this recommendation in referring to DST as an advance tax to be off- set against income at the end of the year.	No recommendation	The ATAF recommendation allows Kenya to avoid the issue of double taxation.	Double taxation does not arise. However, this is noted.

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
8.	Reg. 7- Accounting and payment	Since the DST is payable at the time of paying for the service to the service provider, this may present the service or platform provider an opportunity to raise cost and shift the tax incidence to the user.	No recommendation	No justification	
CELLULLANT KENYA LIMITED					
1.	Reg. 4-Digital Service Tax	Reg. 4(1) provides that DST will be levied on income earned from provision of services through a digital marketplace. Some of the income earned through the digital marketplaces are amorphous in nature as they include consideration for both a good and service. An example of this model is ubereats/Glovo. An appointed digital service tax agent, who is a PSP, may not be able to accurately distinguish the consideration for the good and the service provided through the digital marketplace.	KRA should engage with digital players including PSPs to find a mechanism for isolating consideration for services.	This will ensure that DST is not levied on goods.	This is noted and in agreement.
2.	Reg. 7- Accounting and Payment	Regulation 7(3) requires a non-resident person without a PE to appoint a tax representative to account for the DST. The regulation discriminates against non-resident digital players by giving	The non-resident digital players be given the options of either appointing a local tax representative or appointing a digital tax agent who is	This will ensure smooth and fluid process change for non-resident digital players with respect to compliance with DST regulations.	The nonresidents have an alternative option of self declaration through provisions of the simplified registration.

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		them only one option to appoint a tax representative in order to comply with the DST which is likely to increase their cost and burden them administratively.	connected to a digital service tax collection service. The choice of a digital tax agent should be a preserve of the non-resident digital player where they can appoint a PSP who process the bulk of their payment.		

TAFITI SERA

1.	Regulation 2-Digital service Provider	Vague on the kind of person i.e. resident or non-resident the tax is applicable to.	Needs to be more clear on the individual or entity subject to this provision to avoid foreign companies evading the digital service tax	Provide clarity	The terms are clearly defined and do not present any ambiguity in the definitions provided.
2.	Regulation 3-Scope of Taxable Services	Inclusion of streaming and downloading digital content, applications and e-books in the scope of taxable services.	Expunge	This will make it expensive for the youth to be able to access public information on matters of governance and Knowledge from school online	The tax is on the provider of the service and not the consumer.
3.	Reg. 9-Offence and Penalties	The penalties are not comprehensive and hence leave room for personal data infringement and manipulation.	Need for elaboration on the penalties. There is no need for additional penalties.		Issues of data privacy are already covered in the Tax Procedures Act.
4.	Reg. 7-	Regulation 7(2) provides that DST is due and payable at the time of the transfer of the payment for the service to the service provider.	The due date/frequency for payment of DST be set monthly, like all the other taxes collected in Kenya.		Noted and to be considered

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
		<p>This regulation imposes an unreasonable administrative burden on service providers to make payment for DST each and every time they receive payment for a service.</p> <p>The administrative burden imposed by this regulation will disincentivize digital players from complying with DST.</p> <p>It may also lead to erroneous declaration and payments.</p>	<p>This will ease the administrative burden on digital service providers and digital service tax agents.</p>		
ALFRED MUGAMBI					
1.	Reg. 3-Scope of Taxable Services	<p>The services listed under the section amount to taxation of the channel and not the goods or services. Businesses use various channels to convey their products or services to their customers.</p>	<p>Apply tax to goods/services that are exclusively digital and businesses with no physical outlets.</p> <p>A business with a physical presence but uses an online channel such as website for orders or has created a platform to accommodate Covid-19 measures should be exempted.</p>	No justification	Such do not fall under the scope of DST. Furthermore, we are not taxing goods but rather services.
2.	Reg. 5-determination of user location	<p>The parameters under sub-regulation (b) and (d) are problematic when used to determine the location of the user because a person can pay for another user who is outside the country or a Kenyan residing outside the country roaming on their Kenyan telephone number or using a credit/debit card</p>	<p>Delete the sections and only retain the terminal located in Kenya or a Kenyan IP address as the sole determinant.</p>		This is noted and under review

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
3.	Reg. 7- Accounting and payment	acquired in Kenya and uses the services while abroad. User terminals and IP address are the only accurate forms of determining that the user of the service is in Kenya.	Tax liability should not be imposed on a person collecting payments since they are not the service provider or owner of the goods/services. For example, a bank where the service provider's account is opened, is a collection agent. The bank cannot bear the liability of paying the tax as they are not aware which payments relate to digital services.	Amend and delete the phrase 'person that collects the payments'.	This is noted
ERNEST MURIU					
1.	Reg. 3-(1)(a)- streaming and downloadable services of digital content, including but not limited to movies, videos, music, applications, online games and e-books;	None	Amend Paragraph 3(1)(a) To include the words "Software, Over The Top Services, other communication services" after the words online games	To include Software, Over The Top Services, other communication service as digital services	To be considered
2.	Reg. 6(2)- The transaction value of the service in paragraph (1)	None	Amend subparagraph 6(2) to add the words "or any fees charged to facilitate payments	Ensure that bank / payment charges are excluded from the transaction value.	Those charges do not constitute the gross transaction value

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
	<i>shall not include Value Added Tax charged for the service.</i>		payable to a licensed financial service provider carrying services which facilitate payments”		
3.	Reg. 7(1)- <i>Payment of digital service tax shall be the liability of the digital service provider or any person that collects the payments for digital services.</i>	None	Amend 7(1) To delete the words “any person that collects the payments for digital services” and replace with “digital service tax agent or tax representative”	To give clarity as to who is liable.	Reference to DST agent shall be removed
4.	Reg. 7-A non-resident person without a PE in Kenya may appoint a tax representative in accordance with the provisions of Section 15A of the Tax Procedures Act, 2015 to account for the digital service tax.	None	Amend 7(3) To delete the word “may” and replace with “shall” Amend 7(3) To delete the word “through”	This will make 7(3) consistent with section 15A (1) of the tax procedures Act, which makes appointment of a tax agent mandatory. <i>“In a case where a non-resident person with no fixed place of business in Kenya is required to register under a tax law, the non-resident person shall appoint a tax representative in Kenya in writing”.</i>	This is noted and will be looked at through the budget process

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
5.	Reg 7(4)- <i>Notwithstanding paragraph (2), where a non-resident person appoints a tax representative to account for the digital service tax, the tax representative shall remit the tax due to the Commissioner by the twentieth day of the month following the end of the month that the digital service was offered.</i>	None	Amend 7(4) delete the words “where a non-resident person appoints a tax representative to account for the digital service tax, the tax representative shall remit the tax due to the Commissioner by the twentieth day of the month following the end of the month that the digital” and replace them with “a liable person shall submit a return in the prescribed form in respect of each tax period not later than the twentieth day after the end of that period and make payment of digital service tax due at a date not later than the twentieth day of the month succeeding that in which the tax became due”	To ensure that 7(4) applies to all persons liable not just tax agents.	This is already addressed
6.	Reg. 7(7) <i>A digital service provider or their tax representative shall be required to submit a return in the prescribed form indicating the value of</i>	None	Amend 7(7) To Delete paragraph 7(7)	As this will be covered by the above proposed requirement under 7(4)	See comment above

NO.	Relevant Section	Issue/Comment	Recommendation	Justification	Comments
	<p><i>transactions and the tax remitted by the twentieth day of the month following the end of the month that the digital service was offered.</i></p>				
7.	<p><i>Reg. 8 A person required to deduct, account and remit the digital service tax to Commissioner under these Regulations shall be required to keep records in accordance with section 23 of the Tax Procedures Act, 2015.</i></p>	None	<p>Paragraph 8 Delete the words "required to deduct, account and remit the" and replace with "liable to"</p>	<p>Since the words "deduct, account and remit the digital" imply that paragraph 8 applies to agents only.</p>	<p>This is noted for review</p>