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a breakfast seminar by Oraro &
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**Fresh Thinking Series Webinar | Digital Service Tax and Its
Implementation in Kenya | 5th March 2021 | 11:00 AM - 1:00 PM**



WEBINAR STARTS AT 11:05 AM

Let us keep the conversation going on social media : #freshthinking #digitaltax #DST

Welcoming Remarks



Chacha Odera

Managing Partner

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Panelist Introduction



Ashif Kassam

Executive Chairman

RSM EASTERN AFRICA LLP

Panelist Introduction



Rosemary Koech-Kimwatu

Public Policy Manager

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Panelist Introduction



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International Tax Lead

UBER

Panelist Introduction



Renee Omondi

Tax Partner

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Digital Service Tax (DST) (An overview on legal provisions)

**Presented by: Renee Omondi, Tax
Partner**



Legal Framework

- Finance Act, 2019 – Section 3 (3)(ba) introduced to define Digital marketplace.
- The Finance Act, 2020 - Section 12 E introduced
 - i. to cement enforceability of DST
 - ii. to define who is subject to DST
 - iii. Rate of 1.5% of gross transaction value
- On 25th September 2020, The Value Added Tax Regulations (Digital Market Supply Regulations, 2020) and Value Added Tax (Electronic Tax Invoices) Regulations 2020 were gazetted.
- On 2nd December 2020, the Income Tax (Digital Service Tax) Regulations, 2020 (the “**DST Regulations**”) was gazetted. Effective date 1st January 2021.



What is DST?

- It is a tax chargeable on income **derived or accrued in Kenya from services derived** from the digital marketplace (DST). (Sec.12E ITA).
- The **OECD** recognized the emerging tax challenges thus formulating the Inclusive framework on the Base Erosion and Profit Shifting (the “**BEPS Framework**”) that Kenya is a party to, in order to resolve them and develop measures for the implementation of DST.
- The Kenyan Government introduced DST of 1.5% of the gross transaction value (GTV) which took effect on 1st of January 2021.
- GTV is determined by;
 - **Consideration** received by digital service provider and
 - **Commission** or fees paid to, digital marketplace provider.

Definitions

- “**digital service**” means any service that is **delivered or provided** over a digital marketplace
- “**digital marketplace**” is defined as a platform that enables the **direct interaction** between buyers and sellers of goods services through electronic means.
- “**platform**” means any **electronic application** that allows digital service providers to be connected to user of the services, directly or indirectly and includes a website and mobile application.
- “**digital marketplace provider**” means a person who provides a digital **marketplace** platform.
- “**digital service provider**” means a person who provides digital **service** through a digital marketplace.

SCOPE OF CHARGEABLE SERVICE

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Scope of Chargeable Service

- **Downloadable** digital content including downloadable mobile applications, e-books and films;
- Over-the-top services including **streaming television** shows, films, music, podcasts and any form of digital content;
- 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.
- Provision of a **digital marketplace**;
- **Subscription**-based media including news, magazines and journals;
- **Electronic data management** including website hosting, online data warehousing, file-sharing and cloud storage services;
- **Electronic booking** or electronic ticketing services including the online sale of tickets

Scope of Chargeable Service – Contd.

- Provision of **search engine** and automated held desk services including supply of customised search engine services;
- Online distance training through pre-recorded media or **e-learning** including online courses and training; and
- **Any other service** provided through a digital market place.



WHO IS ELIGIBLE FOR DST?

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Who is Eligible for DST?

- DST shall apply to **digital service providers** and **digital marketplace providers**.
- DST is paid by both **residents and non-residents** who are either:
 - i. Digital service providers who provide digital services listed **under Regulation 3** of the DST Regulations through a digital marketplace;
 - ii. Digital marketplace providers who provide **a platform that enables the direct interaction** between buyers and sellers of goods and services through electronic means; or
 - iii. Where a digital service provider is non-resident and **doesn't have a permanent establishments** in Kenya, they are required to have tax appointed representative who will be responsible to file their DST returns.

Services Exempt from DST

The regulations are specific that **DST does not apply** to:

- Online services **which facilitate payments**, lending or trading of financial instruments, commodities or foreign exchange carried out by a financial institution specified under the Fourth Schedule of the ITA or a financial service provider approved by CBK.
- Online services provided **by government** institutions.
- Services under Section 9(2) ITA- Income of certain non-resident such provision of **business of transmitting messages** by cable optical fiber, radio Tv broadcasting, VSAT, internet, satellite etc.
- **Withholding tax** (WHT) with respect to management and professional fees, dividends, royalty, rent, deemed interest, pension and winnings as provided for under Section 35 of ITA

IMPLEMENTATION

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How do we implement DST?

Simplified Tax Registration.- Non-resident without permanent establishment

- Registration is done online on the i-Tax platform and one follows promotes stage by stage by providing all requisite information required.
- Upon registration, the Commission shall issue an applicant with Personal Identification Number (PIN).
- They may also elect to appoint a tax representative who shall be responsible to declare and file their returns without registering.
- It is a Final tax.

Accounting and Payment

- The payment of DST shall be done by the digital service provider, the digital marketplace provider or the tax representative appointed per regulation 8.
- Return and payment due 20th of the following month.
- It is an advance tax for resident and non-resident providers with permanent establishment in Kenya.

How do we implement DST? – Contd.

Amendment of Returns

- A taxpayer is permitted to file amended returns as provided under the Tax Procedures Act, 2015.
- Where an amendment results in an overpayment of tax:
 - in the case of a non-resident persons **with no permanent establishments in Kenya**, the overpayment will be retained as a **credit that will be offset against** the digital service tax payable in the subsequent tax period;(hopefully there will be inconsistency issues and
 - in the case of **resident or non-resident persons with permanent establishments** in Kenya, the over paid tax shall **be refunded** in accordance with Section 47 of the Tax Procedures Act.

Maintenance, Filing and Record Keeping

- Tax payers are required to keep the relevant tax records as stipulated in the Tax Procedures Act, 2015.

Disclaimer

This presentation is of a general nature and solely for information purposes. The information herein counts as expert opinion but not professional advice. The presentation is not intended to address the circumstances of any particular individual or entity. While the information is accurate as at the date hereof, there can be no guarantee that the information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act upon such information without appropriate professional advice and after a thorough examination of the particular situation.

If you require specific advice on this matter, please write to us through legal@oraro.co.ke.



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Thank you