



OVER 40 YEARS OF ACCOUNTING EXCELLENCE

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Newsletter

MBAYA AND ASSOCIATES

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Introduction

Warm greetings from the M&A family. We are pleased to release our third edition of the year 2022 tax newsletter. The newsletter covers excise tax and the VAT Tax Invoice Management System (TIMS).

We are grateful for your interaction and are eager to be of service to you.

On the right column of the newsletter, you will find contact details for the senior members of our team who can help answer any questions you may have about the issues highlighted in this newsletter or any other matter.

We are interested in your feedback on the items covered and what topics you would like covered in the future. Please provide any feedback at tax@mbaya.co.ke.

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» From the TaxDesk »

Voluntary Tax Disclosure Programme (“the VTDP”)

The Voluntary Tax Disclosure Program (“the VTDP”) came into force on 1st January 2021 and will run for a period of three years. The VTDP gives taxpayers an opportunity to disclose unpaid tax liabilities accrued for the five-year period prior to 1 July 2020 (“unpaid tax liabilities”) and enjoy full or partial waiver of penalties and interest among other benefits.

According to the VTDP, the waiver of penalties and interest apply as follows:

- 100% waiver for disclosure made and tax liabilities paid in 2021;
- 50% waiver for disclosure made and tax liability paid in 2022; and
- 25% waiver for disclosure made and tax liability paid in 2023.

Last year, Kenya Revenue Authority (KRA) acknowledged that taxpayers took advantage of the VTDP and were able to enjoy the 100% waiver of penalties and interest.

In 2022, as indicated above the applicable waiver rate will be 50% as provided under the tax law. This rate is expected to reduce to 25% for disclosures that will be made in 2023.

It is therefore worthwhile for taxpayers to continue conducting self-reviews with the aim of identifying any unpaid tax liabilities.

Where applicable, taxpayers should make a voluntary disclosure with the view of obtaining the 50% waiver.

Cessation of Supply of Non-Compliant Electronic Tax Registers

KRA wishes to remind suppliers of Electronic Tax Registers (ETRs) and VAT registered taxpayers that the supply of ETRs that are not compliant with the Value Added Tax (Electronic Tax Invoice) Regulations, 2020 was discontinued effective 15th January 2022 as per the Public Notice of 23rd November 2021 on the “Requirements for Uptake of Electronic Tax Invoice”.

Any supplier of ETRs found supplying non-compliant ETRs shall be liable to penalties as prescribed in the law.

KRA takes this opportunity to thank all VAT registered taxpayers who are complying with the requirement to generate and transmit electronic tax invoices to KRA in line with the Value Added Tax (Electronic Tax Invoice) Regulations, 2020.

Tax Invoice Management System (TIMS)

In a Public Notice issued on 13 July 2021, the Kenya Revenue Authority (“KRA”) indicated that all VAT registered taxpayers are expected to comply with the requirements of the Regulations within 12 months from the commencement date, i.e. by 31 July 2022.

Where a VAT registered person is unable to comply within the set timelines, the person can apply to the Commissioner for Domestic Taxes for an extension of time to comply, which shall not exceed six months.

The application for extension should be made at least thirty (30) days before expiry of the specified period of 12 months; that is, before 30 June 2022 but approval of this extension will be at the discretion of the Commissioner of KRA.

KRA recently adopted the use of the Tax Invoice Management System ("TIMS") as an enhancement of the current Electronic Tax Register ("ETR") machine.

To comply with the Regulations, a VAT registered taxpayer should acquire a compliant tax register from an approved ETR supplier as published on 14 December 2021 on the KRA's website.

The approved manufacturers and suppliers have various ETR models that have been categorized into four types as follows:

- **Type A** for manual invoicing applicable for small businesses without an accounting software;
- **Type B** for retail outlets like supermarkets or restaurants with Point of Sale ("PoS") terminals;
- **Type C** for businesses with an automated invoicing system (ERP software) and are currently using an Electronic Signature Device ("ESD").
- **Type D** which is suitable for any type of business entity has the ability to connect to any of the invoicing systems (i.e., ETR, PoS or ERP).

Past experience has proved that the set-up time for the TIMS devices varies depending on the business complexity. We recommend that all VAT registered taxpayers consider migrating to TIMS as early as possible. Early adoption of TIMS will provide for ample time to deal with any set up challenges.

Additionally, early implementation will also allow for post implementation reviews to ensure that all pertinent data has been captured and the TIMS devices are able to transmit information to KRA before the mandatory due date for compliance.

Excise Tax

What is Excise Tax?

Excise duty in Kenya is an **indirect tax** on the;

- Importation or
- Local manufacture of certain products and
- Supply of excisable services.

Indirect means KRA levies the tax on the producer or supplier, who passes the tax onto the consumer by including it in the product's price.

Local excise duty is collected monthly or on importation of goods.

Prior to the enactment of the Excise Duty Act, 2015, (the Act) the Kenyan excise duty provisions were enshrined in the Customs and Excise Act, Cap 472.

Time of Supply Excisable Services

The time of supply of excisable services shall be the earlier of:

- The date on which the services are performed;
- The date on which the invoice for the supply of the services is issued; or

- The date on which payment for the supply of the services is received, in whole or part.

Adjustment for Inflation

The Commissioner shall adjust the specific rate of duty annually to take into account inflation in accordance with the adjustment factor.

Excisable Value of Imported Goods

The excisable value of excisable goods imported into Kenya shall be the sum total of the following amounts;

- The customs value of the goods as determined under the East African Community Customs Management Act 2004(EACCMA) and
- The amount of duty of customs (if any) payable on the goods under the EACCMA.

Excisable Value of Manufactured Goods

The excisable value of excisable goods manufactured in Kenya shall be the ex-factory selling price of the goods, but not including;

- The value added tax (VAT) payable on the supply of the goods;
- The cost of excise stamps, if any; or
- The cost of returnable containers.

Ex-factory Selling Price of Excisable Goods

The ex-factory selling price of excisable goods shall be;

- The price payable by the purchaser.
- The open market value of the goods at the time of removal from the manufacturer's factory.

Excisable Value of Services

The excisable value of excisable services shall be;

- If the excisable services are supplied by a registered person in an arm's length transaction, the fee, commission, or charge payable for the services; or
- In any other case, the open market value of the services.

But shall not include;

- The value added tax (VAT), if any, payable on the supply of the services.
- The excisable value of excisable services specified in item 4 of Part II of the First Schedule (Excise duty on other fees charged by financial institutions) shall not include interest or an insurance premium.

Place of Supply of Excisable Services

Subject to this section, a supply of excisable services shall be deemed to be made in Kenya if the services are supplied from a place of business of the supplier in Kenya.

Activities Requiring a Licence

A person shall not undertake any of the following activities unless the person is licensed or registered by the Commissioner to undertake the activity;

- The manufacture of excisable goods in Kenya;
- The importation into Kenya of excisable goods specified by the Cabinet Secretary under section 28 as requiring an excise stamp;
- The supply of excisable services;
- The carrying out of any other activity in Kenya for which the Commissioner, by notice in the Gazette, may impose a requirement for a license.



Withholding Tax on Royalties in Respect of Software Payments

Deductions in respect of withholding tax is provided for by the Income Tax Act (ITA).

Every person who makes payment of any amount in Kenya in respect of royalty shall deduct withholding tax and remit it to KRA on or before 20th of the following month.

In the past KRA has erroneously interpreted what constitutes royalty in respect of software payments for withholding tax purposes and ended making not only irrelevant but also impugned decisions.

The High Court in its judgement delivered on 10th December 2021 in the case of Seven Seas Technology Limited vs Commissioner of Domestic Taxes, made a clear distinction on what constitutes the right to use copyright in a software vis-à-vis the right to use a copyrighted software as well as which payment in relation to the two qualifies as royalty for withholding tax purposes.

The Seven Seas Technology Limited (Vendor) was in the business of buying software from non-residents for resale to end users based in Kenya.

KRA assessed the vendor on basis that the payments it made while acquiring the software for resale qualified as royalties under the ITA and as such subject to withholding tax in Kenya.

KRA further re-iterated that the non-resident from whom the vendor had procured the software received a consideration. The consideration according to KRA was paid for the use of or right to use the copyright of a literary work in which qualified as royalty under the ITA and such attracting withholding tax. KRA stated further that the vendor exploited intellectual property in the software when it resold the software to its customers and therefore the proceeds from the resale qualified as royalty in its wisdom.

The vendor objected the KRA assessments and lodged an appeal at the Tax Appeals Tribunal (TAT) which upheld the KRA decision. Aggrieved by the TAT determination, the vendor subsequently lodged an appeal at the High Court.

The Court, in its determination took the view that in purchasing the software for resale, the vendor acquires a copyrighted article and not the copyright in it hence does not therefore receive the right to exploit the copyright. As such, the payments for the acquisition of a copyrighted material do not fall within the definition of a royalty as per the ITA.

The Court, placing more reliance on the OECD Model Tax Convention, drew a distinction between payments made to acquire partial rights in the copyright which qualify as royalties under the ITA from the payments made to acquire and distribute software copies (without the right to reproduce the software) which in its view should be dealt with as business profits.

This ruling provides certainty on taxation in respect of software payments for withholding tax purposes in Kenya.

Tax Due Dates

Withholding Tax | 20th Day of the following month
Pay as You Earn | 9th Day of the following month
VAT | 20th Day of the following month
Balance of Tax on Self-Assessment | 4th Month after year end
Monthly Rental Income | 20th Day of the following month



Instalment Tax

1st Instalment | 20th day of the 4th month after year end
2nd Instalment | 20th day of the 6th month after year end
3rd Instalment | 20th day of the 9th month after year end
4th Instalment | 20th day of the 12th month after year end

Kindly note that all the returns must be filed on I tax while the payments e-slips must be generated from the I-Tax platform.

Digital Service Tax (DST)

20th day of the following month

Minimum Tax

Applicable where minimum tax is higher than instalment tax payable

1st Instalment | 20th day of the 4th month after year end
2nd Instalment | 20th day of the 6th month after year end
3rd Instalment | 20th day of the 9th month after year end
4th Instalment | 20th day of the 12th month after year end