



ICPAK DRAFT SUBMISSION –VAT REGULATIONS 2014

Introduction

The VAT Act 2013 came into effect in 2013 and the VAT regulations 2014 seek to operationalize the Act. Successive studies on ease of doing business have indicated that VAT compliance accounts for approximately 70% of the total time spent on compliance related issues and therefore it is necessary to ease complexity of VAT law operation to enhance compliance.

The objective of this position paper is to therefore review and make various proposals on the VAT Regulations 2014. The Act aims to reform the legal framework governing administration and enforcement of the VAT regime in Kenya

Objective

The objective of this position paper is to review and make proposals on the VAT Regulations 2014 tabled before the National Assembly and to propose further recommendations on the implementation of the VAT Act 2013.

VAT Regulations 2014

We note that the VAT Act 2013 is a Principal Legislation passed by Parliament which then becomes an Act of Parliament. The VAT Act 2013 is enforced by the Cabinet Secretary for the National Treasury in conjunction with the Kenya Revenue Authority.

To enable the National Treasury implement the Principal Legislation (VAT Act 2013), it has worked out on details on how to enforce it through the VAT Regulations 2014. This is because Parliament may not have the time to go into details on how to implement the

principal law it has passed. Further, the Parliament does not have technocrats to formulate regulations. It is for this reason that Section 67 of the VAT Act 2013 provides that The Cabinet Secretary may make regulations for the better carrying of the provisions of this Act. It further provides that the Regulations shall be tabled before the National Assembly for approval before they take effect.

Therefore the main objective of the VAT regulations is to enhance compliance. In this regard, we propose the following amendments and additions on the VAT Regulations 2014 based on technical deficiencies in the Principal Act and the VAT Regulations 2014 tabled before Parliament.

REGULATION		ISSUE OF CONCERN	OUR PROPOSAL/COMMENT	JUSTIFICATION	
1.	Regulation 2: Interpretation	Arms length transaction	The definition is not clear	We propose that the definition be expounded.	To expound the definition to meaning <i>ø a transaction between person dealing with each other independently and have no relationship with each other,</i>
		Ancillary or incidental supplies	The words have not been defined	We propose that definition for both be included.	This will make it easily understandable by users of the regulations.
		Rights and options	The words have not been defined	We propose that definition for both be included.	This will make it easily understandable by users of the regulations <i>A right is a scenario whereby a shareholder is given a chance to right to purchase new shares at a discount to the market price on a stated future date</i> <i>An option is a contract that gives the buyer the right, but not the</i>

					<i>obligation, to buy or sell an underlying asset at a specific price on or before a certain date.</i>
		Bill of lading	The word has not been defined	We propose that definition be included	<i>A bill of lading is a document issued by a carrier which details a shipment of merchandise and gives title of that shipment to a specified party in international trade to help guarantee that exporters receive payment and importers receive merchandise</i>
		Airway bill	The word has not been defined	We propose that definition be included	<i>Air Waybill is a non-negotiable transport document covering transport of cargo from airport to airport.</i>
2.	Regulation 3: Open market Value	Gives the Commissioner powers to determine the Open Market Value of a transaction if its value at arm's length cannot be determined.	The Commissioner may determine higher taxable values where the open market value is not easily determinable.	The open market value should be determined on the basis of comparative method e.g. similar goods / transactions	This should not be at the discretion of an individual for avoidance of biasness

3.	Regulation 4: Related persons	The regulation expounds on the definition of related persons contained in Section 13(8) of the Act and gives further meaning of a relative and spouse for purposes of Section 13 (8) (c)	The regulation tightens the business meaning of related parties but does not give a procedure for determining the level of control.	Amend to take into consideration situations where an individual is not aware of the employment of a spouse / relative in another entity as well as procedure for disclosure.	There is need to have a procedure for determining the level of control as well as procedure for disclosures
4.	Regulation 5: Mixed supplies	This regulation seeks to clarify the VAT treatment of mixed supplies. The regulation does not however clarify on the application of VAT on composite supplies and cases where a mixed supply involves promotional products which may at times be given free of consideration. The Commissioner is also given power to determine how to determine how to treat a mixed supply despite the	The regulation ignores the differences between single supplies, mixed supplies and composite supplies and does not define what incidental/ancillary supplies are and does not outline the procedure for determining what these are. This creates a situation where there can only be a single supply (with ancillary	It would be ideal if this regulation was amended to set out in clear terms what incidental / ancillary supplies are and also a clear definition of single supplies and Composite supplies. The regulation should also be amended to cover supplies involving promotional items which are given free of consideration promotional items which are given Does Regulation 10 apply in such cases? The formula provided for separating components of mixed supplies is overkill as it stretches the calculation of the value to the OMV instead of the consideration	This will ensure clarity.

		provisions of the Regulation.	supplies) that is fully taxable and mixed supplies that are also taxable The regulation also overlooks the existence of Composite supplies.	for the supply as stated in Section 13 of the Act The power of the Commissioner needs to be checked as well since this can lead to total misapplication of the law	
5.	Regulation 6: Exportation of goods or services	Goods are exported from Kenya when they are entered for export under EACCMA and delivered to a recipient outside Kenya Services are exported from Kenya if they are provided from Kenya to a recipient outside Kenya for use, consumption or enjoyment outside Kenya.	The provisions of the VAT Act on exported services will continue to be the subject of divergent interpretations unless proper guidelines are formulated There is need therefore for the Committee to formulate and include rules pertaining to the place of use, consumption and enjoyment of	The regulations to be amended to clearly set out the place, criteria and documentation required for export of services with respect to use or consumption or enjoyment.	To avoid divergent interpretations and disputes that have arisen in the past

			services in these regulations for avoidance of doubt on the VAT treatment of the same. This will be similar to the place of supply of services provided in Kenya		
			Reg. 6 (2) is missing/ skipped. Reg. 6 (3) refer to regulation 31 which is not related in any way to this regulation.	Reg. 6 (3) should be renumbered as 6(2) and Reference should be made to the correct regulation, in this case, regulation 30.	For clarity and consistency.
6.	Regulation 7: Place of supply of telecommunications services	This regulation buttresses the provisions of Section 8 (2) of the VAT Act which provide that services provided from outside Kenya	The numbering of the sub	The regulation captures the practice under the repealed VAT Act especially in respect of Satellite TV. A continuation of old practice The regulation will aid the implementation of the provisions of	Need for a regulation that covers the criteria, requirements and guidelines for appointing tax representatives for proper administration

		to non-registered persons are taxable supplies made in Kenya		Section 8 (2) and the requirement under Section 9. A positive move However, there is no regulation that covers the criteria, requirements and guidelines for appointing a tax representative in line with Section 9. The Committee should consider including such guidelines to conclusively cover this aspect	
7.	Regulation 8: Place of supply of Professional services	The place of supply of professional services is in Kenya if the supply is made from a place of business outside Kenya, the recipient is not a registered person and the services are supplied to a recipient in Kenya for use and consumption, or enjoyment in Kenya	None. This is a positive move	The regulation will aid the implementation of the provisions of Section 8 (2) and the requirement under Section 9.	None
8.	Regulation 9: Supply of Imported Services	Serves to buttress the provisions of Section 10 (4) that for purposes of imported services, the business of a registered person which is carried out outside	None	The regulation seeks to reinforce the provisions of the Act relating to imported services. It provides more clarity on the application of Section 10 (4) which is a welcome move	None

		<p>Kenya (say in form of a Branch) shall be a separate person to the registered person</p> <p>As a result, any services supplied by the Branch to the registered person shall be treated as imported services</p>			
9.	Regulation 10: Taxable value of supply	The taxable value of a supply for no consideration is zero (0) and that for a supply priced as tax inclusive shall be computed using the tax fraction	None	Welcome change as this has been controversial in the past especially on complementary supplies in the hospitality industry.	None
10.	Regulation 12: Application of section 15	This regulation extends the application of Section 15 (deemed taxable supplies) to the application of taxable importation to use outside a person's business where input tax on the supplies was initially deducted (either partially or in	None	This is an extension of Section 15 which currently only covers taxable supplies and not taxable importation. A positive move	None

		full).			
11.	Regulation 15: Application of goods or services to exempt use	It aims to ensure that if input tax is initially claimed on the basis of making taxable supplies it is not subsequently applied to exempt use	It is not clear how, for instance, capital items will be treated considering that their use (including future use) may not be determined with certainty. E.g if they are used initially to make taxable supplies and later used to make exempt supplies, it is not clear how the usage should be apportioned	In such circumstances, clear guidelines should be formulated to ensure input tax is fairly claimed e.g based on the expected life.	For clarity and avoidance of conflict with other provisions.
12.	Regulation 17: Second-hand Goods	It entitles a registered person who acquires second hand goods from an exempt person to claim input tax for supplies made by the non-registered supplier.	A tax invoice or ETR/ESD is not available from non-registered suppliers.	There need to be clarification of the support documentation required to support the input tax.	For clarity purposes
13.	Regulation 19:	Entitles a person to relief of VAT only for trading stock on		The regulation should be widened to allow for deduction of VAT on capital items, acquired when the	For clarity purposes

	Deduction of input tax on registration or change in use	hand at the date that the person becomes registered		business was exempt; on all goods in stocks that have suffered input VAT, VAT on constructed building or civil works and VAT on assets purchased for use in making taxable supplies. The current law may lock out property developers	
14.	Regulation 20: Refund of VAT on bad debts.	<p>Gives the supplier relief of VAT on bad debts only in insolvency and for a period of 2 years after the 3rd year (not later than 5 years) since the supply and further provides that a credit note must be issued to the recipient</p> <p>This regulation is welcome but the one on VAT refunds as pertains zero rating is not addressed.</p>	Issue of VAT refunds backlog and the burden it created to the private sector need to be addressed.	<p>Make Regulation 20 in line with section 15 (2) (a) and Legal Notice 37 of 2011 to broaden the instances where bad debts occur, other than insolvency, such as court order, debt recovery cost exceeds debt and lack of partial security. The regulation also contradicts the provision of Section 16(1) which provides that a credit note must be issued within six months after the issue of the relevant tax invoice.</p> <p>We propose a regulation on the processing of refunds outlined and/or the necessary reforms effected speedily.</p>	<p>Considering that some recipients may no longer be in business, the requirement to issue a credit note to the supplier may not be practical.</p> <p>The pending refunds will go a long way in easing the inadequacy of resources available for doing business.</p>
15.	Regulation 21: Application for registration	This regulation requires registration to be done as soon as the value of a person's taxable supplies exceeds threshold.	This contradicts sec 34(1) that requires one to register within 30 days of meeting the threshold.	We propose amendment of 21(1) to read <i>øshall be made within 30 days of the person's taxable supplies exceeding threshold...</i>	For consistency with section 34(1)

		The Commissioner may consider the value of taxable supplies made by a related person to determine the registration threshold	The provision as it is subject to misuse.	Clear guidelines should be provided to determine when the value of taxable supplies made by a related person should be considered to determine the registration threshold.	For clarity purposes.
16.	Regulation 22: Voluntary registration	The regulation refers to section 34(4)	No new development as pertains section 34(4)	We propose the Regulation (22) on voluntary registration be deleted from the regulations.	This is a direct repetition and since no new information to be deleted.
17.	Regulation 23: Registration of a group of companies as a single registered person	This regulation sets out the conditions and guidelines for registration as a single person of a group of related entities	The requirement for companies to be in wholly owned group is not practical.	There is need to revise the requirement that companies need to be in a wholly owned group as this is not achievable in practice. <i>We propose removal of 'wholly owned' and replace it with an appropriate level of shareholding or simply majority shareholding.</i>	It is unlikely that the regulation(in its current state) will achieve its intended purposes as many group companies will be restricted by this condition. The key to group registration would be to look at it from a perspective of management and control and set a threshold for shareholding to either a certain level of shareholding or just majority shareholding

18.	Regulation 25: Changes in membership of a registered group	The regulation sets guidelines for changes to a registered group including admission, removal and change of representative member. The procedure for admitting a new member to the group prohibits input tax credits to be carried forward.	The requirement that there should be no VAT credits to be carried forward is very stringent and should be reviewed to allow it to be refunded or transferred to the representative member of the group after approval by the Commissioner if necessary.	Need to remove the restriction to allow a company to carry forward credit upon admission into a group	
19.	Regulation 26: Cancellation of the registration of a registered group	Group registration may be cancelled if the representative member applies for it, a member of the group goes into liquidation or a receiver is appointed for the winding of a member or the group has caused or is causing undue risk to the revenue	These are agreeable but the cancellation should be a properly drawn out process with merits and demerits, not just by notice in writing.	Need to have a proper process for deregistration	To curb from malicious actions by an aggrieved member.

20.	Regulation 33: Assessment of recipient of a supply	The regulation gives the commissioner powers to assess the recipient of the supply in respect of tax penalty as a result of incorrect treatment of supplies and at the same time may recover whole or part of the of the tax due in respect of the supply together with any late payment interest and penalties payable.	This may lead to double standards as the regulations further states that the supplier who pays the said tax and penalties may later recover the amount from the recipient of the supply.	We propose deletion of the part that subjects the recipient to assessment and leave the assessment to be done on the supplier in consistency with other tax laws.	This will enhance smooth operation
21.	Regulation 34: Prescribed form	The regulation provides that “ <i>A return, application, certificate, or other document shall be in the prescribed form</i> ”.	The regulations should set out the commonly used prescribed forms either under the principal Act of the regulation. (eg as provided in the I-tax, VAT 3, VAT 4, VAT 5, VAT 7, VAT 28, VAT 57 etc	The regulations should set out the commonly used prescribed forms either under the principal Act of the regulation. (eg as provided in the I-tax, VAT 3, VAT 4, VAT 5, VAT 7, VAT 28, VAT 57 etc)	

22.	Regulation 35: Tax representative	The regulation defines a non-resident as defined in the Income Tax Act	The regulation does not prescribe the <i>mode, manner and requirements for appointing a tax representative</i>	We recommend that the <i>mode, manner and requirements for appointing a tax representative</i> be prescribed in the regulations.	For clarity.
23.	Regulation 36: Tax exemption card	This Regulation makes reference to the Third	We don't have the Schedule in the VAT Act and zero rating should be covered under the Second Schedule to the VAT Act.	We propose that reference be made to the right schedule.	For consistency
24.	Regulation 38: Currency translation	Provides that the exchange rate applicable is on the date the amount is taken into account for the purpose of the VAT Act 2013	Not clear on the accounting dates of both the supplier and recipient	The regulation need to specify this in both the context of the supplier and recipient since their accounting dates may be different.	For consistency.
25.	Regulation 39: Revocation of Regulations, Rules and Orders	Revocations of various regulations, rules and orders but this has been done selectively.	No public notices and information letters have been revoked. This draft regulation	There is need to ensure that all public notices issued before publication of these regulations/Tax Procedures are revoked. Using notices issued under the old law	This will enable consistent application of the Act.

			<p>revokes only listed regulations, rules and orders.</p>	<p>will lead to inconsistent application of the Act.</p> <p>It would be ideal if this regulation is modified to state that all regulations, rules and orders, information letters, public notices, press notices, rulings and other directives issued under the repealed VAT Act are revoked.</p>	
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SECTION OF THE VAT ACT 2013

26.	Section 2 and 5(6)	<p>Section 2 define supply of imported services to include those supplied to a non-registered person, however Sec 5(6) only indicate that the tax is the liability of the registered person receiving the supplies.</p>	<p>The regulations or the Act should clarify whether the non-registered recipient of imported services need to account/pay reverse charge VAT.</p>	Clarity
27.	Section 17 (5)	<p>The VAT Act does not specify how the excess input tax should be paid/ refunded. It is therefore not clear which prescribed claim form and procedure should be used for VAT refund.</p>	<p>The Regulations, 2014 should prescribe the form this claim should take. Clarity also needs to be given regarding the necessity for an auditor's certificate for refund claims above 1m among other requirements. If the VAT 3 suffice, this should be made clear in the VAT legislation.</p>	

28.	Section 54 (2)	Provides that a public ruling shall bear a heading specifying the subject matter of the ruling and an identification number. Some of the public rulings such as the detailed list of exempt supplies do not have an identification number	The regulations should refer to such rulings since some Taxpayers are not aware of such rulings. The regulation should also prescribe that all rulings should be available in the KRA's website since not all taxpayer have access to a daily newspaper.	
28.	Others	The VAT Act 2013 refer to the regulations with regard to the following: tax period, application of information technology (i tax), electronic tax register,	The regulations should specify whether there is any other tax period other than one calendar month. Clear regulations on application of information technology (i tax), electronic tax register as well as filing guidelines especially in cases where the filing deadline fall on a holiday or a weekend or where the KRA system fails should be formulated.	

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