



REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
Finance – Nairobi
Fax No. 315779
Telephone: 2252299

THE NATIONAL TREASURY
P O BOX 30007 – 00100
NAIROBI
KENYA

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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,*

*① D L & P minister and
Pse table.
CMT
22/12/20*

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,*

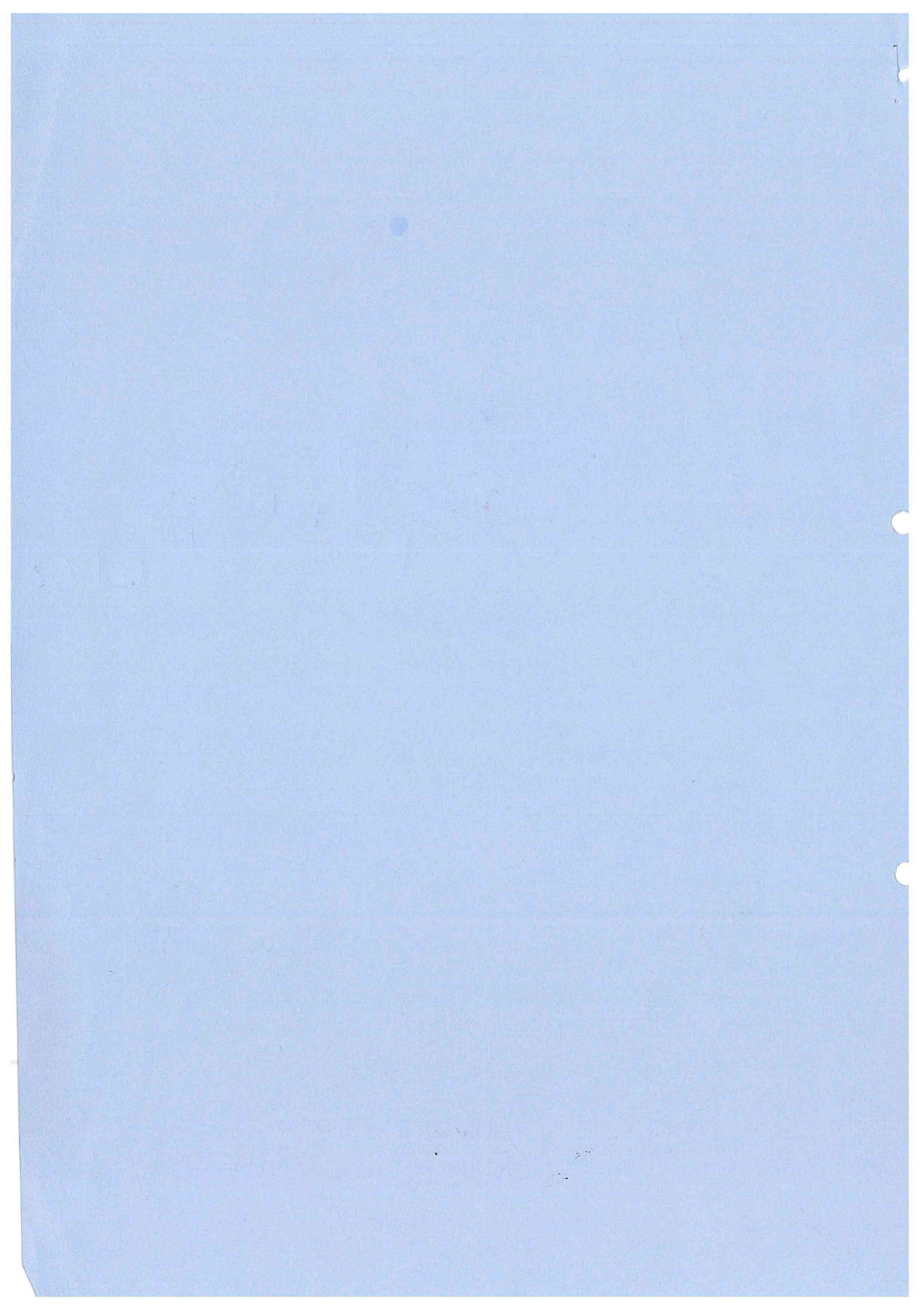
*② Head, Table Office
to cause tabling
register and
reference to
committee
22/12*

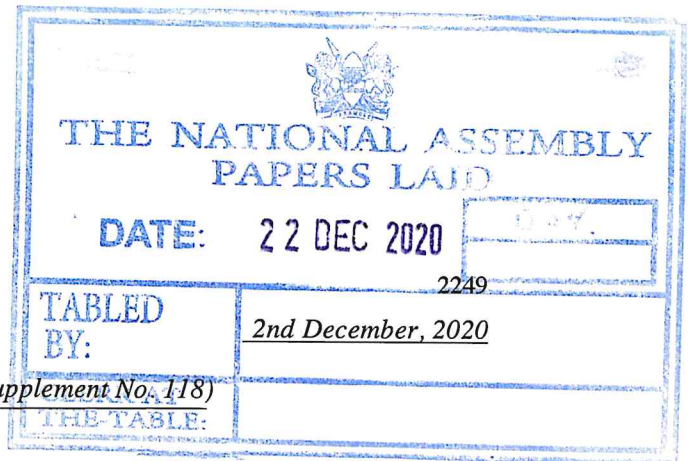
HON. (AMB.) UKUR YATANI, E.G.H
CABINET SECRETARY/THE NATIONAL TREASURY AND PLANNING

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.

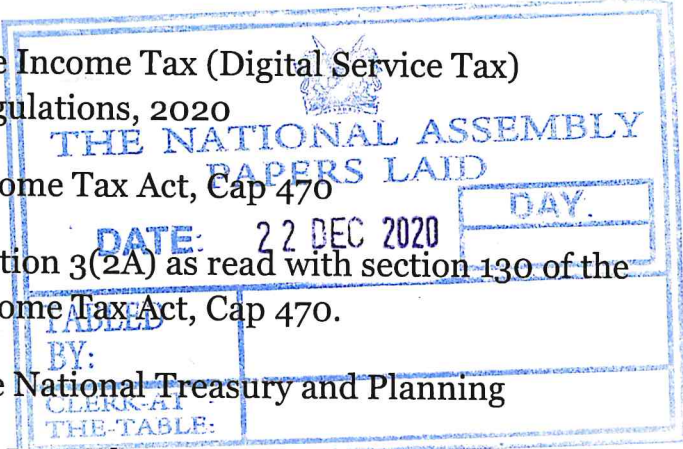
UKUR YATANI,
Cabinet Secretary for National Treasury and Planning.

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

