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THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT-FIFTH SESSION (2021)

COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE CONSIDERATION OF THE VALUE
ADDED TAX (AMENDMENT) REGULATIONS, 2020

(Legal Notice No. 188 of 2020)

FEBRUARY, 2021

The Directorate of Committee Services
The National Assembly,
Parliament Buildings,
NAIROBI.


 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 16 FEB 2021	DAY: TUESDAY
TABLED BY:	Hon. Kamukel - CHAIR.
CLERK-AT THE-TABLE:	Lemuno Moses

TABLE OF CONTENTS

ABBREVIATIONS	ii
CHAIRPERSON'S FOREWORD	1
1.0 PREFACE	2
1.1 <i>Establishment and Mandate of the Committee</i>	2
1.2 <i>Committee Membership</i>	3
1.3 <i>Committee Secretariat</i>	5
2.0 CONSIDERATION OF THE VALUE ADDED TAX (AMENDMENT) REGULATIONS, 2020.....	6
2.1 <i>Introduction</i>	6
2.2 <i>Object and Purpose of the Regulations</i>	6
2.3 <i>Legal Basis for Scrutiny</i>	7
2.4 <i>Conferring with the Regulation Making Authority</i>	7
3.0 COMMITTEE OBSERVATIONS.....	7
3.1 <i>Statutory Timelines – Section 11 of the SI Act</i>	7
3.2 <i>Consultations/Public Participation – Section 5 of the SI Act</i>	7
3.3 <i>Regulatory Impact Statement – Sections 6, 7 & 8 of the SI Act</i>	7
4.0 COMMITTEE RECOMMENDATION	8
5.0 ANNEXURES	9

ABBREVIATIONS

VAT	Value Added Tax
KRA	Kenya Revenue Authority
L.N.	Legal Notice
RMA	Regulatory Making Authority
SI	Statutory Instruments
SO	Standing Order

CHAIRPERSON'S FOREWORD

In exercise of the powers conferred by section 67 of the Value Added Tax Act, 2013, the Cabinet Secretary for the National Treasury and Planning published in the Kenya *Gazette* the Value Added Tax (Amendment) Regulations, 2020 vide Legal Notice No. 188 of 2020 on 25th September, 2020. The Regulations were submitted to the Clerk of the National Assembly on 9th October, 2020 and tabled before the House on 15th October, 2020. The Regulations were subsequently referred to the Committee on Delegated Legislation for consideration.

The Regulations seek to amend the Value Added Tax Regulations, 2017 by deleting Regulation 9, which required that a registered person who makes a taxable supply shall, at tax invoice at the time of supply, furnish the purchaser with a tax invoice.

In accordance with section 16 of the Statutory Instruments Act, 2013, the Committee held a meeting with the regulation making authority on 1st February, 2021 in Mombasa. The delegation was led by Hon. (Amb.) Ukur Yattani, EGH, the Cabinet Secretary responsible for the National Treasury and Planning.

Having scrutinized the Value Added Tax (Amendment) Regulations, 2020 against the Constitution, the Interpretations and General Provisions Act (Cap 2), the Value Added Tax Act (No. 23 of 2013) and the Statutory Instruments Act (No. 23 of 2013), the Committee resolved to approve it for reasons advanced in this Report.

The Report is submitted to the House in accordance with section 67 of the Value Added Tax, 2013 which requires that the Regulations made under this section of the Act be presented to the National Assembly for approval before they take effect.

In conclusion, I wish to most sincerely thank the Speaker and the Office of the Clerk of the National Assembly for the invaluable support accorded to the Committee in the discharge of its mandate.

On behalf of the Members of the Select Committee on Delegated Legislation and pursuant to Standing Order 199 and section 67 of the Value Added Tax, 2013 it is my pleasure and duty to present to the House, the Committee's **Report on the Consideration of the Value Added Tax (Amendment) Regulations, 2020 (Legal Notice No. 188 of 2020)**

HON. WILLIAM KASSAIT KAMKET, M.P.

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Select Committee on Delegated Legislation is established pursuant to *Standing Order No. 210* and is mandated to consider statutory instruments submitted to Parliament for consideration. The Committee is expected to consider in respect of any statutory instrument, whether it is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws.
2. The Committee is mandated to consider in respect of any statutory instrument, whether it:
 - a) is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws;
 - b) infringes on fundamental rights and freedoms of the public;
 - c) contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
 - d) contains imposition of taxation;
 - e) directly or indirectly bars the jurisdiction of the court;
 - f) gives retrospective effect to any of the provision in respect to which the Constitution does not expressly give any such power;
 - g) it involves expenditure from the consolidated fund or other public revenues;
 - h) is defective in its drafting or for any reason form or part of the statutory instrument calls for any elucidation;
 - i) appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;
 - j) appears to have had unjustifiable delay in its publication or laying before Parliament;
 - k) makes rights, liberties or obligations unduly dependent upon non-renewable decisions;
 - l) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
 - m) inappropriately delegates legislative powers;
 - n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
 - o) appears for any reason to infringe on the rule of law;
 - p) inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and
 - q) accords to any other reason that the Committee considers fit to examine.

1.2 Committee Membership

3. The Committee membership comprises –

The Hon. William Kassait Kamket, M.P. (Chairperson)

Tiaty Constituency

KANU

The Hon. Muriuki Njagagua, M.P. (Vice Chairperson)

Mbeere North Constituency

Jubilee Party

COMMITTEE MEMBERS

The Hon. Waihenya Ndirangu, M.P.

Roysambu Constituency

Jubilee Party

The Hon. Ronald Tonui, M.P.

Bomet Central Constituency

Jubilee Party

The Hon. William Cheptumo, M.P.

Baringo North Constituency

Jubilee Party

The Hon. William Kamoti, M.P.

Rabai Constituency

Orange Democratic Movement

The Hon. Cecily Mbarire, MGH, M.P.

Nominated

Jubilee Party

The Hon. Martha Wangari, M.P.

Gilgil Constituency

Jubilee Party

The Hon. Alice Wahome, M.P.

Kandara Constituency

Jubilee Party

The Hon. Gideon Mulyungi, M.P.

Mwingi Constituency

Wiper Democratic Movement – Kenya

The Hon. Robert Mbui, M.P.

Kathiani Constituency

Wiper Democratic Movement -Kenya

The Hon. (Dr.) Wilberforce Oundo, M.P.

Funyula Constituency

Orange Democratic Movement

The Hon. Daniel Maanzo, M.P.

Makueni Constituency

Wiper Democratic Movement -Kenya

The Hon. George G. Murugara, M.P.

Tharaka Constituency

Democratic Party

The Hon. Timothy Wanyonyi, M.P.

Westlands Constituency

Orange Democratic Movement

The Hon. Jennifer Shamalla, M.P.

Nominated

Jubilee Party

The Hon. Munene Wambugu, M.P.
Kirinyaga Central Constituency
Jubilee Party

The Hon. Patrick Mariru, M.P.
Laikipia West Constituency
Jubilee Party

The Hon. Sammy Seroney, M.P.
Nominated
Wiper Democratic Movement – Kenya

The Hon. Tindi Mwale, M.P.
Butere Constituency
Amani National Congress

The Hon. Edith Nyenze, M.P.
Kitui West Constituency
Wiper Democratic Movement – Kenya

The Hon. Abdi Koropu Tepo, M.P.
Isiolo South Constituency
Kenya Patriots Party

The Hon. Robert Gichimu, M.P.
Gichugu Constituency
Jubilee Party

1.3 Committee Secretariat

4. The secretariat facilitating the Committee comprises -

Ms. Susan Maritim
Senior Clerk Assistant (Team Leader)

Mr. Mohamed Jimale
Clerk Assistant II

Mr. Wilson Dima Dima
Principal Legal Counsel

Mr. Josphat Motonu
Fiscal Analyst I

Ms. Winnie Kiziah
Media Relations Officer II

Mr. Anthony Wamae
Serjeant at Arms

Mr. Charles Ayari
Superintendent of Electronics

Ms. Mary Otieno
Office Superintendent

2.0 CONSIDERATION OF THE VALUE ADDED TAX (AMENDMENT) REGULATIONS, 2020

2.1 Introduction

5. In exercise of the powers conferred by section 67 of the Value Added Act, 2013, the Cabinet Secretary for National Treasury and Planning made the Value Added Tax (Amendment) Regulations, 2020 vide Legal Notice No. 188 of 2020 on 25th September, 2020.
6. The Regulations were submitted to the Clerk of the National Assembly on 9th October, 2020 and tabled before the House on 15th October, 2020.

2.2 Object and Purpose of the Regulations

7. The Regulations seek to delete Regulation 9 of the Value Added Tax Regulations, 2017. Regulation 9 stipulates the requirements of issuing a tax invoice when making taxable supplies. It however did not mandate the VAT registered person to generate a tax invoice by use of an electronic tax register. This created a challenge in the enforcement of compliance in the use of electronic tax registers especially following the repeal of the Value Added Tax (Electronic Tax Registers) Regulations, 2004 in 2017.
8. The deletion of regulation 9 is a consequential amendment following the enactment of the Value Added Tax (Electronic Tax Invoice) Regulations, 2020 (Legal Notice 189 of 2020).
9. Regulation 9 required that a registered person who makes a taxable supply shall, at tax invoice at the time of supply, furnish the purchaser with a tax invoice containing –
 - a) the words "Tax Invoice" in a prominent place;
 - b) the name, address, and PIN of the supplier;
 - c) the name, address, and PIN, if any, of the recipient;
 - d) the individualized serial number of the tax invoice;
 - e) the date on which the tax invoice is issued and the date on which the supply was made, if different from the date of issue of the tax invoice;
 - f) the description of the goods supplied including quantity or volume or services provided;
 - g) the details of any discount allowed at the time of supply; and
 - h) the consideration for the supply and the amount of tax charged.
10. Regulation 9(2) had further provided for an additional optional document, an electronically generated fiscal receipt as a simplified tax invoice for cash sales made from retail premises to be provided by a registered person containing-
 - (a) the name, address, and PIN of the supplier;
 - (b) the serial number of the receipt;

- (c) the date and time of issue of the receipt;
- (d) a brief description of the goods supplied (including quantity or volume);
- (e) the tax payable; and
- (f) the total amount payable for the supply inclusive of tax.

2.3 Legal Basis for Scrutiny

11. The Committee examined the Value Added Tax (Amendment) Regulations, 2020 against the Constitution, the Interpretations and General Provisions Act (*Cap 2*), the Value Added Tax Act, 2013 and the Statutory Instruments Act (*No. 23 of 2013*).
12. The scrutiny was undertaken following the tabling of the Regulations before the House on 15th October, 2020 and subsequent referral to the Committee on Delegated Legislation.

2.4 Conferring with the Regulation Making Authority

13. In accordance with section 16 of the Statutory Instruments Act, 2013, the Committee held a meeting with the regulation making authority on 1st February, 2021 in Mombasa. The delegation was led by Hon. (Amb.) Ukur Yattani, EGH, the Cabinet Secretary responsible for the National Treasury and Planning.

3.0 COMMITTEE OBSERVATIONS

14. Having examined the Value Added Tax (Amendment) Regulations, 2020 against the Constitution, the Interpretations and General Provisions Act (*Cap 2*), the Value Added Tax Act, 2013 and the Statutory Instruments Act (*No. 23 of 2013*), the Committee observed THAT –

3.1 Statutory Timelines – Section 11 of the SI Act

15. The Regulations were published in the gazette on 25th September, 2020 vide L.N. No. 188 of 2020, submitted to the Clerk of the National Assembly on 9th October, 2020 and laid on the table of the House on 15th October, 2020 being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act, 2013.

3.2 Consultations/Public Participation – Section 5 of the SI Act

16. Articles 10 and 118 of the Constitution and section 5 of the Statutory Instruments Act require that the regulation-making authority conducts public participation and sufficient consultation with the stakeholders and persons likely to be affected by the regulations.
17. The regulation making authority demonstrated that public participation was adequately undertaken by submitting evidence of stakeholder forums held in the development of the Regulations.


3.3 Regulatory Impact Statement – Sections 6, 7 & 8 of the SI Act

18. The Regulations do not require a Regulatory Impact Statement within the meaning of sections 6, 7, and 8 of the Statutory Instruments Act, as they are not likely to impose significant costs on the community and will only affect persons registered under Section 34 of the Value Added Tax, Act (No. 35 of 2013).

4.0 COMMITTEE RECOMMENDATION

19. Having examined the Value Added Tax (Amendment) Regulations, 2020 (Legal Notice No. 188 of 2020) against the Constitution, the Interpretations and General Provisions Act (Cap 2), the Value Added Tax, Act (No. 35 of 2013) and the Statutory Instruments Act (No. 23 of 2013), **the Committee recommends that the House approves the said statutory instrument in accordance with section 67 of the Value Added Tax Act, (No 35 of 2013).**

Signed.....



Date.....

16/2/2021

**THE HON. WILLIAM KASSAIT KAMKET, M.P.
(CHAIRPERSON)**

5.0 ANNEXURES

- 1. Adoption List**
- 2. Legal Notice No. 188 of 2020 and the Explanatory Memorandum**
- 3. Committee Minutes**





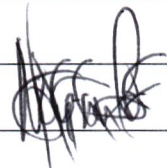


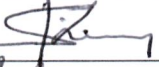
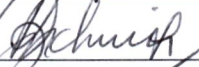

COMMITTEE ON DELEGATED LEGISLATION

ADOPTION LIST

Adoption of the Report on Consideration of the Value Added Tax (Amendment) Regulations, 2020 (Legal Notice No. 188 of 2020)

We, the undersigned, hereby affix our signatures to this Report to affirm our approval:

DATE: 4 February 2021

	HON. MEMBER	SIGNATURE
1.	Hon. Kamket Kassait, MP (Chairperson)	
2.	Hon. Muriuki Njagagua, MP (Vice Chairperson)	
3.	Hon. Cecily Mbarire, MGH, MP	
4.	Hon. Isaac Waihenya Ndirangu, MP	
5.	Hon. Alice Wahome, MP	
6.	Hon. Daniel Maanzo, MP	
7.	Hon. Robert Mbui, MP	
8.	Hon. Martha Wangari, MP	
9.	Hon. Ronald Kiprotich Tonui, MP	
10.	Hon. Timothy Wanyonyi, MP	
11.	Hon. William Kamoti, MP	
12.	Hon. Gideon Mulyungi, MP	
13.	Hon. George Gitonga Murugara, MP	
14.	Hon. Jennifer Shamalla, MP	
15.	Hon. Munene Wambugu, MP	
16.	Hon. Patrick Kariuki Mariru, MP	
17.	Hon. (Dr.) Wilberforce Oundo, MP	
18.	Hon. Abdi K. Tepo, MP	
19.	Hon. William Cheptumo, MP	
20.	Hon. Sammy Seroney, MP	
21.	Hon. Robert Gichimu, MP	
22.	Hon. Edith Nyenze, MP	
23.	Hon. Tindi Mwale, MP	

MINUTES OF THE 7TH SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON THURSDAY, 4TH FEBRUARY, 2020 AT 10.00 A.M. IN BARAZA 2 CONFERENCE ROOM AT THE WHITESANDS RESORT, MOMBASA

PRESENT

1. **The Hon. Kassait Kamket, M.P.** - **Chairperson**
2. **The Hon. Muriuki Njagagua, M.P.** - **Vice Chairperson**
3. The Hon. Waihenya Ndirangu, M.P.
4. The Hon. Alice Wahome, M.P.
5. The Hon. Cecily Mbarire, MGH, M.P.
6. The Hon. Daniel Maanzo, M.P.
7. The Hon. Kamoti Mwamkale, M.P.
8. The Hon. Martha Wangari, M.P.
9. The Hon. Robert Mbui, M.P.
10. The Hon. Ronald Tonui, M.P.
11. The Hon. Timothy Wanyonyi, M.P.
12. The Hon. (Dr.) Wilberforce Oundo, M.P.
13. The Hon. Abdi Tepo, MP
14. The Hon. Edith Nyenze, M.P.
15. The Hon. George Murugara, M.P.
16. The Hon. Gideon Mulyungi, M.P. (*Virtual Attendance*)
17. The Hon. Jennifer Shamalla, M.P.
18. The Hon. Munene Wambugu, M.P.
19. The Hon. Patrick Mariru, M.P.
20. The Hon. Robert Gichimu, M.P.
21. The Hon. Sammy Seroney, M.P.
22. The Hon. Tindi Mwale, M.P.

ABSENT WITH APOLOGY

The Hon. William Cheptumo, M.P

IN-ATTENDANCE

National Assembly Secretariat

1. Mrs. Florence Abonyo-Atenyo - Director, Audit, Appropriations & Other Select Committees
2. Ms. Susan Maritim - Senior Clerk Assistant
3. Mr. Mohamed Jimale - Clerk Assistant II
4. Mr. Dima Dima - Principal Legal Counsel
5. Mr. Charles Ayari - Superintendent of Electronics (Audio)
6. Mr. Anthony Wamae - Serjeant-at-Arms
7. Ms. Beatrice Auma - Personal Secretary
8. Ms. Mary Otieno - Office Superintendent
9. Ms. Yvonne Kiprop - Pupil

MIN.NO. /NA/CDL/2021/025 PRAYER AND PRELIMINARIES

The meeting commenced at 10.30 a.m. with the Prayers.

MIN.NO. /NA/CDL/2021/026 ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE VALUE ADDED TAX (AMENDMENT) REGULATIONS, 2020 (L.N. 188 OF 2020)

The Committee Members unanimously adopted the Report on the Consideration of the Value Added Tax (Amendment) Regulations, 2020 (L.N. 188 of 2020) as proposed and seconded by Hon. Jennifer Shamalla, M.P and Hon. Edith Nyenze, MP, respectively.

MIN.NO. /NA/CDL/2021/027 ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE VALUE ADDED TAX (ELECTRONIC TAX INVOICE) REGULATIONS, 2020 (L.N. 189 OF 2020)

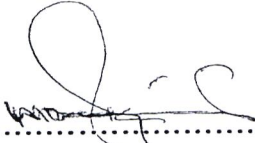
The Committee Members unanimously adopted the Report on the Consideration of the Value Added Tax (Electronic Tax Invoice) Regulations, 2020 (L.N. 189 of 2020) as proposed and seconded by Hon. Timothy Wanyonyi, M.P and Hon. Kamoti Mwamkale, MP, respectively.

MIN.NO. /NA/CDL/2021/028 ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE VALUE ADDED TAX (DIGITAL MARKET PLACE SUPPLY) REGULATIONS, 2020 (L.N. 190 OF 2020)

The Committee Members unanimously adopted the Report on the Consideration of the Value Added Tax (Digital Marketplace Supply) Regulations, 2020 (L.N. 190 of 2020) as proposed and seconded by Hon. Sammy Seroney, M.P and Hon. Waihenya Ndirangu, MP, respectively.

MIN.NO. /NA/CDL/2021/029 ADJOURNMENT

The meeting was adjourned at 12.05 p.m. to be reconvened the same day at 2.30 p.m. at the same venue.

Signed.....

Date.....10/2/2021.....

**HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)**

**MINUTES OF THE 3RD SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION
HELD ON TUESDAY, 2ND FEBRUARY, 2021 AT 10.30 A.M. IN BARAZA 2 CONFERENCE
ROOM AT THE WHITESANDS RESORT, MOMBASA**

PRESENT

1. **The Hon. Kassait Kamket, M.P.** - **Chairperson**
2. **The Hon. Muriuki Njagagua, M.P.** - **Vice Chairperson**
3. The Hon. Waihenya Ndirangu, M.P.
4. The Hon. Alice Wahome, M.P.
5. The Hon. Cecily Mbarire, MGH, M.P.
6. The Hon. Daniel Maanzo, M.P.
7. The Hon. Kamoti Mwamkale, M.P.
8. The Hon. Martha Wangari, M.P.
9. The Hon. Robert Mbui, M.P.
10. The Hon. Ronald Tonui, M.P.
11. The Hon. Timothy Wanyonyi, M.P.
12. The Hon. (Dr.) Wilberforce Oundo, M.P.
13. The Hon. Abdi Tepo, MP
14. The Hon. Edith Nyenze, M.P.
15. The Hon. George Murugara, M.P.
16. The Hon. Gideon Mulyungi, M.P. (*Virtual Attendance*)
17. The Hon. Jennifer Shamalla, M.P.
18. The Hon. Munene Wambugu, M.P.
19. The Hon. Patrick Mariru, M.P.
20. The Hon. Robert Gichimu, M.P.
21. The Hon. Sammy Seroney, M.P.
22. The Hon. Tindi Mwale, M.P.

ABSENT WITH APOLOGY

The Hon. William Cheptumo, M.P

IN-ATTENDANCE

National Assembly Secretariat

1. Mrs. Florence Abonyo-Atenyo - Director, Audit, Appropriations & Other Select Committees
2. Ms. Susan Maritim - Senior Clerk Assistant
3. Mr. Mohamed Jimale - Clerk Assistant II
4. Mr. Dima Dima - Principal Legal Counsel
5. Mr. Charles Ayari - Superintendent of Electronics (Audio)
6. Mr. Anthony Wamae - Serjeant-at-Arms
7. Ms. Beatrice Auma - Personal Secretary
8. Ms. Mary Otieno - Office Superintendent
9. Ms. Yvonne Kiprop - Pupil

The National Treasury and Planning

1. Hon. (Amb) Ukur Yattani, EGH- Cabinet Secretary
2. Mr. Geoffrey Malombe - Senior Deputy Director Accountant General
3. Mr. Livingstone Bumbe - Deputy Director/Economist
4. Ms. CPA Isabella Kogei - Asst. Director, Budget/Parliamentary Liaison Officer
5. Mr. Chris Huka - Adviser to the Cabinet Secretary
6. Mr. Paul J. Oyire - Communication Advisor to the CS

Kenya Revenue Authority

1. Mr. Maurice Oray - Deputy Commissioner, Corporate Tax Unit
2. Mr. Andrew Osiany - Chief Manager, Stakeholder engagements
3. Mr. Ephraim Munene - Manager, Policy and Tax Advisory
4. Ms. Sheila Aduvagah - Assistant Manager/Parliamentary Liaison Officer
5. Mr. Lindstrom Kinoti - Supervisor, Policy and Tax Advisory

PriceWaterhouseCoopers

1. Mr. Job Kabochi - Director, PwC
2. Ms. Edna Gitachu - Senior Manager, PwC

MIN.NO. /NA/CDL/2021/009

PRAYER AND PRELIMINARIES

The meeting commenced at 10.00 a.m. with the Prayers.

MIN.NO. /NA/CDL/2021/010

CONSIDERATION OF THE VALUE ADDED TAX (DIGITAL MARKETPLACE SUPPLY) REGULATIONS, 2020 (L.N. 190 OF 2020)

The Regulations seek to facilitate the implementation of VAT on supplies of services made in Kenya through a digital marketplace by non-resident suppliers who have no physical presence in the country. This will create a level playing field for all players by providing a mechanism for collection of consumption tax in the digital space and counter the unfair advantage previously enjoyed by non-resident suppliers over local suppliers.

The Regulations also seek to address the scope of taxable supplies in the digital marketplace.

The Regulations further provide a simplified framework for VAT registration of non-residents supplying taxable services in Kenya through a digital marketplace.

Submissions by PriceWaterhouseCoopers Ltd

PriceWaterhouseCoopers Ltd. led by Mr. Job Kabochi, a Director at the firm and accompanied by Ms. Edna Gitachu, Senior Manager made the following submissions –

- (i) Regulation 16: Paragraph 3 of Part II of the First Schedule to the VAT Act, 2013 has exempted from VAT the supply of education services. It goes further to define education services to mean education provided by a pre-primary, primary, or secondary school, a technical college or university and an institution established for the promotion of adult education, vocational training or, technical education. *There is need for clarity that these supplies shall preclude the supply of education services as laid out above whether or not they are provided through electronic means.*

Proposal: Amend Regulation 16(i) as follows:

“distance teaching through pre-recorded medium or e-learning including supply of online courses and training excluding education services which are exempted from VAT under paragraph 3 of Part II of the First Schedule to the VAT Act, 2013 regardless of whether such education services are provided through electronic means.”

- (ii) Regulation 17: The Regulations have not provided for application of tax on B2B supplies by a supplier who is already registered for VAT in Kenya by virtue of providing B2C supplies. Further, to minimize the risk of double taxation on B2C supplies, the Regulations should also provide clarity that B2C transactions taxed under the Regulations will not be subject to VAT on imported services.

Proposal: Amend Regulation 17 as follows:

- a. **“17 (2) Where the supply under regulation 3 (read as 16 in the published regulations) is made in a business-to-business transaction, the provisions of section 10 shall apply regardless of whether the non-resident supplier is registered for VAT or not.”**

- b. **Insert –**

“17 (6) Where the supply under regulation 3 (read as 16 in the published regulations) is made in a business to consumer transaction, the provisions of section 10 shall NOT apply.”

- (iii) Regulation 18: Section 34 (1) of the VAT Act, 2013 provides that a person shall be liable to be registered for VAT when the person has made or expects to make taxable supplies, the value of which is five million Kenyan Shillings or more in revenue over a period of 12 months. VAT is imposed on B2C supplies made on a digital marketplace (as stated in Regulation 17) by virtue of the supplies being deemed to have been made in Kenya, as such Section 34(1) of the VAT Act should apply. Separately, and in order to minimize any interpretational disputes, there is a need to clarify and to align the Regulations to the primary VAT legislation.

Proposal: Amend Regulation 18 (1) as follows:

Insert (c) “Registration under this Regulation is subject to value of taxable supplies threshold set out in Section 34 (1) of the VAT Act, 2013.”

- (iv) Regulation 23: Whilst it is expected that invoices will be issued in foreign currency, the Regulations have not indicated whether value of these invoices need to be translated into the Kenyan Shillings equivalent on the face of the invoice and, if so, the currency conversion rate to be applied on these invoices.

Proposal: Regulation 23 be amended to provide clarity on whether invoices raised in foreign currencies need to be translated to the Kenyan Shillings equivalent, the value of which is to be displayed on the face of the invoice. And, if so, the appropriate currency conversion rates to be used such as foreign exchange rates published by the Central Bank of Kenya.

- (v) Regulation 24: The Regulations have restricted claiming of tax by B2C suppliers for business-to-consumer transactions made on a digital marketplace. Section 17 of the VAT Act provides that a registered person shall be entitled to input tax deduction incurred on a taxable supply to the extent that the same was used to make taxable supplies. This Regulation, therefore, contradicts the primary VAT legislation on input tax deduction.

Proposal: Amend Regulation 24 as follows: “A deduction of input tax by a supplier shall be allowed for business-to-consumer transactions for a supply on a digital marketplace, but only to the extent that the input tax was incurred to make taxable supplies in Kenya.”

- (vi) Regulation 25: Section 16 of the Tax Procedures Act, 2015 (“the TPA, 2015”) places an obligation to collect and account for tax on the person making the supply notwithstanding the fact that that such a person has appointed a tax representative. The Regulations seem to contradict the TPA by imposing an obligation to collect and account for tax on the intermediary regardless of whether or not the supplier of the services is registered for VAT. Further, this requirement goes against the principles of basic contract law and agency/principal relationships.

Proposal: Amendment of Regulation 25(2) as follows:

“Where an intermediary whose place of business is in Kenya makes a digital marketplace supply on behalf of another person, the intermediary shall be required to charge and account for the VAT on such supplies in line with the VAT status of the principal.”

- (vii) Regulation 28: Section 67(2) of the VAT Act, 2013 provides that Regulations made under section 67 shall be tabled before the National Assembly for approval before they take effect.

Proposal: Amend Regulation 28 to allow taxpayers sufficient time for registration following the approval of the Regulations as follows –

“a supplier on a digital marketplace from an export country who is required to register under these Regulations shall apply to the Commissioner for registration within six months from the date these Regulations are approved by the National Assembly as envisaged by section 67 of the VAT Act, 2013.”

National Treasury’s response to PwC’s concerns

The National Treasury responded as follows to PwC’s concerns –

- (i) Regulation 16 relating to VAT on educational services: VAT on e-commerce was first introduced in September 2013 following the enactment of the current VAT Act, 2013. The Regulations under the VAT Act exempts tax on some of the educational services and some services relating to education account for VAT payment. Section 8 of the VAT Act requires non-residential suppliers of electronic services to account for VAT on their supplies to non-registered recipient in Kenya.
- (ii) Regulation 17 relating to business-to-business transactions: Businesses are required to pay for VAT and later claim for VAT refunds. The risk of double taxation does therefore not arise.
- (iii) Regulation 18 on currency conversion: the conversion of foreign currency is undertaken administratively for non-residents who transact business in Kenya.

Committee Observations

Having examined the Regulations, the Committee observed THAT –

1. Statutory Timelines – Section 11 of the SI Act

The Regulations were published in the gazette on 10th September, 2020 vide as L.N. No. 190 of 2020, submitted to the Clerk of the National Assembly on 9th October, 2020 and laid on the table of the House

on 15th October, 2020 being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act, 2013.

2. Consultations/Public Participation – Section 5 of the SI Act

Articles 10 and 118 of the Constitution and section 5 of the Statutory Instruments Act require that the regulation-making authority conducts public participation and sufficient consultation with the stakeholders and persons likely to be affected by the regulations.

The regulation making authority demonstrated that public participation was adequately undertaken by submitting copies of evidence stakeholder forums held in the development of the Value Added Tax (Digital Marketplace Supply) Regulations, 2020 (*Legal Notice No.190 of 2020*). Various stakeholders and industry players including Netflix, Bolt, KEPSA, Anjarwalla & Khanna Advocates and Africa Practice were consulted and their input factored in the final draft. A Public Notice dated Friday, 29th May, 2020 was also submitted.

3. Regulatory Impact Statement – Sections 6, 7 & 8 of the SI Act

The Regulations do not require a Regulatory Impact Statement within the meaning of sections 6, 7, and 8 of the Statutory Instruments Act, as they are not likely to impose significant costs on the community and will only affect the non-resident digital market suppliers who had for a long time enjoyed unfair 'exemption'.

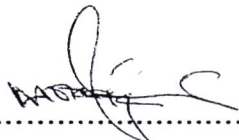
Committee Resolution

Having examined the Value Added Tax (Digital Market Place Supply) Regulations, 2020 against the Constitution, the Interpretations and General Provisions Act (Cap 2), the Value Added Tax, Act (No. 35 of 2013) and the Statutory Instruments Act (No. 23 of 2013), the Committee resolved to approve the said statutory instrument in accordance with section 67 of the Value Added Tax Act (No. 35 of 2013).

The decision to approve was proposed by Hon. Robert Mbui, M.P and seconded by Hon. Tindi Mwale, M.P.

MIN.NO. /NA/CDL/2021/011ADJOURNMENT

The meeting was adjourned at 1.45 p.m. to be reconvened the same day at 3.00 pm at the same venue.

Signed.....

Date.....10/2/2021.....

HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)

MINUTES OF THE 2ND SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON MONDAY, 1ST FEBRUARY, 2021 AT 2.30 P.M. IN BARAZA 2 CONFERENCE ROOM AT THE WHITESANDS RESORT, MOMBASA

PRESENT

1. **The Hon. Kassait Kamket, M.P.** - **Chairperson**
2. **The Hon. Muriuki Njagagua, M.P.** - **Vice Chairperson**
3. The Hon. Waihenya Ndirangu, M.P.
4. The Hon. Alice Wahome, M.P.
5. The Hon. Cecily Mbarire, MGH, M.P.
6. The Hon. Daniel Maanzo, M.P.
7. The Hon. Kamoti Mwamkale, M.P.
8. The Hon. Martha Wangari, M.P.
9. The Hon. Robert Mbui, M.P.
10. The Hon. Ronald Tonui, M.P.
11. The Hon. Timothy Wanyonyi, M.P.
12. The Hon. (Dr.) Wilberforce Oundo, M.P.
13. The Hon. Abdi Tepo, MP
14. The Hon. Edith Nyenze, M.P.
15. The Hon. George Murugara, M.P.
16. The Hon. Gideon Mulyungi, M.P. (*Virtual Attendance*)
17. The Hon. Jennifer Shamalla, M.P.
18. The Hon. Munene Wambugu, M.P.
19. The Hon. Patrick Mariru, M.P.
20. The Hon. Robert Gichimu, M.P.
21. The Hon. Sammy Seroney, M.P.
22. The Hon. Tindi Mwale, M.P.

ABSENT WITH APOLOGY

The Hon. William Cheptumo, M.P

IN-ATTENDANCE

National Assembly Secretariat

1. Mrs. Florence Abonyo-Atenyo - Director, Audit, Appropriations & Other Select Committees
2. Ms. Susan Maritim - Senior Clerk Assistant
3. Mr. Mohamed Jimale - Clerk Assistant II
4. Mr. Dima Dima - Principal Legal Counsel
5. Mr. Charles Ayari - Superintendent of Electronics (Audio)
6. Mr. Anthony Wamae - Serjeant-at-Arms
7. Ms. Beatrice Auma - Personal Secretary
8. Ms. Mary Otieno - Office Superintendent
9. Ms. Yvonne Kiprop - Pupil

The National Treasury and Planning

1. Hon. (Amb) Ukur Yattani, EGH - Cabinet Secretary
2. Mr. Geoffrey Malombe - Senior Deputy Director Accountant General
3. Mr. Ronald Inyangala - D/Director, Financial Sectoral Affairs Department
4. Mr. Livingstone Bumba - Deputy Director/Economist
5. Ms. CPA Isabella Kogei - Asst. Director, Budget/Parliamentary Liaison Officer
6. Mr. Chris Huka - Adviser to the Cabinet Secretary
7. Mr. Paul J. Oyire - Communication Advisor to the CS

Kenya Revenue Authority

1. Mr. Maurice Oray - Deputy Commissioner, Corporate Tax Unit
2. Mr. Andrew Osiany - Chief Manager, Stakeholder engagements
3. Mr. Ephraim Munene - Manager, Policy and Tax Advisory
4. Ms. Sheila Aduvagah - Assistant Manager/Parliamentary Liaison Officer
5. Mr. Lindstrom Kinoti - Supervisor, Policy and Tax Advisory

Kenya Depositors Insurance Corporation

1. Mohamud A. Mohamud - Chief Executive Officer
2. Ms. Eunice Kitche-Oduor - Head of Legal

Capital Markets Authority

1. Mr. Jairus Muaka - Snr. Manager, Legal Framework
2. Ms. Josephine Kang'ong'a - Manager, Regulatory Framework

PricewaterHouseCoopers

1. Mr. Job Kabochi - Director, PwC
2. Ms. Edna Gitachu - Senior Manager, PwC

MIN.NO. /NA/CDL/2021/005 PRAYER AND PRELIMINARIES

The meeting commenced at 2.35 p.m. with Prayers.

MIN.NO. /NA/CDL/2021/006 CONSIDERATION OF THE VALUE ADDED TAX (AMENDMENT) REGULATIONS, 2020 (L.N. 188 OF 2020)

The Committee was informed that the Regulations seek to amend the Value Added Tax Regulations, 2017 by deleting Regulation 9, which required that a registered person who makes a taxable supply shall, at tax invoice at the time of supply, furnish the purchaser with a tax invoice.

Committee Observations

The Committee observed THAT –

1. Statutory Timelines – Section 11 of the SI Act

The Regulations were published in the gazette on 25th September, 2020 vide as L.N. No. 188 of 2020, submitted to the Clerk of the National Assembly on 9th October, 2020 and laid on the table of the House on 15th October, 2020 being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act, 2013.

2. Consultations/Public Participation – Section 5 of the SI Act

Articles 10 and 118 of the Constitution and section 5 of the Statutory Instruments Act require that the regulation-making authority conducts public participation and sufficient consultation with the stakeholders and persons likely to be affected by the regulations.

The regulation making authority demonstrated that public participation was adequately undertaken by submitting evidence of stakeholder forums held in the development of the Regulations.

3. Regulatory Impact Statement – Sections 6, 7 & 8 of the SI Act

The Regulations do not require a Regulatory Impact Statement within the meaning of sections 6, 7, and 8 of the Statutory Instruments Act, as they are not likely to impose significant costs on the community and will only affect persons registered under Section 34 of the Value Added Tax, Act (No. 35 of 2013).

Committee Resolution

Having examined the Value Added Tax (Amendment) Regulations, 2020 against the Constitution, the Interpretations and General Provisions Act (Cap 2), Laws of Kenya, the Value Added Tax Act (No. 23 of 2013) and the Statutory Instruments Act (No. 23 of 2013), the Committee resolved to approve the said statutory instrument in accordance with section 67 of the Value Added Tax Act, (No 35 of 2013).

The decision to approve was proposed by Hon. George Murugara, M.P and seconded by Hon. Edith Nyenze, M.P.

MIN.NO. /NA/CDL/2021/007

CONSIDERATION OF THE VALUE ADDED TAX (ELECTRONIC TAX INVOICE) REGULATIONS, 2020 (L.N. 189 OF 2020)

The Regulations provide a legal framework to govern the use of Electronic Tax Registers in accordance with Section 43(4) of the Value Added Tax Act (No. 23 of 2013) in order to provide for the interpretation, scope of application, use of the register, tax invoices and transmissions thereof, obligations of the user and creates offences for non-compliance and contravention.

The Regulations also seek to enforce the VAT compliance and minimize fraud and tax evasion by obligating a registered business to generate a tax invoice.

The use of electronic tax register by registered persons will provide for standardization and uniformity of tax invoices generated and enhance effective compliance and enforcement measures by minimizing VAT fraud. The use of electronic tax registers will also ensure enhanced administration of VAT.

Committee Observations

The Committee observed THAT –

1. Statutory Timelines – Section 11 of the SI Act

The Value Added Tax (Electronic Tax Invoice) Regulations, 2020 were published in the gazette on 10th September, 2020 vide as L.N. No. 189 of 2020, submitted to the Clerk of the National Assembly on 9th October, 2020 and laid on the table of the House on 15th October, 2020 being within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act, 2013.

2. Consultations/Public Participation – Section 5 of the SI Act

The regulation making authority demonstrated that public participation was adequately undertaken by submitting copies of evidence stakeholder forums held in the development of the Value Added (Electronic Tax Invoice) Regulations, 2020 (*Legal Notice No.189 of 2020*) in compliance with the law.

The Kenya Revenue Authority sought views from the public and stakeholders through a Public Notice dated Friday, 29th May, 2020. The Authority received feedback from the stakeholders who were in support of the proposed Regulations with few amendments. Taking into consideration the advances in technology, the stakeholders recommended review of some aspects of the Regulations which were incorporated in the final draft.

3. Regulatory Impact Statement – Sections 6, 7 & 8 of the SI Act

The Regulations do not require a Regulatory Impact Statement within the meaning of sections 6, 7 and 8 of the Statutory Instruments Act, as they are not likely to impose significant costs on the community and will only affect persons registered under Section 34 of the Value Added Tax Act (No. 35 of 2013).

Committee Resolution

Having examined the Value Added Tax (Electronic Tax Invoice) Regulations, 2020 against the Constitution, the Interpretations and General Provisions Act (Cap 2), Laws of Kenya, the Value Added Tax Act (No. 23 of 2013) and the Statutory Instruments Act (No. 23 of 2013), the Committee resolved to approve the said statutory instrument in accordance with section 67 of the Value Added Tax Act, (No 35 of 2013).

The decision to approve was proposed by Hon. Alice Wahome, M.P and seconded by Hon. Martha Wangari, M.P.

MIN.NO. /NA/CDL/2021/008 ADJOURNMENT

The meeting was adjourned at 5.15 p.m. to be reconvened the following day at 10.00 a.m. at the same venue.

Signed.....

Date.....10/29/2021.....

HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)

SPECIAL ISSUE

Kenya Gazette Supplement No. 171

25th September, 2020

2047

(Legislative Supplement No. 106)

LEGAL NOTICE No. 188

THE VALUED ADDED TAX ACT

(No. 35 of 2013)

IN EXERCISE of the powers conferred by section 67 of Value Added Tax Act, 2013, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

**THE VALUE ADDED TAX (AMENDMENT) REGULATIONS,
2020**

1. These Regulations may be cited as the Value Added Tax (Amendment) Regulations, 2020. Citation.
2. The Value Added Tax Regulations, 2017, are amended by deleting regulation 9. L.N. 54/2017.

Made on the 10th September, 2020.

UKUR YATANI,
Cabinet Secretary for National Treasury and Planning.

**EXPLANATORY MEMORANDUM TO THE VALUE ADDED TAX
(AMENDMENT) REGULATIONS, 2020**

LEGAL NOTICE NO. 188 of 2020

PART I

Name of Statutory Instrument	: The Value Added Tax (Amendment) Regulations, 2020
Name of Parent Act	: The Value Added Tax Act (No. 35 of 2013)
Enacted Pursuant to	: Section 67 of the Value Added Tax Act, No. 35 of 2013
Name of the Ministry/Department	: National Treasury & Planning
Gazetted on	: 25 th September, 2020

PART II

1.0 Purpose of the Statutory Instrument

- 1.1. The objective of this Memorandum is to submit the Legal Notice No. 188 of 2020 for tabling in the National Assembly in accordance with the provisions of Section 11 of the Statutory Instruments Act, 2013.
- 1.2. The Legal Notice deletes paragraph 9 of the Value Added Tax Regulations, 2017, (Legal Notice 54 of 2017 (VAT Regulations, 2017)).

2.0 Legislative Context

Regulation 9 of the VAT Regulations, 2017 which provided that registered persons making a taxable supply shall furnish the purchaser with a tax invoice containing certain information. The deletion was necessary as a consequential amendment following the enactment of the Value Added Tax (Electronic Tax Invoice) Regulations, 2020 (Legal Notice 189) which empowers the Commissioner to require any person to use an electronic tax register, of such type and description as may be

prescribed, for the purpose of accessing information regarding any transaction which may affect the tax liability of the person.

3.0 Policy Background

- 3.1 Paragraph 9 of the VAT Regulations, 2017 came into force vide Legal Notice 54 of 2017. This regulation stipulated the requirements of issuing a tax invoice when making taxable supplies.
- 3.2 Regulation 9 (1) provided for a registered person to furnish a purchaser with a tax invoice containing details as per the VAT Regulations.
- 3.3 Regulation 9(2) of the VAT Regulations 2017, however, did not mandate the registered person to generate a tax invoice by use of an electronic tax register. This created a challenge in the enforcement of compliance in the use of electronic tax registers especially following the repeal of the Value Added Tax (Electronic Tax Registers) Regulations, 2004 in 2017.
- 3.4 The use of electronic tax registers has now been legislated vide Legal Notice 189, the Value Added Tax (Electronic Tax Invoice) Regulations, 2020. The use of electronic tax registers by registered persons will provide for standardization and uniformity of tax invoices generated. In effect, this will enhance effective compliance and enforcement measures, which will result in an increase in revenue by minimizing VAT fraud.
- 3.5 With the enactment of the Value Added Tax (Electronic Tax Invoice) Regulations, 2020, it was therefore necessary to delete Regulation 9 of the VAT Regulations, 2017.

4.0 Consultation Outcome

- 4.1 To the extent that this Legal Notice is a consequential amendment to the VAT Regulations, 2017, following the enactment of the VAT (Electronic Tax Invoice) Regulations, 2020, the stakeholder engagements conducted on the on the VAT (Electronic Tax Invoice)

Regulations, 2020 as stipulated below included deliberations on the effect of this Legal Notice.

- 4.2 The Kenya Revenue Authority informed the public and relevant stakeholders of the intention to introduce the Value Added Tax (Electronic Tax Invoice) Regulations 2020 and sought their comments on the same in a Public Notice published on **23rd August 2019** and **6th November, 2019 (copy attached)**. Feedback was received from professional accountants, audit firms, members of the business community and general public.
- 4.3 KRA conducted public consultation on the proposal to introduce the Value Added Tax (Electronic Tax Invoice) Regulations 2020, between August to November 2019.
- 4.4 The feedback revealed that the stakeholders were in support of the proposed Value Added Tax (Electronic Tax Invoice) Regulations with few amendments which were incorporated in the final draft of those Regulations.
- 4.5 Find attached the following documents:
 - a) Copy of Legal Notice No. 188 of 2020;
 - b) The Public Notices issued calling for stakeholder comments on the draft VAT (Electronic Tax Invoice) Regulations;
 - c) Copies of letters sent to specific key stakeholders (Kenya Association of Manufacturers (KAM), Kenya Private Sector Alliance (KEPSA), Retail Trade Association of Kenya and tax consultants), inviting them to attend the public participation forum to discuss the proposed regulations; and
 - d) A summary of the feedback received during the public participation process and comments on the same.
 - e) Attendance registers for stakeholder consultation forums held in Nairobi.

5.0 Impact

The Legal Notice is a consequential amendment necessary to align the VAT Regulations, 2017 with the VAT (Electronic Tax Invoice) Regulations, 2020.

6.0 Monitoring and review

The Legal Notice does not require to undergo any monitoring or review as it is a consequential amendment.

7.0 Request to the National Assembly

The National Assembly is invited to:

- a) Note the contents of this memorandum.
- b) Adopt Legal Notice No. 188 of 2020

8.0 Contact

Cabinet Secretary,
National Treasury & Planning,
NAIROBI