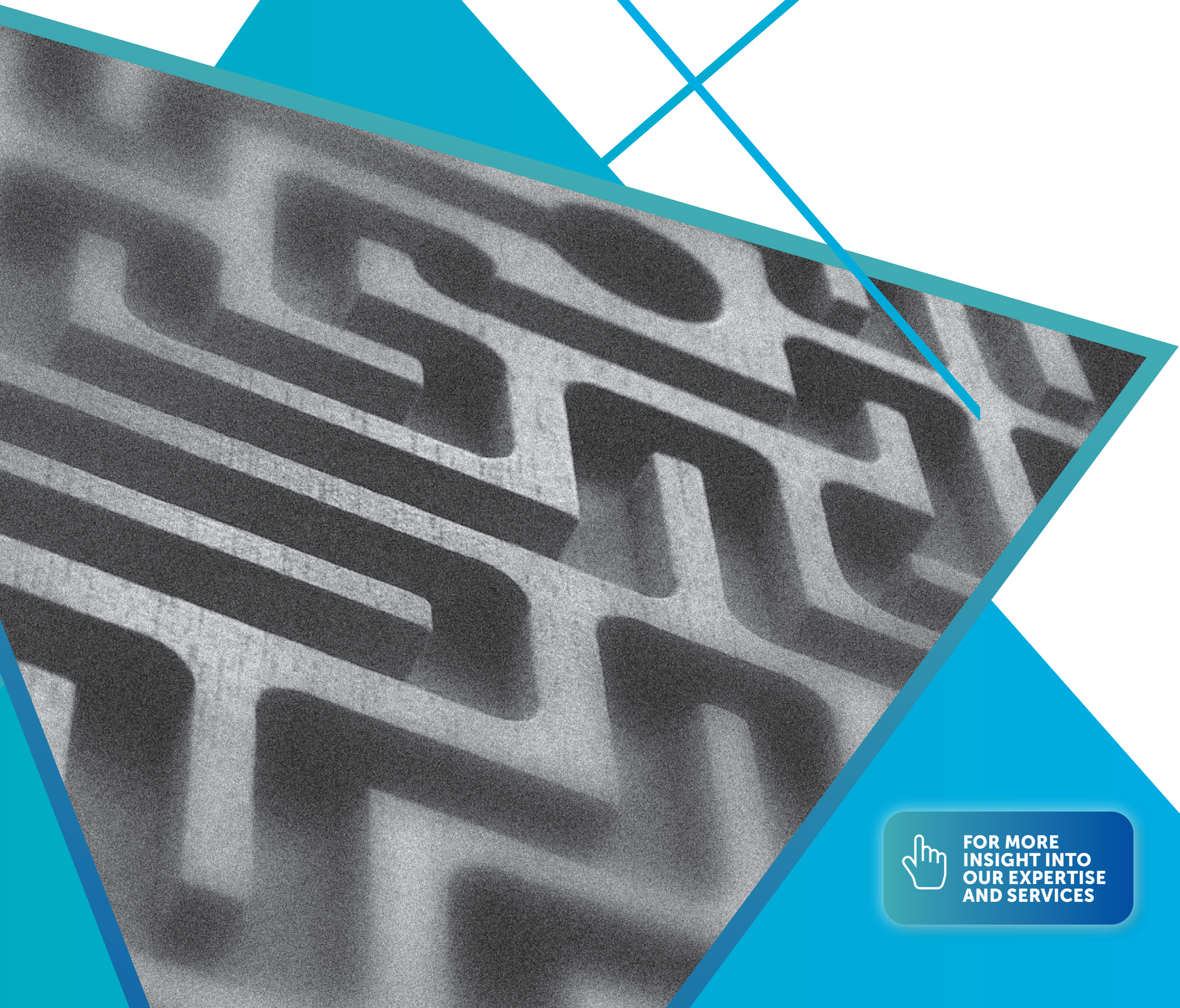
TAX & EXCHANGE CONTROL
ALERT

29 SEPTEMBER 2022



FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

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KENYA

Draft National Tax Policy: Overview and critique

The collection of taxes and levies is a crucial way for countries to generate public money that enables them to support investments in human capital, infrastructure, and the provision of services for citizens and enterprises.

Establishing a fair and efficient tax system, however, is a challenge since it must raise the necessary revenues without disproportionately taxing the public, impeding economic growth, or departing considerably from established international tax standards.

Kenya's tax system has advanced greatly since the country gained independence in 1963. To increase the revenue base, the post-independence administration passed numerous pieces of legislation on issues including income tax, sales tax (later known as value-added tax), excise duty, and customs duty. Successive administrations have made attempts to alter these rules to increase the tax base; nevertheless, these efforts have been uneven and have occasionally impeded economic operations in Kenya.

Despite the Kenyan Government's continued investment in the reform of the tax system, the current tax system has several problems that have led to an underperformance in terms of revenue collected by the Kenya Revenue Authority (KRA) as a percentage of Kenya's GDP. Additionally, the COVID-19 pandemic has hurt Kenyan taxpayers by increasing living and business expenses and lowering tax revenue.

Considering this situation, National Treasury has put up a draft National Tax Policy (Policy) with the intention of creating a fair and efficient tax system that promotes equality in tax administration and encourages a stable economic environment. The Policy offers solutions to problems that Kenya's tax system is now confronting, such as the huge untaxed informal sector, the unpredictability of tax rules, and significant tax spending, among others. The Policy also outlines the co-ordination and implementation process, as well as the roles and responsibilities assigned to various participants in its execution.

An outline of the Policy and potential effects of its implementation is provided below.

RATIONALE OF THE POLICY

The Policy aims to establish a strong domestic resource mobilisation system to assist Kenya in meeting its development goals. In this regard, the development of the Policy was necessitated by the need to:

- **Grow tax revenue** in an environment marked by increased spending pressures and disproportionate revenue growth as a percentage of GDP to reduce the country's fiscal deficit and increase domestic resource mobilisation.
- **Provide a legal framework for the implementation of tax incentives** so that an effective tool for monitoring and evaluating the effectiveness of incentive regimes is available.
- As frequent changes in tax laws cause unpredictability and inefficiency in tax administration, **provide guidance, ensure certainty, and establish coherence considering any future amendments to national tax laws.**

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- **Enhance structures for information gathering and sharing** to support revenue mobilisation and protect the tax base while mitigating against tax avoidance and evasion.
- **Manage tax refunds efficiently** to ensure timely processing and the simplification of the current process, which is plagued by time delays and information asymmetry.
- **Address complexities in tax legislation and administration** including computation of tax liabilities, filing of tax returns and interpretation of tax laws in a bid to improve the ease of doing business in Kenya.

CHALLENGES FOR KENYA'S TAX SYSTEM AND POLICY PROPOSALS TO ADDRESS THESE

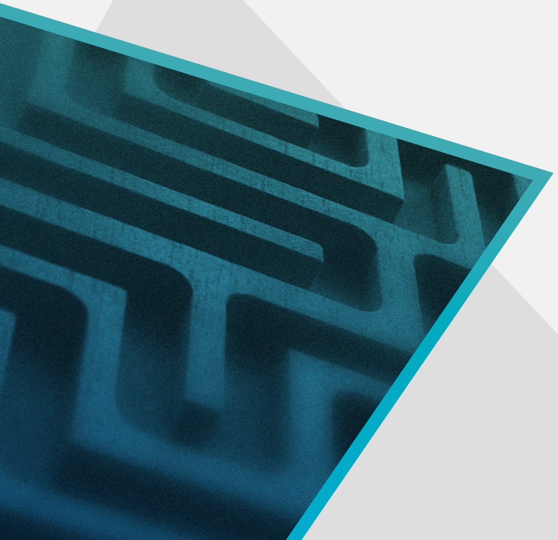
Despite significant progress in tax reform, there are still issues that affect revenue performance. However, the Policy includes several proposals to address these issues. These are the following:

Predictable tax rates and tax bases

Kenya's tax laws are frequently changed, creating an atmosphere of uncertainty and unpredictability. The Policy aims to address this issue by providing some predictability in tax rates and tax bases. In this regard, the Policy proposes that:

- comprehensive reviews of tax laws are undertaken every five years and are aligned with other government policies; and
- there should be adequate stakeholder engagement before any amendment of tax laws, with a focus on the impact of the proposed tax changes on tax revenue, development, investment, employment, and economic growth.

The emphasis on stakeholder engagement prior to tax law amendment is an important step toward ensuring accountability and transparency in tax administration. However, the Policy does not specify any mechanisms that National Treasury or the implementing agencies will use to ensure that stakeholder engagement is incorporated into every amendment process and that such engagement meets the Constitution's standards. It may be beneficial if National Treasury's implementation matrices include an elaborate mechanism for stakeholder engagement and public participation.



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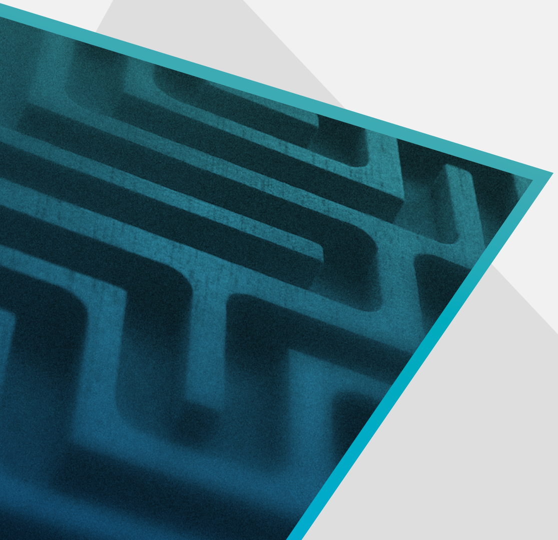

VAT

In terms of value-added tax (VAT), the Policy identifies two major challenges. First, in comparison to total VAT collected, VAT tax expenditure is relatively high, standing at approximately 2,2% of GDP in 2020. Second, Kenya has different VAT rates, giving certain goods an unfair advantage. Some of the Policy proposals in this regard are:

- all goods and services consumed in Kenya should be subject to VAT unless exempted, and the imposition of VAT will be based on the destination principle;
- a single rate for VAT and, where a preferential rate is granted, it cannot be less than 25% of the general rate;
- VAT exemptions shall be limited to specific categories, including, but not limited to persons with privileges and immunities, supplies to armed forces and projects financed by development partners only where the financing agreements provide for such exemptions;
- the VAT Act should provide for all VAT exemptions; and
- VAT zero-rating shall be limited to exported goods except transportation of passengers and supply of taxable services by carriers on international voyage or transportation of goods by land for destinations terminating outside Kenya.

The VAT proposals are welcome, however, the Policy makes no proposals to clarify issues concerning VAT on exported services. There has been much discussion about what constitutes *"use"* and *"consumption"* of services outside Kenya, with the KRA, Tax Appeal Tribunal and Kenyan judiciary being involved in disputes on this issue over the last few years. Further there have been recent changes in law to subject exportation of services to the standard rate unless the services are being done through *"business process outsourcing"*. A term that is yet to be defined. It would be beneficial for the Policy to provide a clear and simple policy proposal in this regard to guide parties involved in the exportation of services.

In addition, the recommendation to have preferential rates that are not less than 25% of the standard rate should be thought through. Currently VAT on petroleum products is at the rate of 8%, which is half (50%) of the standard rate of 16%.

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The Policy should have an exception for petroleum products because a rise in the cost of fuel translates to an increase in the cost of production, an increase in the cost of transport and ultimately a high cost of basic commodities.

Excise Duty

Kenya's excise duty rate is high in comparison to other East Africa Community member countries, which is thought to be contributing to an increase in illicit trade through smuggling. To remedy this challenge, the Policy proposes the following:

- the imposition of excise duty shall be based on the destination principle;
- the rate of excise duty shall be either *ad valorem*, specific, or both, and in determining whether to impose specific or *ad valorem* rate of excise duty, consideration shall be made to ensure no undue advantage is conferred to any category of goods;
- specific rates of excise duty shall be subject to periodic adjustments to take inflation into account; and
- excise duty on inputs used in the manufacture of excisable products shall be offset against the excise duty payable on the finished goods.

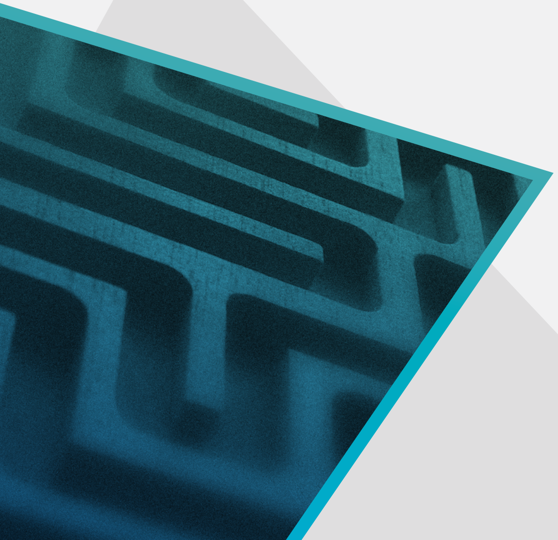
These policy proposals are beneficial in addressing some of the current excise duty issues. However, it would have been beneficial for the Policy to address additional shortcomings, such as the Excise Duty Act's provision for annual inflation adjustment.

Various industry groups have repeatedly urged against the annual inflation adjustment, claiming that it has not resulted in increased tax revenues since its implementation in 2015 and has had negative consequences such as increasing the cost of living and allowing illicit trade to thrive. It would be beneficial if the Policy required inflation adjustments to be made after a longer period, such as five years, similar to the proposed time period for Policy review.

Hard-to-tax sectors

Subsistence agriculture and a sizable informal sector, which are challenging and expensive to tax, are the two main drivers of the Kenyan economy. Even while the informal sector is growing, it still contributes little to overall tax revenue because it is mostly cash based and has shoddy record-keeping practices. The guidelines proposed by the Policy in this respect include:

- exploring ways of enhancing taxation in the agricultural sector and the informal sector, including the use of presumptive tax;



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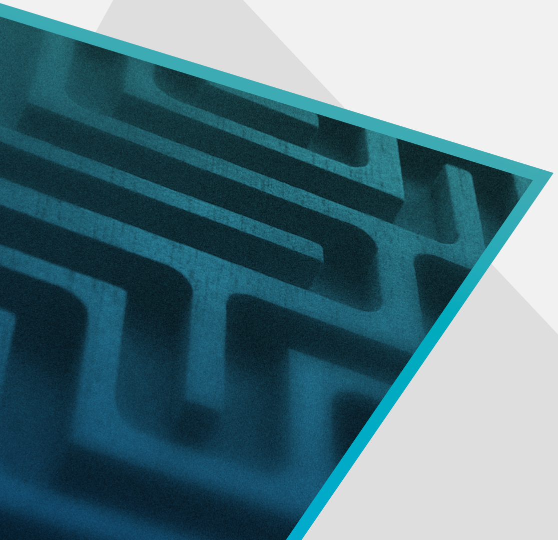
- providing taxation and business education to farmers and informal sector groups, including registration with respective sub-sector associations and co-operative societies; and
- improving collaboration and information exchange on taxpayers between National and County Governments.

Over and above the recommendations on the hard-to-tax sectors, the Policy should address the issues that the informal sector and the agricultural sector face on a daily basis. The Policy should seek to enhance service delivery to these sectors, improve access to markets and provide incentives for the taxpayers in these sectors to voluntarily register and pay tax.



Tax incentives

Tax exemptions, deductions, allowances, tax postponements, preferential tax rates, and timing restrictions are only a few of the tax incentives that Kenyan law provides. These incentives erode the tax base and cause a loss of tax revenue for the Government, even though they are intended to promote investment and help low-income people and vulnerable groups in society. The Policy proposes the following policy guidelines in this regard:

- developing a criterion for granting tax incentives taking into consideration the costs and benefits of the incentives and maintaining a public record of all tax expenditures;
- developing and regularly reviewing guidelines on the administration of tax incentives;
- regularly reviewing tax incentives to align them with the Government's development agenda;
- where possible, having sunset periods for tax incentives provided to specific sectors; and
- developing and implementing a centralised monitoring and evaluation framework for tax incentives.

Various changes to investment deductions have occurred in recent years to stimulate substantive capital investments in Kenya. Recent changes have allowed investment deductions of up to 150% in specific cases, but there have been calls to limit the investment deduction to 100% of the invested amount. With Kenya as an investment hub in East Africa, the Policy should be flexible on the allowable investment deduction so that Kenya remains competitive when compared with the investment deduction that is offered by other countries in the region.

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Low tax compliance

The tax compliance rate in FY 2020/21 was 68% for filing tax returns and 88% for paying taxes. The main causes of low compliance levels include the technical and complex nature of tax laws and procedures, taxpayer apathy, high compliance costs, insufficient sharing of taxpayer information among National and County Government agencies. To address these issues, the Policy proposes several measures, including:

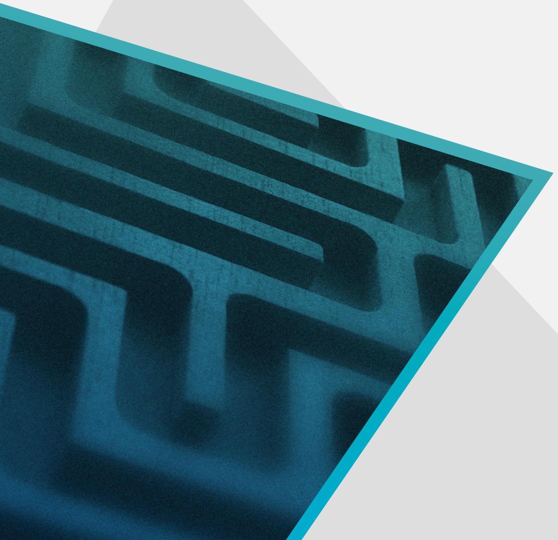
- reviewing the mechanism for detecting, deterring, and sanctioning instances of tax administration integrity on a regular basis;
- maintaining accurate taxpayer data and continuously improving the use of modern information technology in tax administration services;
- issuing public guidelines on a regular basis to clarify any issues that may arise in the administration of tax laws;
- enhancing the implementation and monitoring of a structured and tailored stakeholder engagement programme; and
- improving the mechanism for informing different segments of taxpayers about changes to tax laws and procedures.

Taxing of the digital economy

The current tax system is ill-prepared to deal with emerging technological business models. As a result, some business activities, particularly those conducted via the internet on a digital platform, have been excluded from the tax net. The Policy proposes the following measures for Government to gradually increase tax yields from the emerging digital economy:

- use of technology to deal with emerging business transactions on digital or electronic platforms;
- establishment of mechanisms to optimise revenue collection from the digital economy;
- continuous reviewing of tax laws to align them with emerging technologies; and
- investment in continuous training for tax administrators in emerging technologies.

In addition to these measures, the Policy should encourage collaboration or exchange of information between the digital payment service providers, banks and the revenue authority. Such collaboration will enable the revenue authority to have sight of revenues



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that could be subject to digital tax. In addition, since digital taxes are new in Kenya, the Government should do more in terms of stakeholder education to enhance compliance and revenue collection.

Tax administration

There are many unregistered taxpayers, according to the Policy, and the KRA has only issued personal identification numbers to a small number of people. Furthermore, there is low tax morale because of inadequate taxpayer education and information, as well as limited collaboration and information sharing on tax matters between the National and County Governments.

To address these issues, the Policy proposes the following measures:

- using technology to facilitate registration and categorisation of registered persons according to obligation, as well as sector segmentation for ease of administration;
- examining guidelines for tax refund processes to improve their effectiveness and efficiency;
- enhancing tax refund automation, including integration of various tax administration systems such as iTax and iCMS;
- adopting a unified system for collecting taxes, fees, and levies for the National and County Governments gradually; and
- continuous capacity development in revenue administration through staff training and the acquisition of equipment and technology to deal with emerging tax issues.

Harmonising the collection of taxes and fees at various levels of Government will help to reduce revenue leakage. Such action will necessitate increased co-operation between the KRA and the National and County Governments in order to ensure efficiency and mutual benefit. However, such co-operation may be difficult given recent calls to remove the KRA as the Nairobi County Government's collection agent due to lower revenue collection in the previous fiscal year.

Dispute resolution

The Tax Appeals Tribunal and the out-of-court or tribunal tax dispute resolution processes lack independence because facilitators of dispute resolution are appointed by the Commissioner of Domestic Taxes, who is also a party to the dispute. The Policy sets out the following proposals to improve the efficiency of the dispute resolution mechanisms implemented in the tax system:

- reviewing the dispute resolution process to reduce the cost and time required to resolve disputes;

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- allowing for the independence of the out-of-court or Tax Appeals Tribunal dispute resolution process by detaching it from the KRA; and
- creating a specialised tax court.

Recently, the Judicial Service Commission (JSC) appointed the judges of the Tax Appeals Tribunal to detach appointments from the KRA. While this is a welcome move, there is a need to upskill the tribunal members quickly so that they can deliver on their mandate. The tribunal lost a majority of the experienced members who opted not to be appointed under the JSC's terms.

The proposal to have a specialised tax court is also welcome. While the Tax Appeals Tribunal is a specialised court, the focus should now shift to having specialised tax courts at the High Court and for appeals. Naming one of the divisions at the High Court as a Commercial and Tax Division is not enough. The Government should train and appoint a specialised group of judges at the High Court and above to deal with tax litigation.

IMPLEMENTATION AND MONITORING

National Treasury is in charge of implementing the Policy, and it hopes to meet a number of its objectives by fiscal year 2023/2024. In this regard, National Treasury is expected to prepare an implementation matrix for the Policy. Activities will be implemented and monitored through the annual work plans of the implementing agencies. Furthermore, National Treasury will monitor Policy implementation and prepare and submit an annual report to Cabinet.

The Policy will be reviewed every five years or whenever National Treasury deems appropriate.

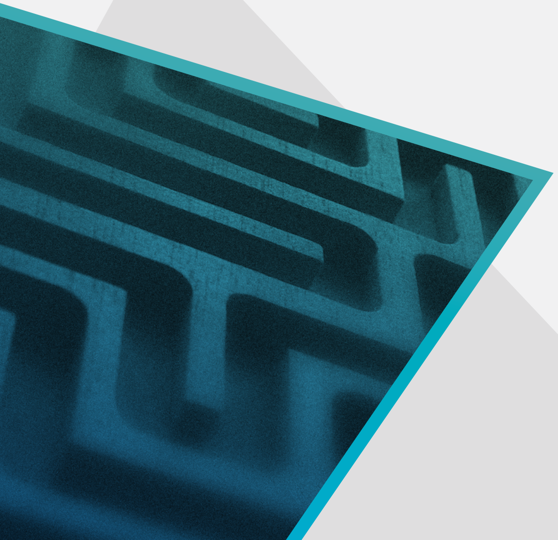
CONCLUSION

A national tax policy is a good thing because it allows taxpayers to plan ahead of time and gives them predictability and certainty about the tax environment. Similar to other African jurisdictions that have implemented national tax policies, such as Nigeria, the Policy seeks to enhance fairness and equity in tax system as well as embracing international best practice in tax administration. While the Policy does not set out many definitive or substantive proposals, it is the first step in enhancing tax compliance, reducing tax expenditure and expanding the tax base.

One significant advantage is that the Policy calls for comprehensive reviews of tax laws and the Policy at least once every five years. This will allow stakeholders to participate in the amendment process, resulting in the development of a tax system that is responsive to market realities and aligned with Government priorities.

To ensure the Policy's implementation, National Treasury and all implementing agencies must take a co-ordinated approach. To begin with, National Treasury should seek buy-in from the new political regime at the national and county levels.

Tax compliance is low among small businesses and the informal sector, and significant steps and actions will be required to ensure that the tax base expansion does not impose an



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undue burden on new taxpayers. Furthermore, significant tax education will be required to unravel the tax requirements that would be imposed on taxpayers.

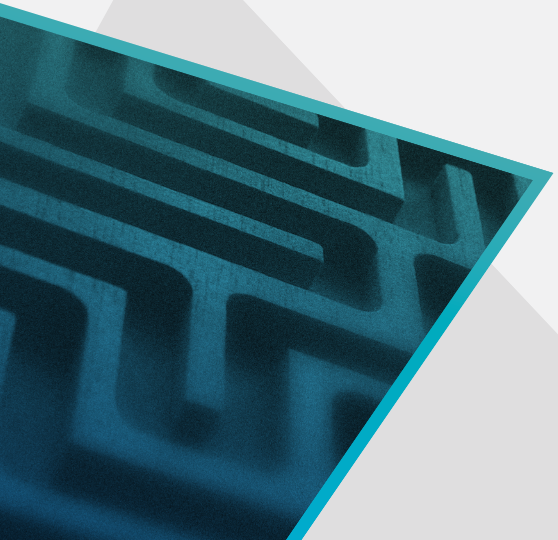
The Policy's evolution of dispute resolution mechanisms is also a positive step in the development of the tax system. The establishment of a specialised tax court and the separation of alternative dispute resolution mechanisms from the KRA should give taxpayers a level of independence that has previously been lacking, as well as instil trust and confidence in the tax system.

National Treasury should be open for more comments on the draft National Tax Policy.

We anticipate that another draft will be available for discussion once National Treasury considers the first raft of proposals by stakeholders.

All taxpayers will benefit from becoming familiar with the Policy and understanding how any tax obligations and tax benefits will be implemented by National Treasury and its implementing agencies. This process should become clearer as National Treasury engages stakeholders on the Policy and begins implementing and monitoring it. We will continue to monitor the Policy's development and the steps taken toward its implementation.

ALEX KANYI AND BRIAN MUCHIRI



SOUTH AFRICA

VAT on imported services: A potential compliance risk

Value-added tax (VAT) is levied on the supply of goods or services by registered vendors, on the importation of goods and on the importation of services into South Africa.

The VAT on supplies of goods and services must be paid by the supplier, whereas the importer of goods is responsible for the payment of the import VAT. VAT on imported services must be paid by the recipient.

Persons who acquire services from foreign suppliers often omit to pay the VAT on these services. It is for this reason that the South African Revenue Service is focusing on imported services in its VAT audits. However, not all services rendered by foreign service suppliers comprise imported services.

WHAT ARE IMPORTED SERVICES?

"*Imported services*" is defined in the Value-Added Tax Act 89 of 1991 (VAT Act) as services rendered by a supplier who is resident or carries on business outside the Republic, to a recipient who is resident of the Republic, to the extent that such services are utilised or consumed in the Republic, otherwise than for the purpose of making taxable supplies. The VAT thereon is payable in terms of section 7(1)(c) of the VAT Act.

There are in essence three requirements that must be complied with for a service to comprise an "*imported service*".

- the service must be supplied by a non-resident supplier to a South African resident;
- the service must be used or consumed in South Africa; and
- the service must be acquired otherwise than for the purpose of making taxable supplies.

The place of residence of the supplier and that of the recipient are generally easily determinable. However, in the absence of so-called "*place-of-supply*" rules in the VAT Act, it is not always clear where a service is utilised or consumed.

UTILISED OR CONSUMED IN SOUTH AFRICA

In the case of *CSARS v De Beers Consolidated Mines Ltd* 74 SATC 330 the Supreme Court of Appeal (SCA) took a practical approach to determine where the services rendered by a foreign supplier were used. The SCA considered that the company was incorporated in South Africa with its head office situated in Johannesburg, the directors appointed the foreign supplier following a meeting held in Johannesburg, and it is also here that the directors met to approve the recommendations made. In addition, a scheme of arrangement in relation to the transaction was approved and implemented in South Africa.

SOUTH AFRICA

VAT on imported services: A potential compliance risk

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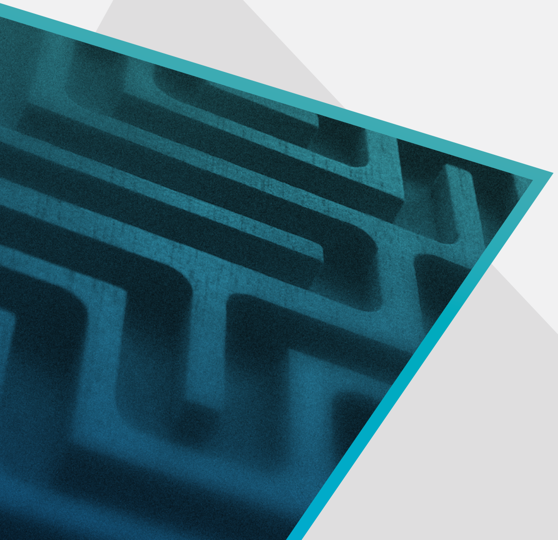
However, as correctly pointed out by SP van Zyl ((2013) 25 SA MERC LJ at p 538), it is not always possible to apply a practical test, and certain services can only be utilised or consumed where and when they are supplied. Such services include transport services, live performances or sporting events, seminars and medical procedures. These may also include foreign listing services or foreign legal services to comply with foreign statutes, or legal services to defend or institute legal action in a foreign country. It cannot be said that, if the benefit of a service is enjoyed in South Africa, the service comprises an "*imported service*". For example, if a person's vehicle breaks down in Botswana while they are on holiday and is repaired in that country, the repair service is utilised and consumed in Botswana, and the subsequent benefit upon return to South Africa does not bring the repair service within the definition of "*imported services*". In the absence of clear place-of-supply rules, one can expect on-going debates on where a service is utilised or consumed.

PURPOSE OTHER THAN FOR MAKING TAXABLE SUPPLIES

For a service rendered by a foreign supplier to comprise an "*imported service*", the service must also be acquired for a purpose other than for making taxable supplies. If the service is acquired for the purpose of making taxable supplies, the recipient is entitled to an input tax deduction if VAT was payable, and it is for this reason that services acquired for making taxable supplies are excluded.

The SCA in the *De Beers* case and in the case of *Consol Glass (Pty) Ltd v CSARS* 83 SATC 186 also considered whether a foreign service was acquired for the purpose of making taxable supplies. In the case of *De Beers* the SCA stated that the foreign services were principally provided to enable the company to comply with its statutory obligations towards its unit holders, and that such services had no impact on its taxable enterprise, which comprised the mining, marketing and selling of diamonds. The SCA held that on this basis the foreign service was acquired for a purpose other than making taxable supplies.

In the *Consol Glass* case the SCA stated that the foreign services were acquired to redeem Eurobonds which were originally issued to effect a reorganisation of the Consol group of companies.



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VAT on imported services: A potential compliance risk

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The court stated that the reorganisation did not bring about any material change to the enterprise comprising the making of glass containers, and as such there was no functional link between the issue of the Eurobonds and the making of taxable supplies. The court considered that the foreign services which were acquired to redeem the Eurobonds were acquired for the same purpose for which the Eurobonds were initially issued. The foreign services were therefore not considered to be acquired for the purpose of making taxable supplies.

For a foreign service to fall outside the scope of "*imported services*" there must be a link between the services acquired and the making of taxable supplies. If the services are acquired partly for the purpose of making taxable supplies and partly for another purpose, then the services will only comprise "*imported services*" to the extent that they are acquired for a purpose other than making taxable supplies. Unlike the deduction of input tax, there is no prescribed method of apportionment to be applied to determine the extent to which an imported service is subject to VAT. It is also not a requirement that the recipient must obtain a ruling to approve an apportionment formula to be applied. The recipient must, however, be able to substantiate that the apportionment basis applied is reasonable.

EXEMPTIONS

The exemptions to imported services as contained in section 14(5) of the VAT Act should also be considered. Supplies that are subject to VAT at the standard rate under section 7(1)(a) are not also subject to VAT under section 7(1)(c) as imported services. A typical example is the supply of electronic services where the foreign supplier is required to register and levy VAT on such supplies in South Africa in terms of section 7(1)(a).

Services which would be exempt from VAT or zero rated if supplied in South Africa are also exempt from VAT on imported services. Accordingly, the supply of a loan by a foreign credit provider to a South African resident does not comprise an imported service. However, any fees charged by the foreign supplier will comprise consideration for imported services because such fees are not exempt from VAT if supplied in South Africa.

In the case of *Metropolitan Life Ltd v CSARS* 70 SATC 162 the taxpayer acquired business advice and computer services from foreign suppliers. The taxpayer argued that these services were physically rendered outside the Republic, and they qualified for the zero rate in terms of section 11(2)(k) and VAT is therefore not payable thereon in terms of section 14(5). The High Court held that the purpose of sections 7(1)(c) and 14(5) must be considered in the context of the VAT

SOUTH AFRICA

VAT on imported services: A potential compliance risk

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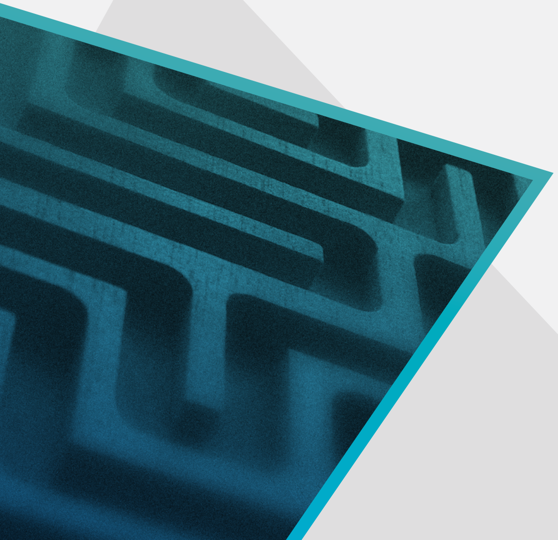
Act, and that the zero rating under section 11(2)(k) is not applicable to this kind of service. The services were held to be imported services because they were utilised or consumed in South Africa.

The supply of educational services by a foreign educational institution which is regulated by an educational authority in that country, is also exempt from the VAT payable under section 7(1)(c), and so is the rendering of services by foreign employees or office holders to a South Africa employer. Finally, no VAT is payable on any supply of a service by a foreign supplier with a value not exceeding R100.

CONCLUSION

The potential liability for VAT on imported services could be substantial, particularly for South African companies who embark on foreign expansion projects or the raising of foreign capital. The services acquired from foreign service providers should be carefully considered on a case-by-case basis to determine whether they comprise imported services, and if so to what extent.

TERSIA VAN SCHALKWYK AND GERHARD BADENHORST



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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