

THE VALUE ADDED TAX ACT

(No. 35 of 2013)

IN EXERCISE of the powers conferred by section 67 of the Valued Added Tax 2013, the Cabinet Secretary for the National Treasury makes the following Regulations:—

THE VALUE ADDED TAX REGULATIONS, 2017

PART I—PRELIMINARY

1. These Regulations may be cited as the Value Added Tax Regulations, 2017.

Citation.

2. In these Regulations, unless the context otherwise requires—

Interpretation.

“Act” means the Value Added Tax Act, 2013;

“arm’s length transaction” means a transaction between persons dealing with each other at arm’s length;

“member”, in relation to a registered group, includes the member of the group appointed, from time to time, as the representative member of the group;

“recipient”, in relation to a supply, means the person to whom the supply is made;

“supplier”, in relation to a supply, means the person making the supply;

“tax fraction”, in relation to a supply, means the fraction computed in accordance with the following formula—

$$t/(1+t)$$

where t is the rate of tax applicable to the supply as determined under section 5 of the Act;

“telecommunications services” means the transmission, emission, or reception of signals, writing, images, sounds, or information of any kind by wire, radio, optical, or other electromagnetic systems, and includes—

- (a) the related transfer or assignment of the right to use capacity for such transmission, emission, or reception; or
- (b) the provision of access to global or local information networks,

but does not include the supply of the underlying writing, images, sounds, or information;

“telecommunications supplier” means a person who supplies telecommunications services; and

“trading stock” includes anything produced, manufactured, purchased, or otherwise acquired for sale or exchange, and any raw materials used in the production or manufacturing process.

3. (1) The open market value of a supply shall be the consideration that the supply would reasonably be expected to fetch in an arm’s length transaction made at the time of supply.

Open market value.

(2) Where the open market value of a supply cannot be determined in accordance with paragraph (1), the open market value shall be an objective approximation of the consideration the supply would fetch in an arm’s length transaction made at the time of supply as determined by the Commissioner based on generally accepted principles of valuation.

(3) Where there is need to determine the open market value for particular goods or services held by a person, at a particular time, the value shall be determined in accordance with paragraph (2), or be the value of similar goods or services, at that time.

4. (1) A supply of telecommunications services shall be treated as made in Kenya when the person who initiated the supply is in Kenya at the time of supply where—

Place of supply of telecommunications services.

- (a) the supply is made from a place of business outside Kenya;

- (b) the supply is not initiated by—
 - (i) a telecommunications supplier; or
 - (ii) a person who is global roaming while temporarily in Kenya; and
- (c) the recipient of the supply is not a registered person.

(2) The person who initiates a supply of telecommunications services shall be the person—

- (a) who controls the commencement of the supply;
- (b) who pays for the supply;
- (c) who contracts for the supply; or
- (d) to whom the invoice for the supply is sent.

5. (1) Unless the Act otherwise provides, where a registered person makes a taxable supply without a separate amount being identified as tax, the taxable value of the supply shall be computed in accordance with the following formula—

Taxable value of supply.

$$B = A / (1 + t)$$

Where—

A is the total amount charged for the supply inclusive of VAT;

B is the taxable value; and

t tax rate

6. (1) An application of taxable supplies by a registered person for use outside his business shall not be treated as a taxable supply made by the person unless the registered person has been allowed a deduction for input tax in respect of the taxable supply made to, or taxable importation made by the person for use outside the person's business.

Taxable importation by a registered person for use outside the person's business.

(2) The taxable value of a taxable supply by a person for use outside his business shall be—

- (a) for goods that are trading stock acquired in a taxable supply, the consideration paid or payable in respect of the acquisition of the trading stock;
- (b) for goods that are trading stock acquired in a taxable importation, the taxable value of the importation; or
- (c) for any other case, the higher of—
 - (i) the consideration paid or payable on acquisition of the goods or services; or
 - (ii) the open market value of the goods or services on the date the supply is first used outside the business.

(3) The taxable value determined under paragraph (2) shall be reduced by—

- (a) if part of the input tax paid by the registered person on acquisition was allowed as a deduction, an amount reflecting the extent to which no deduction was allowed; or

- (b) if part of the goods or services were applied to a use outside the person's business, an amount reflecting the extent to which the goods or services were not so applied.

7. (1) A person shall be entitled to a deduction of input tax incurred for trading stock on hand at the date that the person becomes registered.

Deduction of input tax on registration or change in use.

(2) A deduction of Input Tax shall not be allowed unless—

- (a) the input tax to which the deduction relates is deductible under section 17 of the Act;
- (b) the registered person has provided the Commissioner with satisfactory evidence—
- (i) that input tax was paid on acquisition of the goods;
- (ii) of the quantities, descriptions, and values of the goods on hand at the time of registration.

(3) A person shall when applying for the authorisation of deduction, submit to the Commissioner a list of goods on hand at the date of registration in respect of which the person seeks relief within three months of becoming registered in the approved form.

(4) The Commissioner may require a person who has submitted a list under paragraph (3) to produce further evidence of—

- (a) the quantities, descriptions, or values of goods on hand at the time of registration; or
- (b) the use or intended disposal of the goods after the date of registration.

(5) The Commissioner shall not allow an appropriate deduction—

- (a) for goods that are trading stock, the tax paid on acquisition or importation of the goods; or
- (b) for any other case, the lesser of—
- (i) the tax paid on acquisition or importation of the goods or services; or
- (ii) the tax fraction of the open market value of the goods or services at the time of change in use.

Refunds.

8. (1) A registered person who makes taxable supplies at both the general rate and zero rate, shall only be entitled to a refund arising from making zero rated supplies.

Refund.

(2) In determining the amount due as a refund to a registered person who makes taxable supplies at both the general rate and zero rate, the Commissioner shall use the following formula—

$$R = Z/T \times e$$

Where—

R is the amount to be refunded

Z is total value of the zero rated supplies

T is the total value of the taxable supplies

e is excess input tax for the month of the supply.

(3) A refund payable under section 30 or 31 of the Act shall be applied in accordance with section 47(4) of the Tax Procedures Act, 2015.

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(4) When the recipient of a taxable supply to which section 31(1) of the Act applies is a registered person that is still in existence at the time the supplier applies for a refund under section 31(1), the refund shall be allowed unless the supplier had issued a credit note to the recipient of the supply specifying the amount of the unpaid tax claimed computed in accordance with section 31(1).

(5) The recipient of a taxable supply issued with a credit note under paragraph (4) shall reduce the amount of their deductible input tax in the tax period in which the credit note was received by the amount of tax specified in the note.

(6) When section 31(3) applies and the recipient of the taxable supply is a registered person who has previously been issued with a credit note in relation to the supply, the registered person refunding the tax to the Commissioner shall issue the recipient of the taxable supply with a debit note specifying the amount of tax refunded to the Commissioner.

(7) The recipient of a taxable supply issued with a debit note under paragraph (6) shall be allowed to reduce the amount of their deductible input tax in the tax period in which the debit note is received by the amount of tax specified in the note.

9. (1) A registered person who makes a taxable supply shall, at the time of supply, furnish the purchaser with a tax invoice containing—

Tax invoice

- (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 individualised 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.

(2) Notwithstanding paragraph (1), a registered person may provide an electronically generated fiscal receipt as a simplified tax invoice for cash sales made from retail premises 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.

10. (1) A registered person liable for tax under section 5(1)(c) and (6) of the Act and who is entitled to a credit for part of the amount of input tax payable shall, in respect of a supply of imported services, prepare a tax invoice in respect of the supply containing—

Tax invoice for supplies of imported services.

- (a) the name, address, and PIN of the recipient;
- (b) the name and address of the supplier;
- (c) the individualised serial number of the tax invoice and the date on which the tax invoice is prepared;
- (d) a description of the services supplied and the date of the supply;
- (e) the extent to which the supply has been applied other than to make taxable supplies;
- (f) the consideration for the supply and the amount of tax charged.

11. (1) A registered person for good and valid business reasons, decides to reduce the value of a supply after the issue of a tax invoice after goods are returned to the registered person shall issue a credit note to a person after the registered person has refunded the excess tax to the recipient of the supply, whether in cash or as a credit against any amount owing to the supplier by the recipient.

Credit notes.

(2) A credit note shall contain—

- (a) the words "CREDIT NOTE" in a prominent place;
- (b) the name, address, and PIN of the supplier;
- (c) the name, address, and PIN of the recipient;
- (d) the individualised serial number of the credit note and the date on which the credit note is issued;
- (e) a brief description of the circumstances giving rise to the issuing of the credit note, including the invoice details to which the credit note relates;
- (f) the consideration shown on the tax invoice for the supply, the correct amount of the consideration, the difference between those two amounts, and the amount of tax that relates to the difference.

12. (1) A registered person who issues a debit note in respect of further charge made in respect of a supply, or any transaction associated with that supply shall include the amount of tax specified in the debit note as output tax of the person in the tax period in which the debit note is issued.

Debit notes.

- (2) A debit note issued under paragraph (1) shall contain—
- (a) the words “DEBIT NOTE” in a prominent place;
 - (b) the name, address, and PIN of the supplier;
 - (c) the name, address, and PIN of the recipient;
 - (d) the individualised serial number of the debit note and the date on which the debit note is issued;
 - (e) a brief description of the circumstances giving rise to the issuing of the debit note, including the invoice details to which the debit note relates;
 - (f) the consideration shown on the tax invoice for the supply, the correct amount of the consideration, the difference between those two amounts, and the amount of tax that relates to the difference.

13. (1) An exportation shall be a taxable supply—

Exportation of goods
or services.

- (a) in the case of goods, when the taxable supply involves the goods being entered for export under the East African Community Customs Management Act and delivered to a recipient outside Kenya at an address outside Kenya; or
- (b) in the case of services, when the taxable supply involves the services being provided to a recipient outside Kenya for use, consumption, or enjoyment outside Kenya.

Provided that the exportation of services shall not include—

- (a) taxable services consumed on exportation of goods unless the services are in relation to transportation of goods which terminates outside Kenya;
- (b) taxable services provided in Kenya but paid for by a person who is not a resident in Kenya.

(2) The documentation relating to a supply required as the proof of an exportation of goods or services shall be—

- (a) a copy of the invoice showing the recipient of the supply to be a person outside Kenya;
- (b) proof of payment for the supply;
- (c) for goods, a copy of—
 - (i) the bill of lading, road manifest, or airway bill, as the case may be;
 - (ii) the export or transfer entry certified by a proper officer of Customs at the port of exit;
 - (iii) for excisable goods, the documents shall be in accordance with the provisions of the Excise Duty Act, 2015 ;
- (c) for services, such other documents as the Commissioner may require as proof that the services had been used or consumed outside Kenya.

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(3) Where the Commissioner has reasonable grounds to believe that goods treated by a registered person as exported may not have been exported—

- (a) the Commissioner may, by notice in writing, require the registered person to produce, within the time specified in the notice, a certificate signed and stamped by a competent authority outside Kenya stating that the goods were duly landed and entered for home consumption at a place outside Kenya;
- (b) the supply shall not be treated as an exportation until the certificate referred to in paragraph (a) has been provided to, and accepted by, the Commissioner.

14. (1) The documents relating to a supply required as proof of a supply of goods or services to an Export Processing Zone business or Special Economic Zone shall be—

- (a) a copy of the recipient's export processing zone licence; or Special Economic Zone licence;
- (b) a certificate signed by the recipient of the supply stating that the goods have been received and are for use in the approved operations of an export processing zone enterprise; and
- (c) for goods, the export entry duly certified by the proper officer of customs.

Documents relating to supply to an Export Processing Zone business or Special Economic Zone.

15. (1) A registered person who is a retailer or who otherwise primarily makes taxable supplies to persons who are not registered shall—

- (a) state prominently on its invoices that taxable supplies are made inclusive of tax; and
- (b) disclose prominently on its invoice that the supply is a taxable or exempt supply and, if a taxable supply, the rate of tax charged.

Tax-inclusive pricing of taxable supplies to unregistered persons.

(2) In determining the tax payable in respect of a taxable supply for which the price is quoted as inclusive of tax the following formula shall apply—

$$t \times [A / (1 + t)]$$

where—

A is the total amount charged for the supply inclusive of VAT; and

t tax rate

(3) A registered person who fails to comply with paragraph (1) commits an offence.

16. A return, application, notice, or other document to be lodged or submitted under the Act shall be lodged or submitted in accordance with the Tax Procedures Act, 2015.

Manner of submitting documents.
No. 23 of 2015

17. (1) Where a supply of goods or services is treated as a successive supply under section 12(3) of the Act for a period beginning and ending before the date on which a change in the rate of tax levied becomes effective in respect of the supply, or the date on which tax is imposed or withdrawn in respect of the supply, and the supply is treated under section 12 as having been made on or after that date, then—

Application of increased or reduced tax rate to successive supplies.

- (a) in the case of a change in the rate of tax on the change date, the rate of tax applicable to the supply shall be the rate applicable immediately before the change date;
- (b) in the case of the imposition of tax on the change date, the supply shall be treated as not being subject to tax; or
- (c) in the case of withdrawal of the tax on the change date, the supply shall be treated as being subject to tax as if the tax had not been withdrawn.

(2) When a supply of goods or services is treated as a successive supply under section 12(3) of the Act during a period beginning before and ending on or after the date on which a change in the rate of tax levied becomes effective in respect of the supply, or the date on which tax is imposed or withdrawn in respect of the supply, and the supply is treated under section 12 as having been made on or after the change date, the consideration for the supply shall, on the basis of a fair and reasonable apportionment, be treated as consisting of a part relating to the supply of the goods or services before the change date and a part relating to the supply of goods or services on or after the change date and—

- (a) in the case of a change in the rate of tax on the change date, the tax payable in respect of the first part is determined at the rate applicable before the change date and the tax payable in respect of the second part is determined at the rate applicable on the change date;
- (b) in the case of the imposition of tax on the change date, the first part is not subject to tax; and
- (c) in the case of the withdrawal of the tax, the first part is subject to tax as if the tax had not been withdrawn.

18. Subject to section 68 of the Act, the following are revoked.

Revocation.

- (a) The Value Added Tax Regulations, 1994; LN 195/1994
- (b) The Value Added Tax (Appeals) Rules, 1990; LN 229/1990
- (c) The Value Added Tax (Distraint) Regulations, 1990; LN 227/1990
- (d) The Value Added Tax Order, 2002; LN 95/2002
- (e) The Value Added Tax (Tax Withholding) Regulations, 2004; LN 53/2004
- (f) The Value Added Tax (Electronic Tax Registers) Regulations, 2004. LN 110/2004

(2) The Value Added Tax (Remission) (Official Aid Funded Projects) Order, 2003 shall continue to apply until another Regulation relating to official aid funded project is put in place.

LN 67/2003

(3) The Value Added Tax (Remission) (Low Income Housing Projects), Order 2008 shall continue to apply to a remission granted before the commencement date while the remission remains in force.

Made on the 30th March, 2017.

HENRY ROTICH,
Cabinet Secretary for the National Treasury.