

KENYA PRIVATE SECTOR ALLIANCE, KEPSA, SEPTEMBER, 2013

NOTE ON THE IMPLEMENTATION OF THE VAT ACT, 2013

Below is a summary of some key provisions, of particular interest to the Private Sector under the VAT Act, 2013

Transitional provisions:

- The new VAT Act 2013 entirely repeals the previous VAT Act. However, VAT refunds that were due under the previous Act will still be payable under the new Act.

Taxable Supply:

- This will attract a standard VAT rate of 16 per cent where it is not zero-rated.
- Hotel or restaurants required to charge 2 per cent catering levy over and above the 16 per cent VAT. This means that rates such as the 12 per cent previously charged on electricity to cushion manufacturers will no longer apply. 16 per cent is now the standard rate.
- The Cabinet Secretary can also decrease or increase the VAT rate by 25 per cent through an order in the Kenya Gazette but this must first be approved within 21 days by the National Assembly.
- Failure to secure approval within 21 days means that the order would lapse automatically. Ordinarily, Parliament would approve such proposed amendment through the Finance Bill.

Application for Registration:

- The VAT Act now requires that any business with supplies of taxable good or services with an annual value of Kshs 5 million or more must register under the VAT Act.
- Where such a person who requires to be registered does not have a fixed place of business in Kenya, he may appoint a tax representative. If the non-resident fails to appoint a tax representative within 30 days of becoming liable, the Commissioner may appoint a tax representative for the person. In the case of a group of companies owned or substantially controlled by another person, the Commissioner can allow them to be registered and treated as one person.
- The Commissioner is now empowered to register a person who is VAT liable but not registered. One becomes liable for VAT from the date one was liable – not from the date the certificate of registration is issued.

- There is no longer a requirement to display a certified copy of the VAT registration certificate in other places of carrying out business (other than the principal place of business). A mere copy will suffice.
- The VAT Act makes it an offence to hold out as registered to charge VAT, when not, and a fine of Kshs 1 million may be imposed.

Pre-registration Input VAT:

- Where a person incurs input VAT on supplies that were previously tax exempt and which are now taxable, there is a period of 3 months within which to claim relief on any tax incurred on such supplies.

De-registration:

- In view of the changes under the new Act, a person who no longer meets the annual registration threshold (taxable supplies of Kshs 5 million and over), may apply for de-registration.
- An application must be made within 30 days of ceasing to make taxable supplies but the Commissioner can also, on his own motion, de-register such a person usually upon undertaking a VAT audit.

Assessment:

- A person liable to pay VAT has the burden to prove that the VAT has been paid. Previously, the burden was upon the Commissioner.
- The grey area under the VAT Act 2013 is how to address objections on statement of facts where an assessment is objected.
- It is expected that the Tax Appeals Tribunal will handle this area once established.

Compounding of offences:

- Where one admits offence in writing to the Commissioner, the decision of the Commissioner on penalties will be final and not subject to appeal and will serve as proof of conviction and can be enforced in court as a decree.

Power to Inspect:

- No claim on privilege would bar the Commissioner from exercising the power of inspection to confirm compliance.
- In the case of a request to produce records, no privilege can be pleaded on such documents which could be problematic for those required to maintain confidentiality e.g. advocates, banks etc.
- While the Commissioner will obtain a warrant to access premises for purposes of inspection of records, where such a warrant is not secured, the Commissioner can secure the premises.

Bad debts:

- Where goods or services were supplied and tax paid on the supply yet payment not received from buyer in 3 years or the buyer has become insolvent, one may apply for a refund or remission.
- An application for refund in case of bad debts must be lodged within 5 years from the date of supply.
- Where the tax refunded is subsequently recovered from such buyer, a refund of the tax is due to the Commissioner within 30 days of recovery of the debt.

Recovery of tax:

The VAT Act 2013 grants the Commissioner wide powers to collect any outstanding tax that is due and payable through the following mechanisms:

- Seizure of goods where there are reasonable grounds to believe tax due and payable on supplies or imports has not been, and is unlikely, to be paid. Failure to pay tax due on seized goods may lead to their sale by the Commissioner
- Commissioner may levy distress on the goods for 10 days within which tax due and distress costs should be paid failing which, the goods are disposed off through public auction.
- The Commissioner may also apply to the High Court for an order against any transfer of funds pending payment of tax due.
- Charge property and make subsequent application to the Registrar of Lands to attach any land or buildings to recover tax due.

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