



Seamless tax solutions from territory to territory

CLARITY ON DIGITAL SERVICE TAX FOLLOWING THE FINANCE ACT, 2021

Prior to the enactment of the Finance Act 2021, Digital Service Tax (“DST”) was payable by both resident and non-resident suppliers of digital services and providers of a digital marketplace. Any non-resident persons providing digital services or digital marketplace to a user in Kenya is required to appoint a tax representative in Kenya to remit DST to the Kenya Revenue Authority (“KRA”).

Following the changes introduced by the Finance Act 2021, resident persons are now off the hook of DST.

DST is now chargeable to income earned by **non-resident persons** (our emphasis) from the supply of digital services or provision of a digital marketplace, except where the non-residents’ income is **subject to withholding tax** or where the non-resident person is in the business of transmitting messages via radio, cable, optical fibre, television broadcasting, internet, satellite or VSAT.

Key Considerations

Despite DST now being applicable to non-residents only, the onus of determining whether withholding tax is applicable on any payment for the supply of digital services or provision of a digital marketplace lies with the recipient of the digital services or the user of the digital marketplace.

It is therefore prudent for the recipients of digital services and/or users of digital marketplaces to establish whether or not payments for such services falls under the ambit of withholding tax.

Withholding tax is payable on the following specific payments to non-residents:

- a management or professional fee or training fee
- a royalty or natural resource income
- a rent, premium or similar consideration for the use or occupation of property

Payments for any of the above services is subject to WHT and will therefore not be subject to DST even if the same was payable.

To avoid instances where a single payment is subjected to both withholding tax and DST, it is imperative for the recipients of digital services and users of a digital marketplace to engage their tax consultants to assist in determining which of the two taxes is applicable – withholding tax or DST.

It is also important for the recipients to have a conversation with the supplier at the onset to align on the applicability of DST or withholding tax.

Highlights of DST:

- DST is only applicable on transactions that are not subject to withholding tax.
- The onus of determining which of the two (withholding tax or DST) is applicable is now shifted to the recipient of the digital services.
- Where withholding tax is applicable, the recipient of the digital service should withhold and remit the withholding tax to the Kenya Revenue Authority (KRA).
- Where withholding tax is not applicable, then DST will be applicable. In such a case, the obligation to remit the DST to the KRA is on the provider of the digital service and not the recipient of the service.

Caveat

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