

OVERVIEW OF VAT POLICY AND ADMINISTRATIVE CONSIDERATIONS FOR CONSTRUCTION INDUSTRY

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1. BACKGROUND



- Charged on supply of taxable goods or services made or provided in Kenya and on importation of taxable goods or services into Kenya.
- Registration threshold is Kshs. 5,000,000(App. \$50,000) and above within 12 months; There exists a voluntary registration mechanism despite the threshold.
- Registration is done via an online tax platform (*iTax*)
- Once registered, one is required to account for VAT charged on the taxable supplies through online monthly returns and pay any VAT due.
- The Tax is administered under the VAT Act 2013.

1. THE CONSTRUCTION INDUSTRY



The construction industry in Kenya is driven primarily by two key infrastructure sectors: transportation and building/housing.

Transport construction.

Kenya has seen extensive investment in Road, Rail, maritime and airport infrastructures. This is handled by the government through Public Private Partnerships and direct spending.



Construction in the commercial private and public real estate or buildings.

Time of Supply



- This shall be the earlier of;
 - (a) the date on which the goods are delivered, or services performed;
 - (b) ***the date a certificate is issued by an architect, surveyor or any other person acting as a consultant in a supervisory capacity;***
 - (c) the date on which the invoice for the supply is issued; or
 - (d) the date on which payment for the supply is received, in whole or in part.
- For construction projects, time of supply is effectively the date of issuance of certificate.

Value of Supply

- The value of supply of goods or services shall be the **Transaction Value**.

In the construction industry, the value of supply also includes:-

- Any amount the supplier is liable to pay, in relation to such supply but has been incurred by recipient and not included price actually paid or payable.
- Interest or late fee or penalty for delayed payment of any consideration for any supply.
- **N/B** *Where the supply of goods or services is for a consideration not wholly in money, the value of the supply is the open market value of such supply. The same also applies to related party transactions.*

Input Tax credit against output tax.

Value Added Tax (VAT)

$$\text{VAT to be paid to Government} = \text{Output VAT} - \text{Input VAT}$$



- **Output VAT** = It is a tax charged on the sale of goods. It is charged on the selling price of the goods.
- **Input VAT** = It is the tax paid on the purchase of goods. It is paid at the cost price of the goods.

Claim of input tax



Other conditions include;

- Availability of documentation. If not, then 6 months from the date of such documentation being available.
- The output tax so claimable has been declared by the supplier in their return.

- Input tax on a taxable supply to, or importation made by, a registered person is **deductible if the supply or importation was acquired to make taxable supplies.**

In some instances, some input tax claimable is prohibited. This includes;

- Acquisition, leasing or hiring of passenger cars or minibuses, and the repair and maintenance thereof including spare parts.
- Entertainment, restaurant and accommodation services

Claim of input tax

- For mixed use input tax (input tax in relation to both taxable and exempt supplies), the input tax deductible is prorated through a partial exemption formular.
- In the construction industry where taxpayers incur input tax long before the completion of the project or issuance of certificates, the law allows such to claim the input tax paid prior to registration provided that;
 - Once the person registers for VAT,the date a person is registered application for the claim is done within 3 months upon registration,
 - Supplies purchased within 24 months.

Sticky areas

- Mobilization fees are chargeable to VAT in full in line with the time of supply. This was a policy directive agreed with contractors and set out to the public.
- Retention fees is usually charged to VAT upon release as guided by Kenya Revenue Authority through Technical ruling and public notices issued in 2004
- Time of supply vs delayed payments especially by governments
- Value of supply for building and construction of developer's units. What is sold and what is not sold.
- Keeping of records especially on purchase of some raw materials (Sand, gravel etc.) and payment of wages to casual labourers.

Sticky areas

- illicit payments to Government officials to influence the award of the contracts and costs paid to process invoices and/or payment. Are sometimes treated as subcontracts and should be checked for proper treatment. These payments might also lead to inflated costs, and defrauding the project, thereby threatening its development effectiveness. Investigations have uncovered number of methods for recovering these costs,
 1. Charges for goods, works and services are inflated
 2. Goods and invoices are invoiced but never delivered or quantity greatly reduced.
 3. Contract specifications are not met but the costs are inflated.



David Mwangi Ndegwa v Kenya Revenue Authority [2018] eKLR;

- *Whether or not VAT is payable on a transaction for sale of land on which stands a commercial building!*

“The supply of the following services shall be exempt supplies- Supply by way of sale, renting, leasing, hiring, letting of land or residential premises;”

The question that falls for determination, here, is whether commercial premises are within the supply that is exempt.

- It follows that the exempt supply relates to land or residential premises. That mean exempt supply is in respect to land and residential premises.

The Constitution defines land:

- *“Land includes-*
- *a) The surface of the earth and the subsurface rock;*
- *b) Any body of water on or under the surface;*
- *c) Marine waters in the territorial sea and exclusive economic zone;*
- *d) Natural resource completely contained on or under the surface; and*
- *e) the airspace above the surface.”*

That definition applies to what is on the surface of the earth and in the air space above the surface of the earth.

Hence one cannot sell a building and not land. The law is ambiguous, and benefit goes to the taxpayer.

“What people really want is fairness. They want people paying their fair share of taxes.” Barack Obama

THE END...

...THANK YOU!

Thank
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