Clerk's Chambers

National Assembly

Parliament Buildings

P.O. Box 41842-00200

Nairobi

21 May 2020

Attention: Michael R. Sialai, EBS

Dear Sirs,

RE: Comments and Proposals on the Proposed Digital Service Tax in the Finance Bill, 2020

We refer to the Finance Bill, 2020 (the **Bill**) which has proposed to introduce a Digital Service Tax (**DST**) on income accruing from a "digital marketplace" at the rate of 1.5% of the gross transaction value.

Pursuant to the National Assembly's call to stakeholders and the general public to submit comments on the Bill by 21 May 2020, we set out below our comments and proposals on the above for your kind consideration.

Yours faithfully,

Maxwell Okello

Chief Executive Officer

For and on behalf of The American Chamber of Commerce, Kenya (AmCham Kenya)

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COMMENTS AND PROPOSALS IN RELATION TO THE PROPOSED DIGITAL SERVICES TAX

1 Executive summary

1.1 The Finance Act, 2019 amended the Income Tax Act, Chapter 470, Laws of Kenya (the **ITA**) to introduce the definition of a "digital marketplace" as "*a platform that enables direct interaction between buyers and sellers of goods and services through electronic means*." Further, the ITA was amended to include the Cabinet Secretary's authority to prepare regulations to provide for the implementation of the digital services tax (**DST**).

1.2 Subsequently, the Finance Bill, 2020 (the **Bill**) has proposed to introduce a rate of DST at 1.5% of the gross transaction value. As of the moment, the Cabinet Secretary has not published any regulations to govern this tax.

1.3 Based on extensive discussions with our Members who stand to be impacted by DST, there are a number of serious concerns that have been identified and our view is that Parliament should shelve the proposed introduction of DST in the interim, pending further engagement with stakeholders, detailed amendments to the law to clarify the scope of DST and also pending the outcome of on-going global discussions which are being led by the Organisation for Economic Cooperation and Development (the **OECD**). We have narrowed down these concerns as follows:

1.3.1 Introduction of DST will create complex and multiple taxation regimes as a result of the existing taxes being applicable together with the DST;

1.3.2 Ambiguity in the definition of a "digital marketplace" which would create uncertainty and eventually, unwarranted disputes with the KRA;

1.3.3 Lack of clarity on the income to be subject to the DST and whether this includes goods and services;

1.3.4 The proposed tax rate of 1.5% which is not justifiable based on the size of the digital services sector as well as the Kenyan GDP;

1.3.5 Inequity caused by a blanket application of the tax without providing for thresholds;

1.3.6 Lack of incentives and tax shields for start-ups, low margin businesses and loss-making entities, that will inhibit entrepreneurship and investment in the digital economy;

1.3.7 Lack of clarity on the type of agents who can be appointed by the KRA for the collection of DST;

1.3.8 VAT, WHT and CIT are already applicable to income derived from the digital marketplace as it stands. Having the DST in place poses the risk of burdening taxpayers with numerous taxes, unless DST is designed to replace all taxes currently applicable to income derived from the digital marketplace.

1.3.9 The effective date of commencement of the DST which does not provide adequate time for KRA and businesses to recover from the Covid-19 Pandemic and restructure their ERP systems. Further, the introduction of the DST would be premature considering the

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ongoing international efforts at the UN and OECD to design a globally acceptable DST regime and Kenya's ongoing trade negotiations with the USA;

1.3.10 Various administrative challenges relating to DST; and

1.3.11 Proposal to deal with key aspects of DST through regulations which are likely to change the scope of DST without the same amount of Parliamentary scrutiny as is the case with legislation.

1.4 Having considered the above concerns, which we discuss in detail in the ensuing pages of our submissions, it is pre-mature for a DST regime to be introduced in Kenya at this stage as there are a number of legislative changes which would need to be made to the proposed legislation, which threatens the success and growth of the digital services sector and potentially further erodes a tax base already significantly threatened by the Covid19 Pandemic. In this regard, we propose that the National Assembly defers the proposed commencement date of DST to provide an opportunity for a collaborative policy development process with the private sector and multilateral efforts to be finalised, over the course of the 2020/21 financial year.

1.5 Consequently, and being cognizant of the need to expand the tax base and to enhance tax revenues, we propose as an interim measure for taxation of the digital economy, a **"simplified VAT registration and compliance regime"** which would allow non-resident entities without a physical presence in Kenya to register for and charge VAT without creating a local presence (similar to the electronically supplied services (ESS) regime in South Africa and the European Union (EU) which has been very successful). This model would generate more tax revenues for the Government as compared to the proposed DST, will create equity between local and non-resident entities and will be less complex to administer. We have discussed this model in more detail at **section 3** of this document.

1.6 In Africa, several countries have introduced similar regimes which have been successful, as set out in the table below:

Country	Extraterritorial VAT applicable
South Africa	15%
Angola	14%
Algeria	9%
Cameroon	19.35%
Nigeria	7.5%[1] (Increased from 5%)

[1] Introduced by the Nigeria Finance Act, 2019 in January 13 2020. If significant economic presence is established, CIT is also applicable.

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2 Our considered views on the Bill and suggested proposals

2.1 We have reviewed the proposed amendments which are expected to be included in the Finance Act, 2020 and have highlighted the concerns listed above. We elaborate further below.

2.2 Consideration of an extraterritorial VAT regime over a DST regime

2.2.1 We understand that a policy objective justifying a change in regime is that the existing application of corporate tax rules to businesses operating in the digital economy has led to a misalignment between the place where profits are taxed and the place where value is created. Many of these digital businesses derive value from their interaction and engagement with a user base. Having the most effective tax regime is therefore of utmost importance and it is important for Kenya to consider what is best for the economy of Kenya without rushing to make premature decisions without further consulting the businesses concerned.

2.2.2 Further, the introduction of DST might result to double taxation for players in the digital economy who are already subject to a myriad of taxes (such as excise duties, withholding tax, VAT, turnover tax and corporate income tax). Non-resident companies in the digital economy also stand a substantial risk of double taxation especially bearing in mind that Kenya has a limited network of double tax treaties and in any event, DST is not one of the taxes contemplated by the double tax treaties.

2.2.3 We would like to highlight the fact that the President launched a Digital Economy Blueprint Policy (the **Policy**) whose vision is "*A digitally empowered citizenry, living in a digitally enabled society*" indicating the Government's desire to spur growth in this area.

2.2.4 The Policy acknowledges that there is a legislative gap that needs to be addressed in relation to the digital economy and that tax policies will need to be adapted accordingly. Specifically, the Policy in Chapter 8 provides that "*while some governments are looking to digital service providers as a means of collecting taxes, for example, by taxing internet data communication, mobile money transactions or social media use; care must be taken to avoid unintended consequences arising from tax policies on entrepreneurs, small businesses and the poorest members of society*." We believe that the mandate to encourage a digitally enabled society, as inspired by the President, should be nurtured and unintended consequences should be prevented to the extent possible.

2.2.5 VAT, WHT and CIT are already applicable to income derived from the digital marketplace as it stands. Having the DST in place poses the risk of burdening taxpayers with numerous taxes, unless DST is designed to replace all taxes currently applicable to income derived from the digital marketplace. This subsidiarity is not visible in the currently proposed draft.

2.2.6 Kenya should, therefore, consider the adoption of a simplified VAT registration and collection regime to bring to tax non-resident players with no physical presence or permanent establishment in Kenya. The VAT amendments can be achieved through the issuance of regulations pursuant to the provisions of the VAT Act. The Cabinet Secretary for the National Treasury is empowered to issue VAT regulations pursuant to section 67

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of the VAT Act and such regulations must be tabled before the National Assembly for approval before they take effect. These regulations can come into force in the course of the next financial year (2020/2021).

2.2.7 We have set out below the key issues which should be addressed in the regulations:

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3 Key principles for the proposed Extra-territorial VAT regime:

Proposed Measure	Comment
Determining who is a supplier and customer	That taxation should be limited to the Business to Consumer (**B2C**) supplies of digital services/transactions. A non-resident enterprise should be entitled to presume that a supply is Business to Business (**B2B**), and not charge VAT, if the non-resident enterprise receives, or has previously received, a VAT registration number from the customer, or if the customer represents that the customer has a VAT registration number. This is on the understanding that VAT-registered persons will account for VAT on the imported services through the reverse charge VAT mechanism and is in line with global best practice. No verification of customer-supplied information should be required. Penalties for not charging VAT based on incorrect customer-supplied information should be imposed solely on the customer.
Simplified VAT regime	A simplified registration and collection regime should operate separately from the traditional registration and collection regime, without the same rights (e.g. input tax recovery) and obligations (e.g. full reporting) as a traditional regime. Under the simplified regime, the KRA will need to determine the scope of this simplified regime, i.e. it must determine the categories of supplies for which VAT will be remitted under the simplified regime as distinguished from the other categories for which the traditional regime would continue to apply. Our proposal is for the supplies to be limited to Electronic Supplied Services, as set out in section 8(3) of the Value Added Tax Act, 2013.
Simple registration procedure	Simple registration procedures will be an important incentive for non-resident suppliers to register and charge VAT. The information to be requested during the registration process could be limited to necessary details, which could include: name of the business, including the trading name; Name of the contact person responsible for dealing with tax administrations; Postal and/or registered address of the business and its contact person; Telephone number of the contact person; Electronic address of contact person; Websites or URL of non-resident suppliers through which business is conducted in the taxing jurisdiction; and National tax

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	identification number if such a number is issued to the supplier in the supplier's jurisdiction to conduct business in that jurisdiction.
Local Agents or Tax Representatives	There have been proposals that the KRA should be allowed to elect a local agent or tax representative to assume the compliance burden on behalf of non-resident suppliers. The requirement to appoint such a representative may be motivated by a range of policy considerations such as easier access by KRA to accounting and tax documentation. A mandatory requirement to appoint a local tax representative is not receommended and we have discussed the potential challenges and our reccomendations at section 4.5.
Platforms and intermediaries	Enterprises which host a platform through which third parties can transact should not be treated as the supplier (for example, Mpesa, Visa etc.). In the case of sales through platforms, the indirect tax obligation should be imposed on the enterprise which, as a matter of the applicable contracts, is the supplier to the consumer. Platform operators should, however, be allowed to elect to assume the compliance obligation on behalf of some or all of the non-resident suppliers whose goods or services are made available through such platforms.
Invoicing	The non-resident supplier **should not** be required to issue formal VAT invoices to local customers. This is to reduce the compliance costs which would be incurred if the non-resident supplier was required to amend its invoicing system to comply with the requirements of the VAT Act. It should be noted that the invoicing systems already in place would usually capture most of the invoicing requirements under the VAT Act.
Refund of VAT	Ordinarily, where a registered person has made a supply and has accounted for and paid tax on that supply, but has not received any payment from the person liable to pay the VAT, the person may, after a period of three years from the date of that supply or where that person has become legally insolvent, apply to the Commissioner for a refund of the tax involved and subject to the regulations, the Commissioner may refund the tax. This process may be onerous to a non-resident supplier. Therefore, to avoid non-resident suppliers claiming VAT refunds on account of paying VAT on an accrual basis, non-residents should be given the option to account for VAT either on a cash or on an accrual basis. This means that non-resident suppliers will have the option to account for VAT on their cash sales or at the point of receiving payment on their credit sales and submit the VAT to the KRA at that stage. At this point, VAT will have already been paid by the customer and therefore no VAT refunds would be claimed due to bad debts.

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Record keeping	The supplier should not be required to maintain books and records in Kenya. The regime should avoid unusual administrative burdens, such as requiring the non-resident enterprises to post security, pay for auditors to travel to the enterprise's jurisdiction, or maintain books and records in any form other than what is required in the enterprise's home jurisdiction.
Remittance	The supplier should not be required to maintain a local bank account. Remittances should be allowed in either in Kenya Shillings or the currency in which the sale is invoiced.
Online filing of returns	As requirements for VAT returns differ widely among jurisdictions, satisfying obligations to file tax returns in multiple jurisdictions is a complex process that often results in considerable compliance burdens for non-resident suppliers which includes a change in the accounting system and training of their staff. KRA should consider allowing non-resident businesses to file simplified returns, which would be less detailed than returns required for local businesses that are entitled to input tax credits. In establishing the requirements for information under such a simplified approach, it is desirable to strike a balance between the businesses' need for simplicity and the tax administrations' need to verify whether tax obligations have been correctly fulfilled. This information could be confined to: a. Supplier's registration identification number; b. Tax period; c. Currency and, where relevant, the exchange rate used; d. Taxable amount at the standard rate; e. Taxable amount at reduced rate(s), if any; and f. Total tax amount payable. The supplier should be able to file its return online via iTax.
Thresholds	Any collection obligation should be subject to a reasonable registration threshold based on actual prior sales in Kenya. The threshold should achieve an appropriate balance between the amount of tax raised compared to the administrative costs imposed on both the taxpayer and the tax administration collecting the tax. The current VAT registration threshold of KES. 5 million could be retained in this regard.

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Effective date and grace period	To allow non-residents the necessary time to configure their systems to automate compliance for large volumes of small transactions, the new legislation should allow a grace period of at least 1 year prior to the effective date of the new regime.
No creation of a permanent establishment	For entities without a permanent establishment, there is a need for alternative tax mechanisms to allow them to pay taxes on the revenues derived from Kenya. The legislation should expressly state that a non-resident which registers to report VAT on the remote sale of digital goods or services does not create a permanent establishment for income tax purposes.

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4 Key concerns in relation to the proposed DST regime

4.1 Ambiguity in the definition of a "digital marketplace"

4.1.1 The definition of a ''digital marketplace'' under the ITA envisages the interaction of buyers and sellers of goods and services on a platform made possible through electronic means. The definition does not clarify key elements such as what constitutes a ''platform'' as well as ''electronic means'' and may result in financial transactions being subject to the scope of DST as an unintended consequence, which would be against international best practice (for example, the UK DST regime specifically excludes financial transactions). In addition, the nature of the interaction between the buyers and the sellers of goods and services is not elaborated and may be too broad to guarantee clarity on what is meant by "*digital marketplace"*.

4.1.2 Based on international best practice, we would recommend that the definition of the term *''digital marketplace''* is replaced by a new definition as follows: *digital marketplace* means "*an online service whose main purpose, or one of the main purposes is to facilitate the sale or hiring by users of particular services, goods or other property; and, the service enables users to sell or hire particular services, goods or other property to other users, or to advertise or otherwise offer particular things for sale or hire to other users*".

4.1.3 To ensure that online financial transactions (including transactions undertaken by banks) are excluded from the scope of DST, which is key as Kenya is a thriving FinTech hub and is in line with global best practice, an exclusion of "digital financial marketplace" should be introduced through a definition of the term, to read as follows *''digital financial marketplace* means *''an online service which facilitates payments, lending, the trading of financial instruments, commodities or foreign exchange''.* These financial services will then be excluded from the scope of DST in the charging section under the ITA.

4.1.4 The diversity of interactions through electronic means is seen by the varying nature of services offered by various digital service operators such as those engaged in the provision of a platform that brings about the buying of goods (for example, Jumia and Kilimall), the hiring of goods (for example, Pigiame, Dingah and Jumia Deals), the sale of services (Fundi App) and those that allow individuals to rent out their properties (Airbnb, TripAdvisor and Booking.com). The proposed definitions set out above would capture the diversity of digital interactions for tax purposes.

4.1.5 Taxation laws are required to be certain, unambiguous and simple for all taxpayers to understand their entitlements and obligations. Kenya should strive to have a clear definition of what a digital marketplace that contemplates the various interactions that may present themselves through electronic means.

4.2 Proposed tax rate of 1.5%

4.2.1 As countries around the globe consider the taxation of the digital economy, we believe that it is pre-mature for Kenya to introduce DST measures at this stage where most businesses have been affected significantly by the adverse economic climate. Further, in

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light of the onset of the COVID-19 pandemic which has upended local and global economies alike, we strongly caution against any form of tax that would threaten to further derail economic growth and efforts to deepen trade and investment, particularly as Kenya works towards improving its attractiveness to investors.

4.2.2 We, therefore, note that the proposal to charge DST at 1.5% of the gross transaction value is too high a rate for the players in the digital economy especially in Kenya where the digital economy is at the development phase.

4.2.3 While it may be argued that this rate is low compared to other jurisdictions which have implemented the DST at 3% or even higher, in making this argument, it has been conveniently overlooked that these high rates have been applicable in tandem with an imposed minimum threshold and various overriding factors such as much higher GDP as compared to Kenya. We have provided some examples below:

Country	Gross Domestic Product (Per Capita)		Human Development Index (HDI)	Digital Services Tax (DST) rate
	USD	KES (Approx.)		
Kenya	2,029	216,900	0.59	**1.5%** (No threshold proposed).
Austria	53,482	5,717,226	0.908	**5%** - Advertising services only. DST is only applicable where the entity has a global turnover of EUR 750 million (approx. KES 88 billion) and a local turnover of EUR 25 million (approx. KES 2 billion).
France	44,062	4,710,228	0.901	**3%** (similar thresholds as Austria)
Italy	34,575	3,696,068	0.88	**3%** (domestic threshold of EUR 5.5 million (approx. KES 600 million)
United Kingdom	43,118	4,609,314	0.922	**2%** (On global turnover exceeding £500 million (approx. KES 65,494,980,650) and a UK digital services revenues of more than £25 million (approx. KES 3 billion). *This means a group's first £25 million (approx. KES 3 billion) of revenues derived from UK users will not be subject to DST.*

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4.2.4 Based on the sampled jurisdictions above, it is clear that the higher rates of the DST are applicable where there is a minimum threshold in order to protect small and medium-sized businesses.

4.2.5 We would also re-emphasise that none of the countries in Africa have a DST regime which is comparable to the DST regime proposed for Kenya. Across the Continent, only Tunisia, Zimbabwe and Nigeria have introduced or plan to introduce an income tax based DST regime and even then, the scope of the tax, as well as the principles behind the tax, are very clear as the tax is only intended to bring non-resident entities into the tax bracket. Which can be better achieved with a non-resident VAT regime.

4.3 Introduction of a DST threshold

4.3.1 As currently drafted, the DST provision is applicable to all businesses and the tax is payable at the time of payment for the services. This does not take into consideration the nascent nature of the digital economy in developing countries and particularly in Kenya where many digital businesses are considered "start-ups" and have not yet become profitable. According to a recent study, the digital marketplace is only worth roughly KES 30-35 billion with approximately 100,000 to 200,000 companies.[2]

4.3.2 Further, the Finance Act, 2019 reintroduced turnover tax which is now applicable at the rate of 1% on the gross revenue payable by a resident person whose business revenue does not exceed KES 5 million (approx. USD 50,000) during a year of income. This provision has further been amended by the Tax Laws Amendment Act to provide for the turnover threshold of KES 50 million (from the initial upper limit of KES 5 million). This means that small-scale resident businesses or "start-ups" with a turnover of between KES 1 million to KES 50 million are now eligible to turnover tax at 1%. It is not clear whether the DST will be offset against this tax or whether it will be an additional tax.

4.3.3 The OECD Base Erosion and Profit Shifting Project (the OECD BEPS) Action Point 1 "**Addressing the tax challenges arising from digitalisation**", recommends having a threshold for the application of the DST once it has been met. It is encouraged that Kenya adopts a DST threshold as opposed to the blanket application of the DST. This will take into consideration Kenya's unique economy and the nascent nature of numerous digital businesses in the Kenyan market.

4.3.4 In this regard, we propose that businesses that have an annual gross turnover of less than KES 50 million be exempt from DST, on the basis that entities which are below this threshold would, in any event, either be taxable under the turnover tax regime or would opt-out from the turnover tax regime and apply the corporate tax regime. This will also shield small businesses from the complex nature of DST and the potential of being subject to multiple layers of taxation.

4.4 Exemption from DST for new businesses

[2] Taxation of the Digital Marketplace in Kenya: A Private Sector Perspective, Draft Presented to KRA Commissioner for Strategy Innovation & Risk Management on December 10th 2019.

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4.4.1 Requiring start-up companies and new businesses operating in the digital sector to be subject to DST from the on-set (currently envisaged from 1 January 2020) may have far-reaching implications on the business since this increases the cost of offering goods or services to their customers making them unattractive and might deter them from innovating and engaging in the rendering of digital services. This is also the case for non-resident companies that have launched their businesses in Kenya. Taxing their gross operations immediately they commence operations in Kenya may result in them being uncompetitive in Kenya, which would act as a deterrent to further foreign direct investment in Kenya's digital economy.

4.4.2 Borrowing from the UK DST regime, a business will only be subject to DST in the UK when the group's worldwide revenues from these digital activities are more than £500 million and more than £25 million of these revenues are derived from UK users. The element of threshold here is to the effect that there is an allowance of £25 million, which means a group's first £25 million of revenues derived from UK users will not be subject to DST.

4.4.3 To incentivise start-ups and new businesses to engage in rendering digital services, we propose that an exemption from DST is considered for at least the first three years of operation, to allow start-ups and new business to scale up operations significantly before they are subject to the DST regime.

4.5 Exemption from DST of payments and financial services

4.5.1 The DST provisions in the Finance Bill currently do not provide sufficient clarification on the precise definition of a digital service, setting out criteria, or specification of those entities which would fall within the scope of the tax. However, best practice indicates that that financial and payments services are excluded from the scope of DST in jurisdictions where taxation of digital services is either being considered or has been implemented.

- United Kingdom: Services covered under the DST currently being considered have been very clearly defined to exclude financial and payments services. Digital services are defined to cover provision of users with search engine, online marketplace, or social media services (including associated advertising).
- France: The business activities falling within the scope of the DST are the supply of a digital platform allowing users to interact with other users, in order to facilitate the direct provision of goods or services between users; and the supply of services to advertisers which aim at placing on a digital platform targeted advertising content generated by personal data collected on digital platforms. Regulated payment services supplied on a digital platform are not deemed taxable. Specifically, where the digital interface is used to manage specific regulated financial systems and processes such as payment settlement, the supply of the digital platform is not taxable.
- Italy: Digital interfaces to manage Interbank or financial instruments' settlement systems, as well as other connecting systems, the activity of which is subject to authorization, and the performance of services upon which is subject to an authority's supervision, are excluded from the scope of application of digital service taxes.

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4.5.2 It would be beneficial to follow global best practices in defining sectors not subject to DST. Payments, settlement and associated services provided in support of the financial service sector are typically excluded from the scope of the DST, especially as they already fall under the strict regulatory purview of additional supervisory authorities such as the central bank. The scope of the DST should be articulated to reflect this exemption.

4.6 Undesirability of the tax agent system

4.6.1 The Bill proposes to amend the Tax Procedures Act, 2015 to give powers to the KRA to appoint agents for purposes of collection and remittance of DST. Such agents could be payment service providers and banks but the provision, as currently drafted, is very broad and there is no clarity as to who the tax representatives could be in respect to accounting and remittance of the DST.

4.6.2 While the requirement to appoint such an agent may be motivated by a range of policy considerations such as easier access by KRA to accounting and tax documentation, the mandatory nature of such an appointment may result in unintended consequences, particularly if banks and payment service providers are given a mandatory obligation to account for tax, without compensation for the additional administrative burden.

4.6.3 The KRA is also likely to require non-resident persons without a permanent establishment in Kenya to appoint a tax representative, pursuant to the provisions of the Tax Procedures Act. This requirement for the mandatory appointment of a tax representative is likely to result in various challenges, as set out below:

(a) Foreign suppliers facing the obligation to appoint such a person in Kenya may decide to restrict their trade with Kenya or inadvertently fail to comply with the applicable rules, particularly when sales for relatively low amounts and/or with relatively small profit margins are involved.

(b) For a small business with a modest turnover, the cost of maintaining a fiscal representative in Kenya may be disproportionate to the revenue it derives from Kenya, particularly in cases where the fiscal representative shifts the financial risks of non-compliance to the foreign supplier by requiring it to post-security.

(c) Suppliers may also have significant difficulties in engaging a representative that would be willing to assume such a role in cases where (s)he would be solely or jointly liable for any tax liability of the foreign supplier.

4.6.4 It is, therefore, the case that a mandatory requirement to appoint a tax representative or for KRA to appoint a tax agent for non-residents may not be ideal. To achieve flexibility and enhance the ease of doing business in Kenya, digital marketplace operators should be given the option to elect to register, compute and pay their taxes on iTax or to appoint a local tax representative or agent should they opt to do so.

4.7 Deferring the effective date of the DST from 1 January 2021 to July 2021

4.7.1 The proposed date of 1 January 2021 does not provide sufficient time for digital marketplace operators to make the necessary adjustments to cater for the DST and to

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ensure compliance. Business need not only certainty from the promulgation of implementation regulations, but need the time to set up systems to implement any new form of tax.

4.7.2 Furthermore, the regulations that would be key to implement the taxation of the digital marketplace are yet to be published and legislated in Parliament as is the legal process required to enact regulations.

4.7.3 Kenya is currently party to ongoing multilateral efforts at the UN and OECD to develop a consensus-based solution to the taxation of the digital economy. In addition, Kenya is also currently engaged in trade negotiations with the USA on a Free Trade Agreement and with partners in the AU looking to operationalise the Continental Free Trade Agreement. The imposition of a DST would be premature and would inhibit Kenya's role in the multilateral processes and make trade negotiations more problematic.

4.7.4 It would, therefore, be beneficial to defer the effective date of the DST as this would provide ample time to the digital marketplace operators and the KRA to make the necessary adjustments without which, it will not be possible to implement the DST and ensure alignment with Kenya's economic policy objectives and the ability to attract international investment.

4.8 Administration challenges of the DST

4.8.1 The proposed Section 12E of the Bill does not provide for the point when payment is to be made to the KRA in respect to the DST but merely states that the tax is *''due at the time of transfer of the payment for the service to the service provider''* . Further, the Bill provides for a form of advance tax for resident persons and non-resident persons with a permanent establishment in Kenya as they will be able to offset the DST paid against their total tax due for a year of income.

4.8.2 There are a number of issues which are unclear, for example:

(a) whether withholding tax obligations (especially for non-resident persons) would still be applicable on such income;

(b) modalities for collection and payment of the tax, especially where multiple transactions are undertaken on a daily basis (yet the tax is required to be paid upon ''transfer of payment for the service'');

(c) whether the DST will be a monthly tax payable by the 20th day like VAT and withholding tax;

(d) whether it will be payable in four equal instalments like the income tax; or

(e) whether it will be payable annually.

This, therefore, results in uncertainty as to when remittance of the DST will be required, which is a key prerequisite for compliance.

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4.9 Based on the key issues identified above, we have proposed a number of proposed amendments to the proposed legislation , as set out below:

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5 Summary of proposed amendments and justifications in relation to DST

Below are the proposed amendments and justifications:

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#	Particular	Justification	Proposed amendment
1.	Section 3 (2) of the Income Tax Act as amended by the Finance Act, 2019 by inserting the following new paragraphs immediately after paragraph (c) – **(d)** ***income accruing through a digital marketplace.***	The digital marketplace is defined under section 3 (3) *(ba)* of the Income Tax Act to mean *"digital marketplace" means a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means.* This definition is ambiguous since it does not recognise the diverse nature of digital platforms and the variety of transactions as well as the scope of transactions which should be excluded from the scope of DST. Ensuring clarity in the key definitions will reduce the likelihood of future tax disputes with the KRA. In addition, international best practice is to exclude online financial transactions (including transactions undertaken by banks and other financial service providers) from the scope of DST, which is key as Kenya is a thriving FinTech hub and in any event, since most of these services are regulated and are offered by entities with a physical presence in Kenya, such income is already within the tax net.	We would recommend that the definition of the term ***"digital marketplace"*** under section 3(ba) of the Income Tax Act is replaced by a new definition as follows: ***"digital marketplace"*** means ***"an online service, other than a digital financial marketplace, whose main purpose, or one of the main purposes is to facilitate the sale or hiring by users of particular services, goods or other property; and, the service enables users to sell or hire particular services, goods or other property to other users, or to advertise or otherwise offer particular things for sale or hire to other users"***. The term "digital financial marketplace" should be defined as a new section 3 (bb) of the Income Tax Act, to read as follows ***"digital financial marketplace*** means ***"an online service which facilitates payments, lending, the trading of financial instruments, commodities or foreign exchange"***.

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2.	Section 12E of the Income Tax Act *(1) Notwithstanding any other provision of this Act, a tax to be known as digital service tax shall be payable by a person whose income from services is derived from or accrues in Kenya through a digital market place:* *Provided that a resident person or non-resident person with a permanent establishment in Kenya shall offset the digital service tax paid against the tax payable for that year of income.*	The introduction of DST under Section 12 E of the Income Tax Act has not proposed revenue thresholds for businesses as recommended by the OECD and in line with global best practice. We propose that the DST is aligned to the turnover tax threshold so as not to subject such businesses to both DST at 1.5% on gross revenue and turnover tax at 1% on gross revenue. The DST threshold will also protect lower-income businesses which will only be subject to turnover tax or the corporation tax regime.	We propose to amend Section 12 E as follows: *Notwithstanding any other provisions of this Act, a tax to be known as digital service tax shall be payable by a person whose income from the provision of services is derived from or accrues in Kenya through a digital marketplace and exceeds* ***Kenya Shillings 50 million in a year of income.***

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	Section 12E(2) of the Income Tax Act requires clarity as to the administration of the DST. *(2) The tax payable under subsection (1) shall be due at the time of the transfer of the payment for the service to the service provider*	There is a need to provide certainty to the taxpayer as to when the DST is to be remitted. Since most of the companies that are subject to DST are non-resident companies, we propose for ease of administration, DST is remitted to KRA on a quarterly basis. The corporate tax instalment regime could be adopted so that the tax is due every 20th day of the 4th month, 6th month, 9th month and 12 month to KRA.	We propose to amend Section 12E(2) of the ITA to read as follows: ***"The tax payable under subsection (1) shall be due on or before the 20th day of the fourth month, the sixth month, ninth month and the twelfth month of a year of income.*** *".*
8.	Commencement date The Bill proposes a commencement date of 1 January 2021 for the DST.	The proposed date of 1 January 2021 does not provide ample time for businesses affected by the DST to make the necessary system and compliance adjustments to cater for the DST and to ensure compliance. Furthermore, the Regulations that would be key to implement the taxation of the digital marketplace have not yet been published. It is also critical that Kenya waits for the conclusion of international discussion from the UN and OECD that could be concluded and a consensus arrived towards the end of 2020 before implementing any DST measures.	We propose that the commencement be deferred to 1 July 2021 at the earliest.

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9.	Exemption from other taxes provided for under the Income Tax Act.	It is important that clarity be provided that businesses that are subject to DST shall not be subjected to other taxes under the Income Tax Act and will ensure that non-residents who are unlikely to recover the DST paid in Kenya, will not be subject to additional taxes in Kenya such as withholding tax.	We propose an amendment of Section 12E of the Income Tax Act to read as follows: *(1) Notwithstanding any other provision of this Act, a tax to be known as digital service tax shall be payable by a person whose income from services is derived from or accrues in Kenya through a digital market place:* *Provided that:* *(i) a resident person or a non-resident person with a permanent establishment in Kenya shall offset the digital service tax paid against the tax payable for that year of income; and* ***(ii) a non-resident person without a permanent establishment in Kenya subject to digital services tax shall not be subject to any other tax under this Act.***

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6 Conclusion

6.1 We are confident that these recommendations will contribute to a sustainable digital tax regime in Kenya that will contribute to the mission encapsulated in Digital Economy Blueprint of "A nation where every citizen, enterprise and organization has digital access and the capability to participate in the digital economy". This is a mission that is now even more important as digital marketplaces, services, goods and jobs will be a critical factor driving a post-Covid-19 economic recovery.

6.2 In light of this, it is critical that Kenya continues to provide an enabling policy environment that will encourage growth in the digital economy. Thus, tax measures and their impacts should be carefully considered before their imposition, as suggested in the submissions contained above.

6.3 AMCHAM and its members wish to express their appreciation to the Committee for its consideration of these submissions and, should the Committee require, are ready to further explain these recommendations to the Committee.

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