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Dear Sirs,

**PUBLIC PARTICIPATION ON THE INCOME TAX (DIGITAL SERVICE TAX)
REGULATIONS, 2020**

	Area of Concern	Recommendation by 
1.	Definition of 'Digital service'	<p>The Regulations define 'digital service' to mean any service that is delivered or subscribed over the internet or other electronic network where the delivery of the service is essentially automated. The definition is insufficient and there is a need to include various digital services. The drafters could perhaps provide for the different digital services in two classes as follows:</p> <ol style="list-style-type: none">1. digital intermediary services which are services that allow users through a digital interface to interact with each other in order to;<ol style="list-style-type: none">a. conduct transactions between them or;



		<p>b. network without being able to proceed with transactions.</p> <p>2. Targeted advertising services which are services either marketed to advertisers or their agents, advertising messages placed on a digital interface or messages targeted on user data.</p>
2.	Scope of Taxable Services, Regulation 3	<p>The Regulations have provided for the digital services that are subject to digital service tax and included the following words <i>‘any other service provided through an online digital or electronic platform’</i>. However, there is no clarity as to whether advertising services provided for in a digital platform are subject to this tax as the same is a major source of income for digital service providers.</p>
3.	Digital Service Tax, Regulation 4	<p>The Regulation in paragraph (2) uses the permanent establishment concept in proving for the offsetting of the tax against the tax payable for a year’s income. This approach will pose a challenge to the government in generating additional revenues as its main target for imposing this tax. This is because the concept of a permanent establishment in Kenya is ,mainly based on an entity being physically present or having a physical representative in the country and as such many entities/ digital marketplace providers and digital service providers may interpret the same as a way of being excluded from the tax if they have not established permanent establishment in the country.</p> <p>It is our considered view that the best approach would be to use the significant economic presence (SEP) principle to determine the revenue of digital marketplace providers and digital service providers. The principle entails determining whether an entity has performed significant</p>



		economic activities and generated taxable income within a given jurisdiction.
4.	General applicability of the Act	<p>1. The regulations are ambiguous on which category of traders will be taxed. Will digital traders who sell low value goods also be taxed? Do they earn enough revenue to be taxable? Will start-ups and multinational corporations be taxed equally? Will residents and non-residents be taxed equally? There should be due consideration on the turnover of digital traders. This would help balance the scales between high earners and low earners.</p> <p>For instance, the European Union has mitigated this by having a turnover threshold which prescribes the amount of revenue of the business which can be taxable. The worldwide revenue threshold is EUR 750 Million while the turnover threshold for EU taxable revenues is EUR50 million. Kenya should consider adopting a similar approach.</p> <p>2. There is apparent foreseeability of double taxation especially on digital traders who are in the business of selling goods There is taxation when procuring the goods and taxation on the revenue collected on the sale of goods. There should be a consensus on how to tax such traders.</p>

We are available to clarify and deliberate further on the contents of our letter.

Yours faithfully
TRIPLEOKLAW ADVOCATES LLP

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