

Transfer Pricing: The Nigerian Perspective

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Abstract

Transfer pricing is a result of globalization and international trade. The tax authorities in virtually all major countries are focused on transfer pricing as a mechanism for preventing tax avoidance and as a means of ensuring that a reasonable basis is employed to identify and extract economic benefits of business operations in their jurisdictions. Over the last decade, Nigeria has experienced tremendous increase in the establishment of Multinational Companies. While this is good for the development of the Nigerian economy, there is also the need for the Government to ensure that prices of intra-company transactions are set at the right prices and that transfer pricing is not employed as a tool of tax avoidance. To avoid mis-pricing and potential loss of tax revenue, the Nigerian Government enacted the Income Tax (Transfer Pricing) Regulations 2012 which adopted the OECD model on Transfer Pricing. This article will therefore attempt to examine, appraise and highlight the major provisions of the Income Tax (Transfer Pricing) Regulations 2012 and make appropriate recommendations. The significance of this article is that it will educate corporate taxpayers in Nigeria and foreign investors as well as their advisors on the new transfer pricing legislation.

Keywords: Taxation, Transfer Pricing, Nigeria, OECD model

1.0 Introduction

Transfer pricing is the general term for the pricing of cross-border, intra-firm transactions between related parties. Transfer pricing therefore refers to the setting of prices for transactions between associated enterprises involving the transfer of property or services².

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²United Nations Department of Economic & Social Affairs (2013). Practical Manual on Transfer Pricing for Developing Countries (ST/ESA/347) New York (Chapter 1)

These transactions are also referred to as “controlled” transactions, as distinct from “uncontrolled” transactions between companies that are not associated and can be assumed to operate independently (“on an arm’s length basis”) in setting terms for such transactions³. Transfer Pricing is further defined as “the price charged by one segment of an organization for a product or service supplied to another segment of the same organization; the charge assigned to an exchange of goods or services between a corporation’s organizational units”⁴. Transfer pricing is also defined as “the setting of prices for intra-group or company transfer of goods and services”⁵ Transfer pricing refers to the amount charged in cross-border transactions between affiliated legal entities.

These transactions may involve the transfer of tangible goods, intangible property such as technology or brand names, services or financing. Tax authorities are therefore interested in the methods Companies use to set their transfer prices since the prices directly impact the taxable profits of each entity involved⁶.

2.0state of Affairs Before the Enactment of Income Tax (Transfer Pricing) Regulations 2012

Prior to 2012, there was no special transfer pricing rules in Nigeria. However, there have always been general anti-avoidance rules (GAAR) in tax legislations in Nigeria for many years.

Specifically, Section 17 of the Personal Income Tax Act 2004⁷, Section 22 of the Companies Income Tax Act (2004)⁸, and Section 15 of the Petroleum Profits Tax Act (2004)⁹ all provide for the adjustment of any transaction which is deemed to produce a result artificially reducing taxable income in Nigeria.

³See Ibid

⁴Black’s Law Dictionary (2009) (9th Ed.), West Publishing Co.) Page 1309

⁵Jonathan Law and John Smullen (2008). Transfer pricing, A Dictionary of Finance and Banking. (Syndicated edition for Institute of Scientific and Technical Communicators) Oxford University Press.Oxford Reference (Online).available at <http://istc.oxfordreference.comentry?entry=t20.e3871>

⁶KPMG GLOBAL TRANSFER PRICING SERVICES (2011):Global Transfer Pricing Review (Online) Available:<http://www.kpmg.com/Global/en/WhatWeDo/Tax/Global-Transfer-Pricing-Services/Pages/default.aspx>. (2011) 4

⁷The Personal Income Tax Act 2004 was recently amended in 2011 by the Personal Income Tax (Amendment) Act 2011 Government Notice No. 175 Page A 381-393 Federal Republic of Nigeria Official Gazette Vol. 98.

⁸The Companies Income Tax Act was amended in 2007

⁹The Petroleum Profits Tax Act (2004) is exclusive to Companies operating in the Nigerian Oil & Gas Industry.Petroleum Profits Tax Act, 2004 was amended by the Petroleum Profits Tax (Amendment) Act, 2007

The tax authority therefore, is empowered to adjust the tax liability of a company if it considers any transaction of a company, which reduces or would reduce the amount of any tax payable, to be artificial or fictitious¹⁰. These provisions empowers the Federal Inland Revenue Service (FIRS)¹¹ to disregard any disposition, which in this effect means any trust, grant, covenant, agreement or arrangement that would reduce the tax payable and direct any such adjustments in order to counteract the reduction of liability to tax. By implication, the FIRS is conferred with the responsibility to make adjustments where the internal pricing mechanisms of the related parties tend not to reflect the open market prices¹².

Up until this point, the rules were largely ineffectual from a practical standpoint, because there was no guidance or framework for enforcing GAAR¹³.

Moreover, the lack of guidance resulted in the inconsistent application of the principles of the original legislation and compounded existing perceptions by some taxpayers of FIRS as dysfunctional tax authority¹⁴.

However, in the last decade, a lot of multinational enterprises have established their operations in Nigeria which has consequently led to an increase in volume of intercompany transactions between these local affiliates and their foreign counterparts. As a result, in an attempt to combat perceived income shifting by foreign taxpayers out of Nigeria and to prevent tax evasion and avoidance in intercompany transactions, the FIRS published a new transfer pricing legislation¹⁵ on September 21st, 2012.

¹⁰Section 22 of the Companies Income Tax Act LFN 2004- This section provides for the meaning of artificial transaction as follows: "Where the Board is of opinion that any disposition is not in fact given effect to or any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be affected, by the transaction and any company concerned shall be assessable accordingly"

¹¹The Federal Inland Revenue Service (FIRS) is the operational arm of the Federal Board of Inland Revenue established by Section 1 of the Nigerian Companies Income Tax Act 1961

¹²Humphrey O. (2007): TRANSFER PRICING IN THE NIGERIAN CONTEXT, (Online) Available at:http://works.bepress.com/humphrey_onyeukwu/5/ (January 2007).

¹³Taiwo O., Anthony C., Elizabeth S. and Robert S. (2013): The Impact of Nigeria's New Transfer Pricing Rules on Multinational Enterprises (Online) Available at: - <http://lexis.com/research/xlink?go=tax> (March 2013)

¹⁴See Ibid

¹⁵The Income Tax (Transfer Pricing) Regulations, No. 1 Government Notice No. 206 Page 815-839 21st September, 2012 Federal Republic of Nigeria Official Gazette Vol. 99.

These latest rules signal a new level of sophistication of the Nigerian government in terms of addressing international commerce and taxation and reflects the move toward formal transfer pricing rules in Nigeria.

3.0 The Income Tax (Transfer Pricing) Regulations 2012

Over the years, Corporations in Nigerian indulged in manipulative transfer pricing for the simple reason that they do not want to be taxed and they want to book more profits and just by manipulating a few entries in account books, corporations can transfer billions of dollars of tax liabilities into profits¹⁶. According to an estimate prepared in the late 1990s, 60% of the trade transactions into or out of Africa are mis-priced through abusive transfer pricing and re-invoicing, 11%, resulting in capital flight component of 7% of African trade, totaling US\$ 10 to 11 billion annually in 1999 prices¹⁷.

In a research conducted in 2013 by Global Financial Integrity (GFI) and the African Development Bank, it was reported that between 1980 and 2009, Africa economies lost between US\$597 billion and US\$1.4 trillion in net resources transferred away from the continent.

This illicit transfer of funds was primarily achieved through transfer mispricing. This highlights the serious need to plug the massive leakages of economic resources from the continent.¹⁸

In reaction to the sudden rise in transfer pricing abuses (transfer pricing suddenly became a tool of tax avoidance and transfer mis-pricing became paramount) by large Multinational Companies in Nigeria, the Income Tax (Transfer Pricing) Regulation was enacted as a check on Transfer Pricing abuse. The Income Tax (Transfer Pricing) Regulations was published in the Federal Republic of Nigeria official gazette vol. 99 on 21st September 2012¹⁹.

¹⁶Ierkwagh K. and Shankyula T. S. (2009): GLOBAL PERSPECTIVES IN TAX EVASION AND AVOIDANCE: THE LEGAL QUAGMIRE IN NIGERIA Nigerian Institute of Advance Legal Studies Journal of Business Law 165

¹⁷See Ibid, Ville-Pekka, S. (2005): "Not Against the Windmills: Fighting Tax Avoidance" In "More Taxes" promoting strategies for Global Taxation ATTAC Finland. (ed.) Journal (Online) Available at: www.attac.fi/moretaxes 99 (27th February, 2009).

¹⁸Deloitte's Inside Tax (2013): Transfer Pricing Rules in Nigeria - An Overview, (Online) Available at: www.deloitte.com/ng

¹⁹ The Income Tax (Transfer Pricing) Regulation, No. 1 Government Notice No. 206 Page B 815-839 21st September, 2012 Federal Republic of Nigeria Official Gazette Vol. 99.

The enactment of The Income Tax (Transfer Pricing) Regulations 2014 was a significant development in the Nigerian tax system. According to a KPMG report on introduction of Transfer Pricing Regulations in Nigeria²⁰, the decision of the Federal Inland Revenue Service to introduce detailed Transfer Pricing rules is a landmark decision and a step in the right direction and it will help to provide a common basis for the review of taxpayers' financial records during audits of related party transactions by the Federal Inland Revenue Service.

The Income Tax (Transfer Pricing) Regulations 2012 is effective for all tax years beginning on or after August 2, 2012. As such, calendar year taxpayers will be impacted by the new rules starting January 1, 2013²¹.

Although the Income Tax (Transfer Pricing) Regulations 2012 will not apply retroactively because the arm's length principle has always existed in the tax statutes, the FIRS may challenge a taxpayer to demonstrate that transactions undertaken before the issuance of the Regulations were conducted at arm's length²². Generally, FIRS can audit a taxpayer as far back as six years²³.

4.0 Features The Income Tax (Transfer Pricing) Regulations 2012

The Income Tax (Transfer Pricing) Regulations 2012 provides detailed guidelines on the application of the arm's length principle, which prescribes to the FIRS to make necessary adjustments where a transaction is deemed artificial or fictitious. Below are its major highlights:

²⁰KPMG (2014): Transfer Pricing – a rising dawn in Nigeria (Online) Available at www.kpmg.com/ng (February 14 2014)

²¹Federal Inland Revenue Service with the support of the UN Sub-Committee on Capacity Building (2012): Road Map for implementing Transfer Pricing regulations and structures in Nigeria (Online) Available at: www.firs.gov.ng/Default.aspx (October 19, 2012).

²²Taiwo O., Anthony C., Elizabeth S. and Robert S. (2013): The Impact of Nigeria's New Transfer Pricing Rules on Multinational Enterprises (Online) Available at: - <http://lexis.com/research/xlink?go=tax> (March 2013) 6

²³The Companies Income Tax Act was amended in 2007.

4.1 Purpose

The purpose of the Income Tax (Transfer Pricing) Regulation 2012 is to give effect to the provisions of Section 17 of the Personal Income Tax Act, CAP P8, Laws of the Federation of Nigeria, 2004²⁴; Section 22 of the Companies Income Tax Act, CAP C21, Laws of the Federation of Nigeria, 2004 (as amended by the Companies Income Tax (Amendment) Act 2007²⁵; and Section 15 of the Petroleum Profits Tax Act, CAP 13, Laws of the Federation of Nigeria, 2004 (as amended by the Petroleum Profits Tax (Amendment) Act, 2007²⁶.

4.2 Objectives

The objectives of the Income Tax (Transfer Pricing) Regulations 2012 as provided by Section 2 of the Regulations are as follows:

- a. To ensure that Nigeria is able to tax on an appropriate taxable basis corresponding to the economic activities deployed by taxable persons in Nigeria, including in their transactions and dealings with associated enterprises²⁷;
- b. To provide the Nigerian authorities the tools to fight tax evasion through over or under-pricing of controlled transactions between associated enterprises²⁸;
- c. To reduce the risk of economic double taxation²⁹;
- d. To provide a level playing field between multinational enterprises and independent Enterprises doing business within Nigeria³⁰; and
- e. To provide taxable persons with certainty of transfer pricing treatment in Nigeria³¹.

4.3 Scope

The Income Tax (Transfer Pricing) Regulations 2012 will apply to all controlled transactions, commercial and financial transactions between connected taxable persons.

²⁴Section 1 (a) of the Income Tax (Transfer Pricing) Regulations 2012, the Personal Income Tax Act 2004 was amended in 2011 and the Amendment was published in the Official Gazette of the Federal Republic of Nigeria notice no. 175 dated 24th June 2011.

²⁵Section 1 (b) of The Income Tax (Transfer Pricing) Regulations 2012

²⁶Section 1 (c) of The Income Tax (Transfer Pricing) Regulations 2012

²⁷Section 2 (a) of The Income Tax (Transfer Pricing) Regulations 2012

²⁸Section 2 (b) of The Income Tax (Transfer Pricing) Regulations 2012

²⁹Section 2 (c) of The Income Tax (Transfer Pricing) Regulations 2012

³⁰Section 2 (d) of The Income Tax (Transfer Pricing) Regulations 2012

³¹Section 2 (e) of The Income Tax (Transfer Pricing) Regulations 2012

Some of the transactions specifically mentioned in the Income Tax (Transfer Pricing) Regulations 2012 includes – sale and purchase of goods and services³²; sales, purchase or lease of tangible assets³³; transfer, purchase, licence or use of intangible assets³⁴; provision of services³⁵; lending or borrowing of money³⁶; manufacturing arrangement³⁷; and any transaction which may affect profit and loss or any other matter incidental to, connected with, or pertaining to the transactions referred to the above³⁸.

4.4 Compliance with the Arm's Length Principle

The Income Tax (Transfer Pricing) Regulations 2012 are grounded in the arm's length principle, which is the cornerstone of nearly all developed transfer pricing regimes worldwide³⁹. Under this principle, commonly controlled companies should transact business with their affiliates at arm's length — as if they were unrelated⁴⁰. This foundation is important because it allows taxpayers to base their transfer prices on the facts and circumstances of their intercompany transactions and the associated economic analysis as opposed to prescribing an apportionment or deemed profit approach. Formulary methods sometimes appear more straightforward in terms of application and may in some instances provide for greater certainty for the taxpayer. At the same time, these approaches have their own complexities in terms of which formula should be used and often the result of applying the formula is quite different from what would occur at arm's length — to the benefit of one jurisdiction and the detriment of another⁴¹.

³²Section 3 (a) of The Income Tax (Transfer Pricing) Regulations 2012

³³Section 3 (b) of The Income Tax (Transfer Pricing) Regulations 2012

³⁴Section 3 (c) of The Income Tax (Transfer Pricing) Regulations 2012

³⁵Section 3 (d) of The Income Tax (Transfer Pricing) Regulations 2012

³⁶Section 3 (e) of The Income Tax (Transfer Pricing) Regulations 2012

³⁷Section 3 (f) of The Income Tax (Transfer Pricing) Regulations 2012

³⁸Section 3 (g) of The Income Tax (Transfer Pricing) Regulations 2012

³⁹Taiwo O., Anthony C., Elizabeth S. and Robert S. (2013): The Impact of Nigeria's New Transfer Pricing Rules on Multinational Enterprises (Online) Available at: - <http://lexis.com/research/xlink?go=tax> (March 2013) 2

⁴⁰Section 4 (1) and (2) of The Income Tax (Transfer Pricing) Regulations 2012

⁴¹Taiwo O., Anthony C., Elizabeth S. and Robert S. (2013): The Impact of Nigeria's New Transfer Pricing Rules on Multinational Enterprises (Online) Available at: - <http://lexis.com/research/xlink?go=tax> (March 2013) 2

4.5 Determinant Factors of Compliance with the Arm's Length principle

In determining whether the result of a transaction or series of transactions are consistent with the arm's length principle, the FIRS is empowered to apply one of the following transfer pricing methods⁴²:

- (i) the Comparable Uncontrolled Price (CUP) method;
- (ii) the Resale Price method;
- (iii) the Cost Plus method;
- (iv) the Transactional Net Margin method; or
- (v) the Transactional Profit Split method; and
- (vi) any other method which may be prescribed by regulations made by the Service from time to time.

In each of the above case, the most appropriate transfer pricing method shall be used taking into account the factors and circumstances stipulated under Section 5(2) of the Income Tax (Transfer Pricing) Regulations 2012⁴³.

4.6 Adoption of the Oecd and Un Model Conventions

The Income Tax (Transfer Pricing) Regulations 2012 adopts the OECD and UN Model Tax Conventions on Income and Capital, and the July 2010 OECD Transfer Pricing Guidelines for Multi National Enterprises and Tax Administrations ("The OECD and UN manuals") as may be updated and supplemented from time to time⁴⁴. The Regulations however states that where there are any inconsistencies between the OECD documents and the provisions of any applicable law, rules, regulations or the UN Practical Manual on Transfer Pricing, the OECD document referred to above shall prevail⁴⁵.

⁴²Section 5(1) of The Income Tax (Transfer Pricing) Regulations 2012

⁴³Under Section 5(2) of the Income Tax (Transfer Pricing) Regulations 2012, the circumstances to be considered include (a) the respective strengths and weaknesses of the transfer pricing method in the circumstances of the case; (b) the appropriateness of a transfer pricing method having regard to the nature of the controlled transaction determined, in particular, through an analysis of the functions performed, assets employed and risks assumed by each person that is a party to the controlled transaction; (c) the availability of reliable information needed to apply the transfer pricing method; and (d) the degree of comparability between controlled and uncontrolled transactions, including the reliability of adjustments, if any, that may be required to eliminate any differences between comparable transactions.

⁴⁴Section 11 (a) & (b) of The Income Tax (Transfer Pricing) Regulations 2012

⁴⁵Section 12 of The Income Tax (Transfer Pricing) Regulations 2012

Prior to the enactment of the Income Tax (Transfer Pricing) Regulations 2012, the domestic tax laws make reference to the application of the arm's length principle, the laws did not define the scope of its application nor did they make any reference to the transfer pricing methods that would apply in any given circumstance. However with the adoption of the OECD and the UN manuals, the Income Tax (Transfer Pricing) Regulations 2012 relatively provide some clarity⁴⁶.

4.7 Advance Pricing Agreements ("Apa")

The Income Tax (Transfer Pricing) Regulations 2012 provide for the execution of Advance Pricing Agreements between the Federal Inland Revenue Service ("FIRS") and connected taxable persons for future controlled transactions⁴⁷. The threshold for eligibility for an APA request is that the particular or respective transactions in question must have a minimum value of ₦250million (approximately USD1.5m) total deductible cost or taxable revenue⁴⁸. The prescribed maximum term of an APA under the Income Tax (Transfer Pricing) Regulations 2012 is three years⁴⁹. The FIRS is however not under any obligation to accept a request for an APA⁵⁰. It is important to note that an Advance Pricing Agreement may be cancelled by both the FIRS and connected taxable persons by notice under the circumstances stipulated in Sections 7(8)⁵¹ and 7(9)⁵² of the Income Tax (Transfer Pricing) Regulations 2012.

⁴⁶Lolade O. (2013): Recent Developments in International Taxation Nigeria, Being a paper presented at the Annual International Bar Association Conference 2013 Boston, Massachusetts Journal of the National Report for IBA Tax Committee - NIGERIA1-3

⁴⁷Section 7 of The Income Tax (Transfer Pricing) Regulations 2012

⁴⁸Section 7 (2) (d) of The Income Tax (Transfer Pricing) Regulations 2012

⁴⁹Section 7 (7) of The Income Tax (Transfer Pricing) Regulations 2012

⁵⁰Section 7 (3) of The Income Tax (Transfer Pricing) Regulations 2012

⁵¹The circumstances under which the FIRS may cancel an Advance Pricing Agreement by a notice given to a connected taxable person as stipulated under Section 7(8) of the Income Tax (Transfer Pricing) Regulations 2012 include: (a) the connected taxable person has failed to materially comply with a fundamental term of the Advance Pricing Agreement; (b) there has been a material breach of one or more of the critical assumptions underlying the Advance Pricing Agreement; (c) there is a change in the tax law that is materially relevant to the Advance Pricing Agreement; or (d) the Advance Pricing Agreement was entered into based on a misrepresentation, mistake or omission by the connected taxable person.

⁵²The circumstances under which a connected taxable person may cancel an Advance Pricing Agreement by a notice given to the FIRS as stipulated under Section 7(9) of the Income Tax (Transfer Pricing) Regulations 2012 include – (a) there is a material change in the premise upon which the advance pricing request was made; (b) the Advance Pricing Agreement is no longer relevant based on significant changes to the structure of the controlled transaction; or (c) there is a

4.8 Safe Harbour Rules

A major provision of the Income Tax (Transfer Pricing) Regulations 2014 is the disclosure obligation placed on all connected taxable persons. Under the Income Tax (Transfer Pricing) Regulations 2012, a connected taxable person is required to record in writing or on any other electronic device or medium, sufficient data and analysis to verify that the pricing of controlled transactions is consistent with the arm's length principle⁵³.

However exemption from this disclosure obligation is granted in respect of controlled transactions that are priced in accordance with the requirements of Nigerian statutory provisions, or the prices which have been approved by other government regulatory agencies or authorities established under Nigerian law and which are satisfactory to the FIRS as being at arm's length⁵⁴.

4.9 Documentation and Disclosure

Under the Income Tax (Transfer Pricing) Regulations 2012, taxpayers are required to prepare transfer pricing documentation prior to the due date for filing the income tax return for the year in which the documented transactions occurred⁵⁵. In the event of an audit by FIRS, taxpayers are required to present transfer pricing documentation to FIRS within 21 days of receiving a request⁵⁶. Further, the Income Tax (Transfer Pricing) Regulations 2012 prescribe the completion and attachment of an annual declaration regarding transfer pricing including specific statements about whether or not documentation exists to the income tax return⁵⁷.

Although there is no specified form for this documentation such as a formal report to effectively prove the transfer pricing positions taken by the taxpayer, reference to the OECD Guidelines and the UN Manual in the Regulations suggests that FIRS will respect documentation prepared in accordance with that guidance⁵⁸.

change in tax law applicable in the jurisdiction of the controlled transaction that is materially relevant to the Advance Pricing Agreement.

⁵³Section 6 (1) of The Income Tax (Transfer Pricing) Regulations 2012

⁵⁴Section 15 (a) and (b) of The Income Tax (Transfer Pricing) Regulations 2012

⁵⁵Section 6 (5) of The Income Tax (Transfer Pricing) Regulations 2012

⁵⁶Section 6 (7) of The Income Tax (Transfer Pricing) Regulations 2012

⁵⁷Section 6 (6) of The Income Tax (Transfer Pricing) Regulations 2012

⁵⁸Taiwo O., Anthony C., Elizabeth S. and Robert S. (2013): The Impact of Nigeria's New Transfer Pricing Rules on Multinational Enterprises (Online) Available at: - <http://lexis.com/research/xlink?go=tax> (March 2013) 5

4.10 Retention of Books and Records

The Income Tax (Transfer Pricing) Regulations 2012 requires that all records including ledgers, cashbooks, journals, cheque books, bank statements, deposit slips, paid cheques, invoices, stock list and all other books of account, as well as data relating to any trade carried out by the taxpayer, inclusive of recorded details from which the taxpayer's returns were prepared for assessment of taxes, are to be retained for a period of six years from the date on which the return relevant to the last entry was made⁵⁹.

4.11 Official Language for Provision of Documents

Under the Income Tax (Transfer Pricing) Regulations 2012, the official language for documentation is English and FIRS may request a certified translation of non-English documentation at the taxpayer's expense⁶⁰.

4.12 Applicable Persons

The Income Tax (Transfer Pricing) Regulations 2012 broadly define a connected taxable person⁶¹ to include persons, individuals, entities, companies, partnerships, joint ventures, trusts or associations (collectively referred to as connected taxable persons⁶²) and includes the persons referred to in –

- (i) Sections 13(2)(d), 18(2)(b) and 22(2)(b) of the Companies Income Tax Act, 2004 (as amended)⁶²;
- (ii) Section 15(2) of the Petroleum Profit Tax Act, CAP P13, Laws of the Federation of Nigeria, 2004 (as amended)⁶³;
- (iii) Section 17(3)(b) of the Personal Income Tax Act, CAP P8, Laws of the Federation of Nigeria, 2004⁶⁴;
- (iv) Article 9 of the OECD Model Tax Convention;
- (v) 'Associated enterprise' referred to the OECD Guidelines.

⁵⁹Section 18 of The Income Tax (Transfer Pricing) Regulations 2012

⁶⁰Section 17 (1) and (2) of The Income Tax (Transfer Pricing) Regulations 2012

⁶¹Section 10 of The Income Tax (Transfer Pricing) Regulations 2012

⁶²See the Companies Income Tax Act, 2007

⁶³See Petroleum Profit Tax Act 2007

⁶⁴See Personal Income Tax (Amendment) Act 2011.

4.13 Comparability Factors

The Income Tax (Transfer Pricing) Regulations 2012 provides that for the purpose of determining whether the transfer pricing and other conditions of a controlled transaction are consistent with the arm's length principle, the taxpayer shall, in the first instance, ensure that the transaction is comparable with a similar or identical transaction between two independent persons carrying on business under sufficiently comparable conditions⁶⁵.

The Income Tax (Transfer Pricing) Regulations 2012 also provides that an uncontrolled transaction is comparable to a controlled transaction within the meaning of the regulation where there are no significant differences between the uncontrolled transaction and a controlled transaction under comparable circumstances which could materially affect the conditions being examined under the appropriate transfer pricing method; or where such differences exist, reasonably accurate adjustments are made in order to eliminate the effects of such differences, or reduce the effects of such differences, to the extent that all material differences are eliminated⁶⁶.

In determining whether two or more transactions are comparable, the FIRS shall consider factors to the extent that they are economically relevant to the facts and circumstances of the transactions⁶⁷.

4.14 Corresponding Adjustments and Double Taxation

The Income Tax (Transfer Pricing) Regulations 2012 provides that where an adjustment is made to the taxation of a transaction or transactions of a connected taxable person by a competent tax authority of another country with which Nigeria has a Double Taxation Treaty; and the adjustment results in taxation in that other country of income or profits that are also taxable in Nigeria; the FIRS may, upon request by the connected taxable person subject to tax in Nigeria, determine whether the adjustment is consistent with the arm's length principle and where it is determined to be consistent, the FIRS may make a corresponding adjustment to the amount of tax charged in Nigeria on the income so as to avoid double taxation⁶⁸.

⁶⁵Section 9 of The Income Tax (Transfer Pricing) Regulations 2012

⁶⁶Section 9 (3) (a) and (b) of The Income Tax (Transfer Pricing) Regulations 2012

⁶⁷Section 9 (4) (a-e) of The Income Tax (Transfer Pricing) Regulations 2012

⁶⁸Section 8 (a) and (b) of The Income Tax (Transfer Pricing) Regulations 2012

4.15 Limitation of Usage of Information

Documentation and other correspondence provided by a connected taxable person under the Income Tax (Transfer Pricing) Regulations 2012, shall only be used for the purpose of establishing the arm's length price in respect of the controlled transaction for which the documentation is supplied⁶⁹.

4.16 Offences and Penalties

The Income Tax (Transfer Pricing) Regulations 2012 do not provide for a unique penalty regime for transfer pricing relying instead on the existing Acts noted above⁷⁰. It provide as follows "A taxable person who contravenes any of the provisions of these Regulations shall be liable to a penalty as prescribed in the relevant provision of the applicable tax law⁷¹".

4.17 Dispute Resolution

The Income Tax (Transfer Pricing) Regulations 2012 requires the FIRS to establish a 'Decision Review Panel' (DRP) for the purpose of resolving any dispute or controversy arising from the application of the Regulations⁷². A taxpayer who disagrees with the ruling of the DRP on any transfer pricing matter has recourse to the court of competent jurisdiction in the first instance — which includes the tax tribunals⁷³.

From the above major features of the Income Tax (Transfer Pricing) Regulations 2012, it could be seen that the Nigerian transfer pricing regulations inevitably imposes additional compliance obligations on the taxpayers. These include preparing contemporaneous transfer pricing documentation and filing transfer pricing declaration forms, amongst others. This means that taxpayers having related party transactions would need to initiate proactive measures to ensure full compliance with the regulations.

⁶⁹Section 16 of The Income Tax (Transfer Pricing) Regulations 2012

⁷⁰Companies Income Tax Act, 2004 (as amended), Petroleum Profit Tax Act, 2004 (as amended), Personal Income Tax Act 2004 (as amended);

⁷¹Section 13 of The Income Tax (Transfer Pricing) Regulations 2012

⁷²Section 14(1) of The Income Tax (Transfer Pricing) Regulations 2012

⁷³Section 14(6) of The Income Tax (Transfer Pricing) Regulations 2012

5.00 Conclusion

It is generally accepted that the aims and objectives of multinational companies are different from those of the host countries. Therefore, effective transfer pricing rules would be crucial to developing economies like Nigeria. The FIRS can only commended for joining other African countries such as South Africa, Kenya, Ghana, Cameroon, etc. in coming up with local transfer pricing rules. These rules are expected to address the shortcomings of the anti-avoidance provisions in the Principal Tax Laws on related party transactions (Artificial Transactions).

The expectation is that the operation of these rules would enhance revenue generation for government through taxes whilst limiting leakage of economic resources through related party transactions⁷⁴.

The Income Tax (Transfer Pricing) Regulations 2014 represent a significant leap forward for FIRS, however, the lack of administrative infrastructure and structure, corruption in the tax system, lack of training for FIRS staffswill likely lead to friction between the FIRS and the Multinational Companies.

It is advised that all companies in Nigeria adopt a transfer pricing compliance policy. Companies within multinational groups that have adopted their global Transfer Pricing policies must also ensure that those policies are in line with local regulations and that all transactions be subjected to a related parties' litmus test.

Where such relationships are established, parties must ensure that transactions are priced based on any of the acceptable transfer pricing mechanisms or in line with an advanced pricing agreement entered into with the FIRS⁷⁵.

The introduction of Transfer Pricing regulations in Nigeria is a welcome development and it is expected that it will move the country closer to a more perfect economy.

⁷⁴Deloitte's Inside Tax (2013): Transfer Pricing Rules in Nigeria - An Overview 2013 (Online) Available:www.deloitte.com/ng

⁷⁵TosinAjose (2013):Transfer Pricing Regulation: Impact on Entities Transacting Business in Nigeria published in the Financial Nigeria magazine, (Online) Available at: www.financialnigeria.com/journal(October 2013)

5.0 Recommendation

It is recommended as follows:

- Taxpayers and their advisors should take steps to educate themselves on the Income Tax (Transfer Pricing) Regulations 2012;
- Taxpayers to conduct a review of current operations in Nigeria and Africa generally in light of the new Regulations;
- Taxpayers should keep abreast of policy developments in the region particularly with respect to the African Tax Administrators Forum (ATAF) and other interest groups;
- Transfer pricing disputes between the FIRS and Multinational Companies need to be settled through negotiation with the tax administration and the Multinational Companies making compromises;
- Training and re-training of FIRS staffs on transfer pricing in order to share knowledge and build expertise;
- Closer international collaboration by the FIRS in comparable situations and more widely in the international community. This will help the FIRS to improve their transfer pricing skills and knowledge while at the same time leveling the trading playing field across the globe;
- There should be a shorter timescales for audits or enquiries and for resolving disputes, which are clearly advantageous to both Multinational Companies and the FIRS;
- Clearly defined documentation requests which reduce both the demands on the Multinational Companies in providing the documentation and the time and other resource burdens on the tax FIRS in reviewing it.

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