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1. INTRODUCTION

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REPORTING AND COMPLIANCE REQUIREMENTS UNDER THE NIGERIAN INCOME TAX (TRANSFER PRICING) REGULATIONS OF 2012

M.T. Abdulrazaq* and L.A. Ogboye**

Abstract

Nigeria on the 2nd of August 2012 introduced the Income Tax (Transfer Pricing) Regulations No. 1 of 2012. The objective of these regulations are to ensure that Nigeria is able to [illegible] an appropriate taxable basis corresponding to the economic activities deployed by taxable persons in Nigeria, including in their transactions and dealings with associated enterprises. This article examines the reporting and compliance requirements of the regulations and seeks to elucidate the provisions as it would affect multinational companies and others doing business in the country. This article recommends the use of prices for tax purposes that are consistent with the internal transfer prices that the firm uses for other significant firm activities at arm's length - the resource allocation and performance evaluation processes - and more broadly involves benchmarking against the overall information environment and decision rules employed by the company. The paper proposes some basic compliance and reporting requirement of Nigerian Transfer Pricing regulation.

1. INTRODUCTION

Transfer pricing" refers to the setting of prices at which transactions occur involving the transfer of property or services between associated enterprises, forming part of an MNE group. These transactions are also referred to as "controlled" transactions, as distinct from "uncontrolled" transactions between companies that, for example, are not associated and can be assumed to operate independently ("on an arm's length basis") in reaching terms for such transactions.

Nigeria on the 2nd of August, 2012 introduced the Income Tax (Transfer Pricing) Regulation. The Regulation was introduced in exercise of the powers conferred by Section 61 of the Federal Inland Revenue Service (Establishment) Act which provides that:

The Board may, with the approval of the Minister, make rules and regulations as in its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions and may in particular, make regulations prescribing the—

(*a*) forms for returns and other information required under this Act or any other enactment or law; and

(*b*) procedure for obtaining any information required under this Act or any other enactment or law.

The purpose of the Regulation as stated in paragraph 1 is to give effect to the provisions of

(a) section 17 of the Personal Income Tax, CAP C21, Laws of the Federation of Nigeria, 2004 (as amended by the Personal Income Tax (Amendment) Act, 2011);

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(b) 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 2007); and

(c) section 15 of the Petroleum Profits Tax Act, CAP. P 13, Laws of the Federation of Nigeria, 2004.

It is also stated that the objectives of these Regulations are to –

(a) Ensure that Nigeria is able to tax on an appropriate taxable basis corresponding to the economic activities deployed by the taxable persons in Nigeria, including in their transactions and dealings with associated enterprises;
(b) provide the Nigerian authorities the tools to fight tax evasion through over or under – pricing of controlled transactions between associated enterprises;
(c) reduced the risk of economic double taxation;
(d) provide a level playing field between multinational enterprises and independent enterprises doing business within Nigeria; and
(e) provide taxable persons with certainty of transfer pricing treatment in Nigeria.

This paper examines the reporting and compliance requirements under the Nigeria Income Tax (Transfer Pricing) Regulations No. 1 of 2012 and seeks to elucidate the provisions of the regulation as it would affect multinational companies and others doing business in Nigeria.

2. OVERVIEW OF TRANSFER PRICING REGULATION IN NIGERIA

A. The Meaning of Purpose

The purpose of the regulations as contained in paragraph 1 give effect to provisions dealing with artificial transactions in the Personal Income Tax Act, Companies Income Tax Act and the Petroleum Profits Tax Act. These provisions refer to what may be described as the general anti-avoidance provisions.

(1) The general anti-avoidance provision.

The Nigerian general anti-avoidance provision is contained in Section 17 of the Personal Income Tax Act of 2004 with corresponding provisions in Section 22 of the Companies Income Tax Act 2004 (CITA) and Section 15 of the Petroleum Profits Tax Act 2004.

Section 22 of CITA provides that:

> *Where the Board is of opinion that any disposition is not in fact given effect to, or that 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 effected, or reduction which would otherwise be effected by the transaction and any company concerned shall be assessable accordingly.*

The provision goes further to define "disposition", the operative word in the above mentioned provision, widely as including "any trust, grant, covenant, agreement or arrangement" Accordingly, the provision will catch any "disposition" in its ordinary and natural meaning as well as such legally constituted dispositions which may amount to tax avoidance and even an "arrangement" which may not necessarily be legally enforceable

such as "something in the nature of an understanding between two or more persons - a plan arranged between them which may not be enforceable in law.
The scope of this general anti-avoidance provisions is very wide indeed that one may conclude, on the face of it, that it would catch almost all possible transfer pricing manipulations.

The Nigerian general anti-avoidance provision operates on two limbs, namely:
(1) If a tax authority is of opinion that any disposition is not in fact given effect to; and
(2) If a tax authority is also of the opinion that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious.

The meaning of "any disposition is not in fact given effect to"

In determining the meaning of these words one may begin by giving them their common or ordinary meaning. It may be said that the words used in its ordinary sense indicates a situation in which a person is said to avoid the effect of a disposition which is about to happen to him. He takes steps to get out of the way of it. Not to give effect to any disposition means to take steps to get out of the reach of a liability which is about to fall on a tax payer as a result of the disposition carried out by him.

The section 22 of CITA 2004, if construed literally, would extend to every transaction whether voluntary or for value which had the effect of reducing the income of any tax payer; but, its provisions are intended to and do extend to cover cases in which the transaction in question, if recognised as valid, would enable the taxpayer to avoid payment of income tax on what is really and in truth his income. It does not extend to the case of a *bona fide* disposition by virtue of which the right to receive income arising from a source which therefore belonged to the tax payer is transferred to and vested in some other person.

This type of recognition in Nigeria would require a subsequent statement of the types of tax avoidance arrangements which the legislature intended to permit and those which it did not.

It appears then, that in Nigeria for the meantime, a precise analysis of the proper meaning of the words "any disposition is not in fact given effect to" in Section 22 of *CITA* may have to wait for judicial pronouncement in the Nigerian courts.

The meaning of "Any transaction which reduces or would reduce the amount of any tax payable in artificial or fictitious"

A literal interpretation of these words that once any transaction reduces or would reduce the amount of any tax payable is carried out then transaction is artificial or fictitious and may be disregarded, would also mean that its application would prevent other sections of the Nigerian tax statutes from operating. It is likely that the Nigerian courts would avoid this conflict by a harmonious mode of interpretation as was done to the parallel wordings in an Australian case where it was stated by Barwick C. J. that:

> *As I have already pointed out, there will be no relevant alternation of the incidence of tax if the transaction, being the actual transaction between the parties, conforms to and satisfies a provision of the Act even if it has taken the form in which it was entered into by the parties to obtain the benefit of that provision of the Act.*

In place of the literal meaning of the phrase "altering the incidence of any tax" Barwick C. J., in *Mullens' case*, adopted the following interpretation:

If the actual transaction into which the parties have entered involves the tax payer in liability to tax or does not afford the tax payer some benefit in taxation, such as a deduction, and that transaction is cast into another form which, if effective, would relieve the tax payer of tax, wholly or partially, the intention with which that form of transaction is chosen can properly be said to be an intention 'to alter the incidence of the income tax', as that expression is used in this area of the law of income tax.

"Artificial" is an adjective which is in general use in the English Language. It is not a term of legal art; it is capable of bearing a variety of meanings according to the context in which it is used. The use of the word in *section 22 CITA.* is not necessarily pleonastic, that is, a mere synonym for "fictitious". A fictitious transaction is one which those who are ostensibly the parties to it never intended should be carried out.

"Artificial" as descriptive of a transaction is of wider import.

"Artificial" in ordinary usage means "unnatural", "not genuine" or "not sincere". What is artificial for the purpose of *section 22 CITA*? The United Kingdom Royal Commission on Taxation of Profits and Income, considering a similar problem with regard to *section 44(3)* of the *Excess Profits Duty Act* otherwise known as *Finance No. 2 Act of 1915* which provides that: "A person shall not, for the purpose of avoiding payment of excess profits duty enter into any fictitious or artificial operation," stated that:

The objection to a criterion based on phrases of this kind (that is, fictitious or artificial transaction) is that if a transaction really is fictitious, it ought to be ignored without the aid of special legislation and a transaction is not well described as artificial, if it has valid legal consequences, unless some standard can be set up to establish what is natural for the same purpose.

And concluded, "*such standards are not readily discernible*".

What is clear in this provision, therefore, is that a transaction which reduces or would reduce tax liability does not, *ipso facto*, become "artificial". It would appear that, under the provision, a transaction which has valid legal consequences may nevertheless be regarded as artificial if it is carried out by what could be characterised as "unnatural" or "unreal" means. The test therefore for determining whether or not a transaction is artificial is not its legal consequences but the means employed to carry it out.

Having considered the two limbs on which the general anti-avoidance provision under Nigerian law operates another matter which falls to be considered is the nature of the operation of *section 22 CITA* when it is found to apply. Has the section merely an "annihilating" operation and so does not permit a "reconstruction"?
It can be said that the Nigerian Act permits a reconstruction. While *section 22 CITA* may operate to destroy a taxpayer's defences in certain cases, it also authorises a new construction in their place. In particular it deems some situations to exist that will support assessments to income tax designed to counter the avoidance.

In its application, *section 22 CITA* can do more than destroy a transfer pricing contract, agreement or arrangement in the absence of which a duty or liability would subsist. As the section presently stands and circumstances are such that a choice is presented to a prospective tax payer between two courses of which one will, and the other will not, expose him to liability to taxation, his deliberate choice of the second course can readily be made a ground of the application of the provision. In such a case it can be said that, but for the artificial or fictitious transfer pricing contract, agreement or arrangement impeached, a liability under the Act would exist. To invalidate the transaction into which the prospective taxpayer in fact entered is enough to impose upon him a liability which could only arise out of another transaction into which he might have entered but in fact did not enter. Also, where, the annihilation of an agreement or arrangement so far as it has the purpose or effect of avoiding liability to income tax leaves exposed a set of actual facts from which that liability does arise, the provision will effectively operate to remove the obstacle from the path of the tax authority and enable them to enforce the liability.

The provision for "reconstructing", unlike that involved in the use of only the "annihilating" power which does not enable the tax authority to show that money has come into the hands of the tax payer which can be treated as income under the charging provision, the "reconstructing" power is more desirable and more effective for dealing with transfer pricing manipulations under the Nigerian income tax law.

However, *section 22 CITA* is not without its own problems, the most surprising being that the Nigerian courts seem not to take notice of its existence. It is rare indeed to find an important Nigerian court decision in which *section 22 CITA* has been relied upon to strike down any tax avoidance device.

The tax authorities have also encountered difficulties in its application particularly because of the use of very wide terms which places an enormous burden on the interpretative skills of the tax officials by requiring them to examine every transaction which can sometimes be very sophisticated and complicated and to come to an opinion whether it is artificial or fictitious. Given the situation they are more likely to give up when confronted with difficult situations which are bound to be many in a developing economy.

Thus the reluctance by tax officials to use *section 22 CITA* or any of the anti-avoidance provisions in *PITA* or *PPTA* or *CGTA* could indeed be counter-productive and thereby pale into insignificance the usefulness and effect of a wide tax avoidance provision. Nevertheless, the use of a general anti-avoidance provision still provides a better alternative to specific anti-avoidance provisions if the government is to avoid constantly fighting a series of transfer pricing manipulations.

What is required for a better and proper application of *section 22 CITA* or any anti-avoidance provision apart from a regular improvement in the quality and training of tax officials, are a series of amendments which sets out the criteria to which regard is to be had in determining whether the disposition or transaction in question amount to an "artificial or fictitious" transaction or disposition to which *the anti-avoidance provisions* applies.

A transfer pricing manipulation to which *section 22 CITA* applies should be one where the taxpayer in question has obtained an artificial or fictitious tax advantage, and where, it would be concluded that "the person or one of the persons who entered into or carried out the disposition or transaction or any part of the disposition or transaction did so for the purpose of enabling the tax payer to obtain a tax advantage in connection with the disposition or transaction." However, if those acts or transactions are capable of explanation by reference to ordinary dealing, such as business or family dealing, the arrangement does not come within the application of section 22 of CITA 2004. Also, a taxpayer is entitled to obtain a statutory benefit and financial advantage by creating a situation to which the Nigerian tax law attaches taxation advantages for the taxpayer. Such as stated by the safe harbour provisions in paragraph 15.

(2) Associated Enterprises

This is interpreted in the context of the objectives of the Regulations to include:

(I) persons that are *"associates"*, as defined in the Companies and Allied Matters Act, CAP C20, LFN 2004 (as amended); and

(ii) persons that are business associates in any form and two enterprises are considered to be associated where –

- (a) one enterprise participates directly or indirectly in the management, control or in the capital of the other, or
- (b) the same person or persons participate directly or indirectly in the management, control or in the capital of both enterprises;

Controlled Transaction means a commercial or financial transaction between connected taxable persons and a taxable person in the context of these regulations is as defined in paragraph 10 of these Regulations as including persons, individuals, entities, companies, partnerships, joint ventures, trusts or associations (collectively referred to as *'connected taxable person'*) and includes the persons referred to in –

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

It has been held in the case of *Inland Revenue Commissioner v. Lithgows, Ltd.* that co-trustees who hold shares in their capacity as co-trustees do not individually control the company in which they hold shares because, by virtue of the fiduciary duties they owe to the beneficiaries of the trust, and to each other, they may not direct that the affairs of the company are carried on in accordance with their own wishes; rather, they are bound collectively to ensure that the affairs of the company are carried on in accordance with the best interests of the beneficiaries.

Where a connected taxable person has entered into a transaction or a series of transactions to which these Regulations apply, the person shall ensure that the taxable profits resulting from the transaction or transactions is in a manner that is consistent with the arm's length principles.

In a situation where a connected taxable person fails to comply with the provisions of this Regulations, the Federal Inland Revenue Service shall make adjustments where necessary if it considers that the conditions imposed by connected taxable persons in controlled transactions are not in accordance or consistent with the arm's length principle.
Under the regulations, arm's length principle means the principle that the conditions of a controlled transaction should not differ from the condition that would have applied between independent persons in comparable transactions carried out under comparable

circumstances.
Where a taxpayer carries out, under the same or similar circumstances, two or more controlled transactions that are economically closely linked to one another or that form a continuum such that they cannot reliably be analysed separately, those transactions may be combined to:

(i) perform the comparability analysis set out in regulation 9 of these Regulations.

1. The comparable uncontrolled price method

In these Regulations, unless the context otherwise requires –

(f) *"Comparable Uncontrolled Price (CUP) Method"* means a method in which the price changed for property or services transferred in a controlled transaction is compared with the price charged for property or services transferred in a comparable uncontrolled transaction.

(g) *"Comparable Uncontrolled Transaction"* for the purposes of these Regulations, means an uncontrolled transaction that –

(i) does not differ significantly from a controlled transaction in a way that could materially affect the financial indicator applicable under the method; or

(ii) does differ, but reasonably accurate adjustments can be made to eliminate the effects of such differences.

The easiest method of determining an arm's-length price in any transaction is to compare the prices paid on a particular transaction with prices which are generally paid on the open market for similar types of transactions between unconnected persons. The principal difficulty with the operation of this method is that the likelihood of finding another transaction where all of the surrounding circumstances, apart from the connection between the parties, coincide with the circumstances surrounding the relevant transaction is remote. The Organization for Economic Co-operation and Development (OECD) recognized the difficulties surrounding this method and identified a number of factors which may affect comparability of transactions, such as the nature of the goods, packaging and brand name.
A review of these factors shows clearly how difficult in practice the comparable transactions method is to operate effectively, particularly as the Federal Inland Revenue Services is likely to be prevented by confidentiality rules from disclosing information concerning the pricing arrangements of other companies who are competing with the company whose pricing arrangements are under investigation. Accordingly, although in theory examination of comparable transactions is the easiest and fairest method of evaluating any transaction under investigation, in practice it will usually be very difficult to operate effectively. Therefore, the Federal Inland Revenue Service would invariably falls back on the other methods of determining an arm's-length price, at least in the first instance.

2. The resale prices method

"Resale Price Method" means a method in which the resale margin that a purchaser of property in a controlled transaction earns from reselling the property in an uncontrolled transaction is compared with the resale margin that is earned in a comparable uncontrolled purchase and resale transaction.
The critical issue in arriving at an arm's-length price using this method is the appropriate level of profit margin for the purchasing company. Factors which frequently are taken into

account include: (1) the exclusiveness of the purchaser's marketing rights; (2) the level of risk assumed by the company which will sell the goods into the open market; and (3) the amount of work, if any, performed by the purchasing company on or in respect of the goods in question. Determining the level of profit invariably involves comparison with similar transactions undertaken by other companies. This brings the Federal Inland Revenue Service back to the practical difficulty of obtaining the necessary information to make this comparison.

3. The cost plus method

"Cost Plus Method" means a method in which the mark up on the costs directly or indirectly incurred in the supply of goods, property or services in a controlled transaction is compared with the mark up on those costs directly or indirectly incurred in the supply of goods, property or services in a comparable uncontrolled transaction.
The OECD has acknowledged the difficulties of operating this method in isolation and, in particular, has identified a number of disadvantages of the method. For example, this method: (1) overemphasizes historical cost, (2) ignores user demand, (3) fails to reflect competitive conditions adequately, (4) assumes a guaranteed profit in all circumstances, and (5) ignores abnormal factors such as increased costs due to poor management. Notwithstanding these stated difficulties, the method is used particularly in circumstances where the resale prices method is inappropriate -for example, on a sale of semi-finished products between connected parties, perhaps involving further processing by the purchaser-or as a method of checking figures obtained under one of the other methods. However, regardless of the method adopted, the Federal Inland Revenue Service has stated that it will be guided by the principles set out by the OECD in arriving at an arm's-length price. On this basis the following principles are applied in practice:

(1) The Revenue authorities should not form their own commercial judgment on any transactions and should rely on real and not hypothetical cases in reaching their evaluation.
(2) Reasonable and consistently applied pricing arrangements should not, as a general rule, be challenged, even where on occasions such arrangements give rise, for whatever reason, to an unusually high or low price.
(3) Subsidies, grants and price controls, other than those imposed between connected parties, should be taken into account.
(4) All benefits, and not just pure profit or loss, accruing to either party must be given appropriate consideration. For example, under certain circumstances it should be possible to justify uneconomic pricing policies where such policies are part of a long-term coordinated strategy within the multinational group involved.

In this way it is hoped that commercial realities can be observed whilst, at the same time, the aims of the transfer pricing rules, namely,.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 enterprises" can be achieved.

4. The transactional net margin method

"Transactional Net Margin Method" means a method in which the net profit margin relative to the appropriate base, including cost, sales or assets that a person achieves in a controlled transaction is compared with the net profit margin relative to the same basis achieved in a comparable uncontrolled transaction.

5. The transactional profit split method

"Transactional Profit Split Method" means a method in which the division of profit and loss that a person achieves in a controlled transaction is compared with the division of profit and loss that would be achieved when participating in a comparable uncontrolled transaction.

6. The residual profit split method

"Residual Profit Split Method" means method in which routine costs are identified and tested under one of the other transfer pricing methods and residual profits are split according to the transactional profit split method.

(3) CONDUCT OF TRANSFER PRICING ENQUIRIES

A. Documentation

A connected taxable person shall record, in writing or on any other electronic device or medium, sufficient information or data with an analysis of such information and data to verify that the pricing of controlled transactions is consistent with the arm's length principle and the connected taxable person shall make such information available to the Service upon written request by the Service.

The documentation referred to in this regulation must be prepared taking into account the complexity and volume of transactions.

B. Information Requirements

The obligation of the taxpayer to provide the information referred to in sub-regulation (1) of this regulation, with analysis, is established without prejudice to the authority of the Federal Inland Revenue Service to request for additional information which in the course of audit procedures it deemed necessary to effectively carry out it functions.

What additional information will be required depends upon individual circumstances. The following matters are likely to be of interest to the Federal Inland Revenue Service in connection with the taxpayer itself:

(1) ownership and/or control of the taxpayer;
(2) the nature of its trade;
(3) the organization of the group of which the taxpayer is a member;
(4) the functions of particular companies within the group; and
(5) how far the profitability of particular companies within the group has come up to expectations.

In addition, it is likely, depending on which arm's-length pricing method is adopted, that the Revenue will at some stage need to enquire into some or all of the following matters:

(1) the open market prices of goods or services comparable to those supplied by or to the taxpayer;
(2) production costs;
(3) research and development costs; and
(4) the price at which the multinational group of which the taxpayer is a part ultimately sells the goods into the open market.

C. Limitation on usage of information

Documentation and other correspondence provided by a connected taxable person 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 supplied.

D. Retention of documents

All records including ledgers, cashbooks, journals, cheque books, bank statements, deposit slips, paid cheques, invoice, stock list and all other books of account, as well as data relating to any trade carried out by the taxpayer, inclusive of record 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 made.

E. Transfer pricing manipulation.

Transfer pricing has come to stay in Nigeria and would continue to be a major tax issue particularly in view of the motivation for transfer pricing manipulation.

Transfer pricing manipulation is the over or under invoicing of transfer price in order to avoid or evade tax regulations and policies. This is done by deliberate setting of transfer prices either too high or too low in order to avoid or evade taxation.

The motivation for transfer price manipulation are:

1. Through under invoicing, the Multinational Enterprises can avoid paying customs duties.
2. By shifting tax-deductible costs to the high-tax country and taxable revenue to the low-tax country, the Multinational Enterprise can minimize the total tax paid to the two Countries.
3. If the foreign subsidiary cannot directly remit profits to its parent firm because of host Country foreign exchange restrictions, profits can be shifted out of the host country by over invoicing intra firm exports to, and under invoicing exports from, the foreign affiliate.

It is with this likelihood of manipulation that has led to the provision of penalties to deal with these transgressions.

F. Offences, penalties and dispute resolution

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 law.

The Federal Inland Revenue Service shall set up a Decision Review Panel ("the Panel") for the purpose of resolving any dispute or controversy arising from the application of the provisions of these Regulations.

A taxable person may, within thirty days of the receipt of the assessment on the adjustment refer the assessment to the Panel.

The Panel shall in rendering a decision on a matter presented before it take into consideration –

(I) the adjustment or assessment issued;
(ii) the basis on which the adjustment or assessment was issued;
(iii) the taxable person's objection; and
(iv) the evidence presented to it by the parties.

The Panel shall issue a formal adjustment or assessment –

(a) based on the decision rendered by it on matter presented by the parties; or
(b) where taxable person fails to communicate its decision to refer the assessment or adjustment to the Panel within thirty days of the receipt by the taxable person of the assessment or adjustment.

The decision of the Panel on any adjustment or assessment before it shall be final and conclusive without limiting the right of a taxpayer to refer the matter, where dissatisfied with the decision of the Panel to a court of competent jurisdiction.

2 Power to make Regulations

The power to make regulations and under which the Income Tax (Transfer Pricing) Regulations of 2012 was enacted is contained in Section 61 of the FIRS (Establishment) Act of 2007 and provides that the Board may, with the approval of the Minister, make rules and regulations as in its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions and may in particular, make regulations prescribing the—

(*a*) forms for returns and other information required under this Act or any other enactment or law; and

(*b*) procedure for obtaining any information required under this Act or any other enactment or law.

The question is, in making these regulations was the Minister of Finance acting within the powers conferred by section 61 or was the Minister simply making new laws and acting beyond the powers conferred by the Act? The future would be defined by the response to this question.

Nigeria is not alone in making of Transfer Pricing rules by way of Executive or Ministerial Regulations as Countries like Kenya which enacted the Income Tax (Transfer Pricing) Rules of 2006 and Uganda which enacted their own Transfer Pricing regulations in 2011 were all made by Executive Regulations.

However, in some Countries the transfer pricing rules are enacted as part of the Income Tax Code such as South Africa by way of Section 31 of the Income Tax Act 58 of 1962 and Namibia through Section 95 of the Income Tax Act of 2005.

The Future

The future of the implementation of the Nigerian Transfer Pricing Regulations would depend on the reporting and compliance requirement not being in conflict with or amending any of the sections of the Nigerian Tax Acts. The regulations must also be in accordance with the enabling law, that is, section 61 of the Federal Inland Revenue Service (Establishment) Act No 13 of 2007.

Finally, the regulations must not have a life of their own and must be solely for the purpose of giving effect to the provisions of paragraph 1 as follows:

a. section 17 of the Personal Income Tax Act, CAP P8, Laws of the Federation of Nigeria, 2004 (as amended by the Personal Income Tax (Amendment) Act, 2011)
b. 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 2007); and
c. section 15 of the Petroleum Profits Tax Acts, CAP. P13, Laws of the Federation of Nigeria, 2004.

In so far as these limits are kept Nigeria can begin to look forward to a high tax yield from the implementation of the Income Tax (Transfer Pricing) Regulations of 2012.

END NOTES

[2] Paper presented by UN Tax Committee's Subcommittee on Practical Transfer Pricing Issues

[3] According to the Wikipedia Encyclopaedia, Transfer pricing refers the setting, analysis documentation and adjustment of charges made between related parties for goods, services or use of property including intangible property. Transfer prices among components of an enterprise may be used to reflect allocation of resources among such component or for other purposes.

[4] Section 61 of the FIRS (Establishment) Act 2007

[5] Paragraph 1 of the Income Tax (Transfer Pricing) Regulations No. 1, 2012.

[6] Paragraph 2 of the Income Tax (Transfer Pricing) Regulations No. 1, 2012.

[7] See also section 20 Capital Gains Tax Act 2004. See The Income Tax (Transfer Pricing) Regulations No 1,2012.

[8] CITA s. 22(2) (b); It does not define transaction but states transactions which "shall be deemed to be artificial or fictitious."

[9] *Newton* v *Federal Commissioner of Taxation* (1958) A.C. 450 at p. 465 (P.C.); Whiteman. P.G. (1966). The Meaning of the Term Arrangement, *British Tax Review*. p, 399. See also Dalton (1973) Avoidance of Taxation: Section 260 of the Income Tax Assessment Act *Melbourne University Law Review* 95. Section 260 provides that:

"Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly -

(a) altering the incidence of any income tax;
(b) relieving any person from liability to pay any income tax or make any return;
(c) defeating, evading or avoiding any duty or liability imposed on any person by this Act; or
(d) preventing the operation of this Act in any respect, be absolutely void, as against the Commissioner…"

[10] *Newton* v *Federal Commission of Taxation* (1958) 98 C.L.R. 1 at p. 7.

[11] See Fashokun S. O. (1976) at pp. 28, 29, *op. cit.*, where he stated that it would be fraudulent to use any scheme by way of disposition without really giving effect to it as it would amount to a fictitious disposition and in effect evasion. This statement would appear correct although the use of the word evasion is clearly inappropriate in such circumstances.

[12] *Mullens* v *Federal Commission of Tax* (1976) 6 A.T.R. 504 at p. 509.

[13] *Seramco Ltd. Superannuation Fund Trustees* v *Income Tax Commissioner* (1977) A. C. 287 at p. 298.

[14] See *Advanced Learners Dictionary of Current English.* See also Decree No. 2 Bank Employees, etc. (Declaration of Assets) Decree 1986 S. 15 which states that: "fraudulent, fictitious or artificial transaction" means a disposal or purchase of assets by an employee of a Bank at a price below the market value of such assets and in a manner or circumstance that it can be reasonably inferred that the parties could not have been dealing legitimately or that there might have been some other consideration for the transaction. .

[15] See Cmd 9474 (1955) para. 1024.

[16] Fashokun S O. (1976), *op. cit.*, p. 30; see also *Newton* v *F.C.T.* (1958) 450 where the Privy Council held that the Australian general anti-avoidance provision contained in section 260 of the Australian Commonwealth Income Tax and Social Services Contribution Act 1936 - 1951 was not concerned with the motives of the individuals, not their desire to reduce tax, but only with the means they employed to do it. According to Lord Denning:

"In order to bring the arrangement within the section you must be, able to predicate - by looking at the overt acts by which it was implemented - that it was implemented in a particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid to tax, then the arrangement does not come within the section..."

See further the Australian case of *Peate v Commissioner of Taxation* (1967) 1 A. C. 308 and the New Zealand case of *Margin v I.R.C.* (1976) A. C. 739.

[17] See section 460(3) United Kingdom Income and Corporation Taxes Act 1970; Canadian Income Tax Act (RCS) 1952 (Cap 148), S. 13891), for examples of "reconstructing" provisions and the many affirmations by the Australian courts that section 260 of the Australian Commonwealth Income Tax and Social Services Contribution Act 1936 - 1951 has merely an annihilating effect, and does not permit "reconstruction" in such cases as *Clarke v F.C.T.* (1932) 48 C.L.R. 56 at p. 77. *Bell v F.C.T.* (1953) 87 C.L.R. 548 at pp. 572 - 573; *Cecil Bros Pty Ltd.* v *F.C.T.* (1964) 111 C.L.R. 430 at p. 441 and Editorial (1986) *Australian Tax Review*, March, p. 2.

[18] See *Peate v F.C.T.* (1966) 116 C.L.R. 38.

[19] *CITA.2004*, Section. 9.

[20] Fashokun S. O. (1976), *op. cit.*, p. 34; see also Abdulrazaq M.T. (1989) Legal Limits of Creative Accounting and Corporate Tax Planning in Nigeria. *Nigerian Financial Review*, Volume 2, No. 1, pp. 7-22.

[21] Ayua I. A. (1982), *op. cit.*, p. 19; see *Aboud v Regional Tax Board* (1966) N.M.L.R. 100 where the appellant as assessed in respect of the income from properly he conveyed to his wife, the Supreme Court refused to decide the issue of the applicability of the general anti-avoidance provision because the assessment made thereof had become final and conclusive under the Western Nigeria Income Tax Law 1959, S. 15.

[22] See the comments of a Senior Tax Official on the corresponding section 18 C.I.T.A. 1979 that "it involves so much preparatory work that I would use it as a last resort"; Layade P.S.A. Tax Evasion, Fifth Annual Senior Officers Conference of the Federal Board of Inland Revenue at p. 29.

[23] The tax advantage elements are the most important in any tax avoidance scheme. If no tax advantage or benefit accrues or is about to accrue to the taxpayer, a transaction will not properly constitute an avoidance device, even if it is artificial or fictitious. It is the tax advantage in any particular scheme that anti-avoidance provision is designed to counteract. Hence, where there is no tax advantage, there is no ground on which any anti-avoidance provision can properly operate. Tax advantage includes obtaining a "relief or increased relief from, or repayment or increased payment of, tax" and secondly, "the avoidance or reduction of a charge to tax or an assessment to tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains." See *I.R.C v Parker* (1966) 43 T.C. 39 at p. 441; *I.R.C.* v *Cleary* (1966) 44 T.C. 399; *I.R.C.* v *Clark* (1978) S.T.C. 614; *I.R.C.* v *Joiner* (1973) S.T.C. 244.

[24] *Tax Law in the Melting Pot* (1985) A Study by the Revenue Law Committee of Law Society of the *Ramsay* doctrine after *Furniss* v *Dawson*, with proposals. The Law Society of England and Wales p. 59; See *Peale v F.C. of T.* (1964) 111 CLR 443 per Kitts. J. at 283

[25] Para 19 (c)

[26] Para 19 (i)

[27] Para 10

[28] 39 T.C. 270 (1960).

[29] Para 4 (1) & (2)

[30] Para 19(b)

[31] Para 5(1)

[32] Para 19(f) and (g)

[33] The OECD was established under the Convention for European Economic Co-operation, Dec. 14, 1960, 888 U.N.T.S. 143.

[34] OECD COMM. ON FISCAL AFFAIRS, TRANSFER PRICING AND MULTINATIONAL ENTERPRISES 13, 35-38 (1979).

[35] See, eg., Taxes Management Act, 1970, ch. 9, § 6.

[36] Para 19(w)

[37] OECD COMM. ON FISCAL AFFAIRS, supra note 39, at 40.

[38] Id. at 39.

[39] Id.

[40] Para 19 (k)

[41] OECD COMM. ON FISCAL AFFAIRS, supra note 39, at 40.

[42] Id.

[43] Id. at 41.

[44] Id. at 40.

[45] See OECD COMM. ON FISCAL AFFAIRS, supra note 39.

[46] Transfer Pricing, supra note 7, at 44.

[47] Para 2(a)

[48] Para 19 (aa)

[49] Para 19 (ab)

[50] Para 19 (ac)

[51] Para 6(1)

[52] Para 6(3)

[53] Para 6(2)

[54] Transfer Pricing, supra note 7, at 43.

[55] See supra notes 35-54 and accompanying text.

[56] Para 16

[57] Para 18

[58] Eden and Smith (2001) Not at Arm's Length: A Guide to Transfer Pricing Resources. Journal of Business and Finance Librarianship, Vol 6 (4) pp 4,5.

[59] Para 13

[60] Para 14(1)

[61] Para 14(3)

[62] Para 14(4)

[63] Para 14(5)

[64] Para 14(6). Is the Decision Review Panel equivalent to the Tax Appeal Tribunal or why would an appeal from it lie to a court of competent jurisdiction? Would the rules of natural justice be met by the FIRS setting up an adjudicatory panel in which it has an interest in the outcome of the matter before it? The proper forum for this should have been an independent Arbitration Panel or a Tax Ombudsman.

[65] *Ewete v. Gyang* (1997) 3 NWLR (pt 496) 728

[66] *Kuusu v. Udom* (1990) 1 NWLR (pt 127) 421

[67] *Onazulike v. COS Anambra State* (1992) 3 NWLR (pt 232) 791

[68] *Din v. Attorney – General of the Federation* (1988) 4 NWLR (pt 87) 147