The Transfer Pricing Law Review

Fourth Edition

Editors

Steve Edge and Dominic Robertson

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THE TRANSFER PRICING LAW REVIEW

FOURTH EDITION

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CONTENTS

PREFACE

It has been a great pleasure to edit this fourth edition of *The Transfer Pricing Law Review*. This publication aims to give readers a high-level overview of the principal transfer pricing rules in each country covered in the *Review*. Each chapter summarises the country's substantive transfer pricing rules, explains how a transfer pricing dispute is handled, from initial scrutiny through to litigation or settlement, and discusses the interaction between transfer pricing and other parts of the tax code (such as withholding taxes, customs duties, and attempts to prevent double taxation).

Other than Brazil, all the countries covered in this *Review* apply an arm's-length standard and adhere, at least to some extent, to the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines (the OECD Guidelines); and Brazil itself has recently launched a project to align its transfer pricing rules with the OECD norm. However, as the chapters make clear, there remains significant divergence, both in countries' interpretation of the arm's-length standard (e.g., the transactions it applies to, the pricing methods preferred and whether secondary adjustments are imposed) and in the administration of the rules (e.g., the documentation requirements imposed, and the availability of APAs). Transfer pricing practitioners, therefore, cannot simply assume that the OECD Guidelines contain all the answers but must in fact engage with their detailed application within each country.

As we have said in earlier editions of the *Review*, transfer pricing rules will be high on the corporate tax agenda for many years to come, and they are continuing to evolve at a rapid pace. Over the next year or so, we expect the following to be among the main areas of focus.

First, as in so many other areas of endeavour, the covid-19 pandemic raises new challenges for transfer pricing, and may in some cases invert the 'normal' argument between taxpayers and tax authorities. For example, will tax authorities which have previously argued that a company is not a routine service provider, and should be rewarded through a profit split, now accept that the company therefore needs to bear a share of the group's covid-19 losses? Looking further forward, the experience from the 2008 financial crisis suggests that, in the medium term, the need for tax revenues is likely to push tax authorities towards a more assertive approach in transfer pricing cases.

Second, a number of countries may see disputes over the extent to which transfer pricing can be used to recharacterise transactions, rather than merely to adjust the pricing of transactions. For example, the German courts held last year that transfer pricing rules are not limited to pricing adjustments alone; and Ireland introduced rules that enable the Irish Revenue to impose a 'substance over form' principle.

Third, the long-awaited OECD Transfer Pricing Guidance on Financial Transactions was published in February 2020. Although its immediate impact has been rather overshadowed by the covid-19 situation, many taxpayers, and tax authorities, will need to get to grips with the potential impact of this guidance on them.

Finally, the OECD/G20 project to address the tax consequences of digitalisation continues to work towards its target of presenting an agreed solution by the end of 2020. The current Pillar One and Pillar Two proposals would, if enacted, be the most far-reaching change to transfer pricing principles in close to 100 years, and would mark a significant shift away from the arm's-length principle. The desire to shore up tax revenues in light of covid-19 may well encourage the countries that expect to be 'winners' from the proposals to push for an agreed outcome. It is worth noting, however, that the reforms will not be a silver bullet for public finances. The OECD expects the reform to increase corporate tax revenues by 4 per cent; in the UK, for example, that would raise enough money to fund the National Health Service for only one week.

We would like to thank the authors of all of the country chapters for their comprehensive and illuminating analysis of each country's transfer pricing rules; and the publishing team at Law Business Research for their diligence and enthusiasm in commissioning, coordinating and compiling this *Review*.

Steve Edge and Dominic Robertson
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Chapter 17

NIGERIA

Lolade Ososami, Joseph Eimunjeze and Mojisola Jawando[1]

I OVERVIEW

Prior to 2012, there was no comprehensive law regulating transfer pricing in Nigeria. General anti-avoidance rules (GAARs) were included in Nigeria's income tax laws as a means of curbing tax avoidance. Tax authorities relied on GAARs to assess and regulate the pricing of inter-group transactions where such transactions appeared to be artificial or sham arrangements. In August 2012, the Federal Inland Revenue Service (FIRS), Nigeria's Federal tax authority, published Nigeria's first transfer pricing regulations. The Income Tax (Transfer Pricing) Regulations (the 2012 Regulations) were aimed at unifying and implementing the various transfer pricing provisions available in the Nigerian tax laws and providing a more structured regime for assessing related-party transactions. The 2012 Regulations, however, did not provide much certainty in relation to the scope and contents of the reporting requirements or the parameters for the selection of comparables for purposes of benchmarking prices or profits of related-party transactions. The scope of taxes covered did not include capital gains tax (CGT) and value added tax (VAT), and there were uncertainties around the application of safe-harbour rules and penalties for non-compliance.

In 2016, Nigeria joined the Organisation for Economic Co-operation and Development (OECD)/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) and committed to the implementation of the four minimum standards, which included the re-examination of transfer pricing documentation (Action 13). As part of the implementation of the Action 13 minimum standard, the 2012 Regulations were replaced by the Income Tax (Transfer Pricing) Regulations 2018 (the 2018 Regulations). Unlike the 2012 Regulations, which only took into consideration the provisions of the OECD and United Nations (UN) Transfer Pricing Guidelines, the 2018 Regulations also adopted some of the provisions of the African Tax Administration Forum's suggested approach to drafting transfer pricing legislation (the ATAF Approach). The main thrust of the ATAF Approach is to suggest structure and content to African countries seeking to develop transfer pricing rules, based on policy options that aim to address the limitations that African tax administrations often encounter when assessing transfer prices. These limitations include information asymmetries between multinational entities (MNE) and African tax administration and capacity constraints that make it difficult to price complex controlled transactions, especially involving the transfer of rights relating to intangibles.[2] The 2018 Regulations are to be applied in a manner that is consistent with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax

1 Lolade Ososami and Joseph Eimunjeze are partners and Mojisola Jawando is a senior associate at Udo Udoma & Belo-Osagie.

2 *Suggested Approach to Drafting Transfer Pricing Legislation* – an ATAF Publication.

Administrations 2017 (OECD TP Guidelines) and the UN's *Practical Manual on Transfer Pricing for Developing Countries 2017* (UN Manual), as may be supplemented and updated from time to time.[3] Where, however, there is any inconsistency between any domestic law, rules or regulations and the UN Manual and OECD TP Guidelines, the domestic laws will prevail. What this means, therefore, is that Nigerian transfer pricing rules may be supplemented by the OECD TP Guidelines as updated from time to time, provided that the Guidelines are not inconsistent with domestic law. Consequently, reference can be made to more recent versions of the OECD TP Guidelines in determining whether transactions predating the updated versions of the Guidelines were at arm's length. Some of the introductions made by the 2018 Regulations include rules on intra-group services, pricing of intangibles, pricing of commodities, exports and imports, and transfer pricing documentation processes.

The 2018 Regulations cover transactions between individuals, sole corporations, entities, companies, partnerships, joint ventures, trusts or any other body of individuals deemed to be 'connected'. Persons will be deemed to be connected where one person has the ability to control or influence the other person in making financial, commercial or operational decisions or there is a third person who has the ability to control or influence both persons in making financial, commercial or operational decisions.[4] The degree of control required is, however, not specifically stated in the 2018 Regulations. Eligible transactions include sale and purchase of goods and services; sales, purchase or lease of tangible assets; transfer, purchase, licence or use of intangible assets; provision of services; lending or borrowing of money; manufacturing arrangements and any transaction that may affect profit or loss or any other matter incidental to, connected with or pertaining to these transactions (eligible transactions).

The scope of application of the 2018 Regulations includes all transactions that have an effect on the taxable profit of connected entities, including distributions of dividend and capital contributions between connected persons. Transactions between connected persons are deemed to be controlled transactions and must be at arm's length. A transaction is at arm's length when the conditions of the transaction do not differ from the conditions that would have applied between independent persons in comparable transactions carried out under comparable circumstances. Where a controlled transaction is considered not to be at arm's length, the FIRS may make necessary adjustments to bring the taxable profits resulting from the transaction into conformity with the arm's-length principle.

II FILING REQUIREMENTS

The filing requirements under the 2018 Regulations place specific reporting obligations on a taxable person to disclose its relationship with any party that qualifies as a 'connected person' in relation to its business activities. In addition to the filing of contemporaneous documentation prescribed in the OECD TP Guidelines, the filing requirements for a Nigerian company include making a transfer pricing declaration and filing a transfer pricing disclosure. The taxpayer has the ultimate responsibility to prepare its transfer pricing documentation and any liability arising from non-compliance, inadequacies, defects or misstatements is for the account of the taxpayer.[5]

3 Regulation 18 of the 2018 Regulations.
4 Regulation 12 ibid.
5 FIRS Guidelines on Transfer Pricing Documentation.

i Declaration

A Nigerian entity is required to declare its relationship with all connected persons resident in Nigeria or elsewhere by filing a declaration in the prescribed form within 18 months of its incorporation or within six months of the end of its accounting year, whichever is earlier. A Nigerian entity that fails to make or submit a declaration within the prescribed period shall pay an administrative penalty in the sum of 10 million naira and 10,000 naira for every day the failure continues. The Nigerian entity is required to file an updated declaration upon the occurrence of any changes in the organisation within six months of the end of the accounting year in which the change occurred.[6] Failure to submit a declaration or notification in respect of such changes will attract a penalty of 25,000 naira for each day in which the failure continues.

ii Disclosure

It is mandatory for a Nigerian entity to annually disclose all eligible transactions with connected persons without notice or demand from the FIRS in the prescribed form within 18 months of its incorporation or within six months of the end of its accounting year, whichever is earlier. Failure to file a disclosure in the relevant year of assessment will attract an administrative penalty of 10 million naira or 1 per cent of the value of the controlled transaction not disclosed, whichever is higher; and 10,000 naira for every day the Nigerian entity remains in default.[7] Where the Nigerian entity files an incorrect disclosure, the higher of an administrative penalty of 10 million naira or 1 per cent of the value of the controlled transaction not disclosed, will apply. The Nigerian entity can apply to the FIRS for an extension of time to make the relevant disclosure. Approval is subject to the discretion of the FIRS.

iii Documentation

A Nigerian entity has an obligation to keep in electronic format, sufficient data or information, along with an analysis of the information, to verify that the pricing of controlled transactions is consistent with the arm's-length principle and shall make the documentation available to the FIRS upon written request.[8] The documentation shall be available prior to the due date for filing the income tax return for the year in which the documented transaction occurred. The documentation comprises a master file, a local file (contemporaneous documentation) and a country-by-country report (CbCR), where required.

The master file should include a detailed description of the group's legal and ownership structure, geographical location of operating entities, service arrangements between members,

6 Such changes include a merger of the Nigerian entity's parent company with another company outside the group; acquisition of up to 20 per cent of the Nigerian entity's parent company by persons not connected to the group; merger of the Nigerian entity with another company; acquisition of up to 20 per cent of the Nigerian entity by persons not connected to the group; merger or acquisition of the Nigerian entity by another company outside the group; sale or acquisition of a subsidiary by the person; and any other change in the structure, including a change in directorship, arrangement or circumstances of the Nigerian entity that influences whether it will be considered to be connected or not connected to another person.

7 Regulation 14(4) of the 2018 Regulations.

8 Regulation 16 ibid.

sources of business profit, turnover, intangibles owned, all policies from the development to transfer of research within the group, financing arrangements, tax positions, annual consolidated financial statements and tax rulings on income allocation by jurisdiction.

The local file should provide detailed information relating to specific inter-company transactions between the Nigerian entity and connected enterprise, including a functional analysis, value-chain analysis and comparability analysis of the transactions.

A Nigerian entity with controlled transactions of a total value less than 300 million naira is not obliged to maintain contemporaneous documentation unless a notice is received from the FIRS demanding it.[9] In the event that the FIRS makes such a demand, the contemporaneous documentation must be submitted not later than 90 days from the date the FIRS notice was received. A company with controlled transactions of a total value that exceeds 300 million naira is required to submit contemporaneous documentation to the FIRS within 21 days of receiving a written request. Failure to meet the prescribed deadline will attract an administrative penalty of the sum of 10 million naira or 1 per cent of the total value of the controlled transactions, whichever is higher; and 10,000 naira for every day that the failure continues.[10]

In addition to maintaining contemporaneous documentation, a company that is a member of an MNE group with a total group revenue of 160 billion naira and above during the accounting year immediately preceding the year of assessment is required to file a CbCR. A Nigerian group of companies that does not have any affiliation with a foreign company and that does not meet the eligibility threshold is not required to file a CbCR. The filing of CbCRs is governed by the Income Tax (Country by Country Reporting) Regulations of 2018, which are modelled on the OECD CbCR rules. The information in the CbCR is aggregated by tax jurisdiction, showing the MNE's allocation of income, income tax paid, and certain indicators of the location of economic activity among tax jurisdictions in which the MNE group operates.

III PRESENTING THE CASE

i Pricing methods

The FIRS does not favour any particular method over the other provided that the taxpayer can show that the chosen method is the most appropriate in the circumstance.[11] To determine the most appropriate transfer pricing method to adopt in a given circumstance, four factors must be considered. These are:

a the strengths and weaknesses of the transfer pricing method on a case-by-case basis;

b the nature of the controlled transaction 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; and

9 Regulation 17(3) of the 2018 Regulations..

10 Regulation 16(5) ibid.

11 The OECD Transfer Pricing Guidance on Financial Transactions endorses the comparable uncontrolled price method for benchmarking-related party loans.

d the degree of comparability between controlled and uncontrolled transaction, including the reliability of adjustments, if any, that may be required to eliminate any differences between comparable transactions.[12]

The 2018 Regulations also recognise that, in considering the factors above, a taxpayer may reach a conclusion that none of the specified transfer pricing methods can be reasonably applied. In these circumstances, a taxpayer may apply a different transfer pricing method provided that sufficient information exists, and the method gives rise to financial indicators that are consistent with that of independent persons engaging in comparable uncontrolled transactions in comparable circumstances.

There is unfortunately a dearth of publicly available data from which local comparables can be drawn for benchmarking analysis in Nigeria because of a lack of centralised data. Thus, taxpayers and the FIRS have had to rely on comparables from other jurisdictions in Africa, Asia, Europe and America.

Where the application of the most appropriate method leads to an uncertainty in the degree of comparability in two or more controlled transactions, a statistical approach shall be used and the interquartile range shall be considered to be an arm's-length range.

Extrapolation from near comparables is also permitted, provided that there is sufficient publicly available information on such comparables, against which the FIRS can verify the benchmarking analysis used to arrive at the arm's-length price. The use of unknown comparables that cannot be verified through information that is publicly available is unacceptable.

ii Authority scrutiny and evidence gathering

The FIRS is empowered under the relevant laws to request any relevant information from taxpayers relating to their income and profits.[13] This power is especially useful prior to and during transfer pricing audits, where the FIRS requests various documents, including internal documents relating to controlled transactions, to determine whether the price fixed is at arm's length. This places the burden of proof on the taxpayer to prove beyond reasonable doubt that the controlled transactions under review have been priced in accordance with the arm's-length principle.[14]

During an audit, a taxpayer would usually be required to provide additional information and documents, such as contract agreements with connected persons and third parties, account statements and receipts. The FIRS may also request to meet with certain officers of the taxpayer to provide information, explanations or justifications for certain actions where necessary. In addition, a taxpayer's professional advisers (for example, auditors or transfer pricing specialists) may be required to provide the FIRS with information on matters that require further clarification. The FIRS may also request information on a taxpayer from its bankers. In addition, in recent times, various government agencies have been known to collaborate with the FIRS with a view to providing information on taxpayer activities. The FIRS also leverages the cooperation agreements that Nigeria has signed with a number of

12 Regulation 5(2) of the 2018 Regulations.

13 Federal Inland Revenue Service Establishment Act 2007 and the Companies Income Tax Act 2004 (as amended).

14 https://news.bloombergtax.com/daily-tax-report-international/insight-practical-lessons-from-transfer-pricing-audits-in-nigeria.

countries that allow for the automatic exchange of tax and financial information between the tax authorities of these countries to obtain relevant information from its counterparts in other jurisdictions where the taxpayer is not forthcoming with information relating to members of its group.

IV INTANGIBLE ASSETS

The 2018 Regulations adopt the ATAF Approach, which provides African countries with policy options that provide simplification measures to address capacity constraints that make it difficult to price complex controlled transactions, such as those involving the transfer of rights relating to intangibles.

The determination of arm's-length conditions for controlled transactions involving intangibles differ in terms of whether the intangible asset would be exploited, licensed, sold or otherwise transferred. The general approach when determining the arm's-length price of the exploitation of intangible assets is to consider the contractual arrangements between the parties. Other factors that will be taken into account with regard to the development, enhancement, maintenance, protection and exploitation (DEMPE) of the intangible asset are: (1) the functions performed by the person; (2) management and control of those functions; (3) contribution by the person of assets, including financial assets; (4) management and control regarding the contribution of assets, including financial assets; (5) risks assumed by that person; and (6) management and control of those risks.[15]

In cases where the above-listed factors and the contractual arrangements between the parties differ, regard shall be taken of those factors in determining the arm's-length reward from the exploitation of the intangible asset.[16] In practice, a substance-over-form approach is used when the contractual arrangements underlying the DEMPE functions are being considered.

Regardless of the arm's-length price determined in relation to the exploitation of intangible assets, the consideration that will be allowed as deductible for tax purposes shall not exceed 5 per cent of the taxpayer's earnings before interest, tax, depreciation and amortisation (EBITDA) plus the consideration, derived from the commercial activity conducted by the person in which the rights transferred are exploited.[17]

When there is a transfer of intangible property between connected persons, account shall be taken of both the perspective of the transferor and the transferee of the property, including in particular, the price at which a comparable independent person would be willing to transfer the property and the value of the intangible property to the transferee in its business. Special factors relevant to the comparability of the controlled and uncontrolled transaction will be considered, such as (1) the expected benefits from the intangible property; (2) the commercial alternatives otherwise available to the acquirer of licences derived from the intangible property; (3) any geographic limitations on the exercise of rights to the intangible property; (4) the exclusive or non-exclusive character of the rights transferred; and (5) whether the transferee has the right to participate in further development of the intangible property by the transferor.

15 Regulation 7(1) of the 2018 Regulations.

16 Regulation 7(2) ibid.

17 The ATAF Approach recommends a percentage of the taxpayer's tax EBITDA plus the actual royalty payable for the year of assessment.

V SETTLEMENTS

The need for settlement arises either where a taxpayer objects to an assessment issued by the FIRS after an audit has been concluded or where the taxpayer and the FIRS need to agree on a criterion, including the method of transfer pricing used to determine whether the taxpayer has complied with the arm's-length principle. In the former case, the 2018 Regulations set out an administrative procedure for settlements to be made through the Decision Review Panel (the Panel). Regarding the latter, the 2018 Regulations contain a provision for entering into an advance pricing agreement (APA) with the FIRS.

A taxpayer who disagrees with the transfer pricing assessment may object to the assessment within 30 days. The head of the transfer pricing function of the FIRS may, upon receipt, refer the taxpayer's objection to the Panel,[18] which, in making a decision, shall take into consideration (1) the adjustment or assessment issued; (2) the basis on which the adjustment or assessment was issued; (3) the taxpayer's objection; and (4) the evidence presented to it by the parties. The decision of the Panel on the adjustment or assessment shall represent the final position of the FIRS in respect of the dispute.[19] However, if still aggrieved by the decision of the Panel, the taxpayer may appeal to the Tax Appeal Tribunal (TAT), and appeal further to the courts.

Although the 2018 Regulations set out elaborate provisions regarding the scope and procedure for concluding an APA, the FIRS has yet to enter into any APAs with taxpayers. It is hoped that as part of its obligations to observe the minimum standards of the BEPS Inclusive Framework, the FIRS will consider entering into APAs with taxpayers that require them.

VI INVESTIGATIONS

A company liable to pay tax under the Companies Income Tax Act 2004 (as amended) (the CITA) is required to file a self-assessment return. Where the company has engaged in related-party transactions, it is required to file transfer pricing documentation on the basis of self-assessment.

The FIRS would typically conduct an audit on the company's returns to ascertain that it has complied with the provisions of the law.[20] At the end of the audit, the FIRS may call for further returns or may issue an additional assessment against the company within the year of assessment or within six years of the expiration of the assessment year.[21] The company has 30 days within which to object to the additional notice. With regard to transfer pricing assessments, the FIRS may request the company's transfer pricing documentation, which should be maintained contemporaneously with the transactions documented therein prior to the due date for filing the company's income tax return.

The FIRS may subsequently, as necessary, invite the company to make a presentation about the company and its global operations to justify its transfer pricing policy. The FIRS may also visit the company's premises to observe its internal processes, examine the relevant records and compile its report, which is sent to the company. Upon receiving the FIRS report,

18 Regulation 21(5)(6) and (7) of the 2018 Regulations.
19 Regulation 21(8) ibid.
20 Section 60(4) of the CITA.
21 Section 66 ibid.

the company may be required to provide additional information to clarify any inconsistencies or deficiencies, which may ultimately lead to an adjustment of the tax assessed. The FIRS would meet with the company to provide relevant clarifications where necessary. Upon the conclusion of its investigation, the FIRS will send its assessment to the company summarising its position on the company's transfer pricing structure.

A tax investigation may be triggered if, after an audit or a series of audits, the FIRS observes that the returns filed by the company are inconsistent with information obtained from third parties or underlying records; or where the FIRS has reason to suspect that the company has been engaged in tax evasion either by way of fraud or wilful neglect. Unlike a tax audit, a tax investigation is not subject to the statutory limitation period of six years.[22]

VII LITIGATION

i Procedure

A person aggrieved by an assessment or demand notice made by the FIRS or any action or decision of FIRS under the tax laws (including an action based on transfer pricing assessments), may appeal against the action, decision, assessment or demand notice. If the taxpayer has exhausted all administrative remedies to have the tax authority review its position but does not challenge the assessment at the TAT by way of an appeal within the prescribed period, the assessment is said to become final and conclusive. In that circumstance, the tax due becomes a debt due to the government, and the tax authority may institute proceedings at the TAT for recovery of the unpaid tax.

The TAT is the ultimate fact-finding forum in respect of all tax disputes and is comprised of experts who determine the appropriate tax liability based on all available data and without undue adherence to the strict application of the rules of evidence, while ensuring compliance with the principles of fair hearing[23] and the provisions of the tax laws. To institute an action, the appellant is required to file a notice of appeal at the Registry of the appropriate zone of the TAT and pay the required fees, as stated in the Second Schedule to the TAT Rules. If the appellant wishes to call for the evidence of a witness at the hearing of the appeal, the appellant is required to file, along with the notice of appeal, (1) a list of witnesses to be called at the hearing of the appeal; (2) written statements on oath of the witnesses; and (3) copies of every document to be relied on at the trial. Parties can call any number of witnesses, including expert witnesses, in proof of their case. The evidence given by the expert witnesses will be admitted in evidence if it is relevant to the determination of the case. Where there is a conflict in expert testimonies, the TAT is not bound to accept any of the opinions proffered. In such circumstances, the TAT may choose and rely on the opinion that is most probable. The TAT can also reject the expert opinions if they are not convincing. The respondent is required to enter appearance in respect of the appeal within 30 days of the service of a notice of appeal.

The award or judgment of the TAT is enforced like the judgment of the Federal High Court (FHC), upon registration of a copy of the award with the Chief Registrar of the FHC[24] by the party seeking to enforce the award or judgment.

22 Proviso in Section 66(1) ibid.

23 Appeal No. TAT/LZ/PPT/041/2014: *Mobil Producing Nigeria Unlimited v. Federal Inland Revenue Service.*

24 In Nigeria, the power of a court to enforce and ensure compliance with its judgment or order is derived from Section 6(6)(a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Being

A party who is dissatisfied with the judgment of the TAT may appeal against the decision on points of law to the FHC.[25] The notice of appeal against the judgment of the TAT must be filed at the TAT within 30 days of the date on which the TAT delivered the judgment. After the filing of the notice of appeal, the Secretary of the TAT is required to deliver a copy thereof to the Chief Registrar of the FHC along with the records of proceedings and all exhibits tendered at the hearing before the TAT.[26]

The onus is on the appellant to prove that the assessment complained of is excessive. Under the TAT Rules, an appeal must be filed within 30 days of the date on which the action, decision, assessment or demand notice in question was made by the taxing authority.[27] The 30-day rule, however, is not rigid, as the TAT Rules provide that the Tribunal may entertain an appeal that was filed after 30 days if it is satisfied that there was sufficient cause for the delay.

ii Recent cases

Since the FIRS commenced transfer pricing audits in 2015, there has been only one court decision that has been concluded and reported. This is the case of *Prime Plastichem Nigeria Limited v. FIRS*,[28] which was recently decided by the TAT.

In that case, Prime Plastichem Nigeria Limited (PPNL) had purchased plastics and petrochemicals from a foreign related-party supplier, Vinmar Overseas Limited, in 2013 and 2014. In determining the arm's-length price for 2013, PPNL used the comparable uncontrolled pricing (CUP) method, and in 2014 the transactional net margin method (TNMM) was used as PPNL claimed that there were no comparables available for that year. PPNL had arrived at the price in line with the TNMM using the operating/net profit margin as a profit level indicator (PLI). PPNL filed the relevant transfer pricing documentation for 2013 and 2014 with the FIRS. The FIRS requested additional documentation from the company covering 2013 and 2014 which it provided. Subsequently, the FIRS served PPNL with an additional assessment totalling over 1.7 billion naira inclusive of interest and penalties. PPNL filed an appeal at the TAT.

The main issues before the TAT were, inter alia, (1) whether the FIRS was right to have benchmarked PPNL's transfer pricing transaction with the TNMM for 2013 and 2014 in view of the 2012 Regulations and the OECD/UN Guidelines; and (2) whether the FIRS was right to have used the gross profit margin (GPM) method as the PLI in view of the 2012 Regulations, OECD and UN Guidelines. The TAT held, inter alia, that:

a the onus was on PPNL to provide sufficient information to the tax authority to validate the use of any transfer pricing methods. By the provisions of Regulation 5(2) of the 2012 Regulations, availability of reliable information is a necessary condition for a transfer

a monetary judgment, the award made by the TAT can be enforced by a writ of *fieri facias*, garnishee proceedings, a charging order, a writ of sequestration or an order for committal on judgment debtor summons.

25 Order 24 Rule 1 of the Tax Appeal Tribunal (Procedure) Rules 2010.

26 Order 24 Rule 2 ibid.

27 Order 3 Rule 2 ibid.

28 Appeal No. TAT/LZ/CIT/015/2017. The appeal was decided by the Lagos Zone of the TAT on 19 February 2020.

pricing method to be considered most appropriate. Therefore, the FIRS' rejection of the CUP method was in consonance with the provisions of the 2012 Regulations and OECD TP Guidelines;

b the choice of the most appropriate PLI under the OECD TP Guidelines should consider the respective strengths and weaknesses of the various possible indicators. Furthermore, whether the indicator considered is appropriate is determined by considering the nature of the controlled transaction in question, and the availability of reliable information needed; and

c it was lawful for the FIRS to have considered the various factors enumerated by the OECD Guidelines in deciding that the GPM was the most appropriate PLI to use in the instant case. Accordingly, the FIRS was correct to have limited its benchmarking analysis to direct sales revenue and direct cost items produced by PPNL in order to avoid distorting the comparability analysis.

VIII SECONDARY ADJUSTMENT AND PENALTIES

i Secondary adjustments

The 2018 Regulations do not include any provisions on secondary adjustments.

ii Penalties

The FIRS is empowered under the 2018 Regulations to impose administrative penalties on defaulting taxpayers for the contravention of filing requirements as discussed previously. There are no penalties imposed in relation to secondary transfer pricing adjustments.

IX BROADER TAXATION ISSUES

i Diverted profits tax and other supplementary measures

No additional measures have been adopted or introduced to supplement the 2018 Regulations. Consequently, there is no diverted profits tax or global intangible-low-income regime in Nigeria. However, where a transaction between related parties results in the reduction of tax liability that may have occurred from a diversion of profits, the transaction may be deemed artificial or fictitious and the FIRS may make adjustments as it considers appropriate.

ii Double taxation

Nigeria has, as at the date of this review, negotiated over 20 double-tax agreements (Nigerian DTAs) with other countries, 13 of which have been ratified and are currently in force.[29] The Nigerian DTAs are a modified version of the OECD Model Tax Convention (OECD MC) and the UN Model Double Taxation Convention (UNMC). The 2018 Regulations are applied in a manner consistent with the arm's-length principle in Articles 9 of the OECD MC and of the UNMC in force at the given time. Thus, the adjustments made under the 2018 Regulations are similar to what is provided in Article 9(2) of the OECD MC.

The interpretation of a connected person under the 2018 Regulations is based on the provisions of Articles 9 of the OECD MC and of the UNMC. The 2018 Regulations

29 Nigeria currently has effective DTAs with the United Kingdom, Belgium, Canada, China, the Czech Republic, France, the Netherlands, Pakistan, the Philippines, Romania, Spain, Slovakia and South Africa.

empower the FIRS, upon request by a connected person, to make corresponding adjustments to the amount of tax charged in Nigeria in respect of income earned in a contracting state by a connected person resident in Nigeria. This will apply where an adjustment is made to the taxation of the transactions of a connected person resident in Nigeria by a competent authority in a treaty country that results in taxation in the other country of income and profits that are also taxable in Nigeria.

The Nigerian DTAs provide for the application of a mutual agreement procedure (MAP), which gives a taxpayer the right to present its case to the competent authority of the state of which it is a resident where the taxpayer considers that the action of one or both of the contracting states has resulted or will result in taxation that is not in accordance with the provisions of the DTA.

The Nigerian DTAs contain variations[30] of the MAP provision stated in Article 25 of the OECD MC. Some of the provisions give a taxpayer the right to present its case to the competent authority of the contracting state of which it is a national where the procedure for the application of Paragraph 1 of Article 24 (Non-Discrimination) had previously been set in motion by the taxpayer. The time limit set for presenting an objection to the relevant competent authority also varies from two to five years and, in some cases, no limit is set. Nigeria has indicated its intention to amend its MAP provisions in all its treaties to conform with the wording prescribed in Article 16 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). This would eliminate the non-discrimination exception and establish a three-year time limit for filing an objection. Although Nigeria has submitted its MLI position to the OECD, as at the date of this review Nigeria and some of its treaty partners have yet to ratify the MLI.

A MAP can be invoked where a transfer pricing adjustment or corresponding adjustment results in double taxation. Other circumstances that may be resolved by a MAP include an incidence of double taxation due to dual residence status or characterisation or classification of income. In the latter case, a MAP may be invoked to seek clarification from the competent authorities. Other instances for a MAP are where a withholding tax is levied beyond what is allowed within an applicable tax treaty, or where a Nigerian resident taxpayer that is subject to tax in Nigeria on income is taxed by the tax authority of the treaty partner on the business income earned in that country, despite not having a permanent establishment in that country under the tax treaty.

A taxpayer that has invoked a MAP process still has a right of appeal under domestic law and is entitled to the legal remedies available. Nevertheless, where the taxpayer's MAP request has been accepted, the taxpayer is required to suspend all the legal remedies available to it. Upon the conclusion of a MAP, if the taxpayer is not satisfied with the ruling of the FIRS, it can approach the TAT and courts for legal redress and the available remedies will apply. Where a court has determined a tax matter, it becomes final and binding, and the taxpayer can no longer invoke a MAP. Nigerian law does not allow arbitration of tax disputes.[31]

30 The DTAs between Nigeria and the United Kingdom and Canada respectively do not contain the non-discrimination exemption.

31 *FIRS v. NNPC & Ors.* (2012) 6TLRN1.

iii Consequential impact for other taxes

Although the scope of taxes covered by the 2018 Regulations includes CGT and VAT, the Regulations make no explicit provisions on how they will apply to these taxes. However, depending on the nature of the transaction, where a transaction is considered not to have been at arm's length and adjustments are made to arrive at the income tax due, corresponding adjustments will also be made in respect of the aspect of the transaction that is liable to VAT. The same process will also apply in relation to a disposal of capital assets on terms not otherwise at arm's length. In that case, adjustments will be made to the value of the transaction to determine the gains realised from the disposal and the applicable CGT.

X OUTLOOK AND CONCLUSIONS

A recent development is the adoption of the OECD Transfer Pricing Guidance on Financial Transactions (the FT Guidance) into Nigeria's transfer pricing regime. The FT Guidance seeks to clarify the application of the principles of the OECD TP Guidelines, particularly on the accurate delineation analysis of financial transactions, with particular focus on the role and remit of treasury functions, intra-group loans, cash pooling, hedging, financial guarantees and captive insurance.

Transfer Pricing in Nigeria is still evolving. Limited availability of comparable data for benchmarking analysis, capacity constraints that make it difficult to price complex controlled transactions, and information asymmetries between multinational taxpayers and the tax administrators all remain a challenge.

The criteria for the application of the safe-harbour rule remain uncertain. Another challenge is that although the 2018 Regulations provide that the FIRS can enter into APAs, in reality the FIRS has been reluctant to enter into APAs even when approached by eligible taxpayers with credible reasons for an APA.

Collaborative efforts of African tax administrators through ATAF has continued and the significance of their influence and the BEPS initiative on the Nigerian transfer pricing regime should not be ignored by taxpayers and their advisors.

Regarding the OECD's Inclusive Framework Pillar One, the ATAF has stated that it is in support of the unified approach objective of revising the allocation of taxing rights between residence and source jurisdictions by allocating more of MNE's taxable profits to the market jurisdictions.[32] The ATAF's position on the 'Nexus Rule' is that it is only appropriate that countries have the right to tax the profits that a foreign entity generates from business activities within a country irrespective of whether it has a physical presence in that country.[33] The ATAF also broadly supports the 'New Profit Allocation Rules' under the unified approach given that the rules are based on the principle of allocating greater taxing rights to market jurisdictions as well as the use of simplified conventions.[34]

In relation to the OECD's Inclusive Framework on Pillar Two – Global Anti-Base Erosion rule, the ATAF recommends that a key focus of the pillar should be on developing

32 'ATAF's opinion on the Inclusive Framework Pillar One (including the Unified Approach) and Pillar Two proposals to address the tax challenges arising from the digitalisation of the economy'.

33 ibid.

34 ibid.

rules that address base eroding payments such as excessive interest payments, management fees, royalties and service fees paid by African taxpayers to related entities located in no- or low-tax jurisdictions as these payments reduce the tax base of many African countries.[35]

Nigeria has, however, taken specific steps in addressing the issues of taxation of the digital economy. The Minister of Finance, Budget and National Planning recently issued the Companies Income Tax (Significant Economic Presence) Order 2020, which prescribes the conditions under which a non-resident company that is involved in (1) digital transactions, or (2) the provision of technical, professional, management or consultancy services, offshore to its customers in Nigeria, will be deemed to have a taxable nexus in Nigeria and therefore subject to income tax. Such companies will be subject to tax in Nigeria whether or not they have a physical presence in Nigeria.

35 ibid.

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