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Transfer Pricing and the Regulations in Nigerian Milieu

Shafi'u Abubakar Kurfi[1]
Noraza Mat Udin[2]
Usman Muhtari Tsohuwar Kasuwa[3]

[1] Department of Accounting, Umaru Musa Yar'adua University, Katsina, Nigeria

[2]Tunku Putri Intan Safinaz School of Accountancy, Universiti Utara Malaysia, Malaysia

[3]Department of Accounting, Umaru Musa Yar'adua University, Katsina, Nigeria

Correspondence: Department of Accounting, Umaru Musa Yar'adua University, Katsina, Nigeria, E-mail: abubakarkurfishafiu@gmail.com

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Abstract

The main objective of this paper is to provide an overview of the transfer pricing practices and highlight the newly adopted regulations on transfer pricing in Nigeria. Due to the increase numbers of multinational corporations in the country, reports show that the transfer pricing activities by these entities has resulted in economics lost and a large amount of net resources being carried way from the region. These unethical exercises had signal clearly of the serious need to amend the massive leakages of economic resources. Over decades, Nigeria has worked tirelessly to develop its own transfer pricing formulae and finally the Income Tax (Transfer Pricing) Regulations No. 1, 2012 (or known as TP Regulations) has been published on 21 September 2012. Specifically, the TP Regulations in Nigeria served as the mechanisms that the Government through the tax authority can use to combat the misused of transfer pricing practices. This paper also highlights some issues that need to be strengthen and future challenges in implementing the regulations. Some recommendations are also provided at the end of the paper to the tax authority and policy makers to enhance and improve the governance of transfer pricing matters in the country.

Keywords: Nigeria, Transfer Pricing, Regulations.

1. Introduction

Nigeria is the most populous country in Africawith over 173.6 million people and ranked as seventh most populous country in the world (World Bank, 2013). The people, Nigerian, comprises of more than 250 different ethnic groups with three major religions which are Islam, Christianity and Traditional religions. Nigeria was awarded independency from England on 1October 1960 and encloses more historic cultures and empires than any other nations in Africa. African countries nicknamed Nigeria as "Mother of Africa" where it consists of six geographical zones i.e. North-west, North-east, North Central, South-east, South-south and South-west. In terms of administration, Nigeria has774 local governments, 36 states and Abuja as Federal Capital Territory which are all placed under the Federal Government.

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Nigeria, a member of the Organization of Petroleum Export Countries (OPEC) since 1971, ranks as the largest oil producing county in the Africa and turned as the 17th largest producing oil in the world (Oyedele, Curtis, Sweigart& Smallwood, 2013). The United States (US) Energy Information Administration spelt out vividly that Nigeria has total oil reserved of 37.2 billion barrels as of 2011.As of 9 March 2007, it was reported that there were about 283 listed companies in Nigeria with a total market capitalization of about ₦15 trillion (US$125 billion).According to the research carried out in 2013 by Global Financial Integrity (GFI) and the African Development Bank, between the periods of 1980 to 2009, African economies lost between US$597 billion and US$1.4 trillion in net resources carried way from the region. This unethical transfer of slush was gained primarily through mispricing transfer. These phenomena signal clearly of the serious need to amend the massive leakages of economic resources from the country (Akhidime, 2011).Since then, the issue of transfer pricing (TP) has become a prevalent debate from various parties. The Government has been urged to set up rules to prevent the activities from getting worst and weaken the Nigerian economy.

The aim of this paper is to overview the TP practices and highlight the newly release regulations of TP in Nigeria. This paper is organized as follows: the next section, section two, presents definitions and prominence of TP, it is then followed by section three which explains the Nigerian tax laws on TP and their applications to taxpayers. Section four highlights future challenges in implementing the Regulations. The final section i.e. section five provides conclusion and some recommendations related to the implementation of the new regulations.

2. Ransfer Pricing and Its Prominence

Transfer pricing is a term used to describe all aspects of intercompany pricing arrangements between related business firms including transfers of tangible goods, services, intellectual property and financial transactions (Oyedele et al., 2013).In the US, TP is known as a practice meant to minimize US taxable profits by overpaying foreign subsidiaries for product supplies(New York Times, 2006). TPis also referred as intra-firm trade which involves the sale or transfer of tangible and intangible goods between related companies in two or more countries (Tang, 1997). A study byOnyeukwu (2007) describesTP as an issue in contemporary international taxation which has everlastingly continues to befuddle both the taxpayer and the tax authorities. It is permissible for associated companies in the pricing of inter-related transactions within the circumference of the group of companies, but this created a lot of suspicion for the tax authorities, that the pricing may be in a way of shifting the corporate profits which would results to providing room for tax avoidance (Onyeukwu, 2007).However, Akinla (2014) suggests that TPis the price at which one company buys and sells goods and/or services/resources with a related affiliated in its supply chain. It is clear from the definition that transfer pricing is not a concept exclusivelyrelated to taxation, but when use in the context of international tax, it connotes the artificial manipulation of internal prices within a multinational group with the intention of creating a tax advantage (Miller and Oats, 2012). On the other hand, Sheppard (2012) stress that transfer pricing would never in itself illegal or necessarily abusive, but what is actually illegal or abusive is transfer mispricing which is also known as transfer pricing manipulation or abusive transfer pricing. Transfer mispricing is a general phenomenon known as trade mispricing which includes transactions between unrelated or apparently unrelated parties.

In general, the main objectives or goals of transfer pricing are: performance evaluation and cost minimization (Doupnik and Perera, 2010). Performance evaluation means to evaluate the performance of both parties on an intercompany transaction i.e. the transfer should be made at a price acceptable to both parties. The consensus price could be determined by reference to outside market prices or it could be determined by allowing the parties concerned to negotiate the price. The second objective, cost minimization,relates to intercompany transactions across national borders whereby differences between countries might lead themultinational corporations(MNC) the desire to achieve certain cost-minimization objectives via the use of discretionary transfer prices mandated by their headquarters (Doupnik and Perera, 2010). There are also other cost minimization objectives such as avoidance of withholding taxes, minimization of import duties, circumvent profit repatriation restrictions, protect cash flows from currency devaluation and finally improve competitive position of foreign operations. The basic elements of a transaction which would trigger the transfer pricing implication includes but not limited to the following: commercial transaction, related entities, difference jurisdictions, motive to avoid tax not a pre-requisite (Christina, 2010).

According to the UN member's tax committee, there are three (3) basic issues attached to transfer pricing which include jurisdictional, allocation and valuation issues. Jurisdictional issues include the challenges of which country should tax the MNC's income and what about if both countries claim the same right? If we consider also the case where the tax base arises in more than one country, should one of the countries give tax relief in order to avoid double taxation to MNCs' income?If so, which one among the countries is the destination of transfer or which one is the source of the transfer? Hence, there are some jurisdictional issues which arise as a result of cross-border transactions. In term of allocation issues, there are two perspectives to be considered i.e. MNCs and Government. From the perspectives of MNCs, their resources especially taxable profits need to be allocated with maximum efficiency and with utmost good faith in the most optimal manner as well, whereas for the government, the allocation of costs and income from the MNCs resources needs to be addressed to compute the tax judiciously. Sometimes these diverse perspectives tend to be a 'tug-of-war' between the countries in the allocation of costs and resources in the hope towards maximizing the tax base in their respective states. Finally, many of the resources for MNCs which are sources of competitive advantage for them (MNCs) cannot be disentangled from the global income of the MNCs for tax purpose especially in the case of intangible and service-related intra-group transactions. The third issues i.e. valuations deals with the valuation of intra-firm transfer. This simply means that the mere allocation of income and expenses to one or more members of the MNCs group are insufficient; hence, the income and expenses must also be valued extensively.

The above discussions indicate that the transfer pricing regulations are important for developed countries in order to protect the image of their tax base, to eliminate double taxation on MNCs and simultaneously to improve international trade. For developing country like Nigeria the importance of transfer pricing regulations is to provide a climate of certainty and environment for international trade and at the same time maximize tax revenue which is of paramount importance. Therefore, detailed of transfer pricing regulations are necessary in all countries be it developed, developing or under-developed countries.

Historically, transfer pricing regulations have been captured by many tax systems since 1930s but the US and the Organisation for Economic Co-operation and Development (OECD) had some elements of transfer pricing only by 1979 (Abdallah, Wagdy&Maghrabi, 2009). In 1995, the OECD issued the first draft of its transfer pricing guidelines which was also expanded in 1996 and 2010 respectively. While for the U.S, the issue of transfer pricing started since 1988 and the proposal of comprehensive transfer pricing guidelines was came into effect in between 1990 -1992, which ultimately becomes Regulation in 1994. The two sets of guidelines are indistinguishable where almost all the countries in the world have adopted these principles. Similarly, the OECD guidelines have been formally followed by many European Union countries with little or zero modifications (Abdallah, Wagdy&Maghrabi, 2009).

3. Transfer Pricing in the Nigerian Milieu

General anti-avoidance rules (GAAR) has been in the books of Nigeria for many decades, (Oyedele et al., 2013). Specifically, Section 17 of Personal Income Tax Act (2004), Section 22 of Companies Income Tax Act (2004 as amended 2007) and Section 15 of the Petroleum Profit Tax Act (2004) allow the Federal Inland Revenue Service (FIRS) to adjust any transaction i.e. intercompany or between unrelated partieswhich is deemed to produce a result artificially reducing taxable income in Nigeria (Onyeukwu, 2007). However, until present, GAAR were mostly insignificant from a practical perspective. This is because there was no guidance or mechanism to enforce GAAR in Nigeria. Moreover, the lack of mechanism and guidance is due to the inconsistent application of the principles of the original legislation and compounded existing perceptions by some taxpayers that FIRS is dysfunctional (Oyedele et al., 2013).

Over decades, Nigeria has worked tirelessly to develop its own transfer pricing formulae. In 2012, due to the illicit acts of transfer mispricing by multinational corporations, the Mother of the continent called Nigeria to come up with unique rules to combat the problem. Consequently, the FIRS i.e. the Nigerian tax regulatory body invited all stakeholders to a one day sensitization program on transfer pricing rules in Nigeria. The main goal of this program was to inform and notify all the stakeholders about the progress made by the tax authority subsequent to the introduction of the Income Tax (Transfer Pricing) Regulations No. 1, 2012 (or known as TP Regulations) which put into effect from 2 August 2012[1]. The Regulations is developed based on the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration (OECD Guidelines) and the commentary surrounding the development of the United Nation Transfer Pricing Manual (UN Manual). The FIRS released the draft of transfer pricing rules in May 2012 and the final rules in September 2012.

These TPR regulations consist of six (6) parts which spell as follows:

PART I	**Purpose, Objective and Scope of Application.**
PART II	**Compliance with Arm's length principles, Documentation, Advanced Pricing Agreements and Corresponding Adjustments.**
PART III	**Comparability Factors and Connected Taxable Persons.**
PART IV	**Application of Documents.**
PART V	**Offences, Penalties and Dispute Resolution.**
PART VI	**Supplementary and General Provisions.**

Each part of the TP Regulations is discussed below in order to show how the regulations will apply to Nigerian taxpayers:

3.1 PART I - Purpose, Objective and Scope of Application of the Regulations

The main purpose of these regulations is to curb the level of transfer mispricing among the inter-related companies within and outside Nigeria. These regulations give effect to the provision of: (i) Section 17 of the Personal Income Tax Act, CAP P8; (ii) Section 22 of the Company Income Tax Act, CAP C21; and (iii) Section 15 of the Petroleum Profit Tax Act, CAP 13, Laws of the Federation of Nigeria 2004.

[1]The introduction of the TP Regulations is one of the innovations of the regulations that introduced Advance Pricing Agreement (APA). Unlike OECD TP Guidelines which always uses the term 'Advance Pricing Arrangement', the Nigerian Regulations adopts the 'Advance Pricing Agreement' term. Notwithstanding the differences in terminologies between Advance Pricing Agreement (for the Nigerian Regulations) and Advance Pricing Arrangements (for OCED Guidelines), their goals are inseparable (Akinla, 2014).

The objectives of the regulations are: (i) to make sure that Nigeria is capable to tax on an appropriate taxable basis related to the economic activities deployed by taxable persons in relation to their transactions and dealings with associated enterprises; (ii) to equip the Nigerian authorities with the appropriate tools to fight tax evasion and/or tax avoidance via over or underpricing of controlled transactions between associated enterprises; (iii) to reduce the risk of economic double taxation; (iv) to provide a level playing field between multinational enterprises and independent enterprise doing business within Nigeria; and (v) to provide taxable persons with certainty of transfer pricing treatment in Nigeria.

The scope of these regulations shall apply to all transactions between connected taxable persons carried on in a manner not consistent with the arm's length principles including the following:

a.Sales and purchase of goods and services;

b.Sales, purchase or lease of tangible assets;

c.Transfer, purchase, license or use of intangible assets;

d.Provision of services;

e.Lending or borrowing of money;

f.Manufacturing arrangement; and

g.Any transactions which may affect profit and loss or any other matter incidental to, connected with or pertaining to the transactions referred to (a) to (f) of this regulations.

3.2 PART II - Compliance with Arm's Length Principles, Documentations, Advance Pricing Agreements and Corresponding Adjustments

3.2.1 Compliance with Arm's length Principles

The major principles of transfer pricing is usually based on the arm's length rules (Onyeukwu,2007). The principles of arm's length was derived from the concept of "separate entity" to determine taxable income, whereby each affiliate of a multinational organization is treated as an independent entity for the purpose of determining taxable income (Urquidi, 2008). Under this part, the Regulations state that whenever a taxable person has entered into a transaction or series of transactions to which these Transfer Pricing Regulations apply, the person shall ensure that the taxable profits resulting from the transaction(s) is in a manner that is consistent with the arm's length principles.

3.2.2 Methods of Transfer Pricing

Nigerian Transfer Pricing Regulations state that in order to determine whether the result of a transaction or series of transactions are in line with the arm's length principles, one of the following methods shall be applied:

i.The Comparable Uncontrolled Price (CUP) method;

ii.The Resale Price Methods;

iii.The Cost Plus Method;

iv.The Transactional Net Margin Method;

v.The Transactional Profit Split Method; or

vi.Any other method which may be prescribed and applicable by the Regulations from time to time.

3.2.3 Documentations

Under the Regulations of Transfer Pricing, the taxpayers are required to prepare transfer pricing documentation prior to the due date for filing the income tax return for the period in which the documented transactions occurred(Oyedeleet al., 2013). Alltaxable persons that will be affected must plan for documentation to shows the arm's length nature of their related party transactions. The documentations usually include data on the group structure and activities of the business of related parties, method of pricing adopted and the reason for choosing such methodas well as the information on comparable transactions between the unrelated parties. Finally, the Regulations also requires that the documentations must be submitted within 21 days of the request from the FIRS after filing the company's annual returns which are due not later than six months after the accounting year-end date.

3.2.4 Advance Pricing Agreements

Under the Regulations, taxpayers can enter into APA with the FIRS. An APA is a consensus between the FIRS and the taxpayer in which both agree to the method and way in which related party business will be placed for a specified future period of time.

3.2.5 Corresponding Adjustments

This part of the Regulations deals with the adjustments made for income subjected to tax in two different tax treaties i.e. Nigeria and other country where the Double Taxation Treaty exist. Under such situation, the Regulationsstate that the FIRS may, on request by the connected taxable person subject to tax laws in Nigeria, determine whether the adjustment is consistent with arm's length principles. If so, the FIRS may make a corresponding adjustment to the slush of tax charged in Nigeria on the income in order to avoid double taxation.

3.3 PART III - Comparability Factors and Connected Taxable Persons

Obviously, it is difficult to have an authentic data on Nigerian (or even African) entities to be used in benchmarking. So,to be fair, the Regulations allow taxpayers to use benchmark information from outside Nigeria or even Africa with appropriate adjustments. The yardsticksto measure whether two or more transactions are comparable are as follows:

a.Characteristic of subject matter, which includes goods, property or services;

b.Functions undertaken party i.e. connected taxable persons (CTP) to transactions including assets used and risks assumed;

c.Contractual terms of the transactions;

d.Economic condition/context for the transaction; and

e.Business strategies pursued by the CTP.

The definition of taxable person in the Regulations includes persons, individuals, entities, partnerships, joint ventures, trusts or associations (collectively referred to as 'connected taxable persons') and also the persons referred to in the following Sections:

a.Regulations 13(2)(d), 18(2)(b) and 22(b) of the companies Income Tax Act 2004 (as amended);

b.Section 15(2) of the Petroleum Profit Tax Act, CAP P13, Laws of the Federation of Nigeria, 2004 (as amended);

c.Section 17(3)(b) of the Personal Income Tax Act CAP P8 Laws of the Federation of Nigeria, 2004;

d.Article 9 of the OECD Model Tax Convention; and

e.'Associated enterprise' referred to the OECD Guidelines.

3.4 PART IV – Applicability of Documents

The UN & OECD documents are made applicable into the Nigerian TP Regulations in order to assist the interpretative views and capacity leverage for compliance/enforcement by CTPs and FIRS. It is very crucial to be noted that the Nigerian Transfer Pricing Regulations shall prevail any other laws, rules, regulations, UN practical Manual on TP, OECD documents in the event of inconsistency with other regulatory authorities' approvals.

3.5 PART V – Offenses, Penalties and Dispute Resolution

The Nigerian Transfer Pricing Regulations humbly do not spare any unique penalty for non- compliance with the Regulations but the penalties and interest as provided in the relevant Acts will however apply to Transfer Pricing adjustments.The FIRS currently set up a Decisional Review Panel (DRP) solely in order to tackle disputes or controversy that may arise from the application of TP regulations. Any taxpayer who has any objection(s) with the rulings of DRP on any TP matter has an ultimate right to go to the court of competent jurisdiction in the first instances.

3.6 PART VI – Supplementary and General Provisions

3.6.1 Materiality and safe harbor provisions

In the Nigerian Regulations of TP there are no materiality thresholds. However, a taxpayer may be exempted from the documentation requirements by the FIRSbut not the requirement to transact at arm's length. However, the FIRS agree that when the controlled transactions are conducted in accordance with the Nigerian statutory provisions or in instances where the prices have been previously approved by other Nigerian regulatory authorities (not FIRS), the FIRS may challenge these prices if there is a belief without reasonable doubt that they are not in accordance with arm's length. Examples of such Nigerian regulatory authorities includeCentral Bank of Nigeria, Nigerian Customs Services and National Office for Technology Acquisition and Promotion (NOTAP).

3.6.2 Limitation on Usage of Information

Documentation and any other related 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 transactions for which the documentation is supplied.

3.6.3 Official Language of Documents

According to the Nigerian Regulations on TP, the official language for the purpose of any documentation shall be in the English Language. However, where a document is not in English, FIRS may be written notice require the taxpayer to, at his own expense, produce a translation in the English language, prepared and certified by a sworn translator or any other person(s) approved by the FIRS.

3.6.4 Retention of Documents

All records related to TP including cashbooks, ledgers, journals,cheque books, bank statements, pay slips invoices, stock list and all other books of accounts as well as data relating to any trade carried out by the taxpayer, recorded details inclusive from which the taxpayers returns were prepared for assessment of taxes, are to be retained for a period of six years from the date on which the last entry related to the relevant return was made.

4. Future Challenges

The introduction of the TP Regulations is based on the general anti-avoidance provisions in many tax laws in Nigeria which requires related party transactions to be conducted at arm's length. After reviewing the Regulations, it is noticed that there are some issues which taxpayers may find them very helpful if they are specified in the Regulations. These includes: (i) a real, authentic and/or unique definition of the arm's length range; (ii) the effect of TP adjustments especially on demarcation of income and secondary income taxes (like royalty taxes and dividend) which involve the acceptability of year-end TP adjustments; and (iii) the Regulations does not specify the exact and extent to which non-Nigerian data will be acceptable for benchmark analysis. The guide related to non-Nigerian data is need because due to the insufficient information on Nigerian companies, it is expected that data from foreign companies should be enough and acceptable with appropriate adjustment.

There are twenty rules under six (6) parts in the TP Regulations which attempt to cover almost all angles of TP transactions in Nigeria. Many companies have already received letters from the FIRS asking them to summit their TP policy documents (Taiwo, 2014). It is expected that the implementation of TP Regulations will face more challenges which includes, among others, are: (i) lack of full commitment in making sure that the rules are applied from rhetoric to action both by FIRS and taxpayers; (ii) the level of enlightenment by FIRS to taxpayers is extremely weak; and (iii) the penalty mechanism for any defaulting taxpayers are not even well address in the TP Regulations as spelt out in Part V Regulation 13, this is a signal that the Regulations would perish if extra care is not taken.

Specifically, the TP Regulations in Nigeria served as the mechanisms that the Nigerian government through FIRS can use in order to combat the size of the figures that taxpayers stash away illicitly via transfer pricing (transfer mispricing). As stated earlier, if this phenomenon is unattended, it will lead to a serious tax evasion if not tax avoidance problem. Since the implementation of the Regulations is still current, it is important for the FIRS to make all possible efforts to monitor and enforce to ensure its full compliance by the taxpayers.

5. Conclusion and Recommendation

Base on the above discussions, it is perceived that in order for Nigerian TP Regulations to be effective and benefits the Nigerians (both FIRS and taxpayers), it is recommended that the FIRS to carry out various educational programmes in order to create and enhance more awareness to the taxpayers and the public as a whole about the value and importance of these Regulations and the risk of tax avoidance and calamity of tax evasion related to the TP activities to the Nigerian economy. In addition, the Regulations 13 and 14 under Part V related to offences and penalties by and for the taxpayers need to be emphasized and strengthen to make it clearer in order for the taxpayers to easily understand the offences and punishments for misusing the provisions in the Regulations.

Besides the programmes for the taxpayers, it is also important that the FIRS to equip the personnel in charge with the TP matters to possess necessary and relevant knowledge to handle and administer the TP matters according to the specified provisions in the Regulations. The FIRS personnel must be made familiar and comprehend all aspects of TP substances in the Regulations so that the Regulations can be implemented smoothly. Taking the advantage of the advancement in information technology worldwide, it is also recommended that the FIRS to introduce an electronic TP Audit (e-TPA) as part of its internal control system. This can be realized by introducing well-designed software for all taxpayers in Nigeria to fill it as their TP Declaration Form electronically to replace the manual system. The electronic system will enhance the efficiency and effectiveness of the assessment process by FIRS related to TP matters and indirectly encourages the compliance by taxpayers by reducing documentation bureaucracy. As a newly implemented regulations, it is recommended that there are proper and timely evaluation to be carried out by the enforcement body and related authorities in order to determine its applicability and suitableness with the Nigerian economics and business environment. Other established regulations and guidelines such as the UN Transfer Pricing Manual for Developing Countries and the OECD's rules can be taken as a benchmark to revise and improve the Regulations from time to time in order to strengthen and established a comprehensive regulations related to TP matters in Nigeria.

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