ACAS-LAW
ADEPETUN, CAXTON-MARTINS, AGBOR & SEGUN
BARRISTERS & SOLICITORS

NEWSLETTER 22 OCTOBER 2018

HIGHLIGHTS OF THE REVISED INCOME TAX (TRANSFER PRICING) REGULATIONS 2018 AND THE GUIDELINES ON TRANSFER PRICING DOCUMENTATION

The Federal Inland Revenue Service ("FIRS")[1], on 19 March 2018 and 20 September 2018, released the revised Income Tax (Transfer Pricing) Regulations 2018 (the "Revised TP Regulations") and the Guidelines on Transfer Pricing Documentation ("Guidelines") respectively.

The Revised TP Regulations repealed the Income Tax (Transfer Pricing) Regulations No. 1 2012 (the "2012 Regulations"), and the Guidelines seek to provide guidance to the public and connected taxable persons on Transfer Pricing ("TP") documentation requirements in Nigeria.

Highlights of the Revised TP Regulations and the Guidelines are provided below:

i. **Scope of Application**: The Revised TP Regulations apply to the Capital Gains Tax Act[2] and the Value Added Tax Act[3]. It also applies to the Personal Income Tax Act (PITA)[4], Companies Income Tax Act (CITA)[5], and Petroleum Profits Tax Act (PPTA)[6] as referenced in the 2012 Regulations.

ii. **Absence of a Threshold for applying for Advance Pricing Agreement**: The Revised TP Regulations set no materiality threshold for Advance Pricing Agreement. This is a clear departure from the previous position in Regulation 7 (2) of the 2012 Regulations which sets the materiality threshold for Advance Pricing Agreements at ₦250 million (two hundred and fifty million Naira).

iii. **Documentation**: Under Item 4.0 of the Guidelines, the obligation to maintain TP documentation is imposed on the taxpayer; consequently, any liabilities which

[1]In exercise of the powers conferred on it under Section 61 of the Federal Inland Revenue Service (Establishment) Act No.13 of 2007 and upon the approval of the Honourable Minister of Finance.
[2] Cap C1, Laws of the Federation of Nigeria, 2004.
[3] Cap V1, Laws of the Federation of Nigeria, 2004.
[4] Cap P8, Laws of the Federation of Nigeria, 2004.
[5] Cap C21, Laws of the Federation of Nigeria, 2004
[6] CAP 13, Laws of the Federation of Nigeria, 2004.

result from non-compliance, inadequacies, defects or misstatement in respect of TP documentation, are for the account of the taxpayer[7].

Under Regulation 6 of the 2012 Regulations, submission of the TP Disclosure form, TP Declaration Form and local TP Documentation were required to be filed on an annual basis. However, further to Regulation 17 (1) of the Revised TP Regulations, a Master File and a Local File[8] are now required to be submitted to the FIRS, in addition to the documents provided for under the 2012 Regulations. The Guidelines prescribe a standardized three-tiered TP documentation structure comprised of the Master File (which provides a broad overview of the group's global TP practices); the Local File (containing the detailed information regarding specific intercompany transactions); and the Country-by-Country reports (which detail the aggregated information by tax jurisdiction, respective income and taxes paid in the relevant tax jurisdiction)[9].

iv. **Penalty for late filing**: Regulation 13 (8) of the Revised TP Regulations provides that subject to the provisions of Regulation 15, a connected person[10] who fails to make or submit a declaration under sub-regulations (1) and (2) of Regulation 13 within the statutory deadline, will pay an administrative penalty in the sum of ₦10million (ten million Naira) and a further penalty of ₦10,000 (ten thousand Naira) for every day that the failure continues.

v. **Threshold for maintaining contemporaneous/transfer pricing documentation**: Regulation 17 (3) of the Revised TP Regulations and Item 8.0 (a) of the Guidelines exempt a connected person whose total value of controlled transactions is less than ₦300million (three hundred million Naira) from maintaining contemporaneous documentation.

Another exemption also provided in Item 8.0 (b) of the Guidelines relates to where related party transactions are covered by an understanding under the Advance Pricing Agreement, such taxpayer will keep relevant documents for the preparation of the annual compliance report to demonstrate compliance with the terms of the agreement and critical assumptions remain valid.

---

[7]The Guidelines also prohibits taxpayers from procuring the services of any person in the employment of the FIRS to develop, correct and submit TP documentation on its behalf.

[8]The Schedule to the Revised TP Regulations provides details of the information to be contained in the Master File and Local File.

[9]Items 5.1 and 5.2 of the Guidelines outlines details of the information to be contained in the Master File and Local File.

[10]Connected Persons include persons who are related, associated or connected to one another. Connected persons are persons who have the ability to control or influence another person in making financial, commercial or operational decisions or a third party with the ability to control or influence persons in making financial, commercial or operational decisions.

Similarly, where related party transactions are priced in accordance with the requirement of the provision of a Nigerian statute (for example in the event of prices regulated by statute), the exemption will apply[11].

Notwithstanding the above, a company having controlled transactions[12] of ₦300 million (three hundred million Naira) or more will be required to provide TP documentation within 21 days of receipt of the FIRS notice requesting for the submission of TP documentation. On the other hand, a company having controlled transactions of less than ₦300 million (three hundred million Naira) will have to comply within 90 days[13].

vi. **Failure to provide TP documentation within the stipulated period**: Regulation 16 (5) of the Revised TP Regulations imposes a penalty of ₦10 million (ten million Naira) or 1% percent of the value of all controlled transactions, whichever is higher for failure to file TP documentation and an additional penalty of ₦10,000 (ten thousand Naira) for every day that the failure continues.

vii. **Failure to file updated TP documentation following change in structure**: Regulation 13 of the Revised TP Regulations requires a connected person to submit a declaration or notification to the FIRS in respect of: (i) a merger of the taxpayer or its parent company; (ii) an acquisition of up to 20% of the taxpayer or its parent company by previously unrelated persons or companies; or (iii) any other change in the structure, arrangement or any change in circumstances of the taxpayer that might be seen as influencing a connected person.

Under Regulation 13 (7) of the Revised TP Regulations, a connected person who fails to file the requisite notification is liable to a fine of ₦25,000 (twenty-five thousand Naira) for each day that the failure continues.

viii. **Fine for making incorrect disclosures of controlled transactions**: Regulation 14 (5) of the Revised TP Regulations introduces a fine at ₦10million (ten million Naira) or 1% of the value of controlled transactions which were not accurately disclosed, whichever is higher.

ix. **Failure to make disclosure of controlled transactions**: Regulation 14 (4) of the Revised TP Regulations introduces a penalty of ₦10 million (ten million Naira) or 1% of the value of controlled transactions which were not disclosed, whichever is higher; and a further ₦10,000 (ten thousand Naira) for every day that the failure continues, where a person fails to disclose transactions which are

[11] Item 8.0(c) of the Guidelines.
[12] Controlled transaction means a commercial or financial transaction between connected persons.
[13] Item 6.3 of the Guidelines.

subject to the Regulations within the specified period in the Revised TP Regulations.

x. **Failure to provide information required by the FIRS within the stipulated period**: Regulation 17 (5) of the Revised TP Regulations provides that subject to the provisions of Regulation 15, failure to provide information required within the time specified in a notice will result in a fine equal to 1% of the value of each controlled transaction for which information is required, plus ₦10,000 (ten thousand Naira) for every day that the failure continues.

In addition to the foregoing, below are other notable points in the Revised TP Regulations:

a. The Revised TP Regulations amended the safe harbour provisions under the 2012 Regulations. Under the Revised TP Regulations, a connected person is only exempted from the requirements of Regulation 16 (which deals with documentation) in instances where such controlled transactions are priced in accordance with guidelines intermittently published by the FIRS[14];

b. The Revised TP Regulations also amended the mode of dispute resolution under the 2012 Regulations. A taxpayer who is dissatisfied with a decision of the FIRS can only raise an objection through the Head of the Transfer Pricing Function within the FIRS who in turn has the right to refer such taxpayer's objection to the Decision Review Panel[15]. This contrasts with the previous position under the 2012 Regulations, which allowed a dissatisfied taxpayer to refer his objection directly to the Decision Review Panel, within thirty days of the receipt of an assessment on an adjustment.

c. The provisions of Regulation 7 (5) of the Revised TP Regulations, limits deductions which can be made on royalty payments regarding intangibles to not more than 5% of earnings before interest, tax, depreciation and amortization; and

d. Lastly, the Revised TP Regulations provide that a capital-rich-low function company[16] that does not control the financial risks associated with its funding activities, shall for tax purposes not be allocated the profits associated with those risks and will be entitled to no more than a risk-free return. It further provides that such profits or losses associated with the financial risks will be allocated to the entities that manage their risks and have the capacity to bear them.

---

[14]The Guidelines have widened the exemptions from TP documentation. Please see Item 8.0 (a, b, c and d) of the Guidelines.

[15]Regulation 20(6) of the Revised TP Regulations.

[16]This means companies that are capitalized with a relatively high amount of equity (or equity equivalent) capital but which have limited capacity to carry out risk management functions.

Conclusion

In comparison with the 2012 Regulations, the provisions of the Revised TP Regulations are more stringent, particularly with respect to the administrative sanctions for TP related offences. It should be noted that the FIRS recently released a public notice on the Revised TP Regulations by which it granted relevant taxpayers a grace period till 31 December 2018 to fulfil pending obligations in connection with the filing of TP declarations, submission of TP documentation and disclosure of controlled transactions among other things. The FIRS maintains that any taxpayer who does not comply with its filing obligations by 31 December 2018 will be sanctioned for non-compliance.

We believe that the inevitable result of the effective implementation of the Revised TP Regulations combined with dutiful compliance with the Guidelines will be the enhancement of the Transfer Pricing regime in Nigeria.

Adepetun Caxton-Martins Agbor & Segun by telephone (+234 1 462 2094), fax (+234 01 461 3140)
Adcax Nominees Limited by telephone (+234 1 460 5271-2), (+234 1 279 7035), fax (+234 01 461 3140)