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GLOBAL TRANSFER PRICING SERVICES

Global Transfer Pricing Review

Nigeria

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TAX



Nigeria

KPMG observation

Income Tax (Transfer Pricing) Regulations were recently introduced in Nigeria. The Regulations were made public on 21 September 2012 with an effective date of 2 August 2012. Companies are required to comply with the Regulations from the basis period beginning after the aforementioned effective date. For instance, companies with a 31 August accounting year-end will comply from 1 September 2012, the first basis period beginning after the effective date.

Companies are required to conduct transactions with related parties at arm's length and appropriate documentation must be available to verify that the pricing of controlled transactions is consistent with the arm's length principle.

The required documents include a contemporaneous compliance documentation which should be in place before the filing of the taxpayer's tax returns for the year of interest and the completion and filing of Statutory forms (transfer pricing (TP) Declaration & Disclosure Forms) along with the tax returns.

Finally, in line with the spirit of increased transparency under the Base Erosion and Profit Shifting (BEPS) Action 13, the Federal Inland Revenue Service (FIRS) has sent letters to some taxpayers with related party transactions to submit their group/global transfer pricing policies as well as local transfer pricing policies to aid with their transfer pricing risk assessment.

Basic information

Tax authority name

Federal Inland Revenue Service (FIRS).

Citation for transfer pricing rules

The Income Tax (Transfer Pricing) Regulations No. 1, 2012.

Effective date of transfer pricing rules

2 August 2012.

What is the relationship threshold for transfer pricing rules to apply between parties?

The Regulation covers all transactions entered into by connected taxable persons. Enterprises are considered to be associated where one party participates directly or indirectly in the management, control or in the capital of the other; or the same person or persons participate directly or indirectly in the management, control or in the capital of both enterprises.

What is the statute of limitations on assessment of transfer pricing adjustments?

The Transfer Pricing Regulations do not provide for a statute of limitations on assessment of transfer pricing adjustments. However, the Companies' Income Tax Act (CITA) provides that the statute of limitation is 6 years except in cases of fraud, wilful default, or neglect with respect to any tax payable, in which case there is no statute of limitation.

Transfer pricing disclosure overview

Are disclosures related to transfer pricing required to be prepared or submitted to the revenue authority on an annual basis (e.g. with the tax return)?

Yes, the Regulations require companies to file statutory transfer pricing forms – Declaration Form and Disclosure Form – along with their annual tax returns.

What types of transfer pricing information must be disclosed?

The transfer pricing Declaration Form requires the disclosure of general information about the reporting company's legal form and ownership structure. Specifically, companies are to provide detailed information on the following:

- particulars of the reporting company or entity
- particulars of immediate parent company
- particulars of the directors of the reporting company or entity
- major shareholders of reporting company or entity
- particulars of subsidiaries and other connected persons to the reporting entity

- particulars of external auditors, company secretary and tax consultants to the reporting company
- particulars of the person completing the declaration form.

The transfer pricing Disclosure Form requires the disclosure of the nature of connected transactions. Specifically, companies are to provide detailed information on the following:

- particulars of the reporting company or entity
- income from controlled transactions
- costs of controlled transactions
- transfer pricing method and documentation
- basic financial information
- particulars of the person completing the Disclosure Form.

What are the consequences of failure to prepare or submit disclosures?

The penalties for failure to submit disclosures are the same as the penalties for not filing tax returns, and are provided for in the income tax legislation.

Further, the failure to submit the disclosures may be a potential audit trigger and result in unilateral income adjustment by the tax authority. Any resulting additional tax liability may also be subject to both penalties and interest.

Transfer pricing study overview

Is preparation of a transfer pricing study required – i.e. can the taxpayer be penalized for mere failure to prepare a study?

Yes. The taxpayer is required to prepare a contemporaneous transfer pricing study and the necessary documentation prior to filing its income tax return for the year in which the documented transactions occurred. There is, however, no express penalty for failure to comply other than the potential penalties and interest that may arise from additional tax liabilities that may be payable in the event of any adjustment to the value of related party transactions by the tax authority.

Other than complying with a requirement per the previous question, describe the benefits, if any, of preparing and maintaining a transfer pricing study?

Preparing and maintaining a transfer pricing study has the added benefit of helping mitigate any potential transfer pricing audit by the FIRS. The Disclosure Form asks whether taxpayers with related party transactions have compliance transfer pricing documentation in place. As such, a response to the contrary is a red flag for potential transfer pricing audit.

In addition, prior to the introduction of the Regulations, the tax authority had usually adjusted connected taxable transactions based on the need to maximize tax revenue. This was usually subjective and it was difficult for the taxpayer to justify the terms of connected taxable transactions.

It is expected that with the introduction of the Regulations, there will be an objective basis to discuss and possibly defend the terms of connected taxable transactions with the tax authority.

To satisfy the requirement and/or obtain the benefits, are there any requirements on when the transfer pricing study must be prepared and submitted?

The Regulations state that the contemporaneous compliance documentation should be in place prior to the due date of filing the income tax return for the year to which it relates.

The contemporaneous compliance documentation must be provided to the FIRS upon request within 21 days.

When a transfer pricing study is prepared, should its content follow Chapter V of the Organisation for Economic Co-operation and Development (OECD) Guidelines?

Yes. The Regulations did not provide specific information regarding the content of transfer pricing documentation. It is therefore acceptable if it follows Chapter V of the OECD Guidelines.

Does the tax authority require an advisor/tax practitioner to have specific designation in order to prepare or submit a transfer pricing study?

No.

Transfer pricing methods

Are transfer pricing methods outlined in Chapter II of the OECD Guidelines acceptable?

Yes. In addition, if a taxpayer is of the view that none of the methods stated in Chapter II are appropriate for determining the arm's length pricing, a taxable person may apply transfer pricing methods other than those listed in the Regulations, so long as they can show that the transactions are at arm's length.

Is there a priority among the acceptable methods?

No.

If there is no priority of methods, is there a "best method" rule?

The Regulations does not explicitly have a 'best or most appropriate method' rule. However, considering that the Regulations make reference to the OECD Guidelines for detailed guidance for compliance with the arm's length principle, it is expected that taxpayers will select the most appropriate method based on facts and circumstances.

Transfer pricing audit and penalties

When the tax authority requests a taxpayer's transfer pricing documentation, how long does the taxpayer have to submit its documentation?

Twenty-one days. However, upon a reasonable request, the tax authority has discretionary power to grant an extension.

If an adjustment is proposed by the tax authority, are dispute resolution options available to the taxpayer outside of competent authority?

Yes.

If an adjustment is sustained, can penalties be assessed? If so, what rates are applied and under what conditions?

Yes. The applicable penalty rates are as follows:

- Companies' income tax – in addition to the principal tax liability chargeable at 30 percent, the law imposes penalties of 10 percent plus interest at Central Bank of Nigeria's rediscount rate.
- Value Added Tax (VAT) – in addition to the principal liability chargeable at 5 percent, the law imposes penalties of 5 percent plus interest at the commercial rate.

To what extent are transfer pricing penalties enforced?

No experience to date.

What defences are available with respect to penalties?

No experience to date.

What trends are being observed currently?

No observations.

Special considerations

Are secret comparables used by tax authorities?

No.

Is there a preference, or requirement, by the tax authorities for local comparables in a benchmarking set?

No.

Do tax authorities have requirements or preferences regarding databases for comparables?

No.

What level of interaction do tax authorities have with customs authorities?

Minimal.

Are management fees deductible?

Management fees are deductible only if the taxpayer has obtained prior approval of the National Office for Technology Acquisition and Promotion (NOTAP) and the tax authority is satisfied that they are at arm's length.

Are management fees subject to withholding?

Yes.

Are year-end transfer pricing adjustments permitted?

Yes. There is no express provision in this regard. It is KPMG in Nigeria's view that this will be permitted.

Other unique attributes?

There are safe harbor provisions in the Regulations. They provide that a taxpayer will no longer be required to prepare transfer pricing documents if the pricing arrangement is approved by relevant government agencies and the tax authority is satisfied that the transactions are at arm's length. The agencies include Department of Petroleum Resources (DPR), Central Bank of Nigeria (CBN), NOTAP, among others.

Other recent developments

The FIRS has recently written to companies requesting their group transfer pricing policy. The group transfer pricing policy is expected to address dealings among group members generally and Nigerian group entities in particular. We understand that the FIRS made this request with a view

to conducting transfer pricing risk assessment on taxpayers ahead of the filing deadlines.

Tax treaty/double tax resolution

What is the extent of the double tax treaty network?

Minimal. Nigeria currently has double tax agreements with nine countries that have been ratified by the National Assembly.

If extensive, is the competent authority effective in obtaining double tax relief?

Sometimes.

When may a taxpayer submit an adjustment to competent authority?

The Regulation is silent on the timing for submission of adjustments. The enabling legislation (i.e. Companies Income Tax Act 2007) however permits a taxpayer to file revised tax returns as often as necessary within 6 years after the accounting year-end date.

May a taxpayer go to competent authority before paying tax?

Yes.

Advance pricing agreements

What Advance Pricing Agreement (APA) options are available, if any?

APAs are provided for in the Regulations. However, the FIRS has indicated informally that it will be ready to process APA requests after two years of the effective date of the transfer pricing regulations.

Is there a filing fee for APAs?

No.

Does the tax authority publish APA data either in the form of an annual report or through the disclosure of data in public forums?

None. Nevertheless, information obtained from taxpayers is generally not released to the public.

Please provide some information on how successful the APA program is and whether there are any known difficulties?

Not applicable.

Language

In which language or languages can documentation be filed?

English only.

KPMG in Nigeria

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