



TRANSFER PRICING REGULATIONS DEVELOPMENT AND IMPLEMENTATION IN NIGERIA

TRANSFER PRICING REGULATIONS IMPLEMENTATION IN
NIGERIA
A PRESENTATION BY A. J. SAMIDELE
DIRECTOR, LTD (OIL & GAS)

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INTRODUCTION

- Nigeria is a country with fast growing population of over 160 million people. The population serves as good market (labour and consumers) potential for investors.
- It is blessed with huge deposit of oil and currently producing about 2.5million barrels of crude per day
- The 2nd highest OPEC member producer in Africa.
- Nigeria is richer in gas deposit than crude oil and blessed with about 34 different solid minerals deposits
- Nigeria has over 5,000 multinational companies spread over all sectors of the economy.
- It is generally doubtful if Nigeria actually collects the right taxes due from all companies doing business in and with Nigeria




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Development of Transfer Pricing in Nigeria

- In February, 2011 TP units were established in two of the Large Taxpayers' offices with a view to identifying the TP issues and developing TP regulations.
- The development of TP regulations and Declaration Form started on 5th April, 2011 by constituting a committee with responsibility of drafting the TP regulations
- Workshop on Compliance of Multinational Enterprises with Transfer Pricing was held on 6th October, 2011.
- The workshop was facilitated by the Deputy Commissioner of New Zealand Inland Revenue.




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Development of Transfer Pricing in Nigeria

- FIRS Transfer Pricing Basic Training, held on 20th to 24th February, 2012 at Lagos, facilitated by Prof. D.N. Erasmus, Anneline Venter C.A (SA) and Dr. A.Sani.
- Engaged stake holders which include: Oil Producers Trade Section, The Four Biggest Audit Firms, and Major players in different sectors of the Economy
- Minister of Finance briefed on the steps being taking on the Transfer Pricing administration. This is done with a view to securing the buy-in of the Minister and for gazetting the regulations on completion



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Development of Transfer Pricing in Nigeria

Aggressive capacity building:

- ATAF technical events on TP for Policymakers and Implementation of TP
- TRM technical training on TP
- Workshop with the New Zealand Revenue Service to share experience on compliance of MNEs
- OECD Transfer Pricing Forum



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Development of Transfer Pricing in Nigeria

Information about the foreign activities of foreign companies doing business in Nigeria

- There is no difficulty envisaged in obtaining information about the foreign activities of foreign companies doing business in Nigeria.
- The Nigeria TP rules have taken consideration of the importance of information in implementing and enforcing TP and have put the following in place:
 - TP disclosure form or any other form as may be prescribed by the Service (Federal Inland Revenue Service) which should show details of foreign activities of companies doing business in Nigeria (transactions with related parties). For each year of assessment, a connected person shall without notice or demand make such disclosure.
 - The onus of proof on documentation requirement is on the taxpayer (connected person) to provide sufficient information or data in writing or any other electronic device or medium to verify that transactions done with foreign companies doing business in Nigeria is at arms length.
- The Service in its quest for information may require prescriptive documentation and may further require additional information based on the authority of the tax administration in the Nigerian tax laws.



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Nigeria TP PURPOSE, OBJECTIVE AND SCOPE OF APPLICATION

Purpose

The Regulations give effect to the provisions of-

- (a) section 17 of the Personal Income Tax Act, CAP P8, Laws of the Federation of Nigeria, 2004;
- (b) section 22 of the Companies Income Tax Act, CAP C21, Laws of the Federation of Nigeria, 2004 (as amended by the Companies Income Tax (Amendment) Act 2007; and
- (c) section 15 of the Petroleum Profit Tax Act, CAP 13, Laws of the Federation of Nigeria, 2004.

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Objectives

The objectives of the regulations are:

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

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Scope

The Regulations shall apply to transactions between connected taxable persons carried on in a manner not consistent with the arm's length principle and includes;

- a. sale and purchase of goods and services;
- b. sales, purchase or lease of tangible assets;
- c. transfer, purchase or use of intangible assets;
- d. provision of services;
- e. lending or borrowing of money;
- f. manufacturing arrangement;
- g. For purposes of applying this regulation, Permanent Establishments ("PEs") are treated as separate entities, and any transaction between a Permanent Establishment ("PE") and its head office or other connected taxable persons shall be considered a controlled transaction; and
- h. any transaction which may affect profit and loss or any other matter incidental to the transactions referred to in (a) to (g) of this regulation.

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COMPLIANCE WITH ARM'S LENGTH PRINCIPLE, DOCUMENTATIONS, ADVANCED PRICING AGREEMENTS AND CORRESPONDING ADJUSTMENTS

Compliance with the arm's length principle

- Where a connected taxable person has entered into a transaction or a series of transactions to which these Regulations apply, the person shall determine the taxable profits resulting from the transaction or transactions in a manner that is consistent with the arm's length principle.
- Where a connected taxable person fails to comply with the provisions of these regulations, the Service shall make necessary adjustments if it considers that the conditions imposed by connected taxable persons in controlled transactions are not in accordance/consistent with the arm's length principle.

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Transfer Pricing Methods And Evaluation Of Taxpayer's Controlled Transaction

In determining whether the result of a transaction or series of transactions is consistent with the arm's length principle, one of the following transfer pricing methods shall be applied—

- the Comparable Uncontrolled Price ("CUP") Method
- the Resale Price Method;
- the Cost Plus Method;
- the Transactional Net Margin Method; or
- the Transactional Profit Split Method.

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In each case, the most appropriate transfer pricing method shall be used taking into account:—

- the respective strengths and weaknesses of the transfer pricing method in the circumstances of the case;
- the appropriateness of a transfer pricing method having regard to the nature of the controlled transaction determined, in particular, through an analysis of the functions performed, assets employed and risks assumed by each person that is a party to the controlled transaction;
- the availability of reliable information needed to apply the transfer pricing method; and
- the degree of comparability between controlled and uncontrolled transactions, including the reliability of adjustments, if any, that may be required to eliminate differences.

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When examining whether or not the taxable profit resulting from a taxpayer's controlled transaction or transactions is consistent with the arm's length principle, the Service shall base its review on the transfer pricing method used by the taxable person if such method is appropriate to the transaction.

A connected taxable person may apply a transfer pricing method other than those listed in this regulation, if the person can establish that-

- none of the listed methods can be reasonably applied to determine whether a controlled transaction is consistent with the arm's length principle; and
- the method used gives rise to a result that is consistent with that between independent persons engaging in comparable uncontrolled transactions in comparable circumstances.




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

- perform the comparability analysis set out in regulation 9 of these Regulations; and
- apply the transfer pricing methods set out in these Regulations.




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Documentation

- (1) A connected taxable person shall record, in writing or on any other electronic device or medium, sufficient information or data with an analysis of such information and data to verify that the pricing of controlled transactions is consistent with the arm's length principle and the connected taxable person shall make such information available to the Service upon written request by the Service.
- (2) The obligation of the taxpayer to provide the information referred to in sub-regulation (1) of this regulation, with analysis, is established without prejudice to the authority of the tax administration to request for additional information which in the course of audit procedures it deems necessary to effectively carry out its functions.
- (3) The documentation referred to in this regulation must be prepared taking into account the complexity and volume of transactions.
- (4) The Service shall have the authority to specify the items of documentation required to be provided to it upon request.



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(5) The documentation referred to in sub-regulation (1) of this regulation shall be in place prior to the due date for filing the income tax return for the year in which the documented transactions occurred.

(6) The TP Declaration Form as set out in the Schedule to these Regulations shall be appended to the tax return for the year to which it relates.

(7) The information, data and analysis referred to in these regulations must be provided to the Service upon request within twenty-one days.

(8) The Service may upon reasonable request made to it by a connected taxable person extend the time within which the documents referred to in (7) is to be provided.

(9) The documentation retained by a connected taxable person shall be adequate to enable the Service verify that the controlled transaction is consistent with the arm's length principle.

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(10) The burden of proof that the conditions of the controlled transactions are consistent with the arm's length principle shall be that of the taxable person and the taxable person will be regarded as satisfying this burden of proof if it provides documentation consistent with this regulation to support the consistency with the arm's length principle of the taxable profits derived from its controlled transactions.

(11) For each year of assessment a connected taxable person shall, without notice or demand, make a disclosure on the TP Disclosure Form or on any other form as may be prescribed by the Service, details of transactions that are subject to these Regulations.

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Advance Pricing Agreements

(1) A connected taxable person may request that the Service enter into an Advance Pricing Agreement ('Advance Pricing Agreement') to establish an appropriate set of criteria for determining whether the person has complied with the arm's length principle for certain future controlled transactions undertaken by the person over a fixed period of time provided that such agreement shall be consistent with the requirements established by this regulation.

(2) A request under sub-regulation (1) of this regulation shall be accompanied by—

(a) A description of the activities of the taxable person to be addressed by the Advance Pricing Agreement, including:

(i) A detailed description of the controlled transactions to be included within the scope of the Advance Pricing Agreement;

(ii) an analysis of functions to be performed, assets to be employed, and risks to be assumed by the parties to the covered transactions; and

(iii) the proposed duration of the Advance Pricing Agreement.

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(b) A proposal by the taxable person for the determination of the transfer prices for the transactions to be covered by the Advance Pricing Agreement, including the following information:

- (i) an analysis of the comparability factors,
- (ii) the selection of the most appropriate transfer pricing method to the circumstances of the controlled transactions; and
- (iii) the critical assumptions as to future events under which the determination is proposed;

(c) The identification of any other country or countries that the person wishes to participate in the Advanced Pricing Agreement;

(d) the cumulative amount resulting from the transaction in every year of assessment is not less than two hundred and fifty million Naira (₦ 250, 000, 000) (about a million US Dollar) of a connected taxable person's total deductible costs or total taxable revenues;




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(e) Any other relevant information that the Service may require to complete its analysis of the Advance Pricing Agreement request; and

(f) An administrative charge of five million Naira.



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(3) The Service may accept, modify or reject a request made by a connected taxable person under sub-regulation (1) of this regulation after taking into account matters specified in sub-regulation (2) of this regulation and the expected benefits from an Advance Pricing Agreement.

(4) The Service may in addition to the provisions of sub-regulation (4) of this regulation specify the basis for acceptance, modification or rejection of a request.

(5) The Service may enter into an Advance Pricing Agreement a the taxable person either alone or together with the competent authority of Nigeria or countries of the connected taxable person

(6) Where the Service approves or modifies a proposal under sub-regulation (4) of this regulation, the Service may enter into an Advance Pricing Agreement which shall provide, among other things, a confirmation to a connected taxable person that no Transfer Pricing Adjustment will be made under sub-regulation (2) of this regulation to controlled transactions covered by the Agreement where the transactions are consistent with the terms of the Agreement.



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(7) An Advance Pricing Agreement entered into under this regulation shall apply to the controlled transactions for a period not exceeding three years as specified in the Advance Pricing Agreement.


(8) The Service may cancel an Advance Pricing Agreement by notice if—

(a) the connected taxable person has failed to materially comply with a fundamental term of the Advance Pricing Agreement;

(b) there has been a material breach of one or more of the critical assumptions underlying the Advance Pricing Agreement;

(c) there is a change in the tax law that is materially relevant to the Advance Pricing Agreement; or

(d) the Advance Pricing Agreement was entered into based on a misrepresentation, mistake or omission by the connected taxable person.



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(9) A connected taxable person may cancel an advanced pricing agreement by a notice given to the Service where—

(a) there is a material change in the premise upon which the advance pricing request was made;

(b) the Advance Pricing Agreement is no longer relevant based on significant changes to the structure of the controlled transaction; or

(c) there is a change in tax law applicable in the jurisdiction of the controlled transaction that is materially relevant to the Advance Pricing Agreement.

(10) The Service shall treat as confidential any trade secret or other commercially sensitive information or documentation provided to the Service in the course of negotiating or entering into an Advance Pricing Agreement.



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Termination of an Advance Pricing Agreement under paragraphs (8) and (9) of this regulation takes effect in the case of-

(a) Paragraphs 8(a) and (c) of this regulation, from the date specified by the Service in the notice of cancellation;

(b) Paragraphs 8(b) of this regulation, from the date the material breach occurred;

(c) Paragraphs 8(d) of this regulation, from the date the Advance Pricing Agreement was entered into; and

(d) Paragraphs 9 of this regulation, from the date specified in the notice of cancellation.



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Corresponding Adjustments

Where—

(a) an adjustment is made to the taxation of a transaction or transactions of a connected taxable person by a competent authority of another country with which Nigeria has a Double Taxation Treaty; and

(b) the adjustment results in taxation in that other country of income or profits that are also taxable in Nigeria, then the Service may, upon request by the connected taxable person subject to tax in Nigeria, determine whether the adjustment is consistent with the arm's length principle and where it is determined to be consistent, the Service may make a corresponding adjustment to the amount of tax charged in Nigeria on the income so as to avoid double taxation.



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COMPARABILITY FACTORS AND APPLICABILITY OF DOCUMENTS OF THE CONNECTED TAXABLE PERSONS, UNITED NATIONS AND ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT DOCUMENTS

Comparability factors

(1) For the purpose of determining whether the pricing and other conditions of a controlled transaction are consistent with the arm's length principle, the taxpayer in the first place, ensure that the transaction is comparable with a similar or identical transaction between two independent persons carrying on business under sufficiently comparable conditions.

(2) An uncontrolled transaction is comparable to a controlled transaction within the meaning of this regulation:

(a) where there are no significant differences between an uncontrolled transaction and a controlled transaction that could materially affect the financial indicator being examined under the appropriate transfer pricing method; or



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(b) where such differences exist, reasonably accurate adjustments are made in order to eliminate the effects of such differences, or reduce the effects of such differences, to the extent that all material differences are eliminated.

(3) In determining whether two or more transactions are comparable the following factors shall be considered to the extent that they are economically relevant to the facts and circumstances of the transactions-


(a) the characteristics of the goods, property or services transferred or supplied;

(b) the functions undertaken by the person entering into the transaction taking into account the assets used and risks assumed;

(c) the contractual terms of the transactions;

(d) the economic circumstances under which the transactions were undertaken; and

(e) the business strategies pursued by the connected taxable persons to the controlled transaction.



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Connected Taxable Person

In these Regulations, a 'connected taxable person' includes persons, individuals, entities, companies, partnerships, joint ventures, trusts or associations (collectively referred to as 'connected taxable persons') and also includes the persons referred to in:

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

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Application Of UN And OECD Documents

(1) Subject to the provision of sub-regulation (2) of this regulation, these Regulations shall be applied in a manner consistent with—

(a) the arm's length principle in Article 9 of the UN and OECD Model Tax Conventions on Income and Capital for the time been in force; and

(b) the OECD Transfer Pricing Guidelines for Multi-national Enterprises and Tax Administrations approved by the Council of the OECD approved for publication on 22 July, 2010 (otherwise referred to as 'Annex I to C (2010)99' as supplemented and updated from time to time).

(2) Where any inconsistency exists between the provisions of any applicable law, rules, regulations, the UN Practical Manual on Transfer Pricing, the OECD documents referred to in sub-regulation (1) of this regulation and this regulation the relevant tax law provisions.

(3) The provision of this regulation shall prevail in the event of inconsistency with other regulatory authorities' approvals.

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OFFENCES, PENALTIES AND DISPUTE RESOLUTION

Offences and Penalties

(1) A taxable person who contravenes any of the provisions of these Regulations shall be liable to a penalty as provided in the applicable tax law provisions or 1% of tax unpaid or under paid (whichever is higher) in addition to payment of the amount of tax unpaid or under paid or imprisonment for a term of not less than three years or to both fine and imprisonment upon conviction by a court or tribunal of competent jurisdiction.

(2) Where the contravention is committed by a corporate body, every director, secretary or any other principal officer of the body corporate shall be liable to the penalty prescribed in sub-regulation (1) of this regulation unless he proves that the contravention was without his knowledge or connivance.

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Dispute Resolution

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

(2) The Panel, referred to in sub-regulation (1) of this regulation, shall comprise of-

(a) the Head of the Transfer Pricing Department of the Service; and

(b) two other employees of the Service who shall be at least of the rank of Deputy Directors.

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



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(4) The Panel shall in rendering a decision on a matter presented before it take into consideration-

(i) the adjustment or assessment issued;

(ii) the basis on which the adjustment or assessment was issued;

(iii) the taxable person's objection; and


(iv) the evidence presented to it by the parties.

(5) The Panel shall issue a formal adjustment or assessment-

(a) based on the decision rendered by it on a matter presented by the parties; or

(b) where a taxable person fails to communicate its decision to refer the assessment or adjustment to the Panel within thirty days of the receipt by the taxable person of the assessment or adjustment.

(6) The decision of the Panel on any adjustment or assessment before it shall be final without limiting the right of taxpayer to courts of competent jurisdiction.



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Dispute Resolution

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SUPPLEMENTARY AND GENERAL PROVISIONS

Safe Harbour

A connected taxable person may be exempted from the requirements of regulation 6 of these Regulations where-

(a) the controlled transactions are priced in accordance with the requirement of Nigerian statutory provisions; and

(b) the prices of connected transactions have been approved by other Government regulatory agencies or authorities established under Nigerian law and satisfactory to the Service to be at arm's length.



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Limitation On Usage Of Information

Documentation and other correspondence provided by a connected taxable person shall only be used for the purpose of establishing the arm's length price in respect of the controlled transaction for which the documentation is supplied.

Official language of documents

(1) The official language for purposes of documentation under these Regulations shall be in the English language.

(2) Where a document is not in the English language, the Service may, by written notice require the taxpayer to, at his own expense, produce a translation in the official language, prepared and certified by a sworn translator or another person approved by the Service.



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Retention Of Documents


All records including ledgers, cashbooks, journals, cheque books, bank statements, deposit slips, paid cheques, invoices, stock list, all other books of account, data relating to any trade carried out by the taxpayer inclusive of recorded details from which the taxpayer's returns were prepared for assessment of taxes are to be retained for a period of six years from the date on which the return relevant to the last entry.

Interpretation

a to ad

Citation

These Regulations may be cited as Income Tax (Transfer Pricing) Regulations, 2012.




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Conclusion

- The ability to tax appropriately and fairly the income earned in Nigeria like any other countries of the world is the desire of the Nigeria government.
- This is to be achieved through the effective implementation of her Transfer Pricing Regulations.
- We hope this seminar will enhance our knowledge at achieving our desired objective.




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