

The New Practice (TNP)

- An Andersen Collaborating Firm



Olumayowa Oluwole
Senior Associate
E: mayowa@tnp.com.ng

Oluwatobi Aluko
Associate
E: tobi@tnp.com.ng

Obstacles on Nigeria's Road to Increasing Tax Revenues

the view that the CbCR Regulations cannot be used as a backdoor to give it legal effect in Nigeria.

The Tribunal went further to hold that, even if the CbCR Regulations had been validly issued, the monetary penalties imposed by it should not have exceeded the amount prescribed in the enabling law – in this case, Section 49 of the FIRS Act which prescribes a maximum fine of ₦50,000.00 in respect of offences for which no penalties are specifically provided in the FIRS Act.

Our Analysis

The immediate implication of this Judgment is that the CbCR Regulations and possibly all other regulations issued by the FIRS between 2012 and 2020 when there was no FIRS Board are null. This includes important regulations such as the Income Tax (Transfer Pricing) Regulations, 2018 (the "TP Regulations") and the Income Tax (Common Reporting Standard) Regulations, 2019 (the "CRS Regulations").

The CRS Regulations contains a similar provision to paragraph 1 of the CbCR Regulations which purports to give effect to:

- (i). The Multilateral Convention on Mutual Administrative Assistance in Tax Matters,
- (ii). The Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information signed by Nigeria on 17th August 2017, and
- (iii). The Common Reporting Standard and its Commentaries contained in the Standard for Automatic Exchange of Financial Account Information in Tax Matters approved by the Council of the Organisation for Economic Cooperation and Development (OECD).

These regulations are part of measures adopted by Nigeria to combat Base Erosion and Profit Shifting ("BEPS").

The importance of these regulations to Nigeria's ongoing efforts to adopt global anti-BEPS measures, raises the question: must the National Assembly ratify the CbC Agreement before the FIRS can give effect to the notification requirements in the CbCR Regulations? We believe that the answer should be "no".

The appellant in this case argued that the CbCR Regulations are a reproduction of the CbC Agreement which requires ratification by the

National Assembly before it can have the force of law in Nigeria. However, Section 8(2) of the FIRS Act empowers the FIRS to "specify the form of returns, claims, statements and notices necessary for the due administration of" its powers. Secondly, Section 61 of the FIRS Act empowers the FIRS Board to make regulations to give effect to the FIRS's mandate including, prescribing the form of returns and any other information.

The combined effect of the above provisions is that the FIRS, through its Board, has the power to issue regulations on reporting standards. To us, it is irrelevant that such regulations are inspired by or even a copious reproduction of the provisions of international treaties. Such regulations, once they are issued by the FIRS Board, would derive their validity from Sections 8(2) and 61 of the FIRS Act. To the extent that a regulation does not claim to give direct effect to an unratified treaty and can be made pursuant to Sections 8(2) and 61 of the FIRS Act, such regulations, if issued by a duly constituted FIRS Board, would be valid.

It is important to point out that the appellant in this case made efforts to comply with the reporting requirements of the CbCR Regulations. It appears that the tax dispute was triggered by the steep penalties imposed by the FIRS for late compliance (which were prescribed by the CbCR Regulations). The lesson here is that tax authorities need to reassess their approach to the imposition and enforcement of penalties, even if permitted by law.

A high compliance cost will only incentivise defaulting taxpayers to remain in default, even if the default was inadvertent. This will inevitably occasion a significant loss of tax revenue. The CbCR Regulations prescribes a penalty of ₦5 million for each year of non-compliance while the TP Regulations and the CRS Regulations prescribe a minimum penalty of ₦10 million for non-compliance. Such outsized penalties are a disincentive to compliance and should be revisited particularly as they are significantly higher than the penalties prescribed in the enabling law.

The potential of the CbCR Regulations, the TP Regulations, and the CRS Regulations to give teeth to the anti-BEPS efforts of Nigeria requires the FIRS to take immediate steps to ensure that these regulations are given effect in the manner prescribed by law.

Despite the nullification of the regulations, MNEs and other affected taxpayers are advised to adopt the culture of keeping the records required by the regulations as it is inevitable that the identified irregularities in their issuance will be remedied. These regulations essentially mirror legislation in several other jurisdictions and continued observance of their underpinning principles (even if for internal purposes only) will keep the taxpayer in tune with global best practices.

Conclusion

We believe that in the light of this Judgment, the FIRS should urgently take steps to ensure that the CbCR Regulations, the TP Regulations and the CRS Regulations are given legal effect in Nigeria. The FIRS should also undertake a holistic review of all other regulations issued between 2012 and 2020 to ensure that none of them are affected by the issues identified in the TAT's judgment.

As stated earlier, the FIRS must reassess its approach to enforcement and compliance by removing steep administrative penalties that serve no purpose other than to encourage delinquent taxpayers to remain in the shadows of the tax system.

“We believe that in the light of this Judgment, the FIRS should urgently take steps to ensure that the CbCR Regulations, the TP Regulations and the CRS Regulations are given legal effect in Nigeria. The FIRS should also undertake a holistic review of all other regulations issued between 2012 and 2020 to ensure that none of them are affected by the issues identified in the TAT's judgment.”

The Tax Appeal Tribunal (TAT or "the Tribunal") sitting in Lagos, recently delivered judgment in an appeal, *Checkpoint Software Technologies B. V. Nig Ltd v Federal Inland Revenue Service*, in which it set aside penalties imposed by the Federal Inland Revenue Service (FIRS) for non-compliance with the filing obligations prescribed by the Country-by-Country Reporting Regulations ("CbCR Regulations").

The CbCR Regulations, issued by the FIRS in 2018, requires multinational entities ("MNEs") operating in Nigeria to file annual reports disclosing certain information for the purpose of curbing transfer pricing abuses. Any MNE which fails to fulfil this obligation will be liable to a penalty of ₦5 million and an additional ₦10,000.00 for every day the non-compliance continues.

Section 61 of the FIRS (Establishment) Act ("FIRS Act") empowers the Board of the FIRS to make rules and regulations to give effect to the FIRS Act. The Tribunal found that the Federal Government had dissolved the boards of all its agencies (including the FIRS) in 2012 and did not reconstitute them until 2020. Given that there was no duly constituted FIRS Board in 2018, it was impossible for the CbCR Regulations to have been issued by the Board. The Tribunal consequently declared the CbCR Regulations a nullity.

The Tribunal also found that the CbCR Regulations were issued "to give effect to the provisions of the Country-by-Country Multilateral Competent Authority Agreement ("the CbC Agreement") signed by Nigeria on the 27th Day of January, 2016 and ratified by the Federal Executive Council (FEC) on the 3rd Day of August, 2016".

According to the Tribunal, Section 12 of the Nigerian Constitution provides that no treaty between Nigeria and any other country can have the force of law in Nigeria until it is ratified by the National Assembly. Given that the CbC Agreement is a treaty that has not been ratified by the National Assembly, the Tribunal was of

Disclaimer: This article is provided for general information and educational purposes only. It should not be construed as legal advice from TNP or the author. We advise that you seek legal and or other professional advice on issues raised in the article.

Setting the trend. Shaping the future.

