

FEDERAL INLAND REVENUE SERVICE (ESTABLISHMENT) ACT 2007 INCOME TAX (TRANSFER PRICING) REGULATIONS 2018

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SCHEDULE

FEDERAL INLAND REVENUE SERVICE (ESTABLISHMENT) ACT, 2007

INCOME TAX (TRANSFER PRICING) REGULATIONS, 2018

[] Commencement

In exercise of the powers conferred by section 61 of the Federal Inland Revenue Service (Establishment) Act No. 13 of 2007 (“the Act”) and all other powers enabling it in that behalf, the Board of the Federal Inland Revenue Service (“the Board”), established under section 3 of the Act with the approval of the Honourable Minister of Finance, makes the following Regulations.

PART I

PURPOSE, OBJECTIVE AND SCOPE OF APPLICATION

1. Purpose.

These Regulations give effect to the relevant provisions of the –

- (a) Personal Income Tax Act, CAP. P8, Laws of the Federation of Nigeria, 2004;
- (b) Companies Income Tax Act, CAP. C21, Laws of the Federation of Nigeria, 2004 (as amended by the Companies Income Tax (Amendment) Act 2007);
- (c) Petroleum Profits Tax Act, CAP. 13, Laws of the Federation of Nigeria, 2004 (as amended by the Petroleum Profits Tax (Amendment) Act, 2007);
- (d) Capital Gains Tax Act, CAP. C1, Laws of the Federation of Nigeria, 2004; and
- (e) Value Added Tax Act, CAP. V1, Laws of the Federation of Nigeria, 2004.

2. Objectives.

The objectives of these Regulations are to –

- (a) ensure that Nigeria is able to tax on an appropriate taxable basis corresponding to the economic activities deployed by taxable persons in Nigeria, including in their transactions and dealings with related persons;
- (b) provide the Nigerian authorities with the tools to fight tax evasion that may arise through over or under pricing of transactions between related persons;
- (c) reduce the risk of economic double taxation;
- (d) provide a level playing field for both multinational enterprises and independent enterprises carrying on business in Nigeria; and
- (e) provide taxable persons with certainty of transfer pricing treatment in Nigeria.

3. Scope.

(1) These Regulations shall apply to transactions between connected persons and shall include –

- (a) sale and purchase of goods and services;
- (b) sales, purchase or lease of tangible assets;
- (c) transfer, purchase, licence or use of intangible assets;
- (d) provision of services;
- (e) lending or borrowing of money;
- (f) manufacturing arrangements; and
- (g) any transaction which may affect profit or loss, or any other matter incidental to, connected with, or pertaining to the transactions referred to in paragraphs (a) to (f) of this regulation.

(2) For purposes of applying these Regulations, a Permanent Establishment and its Head Office are treated as separate entities who are connected persons and any transaction or dealing between a Permanent Establishment and its head office or other connected persons shall be considered to be a controlled transaction.

PART II

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

4. Compliance with the arm's length principle.

(1) Where a connected person has entered into a transaction or series of transactions to which these Regulations apply, the person shall ensure that the taxable profits resulting from the transaction or transactions are ascertained in a manner that is consistent with the arm's length principle.

(2) A controlled transaction is at arm's length if the conditions of the transaction do not differ from the conditions that would have applied between independent persons in comparable transactions carried out under comparable circumstances.

(3) Where a connected person fails to comply with the provisions of this regulation, the Service shall make adjustments, where necessary, in order to bring the taxable profits resulting from the transactions in conformity with the arm's length principle.

5. Transfer pricing methods and evaluation of taxpayer's controlled transaction.

(1) In determining whether the result of a transaction or series of transactions are consistent with the arm's length principle, one of the following transfer pricing methods shall be applied –

- (i) the Comparable Uncontrolled Price ('CUP') method;
- (ii) the Resale Price method;
- (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 by Regulations made by the Service from time to time.
- (2) In each case, the most appropriate transfer pricing method shall be used taking into account the –
- (a) respective strengths and weaknesses of the transfer pricing method in the circumstances of the case;
 - (b) 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;
 - (c) availability of reliable information needed to apply the transfer pricing method; and
 - (d) degree of comparability between controlled and uncontrolled transactions, including the reliability of adjustments, if any, that may be required to eliminate any differences between comparable transactions.
- (3) 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, where such method is appropriate to the transaction, or on a transfer pricing method the Service considers most appropriate.
- (4) A connected person may apply a transfer pricing method other than those listed in this regulation, where the person can establish, to the satisfaction of the Service, that –
- (a) none of the listed methods can be reasonably applied to determine whether a controlled transaction is consistent with the arm's length principle;
 - (b) the method used gives rise to a result that is consistent with that between independent persons engaging in comparable uncontrolled transactions in comparable circumstances; and

- (c) reliable information needed to apply the chosen transfer pricing method exists.

(5) Where 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 –

- (a) perform the comparability analysis required by these Regulations; and
- (b) apply the transfer pricing methods set out in sub-regulation (1) of this regulation.

(6) Where the application of the most appropriate method results in a number of financial indicators for which the degree of comparability of each to the controlled transactions, and to each other, is uncertain, a statistical approach shall be used. Where such an approach is used, the interquartile range shall be considered to be an arm's length range.

(7) Where the relevant financial indicator derived from a controlled transaction, or from a set of controlled transactions that are combined according to sub-regulation 5, falls outside the arm's length range, the Service shall adjust the taxable profit of the connected person to ensure that the relevant financial indicator equates to the most appropriate point in the arm's length range based on the facts and circumstances of the transactions.

(8) The Service is not obliged to accept the value reported for customs duty purposes when considering the income tax implications of a non-arm's length importation.

(9) Notwithstanding any other provision in these Regulations, where a person chargeable to tax in Nigeria engages directly or indirectly in a transaction with a connected person for the export or import of commodities and:

- (a) in the case of export, the price that was agreed upon with the connected person is lower than the quoted price, the quoted price on the

“date of transaction”, regardless of the means of transport, shall be, the sale price for the purposes of computing the taxable income of that person, unless the person provides all of the evidence needed to show that adjustments are appropriate to that quoted price to be consistent with the arm’s length principle

(b) in the case of import, the price that was agreed upon with the connected person is higher than the quoted price, the quoted price on the “date of transaction”, regardless of the means of transport, shall be, the sale price for the purposes of computing the taxable income of that person, unless the person provides all of the evidence needed to show that adjustments are appropriate to that quoted price to be consistent with the arm’s length principle

Provided that in the case of goods exported from Nigeria that are subsequently sold by a related party to an unrelated party, if the price agreed upon between that related party and the unrelated person is higher than the quoted price at the above-mentioned date, the agreed price in this case will be considered as the sale price for the purposes of computing the seller’s taxable income in Nigeria unless the person provides all of the evidence needed to show that adjustments are appropriate to that sale price to be consistent with the arm’s length principle.

6. Intra-group Services.

(1) A service charge between a taxpayer and a connected person shall be considered consistent with the arm’s length principle where –

- (a) it is charged for a service that is actually rendered;
- (b) the service provides, or when rendered was expected to provide, the recipient with economic or commercial value to enhance its commercial position;
- (c) it is charged for a service that an independent person in comparable circumstances would have been willing to pay for if performed for it by an independent person, or would have performed in-house for itself; and

(d) its amount corresponds to that which would have been agreed between independent persons for comparable services in comparable circumstances.

(2) A service charge made to a person shall not be consistent with the arm's length principle where it is made by a connected person solely because of the shareholder's ownership interest in another member of the group, including for any of the following costs incurred or activities undertaken by such connected person –

(a) costs or activities relating to the juridical structure of the parent company of the first-mentioned person, such as meetings of shareholders of the parent, issuing of shares in the parent company and costs of the parent company's supervisory board;

(b) costs or activities relating to reporting requirements of the parent company of the first-mentioned person, including the consolidation of reports; or

(c) costs or activities related to raising funds for the acquisition of participations, unless those participations are directly or indirectly acquired by the first-mentioned person and the acquisition benefits or is expected to benefit that first-mentioned person.

(3) Where it is possible to identify specific services provided by a taxpayer to a connected person, the determination whether the service charge is consistent with the arm's length principle shall be made for each specific service, subject to the provisions of sub-regulation (4) of this regulation.

(4) Where services are rendered by a taxpayer jointly to various connected persons and it is not possible to identify specific services provided to each of them, the total service charge shall be allocated among the connected persons that benefit or expect to benefit from the services according to reasonable allocation criteria.

(5) For the purpose of this sub-regulation, allocation criteria shall be viewed as reasonable where they are based on a variable or variables that –

(a) take into account the nature of the services, the circumstances under which they are provided and the benefits obtained or that were expected to be obtained by the persons for which the services are intended;

(b) relate exclusively to uncontrolled, rather than controlled, transactions; or

(c) are capable of being measured in a reliable manner.

7. Intangibles.

(1) The determination of arm's length conditions for controlled transactions involving the exploitation of an intangible shall take into account the contractual arrangements and the following factors with regard to the development, enhancement, maintenance, protection and exploitation of the intangible asset, the -

- (a) functions performed by the person;
- (b) management and control of those functions;
- (c) contribution by the person of assets, including financial assets,
- (d) management and control regarding the contribution of assets, including financial assets;
- (e) risks assumed by that person; and
- (f) management and control of those risks.

(2) In cases where the contractual arrangements diverge from the factors listed under sub-regulation (1) of this regulation, regards shall be taken of those factors in determining the arm's length reward from the exploitation of the intangible.

(3) The determination of arm's length conditions for controlled transactions involving licenses, sales or other transfers of intangible property between connected persons shall take into account both the perspective of the transferor of the property and the perspective of the transferee, including in particular the pricing at which a comparable independent person would be willing to transfer the property and the value and usefulness of the intangible property to the transferee in its business.

(4) In applying the provisions of sub-regulations (3) of this regulation to a transaction involving the license, sale or other transfer of intangible property, consideration shall be given to any special factors relevant to the comparability of the controlled and uncontrolled transactions, including -

- (a) the expected benefits from the intangible property;
- (b) the commercial alternatives otherwise available to the acquirer or licensee derived from the intangible property;

- (c) any geographic limitations on the exercise of rights to the intangible property;
- (d) the exclusive or non-exclusive character of the rights transferred; and
- (e) whether the transferee has the right to participate in further developments of the intangible property by the transferor.

(5) Notwithstanding any other provision of these Regulations, where a person engages in any transaction with a related person that involves the transfer of rights in an intangible, other than the alienation of an intangible, the consideration payable in that transaction that is allowable for deduction for tax purposes shall not exceed 5% of the earnings before interest, tax, depreciation, amortisation and that consideration, derived from the commercial activity conducted by the person in which the rights transferred are exploited.

8. Capital-Rich, Low-Function Companies.

(1) A Capital-rich, low-function company, that does not control the financial risks associated with its funding activities, for tax purposes, shall not be allocated the profits associated with those risks and will be entitled to no more than a risk-free return. The profits or losses associated with the financial risks would be allocated to the entity (or entities) that manage those risks and have the capacity to bear them.

9. Advance Pricing Agreements.

(1) A connected person may request that the Service enter into an Advance Pricing Agreement (APA) 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;
- (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) any other relevant information that the Service may require to complete its analysis of the Advance Pricing Agreement request.

(3) The Service may accept, modify or reject a request made by a connected 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 (3) of this regulation specify the basis for acceptance, modification or rejection of a request.

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

(6) Where the Service approves or modifies a proposal under sub-regulation (3) of this regulation, it may enter into an Advance Pricing Agreement which shall provide, among other things, a confirmation to the connected person that no Transfer Pricing adjustment will be made to controlled transactions covered by the Agreement where the transactions are consistent with the terms of the Agreement.

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

(8) The Service may terminate an Advance Pricing Agreement by notice where –

- (a) the connected person has failed to materially comply with fundamental terms 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 person.

(9) A connected person may terminate an Advance 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.

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

- (a) sub-regulation (8) (a) and (c) of this regulation, from the date specified by the Service in the notice of termination;
- (b) sub-regulation (8) (b) of this regulation, from the date the material breach occurred;
- (c) sub-regulation (8) (d) of this regulation, from the date the Advance Pricing Agreement was entered into; and
- (d) sub-regulation (9) of this regulation, from the date specified in the notice of termination.

(12) The provisions of this regulation shall come into force upon the publication, by the Service, of relevant Notices and Guidelines.

10. Corresponding adjustments.

(1) Where –

- (a) an adjustment is made to the taxation of a transaction or transactions of a connected person resident in Nigeria by a competent authority of another country with which Nigeria has an Agreement for the Avoidance of Double Taxation; and
- (b) the adjustment results in taxation in that other country of income or profits that are also taxable in Nigeria;

the Service may, upon request by the connected person, 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.

(2) No adjustment shall be granted by the Service where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under these Regulations, one of the person concerned is liable to penalty with respect to fraud, gross negligence or wilful default.

PART III

COMPARABILITY FACTORS AND CONNECTED PERSONS

11. Comparability factors.

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

(2) The Service shall have the power to review or challenge the assessment of the taxpayer made pursuant to the provisions of sub-regulation (1) of this regulation.

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

- (a) where there are no significant differences between the uncontrolled transaction and a controlled transaction under comparable circumstances which could materially affect the conditions being examined under the appropriate transfer pricing method; or
- (b) where such differences exist, reasonably accurate adjustments can be 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.

(4) 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 persons 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 persons to the controlled transaction.

12. Connected person.

(1) Generally, persons are deemed connected where one person has the ability to control or influence the other person in making financial, commercial or operational decisions, or there is a third person who has the ability to control or influence both persons in making financial, commercial, or operational decisions.

(2) In these Regulations, “*connected persons*” includes persons who are related, associated, or connected to one another as defined in –

- (a) the Companies Income Tax Act, CAP. C21, Laws of the Federation of Nigeria, 2004 (as amended);
- (b) the Petroleum Profit Tax Act, CAP. P13, Laws of the Federation of Nigeria, 2004;
- (c) the Personal Income Tax Act, CAP. P8, Laws of the Federation of Nigeria, 2004 (as amended);
- (d) the Capital Gains Tax Act, CAP. C1, Laws of the Federation of Nigeria, 2004;

(e) Article 9 of the OECD and UN Model Tax Conventions and the Agreements for the Avoidance of Double Taxation between Nigeria and other countries; and

(f) the OECD TP guidelines and UN TP manual.

PART IV

TRANSFER PRICING DECLARATIONS, DISCLOSURES AND DOCUMENTATION

13. Declarations.

(1) A connected person shall declare its relationship with all connected persons whether such persons are resident in Nigeria or elsewhere.

(2) The declaration referred to in sub-regulation (1) of this regulation (Transfer Pricing Declaration) shall be in the form as may be prescribed by the Service from time to time.

(3) The Transfer Pricing Declaration referred to in this regulation shall be made and submitted to the Service not later than eighteen months after the date of incorporation or within six months after the end of the Accounting year, whichever is earlier.

(4) A connected person shall make an updated declaration upon the occurrence of any of the following events –

(a) merger of the person's parent with another company outside the group;

(b) acquisition of up to 20% of the person's parent by persons not connected to the group;

(c) merger of the person with another company;

(b) acquisition of up to 20% of the person by persons not connected to the group;

(e) merger or acquisition of the person by another company outside the group;

(f) sale or acquisition of a subsidiary by the person;

(g) any other change in the structure, arrangement or circumstances of the person not mentioned in the foregoing paragraphs (a) – (f) of this subsection and which influences whether it will be considered to be connected or not connected to another person.

(5) The updated declaration shall be made and submitted to the Service within six months of the end of the accounting year in which the event occurred.

(6) Where there is an appointment or retirement of a director of the connected person, a notification shall be made to the Service in line with sub-regulation 4 of this regulation or as may be otherwise prescribed by the Service from time to time.

(7) Subject to the provisions of regulation 15 of these Regulations, a connected person who fails to submit a declaration or notification, as the case may be, to the Service under sub-regulation (4), (5) or (6) of this regulation shall be liable to an administrative penalty of twenty-five thousand naira for each day in which the failure continues.

(8) Subject to the provisions of regulation 15, a connected person who fails to make or submit a declaration under sub-regulations (1) and (2) of this regulation within the time specified in sub-regulation (3) shall pay an administrative penalty in the sum of ten million naira in addition to ten thousand naira for every day in which the failure continues.

14. Disclosure of Controlled Transactions.

(1) For each year of assessment, a connected person shall, without notice or demand, make a disclosure of transactions that are subject to these Regulations.

(2) The disclosure referred to in sub-regulation (1) of this regulation shall be in the form as may be prescribed by the Service from time to time.

(3) The disclosure shall be made and submitted to the Service not later than six months after the end of each accounting year or eighteen months after the date of incorporation, whichever is earlier.

(4) Subject to the provisions of regulation 15 of these Regulations, where any person fails to make disclosures of transactions which are subject to these Regulations within the period specified in this regulation, an administrative penalty shall apply as follows –

(a) ten million naira or one percent of the value of controlled transaction not disclosed, whichever is higher; and

(b) ten thousand naira for every day in which the failure continues.

(5) Where a connected person makes an incorrect disclosure of transactions which are subject to these Regulations, an administrative penalty of ten million naira or one percent of the value of controlled transactions incorrectly disclosed, whichever is higher shall apply.

15. Extension of Period for Making Declarations or Disclosures

(1) A connected person may apply in writing to the Service for an extension of the time within which to comply with the provisions of regulations 13 and 14 of these Regulations provided –

(a) the application is submitted before the expiration of the time stipulated in regulations 13 and 14; and

(b) the applicant shows good cause for its inability to comply with stipulated submission dates.

(2) Where the Service is satisfied with the cause shown in an application under sub-regulation 1 of this regulation, it may in writing grant an extension of time.

(3) Where the taxable person fails to meet the extended submission date granted under sub-regulation (2) of this regulation, administrative penalties in regulations 13 or 14, as the case may be, shall apply as if no extension was granted.

16. Documentation.

(1) A connected 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 (documentation) and shall make such documentation 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 Service 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 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 (contemporaneous documentation).

(5) The documentation referred to in sub-regulation (1) of this regulation shall be submitted to the Service within 21 days of receiving a request from the Service failing which the reporting entity shall be liable to an administrative penalty of a sum equal to –

(a) ten million naira or one percent of the total value of all controlled transactions, whichever is higher; and

(b) ten thousand naira for every day in which the failure continues.

(6) A connected person may apply in writing, to the Service for an extension of time within which the documents referred to in sub-regulation (1) of this regulation is to be submitted, stating the reasons for the application for extension.

(7) Where the Service is satisfied with the reasons stated in the application made pursuant to sub-regulation (6) of this regulation, it may grant the extension.

(8) Where the taxable person fails to meet the extended submission date granted under sub-regulation (7) of this regulation, the administrative penalty in sub-regulation (5) shall apply as if no extension of period was granted.

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

(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 compliance with the arm's length principle of the taxable profits derived from its controlled transactions.

17 Information and Documents to be Maintained.

(1) For the purposes of regulation 16, a connected person shall maintain contemporaneous documentation consistent with the provisions of the Schedule to these Regulations.

(2) In the event of a merger or divestiture, the relevant contemporaneous documentation shall be kept by the surviving enterprise after the merger or divestiture.

(3) A connected person whose total value of controlled transactions is less than three hundred million naira may choose not to maintain contemporaneous documentation; provided that, where the Service deems it necessary, it may demand that relevant documentation shall be prepared and submitted to the Service not later than 90 days from the date of receipt of a notice from the Service.

(4) Subject to the provisions of sub-regulation 16 (6) and (7), the administrative penalty imposed by sub-regulation 16 (5) shall apply for failure to comply with a notice issued under this regulation.

(5) Subject to the provisions of regulation 15, any person who fails to furnish the Service with any information or document required within the time specified in a notice shall be liable to an administrative penalty of a sum equal to one per cent of the value of each controlled transaction for which the information or

document was required in addition to ten thousand naira for each day in which the failure continues.

(6) Where goods, assets, services or other supplies produced or traded by unrelated persons are procured by a connected person through another related person, the contemporaneous documentation to be maintained in respect of the transaction shall include documents (contracts, invoices, bills or similar documents) issued by the unrelated person from whom the items originated.

PART V

APPLICABILITY OF DOCUMENTS

18. Application of UN and OECD Documents.

Subject to the provisions of regulation 19 of these Regulations, this regulation 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 being in force; and
- (b) the OECD Transfer Pricing Guidelines for Multi-national Enterprises and Tax Administrations, 2017 and the UN Practical Manual on Transfer Pricing for Developing Countries, 2017, as may be supplemented and updated from time to time.

19. Supremacy of relevant tax laws

(1) Where any inconsistency exists between the provisions of any applicable law, rules, regulations, the UN Practical Manual on Transfer Pricing and the OECD documents referred to in regulation 18 of these Regulations, the provisions of the relevant domestic tax laws shall prevail.

(2) The provisions of these Regulations shall prevail in the event of inconsistency with other regulatory authorities' approvals.

PART VI

NON-COMPLIANCE, ADMINISTRATIVE PENALTIES AND DISPUTE RESOLUTION

20. Non-Compliance and Administrative Penalties.

A taxable person who contravenes any of the provisions of these Regulations for which no specific administrative penalty is provided in these Regulations shall be liable to a penalty as prescribed in the relevant tax law.

21. Dispute Resolution.

(1) The Service shall set up a Decision Review Panel (“the Panel”) for the purposes of resolving any dispute or controversy arising from the application of 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 Function of the Service;
- (b) a representative of the Legal Department of the Service, not below the rank of Deputy Director; and
- (c) three other employees of the Service, not below the rank of Deputy Director.

(3) The Head of the Transfer Pricing Function and any other two members shall form the quorum.

(4) The most senior officer among members of the Panel shall be the chairman.

(5) A taxable person may, within thirty days of the receipt of an assessment, object to the assessment.

(6) The Head of the Transfer Pricing Function may, upon receiving a taxpayer's objection, refer it to the Panel.

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

- (a) the adjustment or assessment issued;
- (b) the basis on which the adjustment or assessment was issued;
- (c) the taxable person's objection; and
- (d) the evidence presented to it by the parties.

(8) The decision of the Panel on any adjustment or assessment shall represent the final position of the Service without limiting the taxpayer's right of appeal enshrined in the relevant tax legislation.

PART VII

SUPPLEMENTARY AND GENERAL PROVISIONS

22. Safe Harbour.

A connected person may be exempted from the requirements of regulation 16 of these Regulations where the controlled transactions are priced in accordance with specific guidelines that may be published by the Service for that purpose from time to time.

23. Limitation on usage of information.

Information, explanations, records, documents or correspondences provided by any person to the Service in compliance with these Regulations shall only be used for tax purposes or as may be legally required.

24. 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.

25. Retention of documents.

All records including ledgers, cashbooks, journals, cheque books, bank statements, deposit slips, paid cheques, invoices, stock list and all other books of account, as well as 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 was made.

26. Revocation and Savings

- (1) The *Income Tax (Transfer Pricing) Regulations, No. 1, 2012*, is hereby revoked.
- (2) Anything made or done or having effect, pursuant to the Regulations revoked under sub regulation (1) of this regulation, shall from the commencement of these Regulations, be treated as if it were made or done, or having any resulting or continuing effect under these Regulations, to the extent that it is not inconsistent with any provision of these Regulations.

27. Interpretations

In these Regulations, unless the context otherwise requires –

“arm's length principle” means the principle that the conditions of a controlled transaction should not differ from the conditions that would have applied between independent persons in comparable transactions carried out under comparable circumstances;

“Capital-rich, low-function companies” mean companies that are capitalised with a relatively high amount of equity (or equity-equivalent) capital, but which have limited capacity to carry out risk-management functions. Within multinational groups, such companies may, for example, provide debt funding to associated enterprises, or fund research and development programmes carried out by associated enterprises.

For example, where such a company funds a research and development programme conducted by an associated enterprise, but does not have the capacity to make the key decisions that manage the risks associated with the programme, it will be considered to be conducting a funding function only, and will be allocated a return on that funding on the assumption that the funding is risk-free.

“commencement” means basis periods beginning after the effective date of these Regulations;

“Commodities” includes agricultural produce, solid minerals, hydrocarbons and derivatives thereof, other products or natural minerals obtained from the land or waters, and, in general, goods where prices can be obtained at the date of the transaction from an international or domestic commodity exchange market, or from recognised and transparent price reporting or statistical agencies, or from governmental price-setting agencies or any other index;

“comparability factors” means the factors specified under regulation 9;

“Comparable Uncontrolled Price (‘CUP’) Method” means a method in which the price charged for property or services transferred in a controlled transaction is compared with the price charged for property or services transferred in a comparable uncontrolled transaction;

“Comparable Uncontrolled Transaction” for the purposes of these Regulations, means an uncontrolled transaction that —

- (i) does not differ significantly from a controlled transaction in a way that could materially affect the financial indicator applicable under the method; or
- (ii) does differ, but reasonably accurate adjustments can be made to eliminate the effects of such differences;

“competent authority” is a person identified as such in a Double Taxation Convention and who by that Convention is given the authority to carry out certain functions under that Convention;”

“controlled transaction” means a commercial or financial transaction between connected persons;

“connected persons” in the context of these Regulations is as defined in regulation 9 of these Regulations;

“Cost Plus Method” means a method in which the mark up on the costs directly and indirectly incurred in the supply of goods, property or services in a controlled transaction is compared with the mark up on those costs directly or indirectly incurred in the supply of goods, property or services in a comparable uncontrolled transaction;

“Date of Transaction”, in respect of regulation 5, means the date on which the goods are shipped as evidenced by the bill of lading or equivalent contemporaneous document, depending on the means of transport, unless the person provides reliable contemporaneous evidence of the actual pricing date agreed by the related persons in the transaction and that the date accords with the date that would have been agreed if the persons had been dealing at arm’s length;

“Enterprise” means company or any other form of business structure, organization or arrangement

“Financial Indicator” means, in relation to the –

- (a) comparable uncontrolled price method, the price;
- (b) cost plus method, the mark up on costs;
- (c) resale price method, the resale margin;
- (d) transaction net margin method, a net profit indicator; or
- (e) transactional profit split method, the division of profit and loss;

“Fixed base” has the same meaning as permanent establishment

“independent enterprises or persons” mean enterprises or persons that are not related to one another;

“Minister” means the Minister of Finance;

“OECD” means the Organisation for Economic Cooperation and Development;

“other regulatory authorities’ approvals” include approvals issued by the National Office For Technology Acquisition and Promotion; Department of Petroleum Resources, the Nigeria National Petroleum Corporation and other such regulatory authorities or bodies.

“Permanent Establishment (PE)” means a fixed place of business through which the business of an enterprise is wholly or partly carried on in Nigeria. It also includes any other form of taxable presence of a foreign enterprise in Nigeria.

“person” includes individuals, corporation sole, entities, companies, partnerships, joint ventures, trusts or any other body of individuals

“Related party” has the same meaning as “associated person” or “connected person”

“relevant domestic tax laws” includes, the Companies Income Tax Act, Petroleum Profit Tax Act, Capital Gains Act, Stamp Duties Act, Value Added Tax Act, Personal Income Tax Act or any other Act imposing tax on persons, properties or transactions;

“Resale Price Method” means a method in which the resale margin that a purchaser of property in a controlled transaction earns from reselling the property in an uncontrolled transaction is compared with the resale margin that is earned in a comparable uncontrolled purchase and resale transaction;

“Residual Profit” means when routine costs are identified and tested under one of the other transfer pricing methods and residual profits are split according to the transactional profit split method;

“Quoted price” means the price obtainable from an international or domestic commodity exchange market, or from recognised and transparent price reporting or statistical agencies, or from governmental price-setting agencies, or any other index, that is used as a reference by unrelated parties to determine prices in transactions between them. Where there is more than one recognised market, statistical or price-setting agency, the Service may by notice specify the process for determining the most appropriate index;

“the Service” means Federal Inland Revenue Service or the ‘FIRS’;

“TP” means Transfer Pricing;

“Transactional Net Margin Method” means a method in which the net profit margin relative to the appropriate base, including costs, sales or assets that a person achieves in a controlled transaction is compared with the net profit margin relative to the same basis achieved in a comparable uncontrolled transaction;

"Transactional Profit Split Method" means a method in which the division of profit and loss that a person achieves in a controlled transaction is compared with the division of profit and loss that would be achieved when participating in a comparable uncontrolled transaction;

"UN" means the United Nations; and

"uncontrolled transaction" means a transaction that is not a controlled transaction

28. Citation.

These Regulations may be cited as Income Tax (Transfer Pricing) Regulations, 2018.

MADE in Abuja this day of 2018.

TUNDE FOWLER
Executive Chairman,
Federal Inland Revenue Service

Explanatory Note

(This note does not form part of these Regulations but is intended to explain its purport)

These Regulations revoke the Income Tax (Transfer Pricing) Regulations, No. 1, 2012 and seek to provide the legal framework to specify rules for transfer pricing implementation in Nigeria.

SCHEDULE

[Regulation 17]

Information and Documents to be Maintained in Transfer Pricing Documentation

For the purposes of regulation 17, a connected person shall maintain contemporaneous documentation thus:

1. Master File:

The master file shall provide an overview of the global business operations of the Multinational enterprises (MNE) group to which the ultimate holding company belongs, and shall include the following information -

(A) Organisational Structure:

- (I) A description of the ownership structure of the taxable person with details of shares or other ownership interest held therein by other persons.
- (II) A profile of the multinational group of which the taxable person is a part along with the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom controlled transactions have been entered into by the taxable persons, and ownership linkages among them.
- (III) Chart illustrating the global organisational structure and ownership structure of the MNE group, and the geographical locations of all constituent entities.

A constituent entity refers to any operating entity of the MNE group, including corporations, partnerships, permanent establishments, etc.

(B) Description of MNE's Business:

A broad description of the business of the MNE and the industry in which it operates including:

- (I) Important drivers of business profits.
- (II) Descriptions of the supply chain and main geographic markets for the group's five largest products or service offerings by turnover plus any other products or services amounting to more than five percent of group turnover.

The required description could take the form of a chart or a diagram.

- (III) A list and brief description of important service arrangements between constituent entities of the group, other than research and development services,

including a description of the capabilities of the principal locations providing important services and transfer pricing policies for allocating service costs and determining prices to be paid for intra-group services.

(IV) Functional analysis describing the principal contributions to value creation by individual constituent entities within the group, that is, key functions performed, important risks assumed, and important assets used.

(V) A description of business restructurings, industrial restructurings, transfers of functions, risks or assets occurring within the group during the fiscal year.

(VI) A description of reorganizations occurring during the fiscal year within the group, that is, changes of legal form, debt restructuring, equity acquisition, asset acquisitions, merger and divestitures.

(C) Intangibles:

(I) A general description of the MNE's overall strategy for the development, ownership and exploitation of intangibles, including location of principal research and development facilities, location of research and development management, and their functions, risks, assets and personnel.

(II) A list of intangibles or groups of intangibles of the MNE group that are important for transfer pricing purposes and which entities own them.

(III) A list of important agreements entered between constituent entities and their related parties related to intangibles, including cost-sharing arrangements, principal research services agreements and licence agreements.

(IV) A description of the group's transfer pricing policies related to research and development and intangibles.

(V) A description of any important transfer of interests in intangibles among related parties during the fiscal year concerned, including the entities, countries, and compensations involved.

(D) MNE's Intercompany Financial Activities:

(I) A description of financing arrangements between members of the MNE group and important financing arrangements with unrelated parties.

(II) The identification of any constituent entity of the MNE group that provides a central financing function for the group, including the country under whose laws the entity is organised and the state of tax residence of such entities.

(III) A description of the MNE's general transfer pricing policies related to financing arrangements between connected persons.

(E) Financial and tax positions

(I) The MNE's annual consolidated financial statements for the fiscal year concerned.

(II) A list of the MNE group's existing unilateral advance pricing agreements, bilateral advance pricing agreements and other tax rulings relating to the allocation of income among countries.

2. Local File:

Local file shall disclose detailed information on the enterprise's related party transactions, including the following:

(A) Overview of the enterprise

(I) Organisational structure, including the setup, scope of responsibility and number of employees of each functional department of the enterprise.

(II) Management structure, including the parties to which each level of the management reports, and the locations in which such parties maintain their principal offices, etc.

(III) Industry description, including an overview of the industry in which the enterprise operates and its development, other major economic and legal factors affecting the industry, such as industry policies, trade restrictions, as well as key competitors.

(IV) Business strategies, including the workflow, operational model and factors that contribute to value creation, etc., of each department and each operational stage of the enterprise.

(V) Financial data, including turnover, costs, expenses and profits for the different types of business and product offerings of the enterprise.

(VI) A description of business restructurings or intangibles transfers in which the enterprise has been involved in or affected by and an explanation of those aspects of such transactions affecting the enterprise.

(B) Related party relationship

(I) Information on related parties including the name, legal representatives, composition of senior management, address of actual operation of any related party (enterprise) that directly or indirectly own shares of the enterprise and with which the enterprise has entered into transactions, as well as the name, nationality and country of residence of any related party (individual).

(II) Information on taxes of income tax nature to which the enterprise is subject, with details including types of the taxes, tax rates and applicable preferential tax treatments.

(III) Information on changes in related party relationship of the enterprise during the fiscal year concerned.

(C) Controlled Transactions:

For each category of controlled transactions in which the reporting entity is involved, provide the followings:

(I) Overview of Controlled Transactions:

(a) Detailed description of the controlled transactions stating parties involved, timing, transaction value, settlement currency, contractual terms and conditions, trading models of the controlled transactions as well as explanations of how they are similar to or different from that of uncontrolled transactions.

(b) Copies of contracts or agreements relating to the controlled transactions and their execution.

(c) Transactional flow of the controlled transactions, including the flows of information, goods and materials, and capitals, as well as explanations of how they are similar to or different from that of uncontrolled transactions.

- (d) A description of functions and risks, including the functions performed, risks assumed and assets used by the enterprise and its related parties for each category of controlled transactions.
- (e) Key factors affecting the pricing of controlled transactions, including intangibles involved in the transactions and their impact on pricing, as well as location specific factors such as cost savings and market premium etc.
Analysis on location specific factors shall focus on aspects such as labour costs, environmental costs, market size, degree of market competition, consumer purchasing power, substitutability of goods or services, and regulatory controls, etc.
- (f) Financial information on controlled transactions, including the amount involved for each related party and each category of controlled transactions, and the reporting line in the books of account and audited financial statements.
- (g) Segmented data on turnover, costs, expenses and profits of controlled transactions and uncontrolled transactions; for items that could not be directly segmented and therefore have been allocated using appropriate allocation keys, information on how they are allocated and an explanation of how the allocation keys have been selected.

(II) Value Chain Analysis:

- (a) Flows of business, goods and materials, and capitals within the group, including design, development, manufacturing, marketing, sales, delivery, billing and payment, consumption, after-sale service, recycling, other processes related to goods, services or other relevant underlying targets of the controlled transactions and all the parties involved.
- (b) Annual financial statements of each of the parties involved in the controlled transactions for the relevant accounting year.
- (c) Measurement and attribution of value creation contributed by location specific factors.
- (d) Allocation policies and actual allocation results of the group's profits in the global value chain.

- (III) Related-Party Equity Transfers:
- (a) An overview of related party equity transfer, including background, parties involved, timing, pricing, payment method of the transfer, as well as other factors affecting the transfer.
 - (b) Information on the equity transferred, including information like the equity's geographic location, timing of the transfer, methodology of the transfer, cost of the transfer, income generated from the transfer, etc.
 - (c) Due diligence report or asset valuation report or any other information pertaining to the equity transfer.
- (IV) Related party services:
- (a) An overview of related party services, including service providers and recipients, nature of services, characteristics, method of service delivery, pricing policies and methods, form of payments, and benefits received by each party in relation to the services provided, etc.
 - (b) Methodology for determining the service costs, service items, service amount, allocation keys, calculation process and results.
 - (c) Where the enterprise and its group are involved in transactions of the same or similar nature with an unrelated party, the enterprise shall describe in detail how the transactions are similar to or different from related party transactions in pricing policies and results.
 - (d) Existing advance pricing agreements and other tax rulings to which the Service is not a party and which are related to the enterprise's related party transactions.
- (V) Comparability Analysis:
- (a) Factors considered in the comparability analysis, including characteristics of the goods or services involved in the transactions, functions performed, risks assumed and assets used by each party involved, contractual terms, economic environment, business strategies, etc.
 - (b) Information related to the functions performed, risks assumed, and assets used by the comparable companies.
 - (c) Search process for comparables, data source, selection criteria and rationale for setting the criteria.

- (d) Information of selected internal or external comparable uncontrolled transactions and financial information of comparable companies.
- (e) Comparability adjustments and rationale for the adjustments.

(VI) Selection and Application of Transfer Pricing Method:

- (a) Selection of tested party and rationale for the selection.
- (b) Description of the methods considered for determining the arm's length price in relation to each controlled transaction, the method selected as the most appropriate method together with explanations as to why such method was so selected.
- (c) The contribution of the enterprise to the group's overall profit or residual profit is required.
- (d) Assumptions and judgment made in the process of determining arm's length prices or profits.
- (e) Application of reasonable transfer pricing method and result from comparability analysis to determine the arm's length prices or profits.
- (f) Other information supporting the selection of transfer pricing method.
- (g) Analysis and conclusion of whether the transfer pricing for the related party transactions complies with the arm's length principle.

(VII) Financial Information:

- (a) The reporting entity's audited financial statements for the relevant year of assessment.
- (b) Information and allocation schedules showing how the financial data used in applying the transfer pricing method may be tied to the annual financial statements.
- (c) Summary schedules of relevant financial data for comparables used in the analysis and the sources from which that data was obtained.

3. The information specified in sections 1. and 2. of this Schedule shall be supported by authentic documents including but not limited to -

- (a) official publications, reports, studies and databases from the Government of the country of residence of the connected person, or of any other country;

- (b) reports of market research studies carried out and technical publications brought out by institutions of national or international repute;
- (c) price publications including stock exchange and commodity market quotations;
- (d) published accounts and financial statements relating to the business affairs of the related enterprises;
- (e) agreements and contracts entered into with connected persons or with independent persons in respect of transactions similar to the controlled transactions;
- (f) letters and other correspondences documenting any terms negotiated between the reporting entity and the connected persons;
- (g) documents normally issued in connection with the relevant transactions under the accounting practices followed; and
- (h) any other document considered relevant to the controlled transaction or requested by the Service.