# REPORTING AND COMPLIANCE REQUIREMENTS UNDER THE NIGERIAN INCOME TAX (TRANSFER PRICING) REGULATIONS 2012*

**Abstract**
*Nigeria on the 2nd of August 2012 introduced the Income Tax (Transfer Pricing) Regulation No. 1 of 2012. The objective of these regulations are to 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 associated enterprises. This article examines the reporting and compliance requirements of the regulations and seeks to elucidate the provisions as it would affect multinational companies and others doing business in the country.*

**Keywords:** Income Tax (Transfer Pricing) Regulations 2012, Reporting, Compliance, Nigeria

## 1. Introduction

Nigeria on the 2nd of August, 2012 introduced the Income Tax (Transfer Pricing)[1] Regulation. The Regulation was introduced in exercise of the powers conferred by Section 61 of the Federal Inland Revenue Service (Establishment) Act[2] which provides that:

> The Board may, with the approval of the Minister, make rules and regulations as in its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions and may in particular, make regulations prescribing the—
> (*a*) forms for returns and other information required under this Act or any other enactment or law; and
> (*b*) procedure for obtaining any information required under this Act or any other enactment or law.

The purpose of the Regulation as stated in paragraph 1 is to give effect to the provisions of[3] –

(a) section 17 of the Personal Income Tax, CAP C21, Laws of the Federation of Nigeria, 2004 (as amended by the Personal Income Tax (Amendment) Act, 2011);
(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 Profits Tax Act, CAP. P 13, Laws of the Federation of Nigeria, 2004.

It is also stated that the objectives of these Regulations are to[4] –

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

This paper examines the reporting and compliance requirements under the Nigeria Income Tax (Transfer Pricing) Regulations No. 1 of 2012 and seeks to elucidate the provisions of the regulation as it would affect multinational companies and others doing business in Nigeria.

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[1]According to the Wikipedia Encyclopaedia, Transfer pricing refers the setting, analysis documentation and adjustment of charges made between related parties for goods, services or use of property including intangible property. Transfer prices among components of an enterprise may be used to reflect allocation of resources among such component or for other purposes.
[2] Section 61 of the FIRS (Establishment) Act 2007
[3] Paragraph 1 of the Income Tax (Transfer Pricing) Regulations No. 1, 2012.
[4] Paragraph 2 of the Income Tax (Transfer Pricing) Regulations No. 1, 2012.

## 2. Legislation in Nigeria

### Meaning of Purpose

The purpose of the regulations as contained in paragraph 1 give effect to provisions dealing with artificial transactions in the Personal Income Tax Act, Companies Income Tax Act and the Petroleum Profits Tax Act. These provisions refer to what may be described as the general anti-avoidance provisions.

### The General Anti-avoidance Provision

The Nigerian general anti-avoidance provision is contained in Section 17 of the Personal Income Tax Act of 2004 with corresponding provisions in Section 22 of the Companies Income Tax Act 2004 (CITA) and Section 15 of the Petroleum Profits Tax Act 2004.[5] Section 22 of CITA provides that:

> Where the Board is of opinion that any disposition is not in fact given effect to, or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax effected, or reduction which would otherwise be effected by the transaction and any company concerned shall be assessable accordingly.

The provision goes further to define 'disposition', the operative word in the above mentioned provision, widely as including 'any trust, grant, covenant, agreement or arrangement'[6] Accordingly, the provision will catch any 'disposition' in its ordinary and natural meaning as well as such legally constituted dispositions which may amount to tax avoidance and even an 'arrangement' which may not necessarily be legally enforceable such as 'something in the nature of an understanding between two or more persons - a plan arranged between them which may not be enforceable in law.[7] The scope of this general anti-avoidance provision is very wide indeed that one may conclude, on the face of it, that it would catch almost all possible transfer pricing manipulations.
The Nigerian general anti-avoidance provision operates on two limbs, namely:

(1) If a tax authority is of opinion that any disposition is not in fact given effect to; and
(2) If a tax authority is also of the opinion that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious.

### The meaning of 'any disposition is not in fact given effect to'

In determining the meaning of these words one may begin by giving them their common or ordinary meaning. It may be said that the words used in its ordinary sense indicates a situation in which a person is said to avoid the effect of a disposition which is about to happen to him. He takes steps to get out of the way of it. Not to give effect to any disposition means to take steps to get out of the reach of a liability which is about to fall on a tax payer as a result of the disposition carried out by him.[8] The section 22 of CITA 2004, if construed literally, would extend to every transaction whether voluntary or for value which had the effect of reducing the income of any tax payer; but, its provisions are intended to and do extend to cover cases in which the transaction in question, if recognised as valid, would enable the taxpayer to avoid payment of income tax on what is really and in truth his income. It does not extend to the case of a *bona fide* disposition by virtue of which the right to receive income arising from a source which therefore belonged to the tax payer is transferred to and vested in some other person. This type of recognition in Nigeria would require a subsequent statement of the types of tax avoidance arrangements which the legislature intended to permit and those which it did not. It appears then, that in Nigeria for the meantime, a precise analysis of the proper meaning of the words 'any disposition is not in fact given effect to' in Section 22 of *CITA* may have to wait for judicial pronouncement in the Nigerian courts.[9]

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[5] See also section 20 Capital Gains Tax Act 2004. See The Income Tax (Transfer Pricing) Regulations No 1, 2012.
[6] CITA s. 22(2) (b); It does not define transaction but states transactions which 'shall be deemed to be artificial or fictitious.'
[7] *Newton* v *Federal Commissioner of Taxation* (1958) A.C. 450 at p. 465 (P.C.); Whiteman, P.G. (1966). The Meaning of the Term Arrangement, *British Tax Review.* p, 399. See also Dalton (1973) Avoidance of Taxation: Section 260 of the Income Tax Assessment Act *Melbourne University Law Review* 95. Section 260 provides that:'Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly – (a) altering the incidence of any income tax; (b) relieving any person from liability to pay any income tax or make any return; (c) defeating, evading or avoiding any duty or liability imposed on any person by this Act; or (d) preventing the operation of this Act in any respect, be absolutely void, as against the Commissioner…'
[8] *Newton* v *Federal Commission of Taxation* (1958) 98 C.L.R. 1 at p. 7.
[9] See Fashokun S. O. (1976) at pp. 28, 29, *op. cit*., where he stated that it would be fraudulent to use any scheme by way of disposition without really giving effect to it as it would amount to a fictitious disposition and in effect evasion. This statement would appear correct although the use of the word evasion is clearly inappropriate in such circumstances.

**The meaning of 'Any transaction which reduces or would reduce the amount of any tax payable in artificial or fictitious'**

A literal interpretation of these words that once any transaction reduces or would reduce the amount of any tax payable is carried out then transaction is artificial or fictitious and may be disregarded, would also mean that its application would prevent other sections of the Nigerian tax statutes from operating. It is likely that the Nigerian courts would avoid this conflict by a harmonious mode of interpretation as was done to the parallel wordings in an Australian case[10] where it was stated by Barwick C. J. that:

> As I have already pointed out, there will be no relevant alternation of the incidence of tax if the transaction, being the actual transaction between the parties, conforms to and satisfies a provision of the Act even if it has taken the form in which it was entered into by the parties to obtain the benefit of that provision of the Act.

In place of the literal meaning of the phrase 'altering the incidence of any tax' Barwick C. J., in *Mullens' case*, adopted the following interpretation:

> If the actual transaction into which the parties have entered involves the tax payer in liability to tax or does not afford the tax payer some benefit in taxation, such as a deduction, and that transaction is cast into another form which, if effective, would relieve the tax payer of tax, wholly or partially, the intention with which that form of transaction is chosen can properly be said to be an intention 'to alter the incidence of the income tax', as that expression is used in this area of the law of income tax.

'Artificial' is an adjective which is in general use in the English Language. It is not a term of legal art; it is capable of bearing a variety of meanings according to the context in which it is used. The use of the word in section 22 CITA is not necessarily pleonastic, that is, a mere synonym for 'fictitious'. A fictitious transaction is one which those who are ostensibly the parties to it never intended should be carried out.

**'Artificial' as descriptive of a transaction is of wider import.[11]**

'Artificial' in ordinary usage means 'unnatural', 'not genuine' or 'not sincere'.[12] What is artificial for the purpose of *section 22 CITA*? The United Kingdom Royal Commission on Taxation of Profits and Income, considering a similar problem with regard to *section 44(3)* of the *Excess Profits Duty Act* otherwise known as *Finance No. 2 Act of 1915* which provides that: 'A person shall not, for the purpose of avoiding payment of excess profits duty enter into any fictitious or artificial operation,' stated that:

> The objection to a criterion based on phrases of this kind (that is, fictitious or artificial transaction) is that if a transaction really is fictitious, it ought to be ignored without the aid of special legislation and a transaction is not well described as artificial, if it has valid legal consequences, unless some standard can be set up to establish what is natural for the same purpose.

**And concluded, '*such standards are not readily discernible'*[13]**

What is clear in this provision, therefore, is that a transaction which reduces or would reduce tax liability does not, ipso facto, become 'artificial'. It would appear that, under the provision, a transaction which has valid legal consequences may nevertheless be regarded as artificial if it is carried out by what could be characterised as 'unnatural' or 'unreal' means. The test therefore for determining whether or not a transaction is artificial is not its legal consequences but the means employed to carry it out.[14]

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[10] *Mullens v Federal Commission of Tax* (1976) 6 A.T.R. 504 at p. 509.

[11] *Seramco Ltd. Superannuation Fund Trustees* v *Income Tax Commissioner* (1977) A. C. 287 at p. 298.

[12] See *Advanced Learners Dictionary of Current English.* See also Decree No. 2 Bank Employees, etc. (Declaration of Assets) Decree 1986 S. 15 which states that: 'fraudulent, fictitious or artificial transaction' means a disposal or purchase of assets by an employee of a Bank at a price below the market value of such assets and in a manner or circumstance that it can be reasonably inferred that the parties could not have been dealing legitimately or that there might have been some other consideration for the transaction.

[13] See Cmd 9474 (1955) para. 1024.

[14] Fashokun S O. (1976), *op. cit*., p. 30; see also *Newton* v *F.C.T.* (1958) 450 where the Privy Council held that the Australian general anti-avoidance provision contained in section 260 of the Australian Commonwealth Income Tax and Social Services Contribution Act 1936 - 1951 was not concerned with the motives of the individuals, not their desire to reduce tax, but only with the means they employed to do it. According to Lord Denning: 'In order to bring the arrangement within the section you must be, able to predicate - by looking at the overt acts by which it was implemented - that it was implemented in a particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid to tax, then the arrangement does not come within the section…' See further the Australian case of *Peate* v *Commissioner of Taxation* (1967) 1 A. C. 308 and the New Zealand case of *Margin* v *I.R.C.* (1976) A. C. 739.

Having considered the two limbs on which the general anti-avoidance provision under Nigerian law operates another matter which falls to be considered is the nature of the operation of *section 22 CITA* when it is found to apply. Has the section merely an 'annihilating' operation and so does not permit a 'reconstruction'?[15] It can be said that the Nigerian Act permits a reconstruction. While section 22 CITA may operate to destroy a taxpayer's defences in certain cases, it also authorises a new construction in their place. In particular it deems some situations to exist that will support assessments to income tax designed to counter the avoidance.[16] In its application, section 22 CITA can do more than destroy a transfer pricing contract, agreement or arrangement in the absence of which a duty or liability would subsist. As the section presently stands and circumstances are such that a choice is presented to a prospective tax payer between two courses of which one will, and the other will not, expose him to liability to taxation, his deliberate choice of the second course can readily be made a ground of the application of the provision. In such a case it can be said that, but for the artificial or fictitious transfer pricing contract, agreement or arrangement impeached, a liability under the Act would exist. To invalidate the transaction into which the prospective taxpayer in fact entered is enough to impose upon him a liability which could only arise out of another transaction into which he might have entered but in fact did not enter. Also, where, the annihilation of an agreement or arrangement so far as it has the purpose or effect of avoiding liability to income tax leaves exposed a set of actual facts from which that liability does arise, the provision will effectively operate to remove the obstacle from the path of the tax authority and enable them to enforce the liability.

The provision for 'reconstructing', unlike that involved in the use of only the 'annihilating' power which does not enable the tax authority to show that money has come into the hands of the tax payer which can be treated as income under the charging provision,[17] the 'reconstructing' power is more desirable and more effective for dealing with transfer pricing manipulations under the Nigerian income tax law.[18] However, section 22 CITA is not without its own problems, the most surprising being that the Nigerian courts seem not to take notice of its existence. It is rare indeed to find an important Nigerian court decision in which section 22 CITA has been relied upon to strike down any tax avoidance device.[19]

The tax authorities have also encountered difficulties in its application particularly because of the use of very wide terms which places an enormous burden on the interpretative skills of the tax officials by requiring them to examine every transaction which can sometimes be very sophisticated and complicated and to come to an opinion whether it is artificial or fictitious. Given the situation they are more likely to give up when confronted with difficult situations which are bound to be many in a developing economy.[20] Thus the reluctance by tax officials to use *section 22 CITA* or any of the anti-avoidance provisions in *PITA* or *PPTA* or *CGTA* could indeed be counter-productive and thereby pale into insignificance the usefulness and effect of a wide tax avoidance provision. Nevertheless, the use of a general anti-avoidance provision still provides a better alternative to specific anti-avoidance provisions if the government is to avoid constantly fighting a series of transfer pricing manipulations. What is required for a better and proper application of section 22 CITA or any anti-avoidance provision apart from a regular improvement in the quality and training of tax officials, are a series of amendments which sets out the criteria to which regard is to be had in determining whether the disposition or transaction in question amount to an 'artificial or fictitious' transaction or disposition to which the anti-avoidance provisions applies.

A transfer pricing manipulation to which *section 22 CITA* applies should be one where the taxpayer in question has obtained an artificial or fictitious tax advantage,[21] and where, it would be concluded that 'the person or one of

[15] See section 460(3) United Kingdom Income and Corporation Taxes Act 1970; Canadian Income Tax Act (RCS) 1952 (Cap 148), S. 1389I), for examples of 'reconstructing' provisions and the many affirmations by the Australian courts that section 260 of the Australian Commonwealth Income Tax and Social Services Contribution Act 1936 - 1951 has merely an annihilating effect, and does not permit 'reconstruction' in such cases as *Clarke v F.C.T.* (1932) 48 C.L.R. 56 at p. 77. *Bell* v *F.C.T.* (1953) 87 C.L.R. 548 at pp. 572 - 573; *Cecil Bros Pty Ltd.* v *F.C.T.* (1964) 111 C.L.R. 430 at p. 441 and Editorial (1986) *Australian Tax Review,* March, p. 2.

[16] See *Peate* v *F.C.T.* (1966) 116 C.L.R. 38.

[17] CITA.2004, Section. 9.

[18] Fashokun S. O. (1976), *op. cit*., p. 34; see also Abdulrazaq M.T. (1989) Legal Limits of Creative Accounting and Corporate Tax Planning in Nigeria. *Nigerian Financial Review*, Volume 2, No. 1, pp. 7-22.

[19] Ayua I. A. (1982), *op. cit*., p. 19; see *Aboud* v *Regional Tax Board* (1966) N.M.L.R. 100 where the appellant as assessed in respect of the income from properly he conveyed to his wife, the Supreme Court refused to decide the issue of the applicability of the general anti-avoidance provision because the assessment made thereof had become final and conclusive under the Western Nigeria Income Tax Law 1959, S. 15.

[20] See the comments of a Senior Tax Official on the corresponding section 18 C.I.T.A. 1979 that 'it involves so much preparatory work that I would use it as a last resort'; Layade P.S.A. *Tax Evasion, Fifth Annual Senior Officers Conference of the Federal Board of Inland Revenue* at p. 29.

[21] The tax advantage elements are the most important in any tax avoidance scheme. If no tax advantage or benefit accrues or is about to accrue to the taxpayer, a transaction will not properly constitute an avoidance device, even if it is artificial or fictitious. It is the tax advantage in any particular scheme that anti-avoidance provision is designed to counteract. Hence, where there is no tax advantage, there is no ground on which any anti-avoidance provision can properly operate. Tax advantage

the persons who entered into or carried out the disposition or transaction or any part of the disposition or transaction did so for the purpose of enabling the tax payer to obtain a tax advantage in connection with the disposition or transaction.'[22] However, if those acts or transactions are capable of explanation by reference to ordinary dealing, such as business or family dealing, the arrangement does not come within the application of section 22 of CITA 2004. Also, a taxpayer is entitled to obtain a statutory benefit and financial advantage by creating a situation to which the Nigerian tax law attaches taxation advantages for the taxpayer such as stated by the safe harbour provisions in paragraph 15.

**Associated Enterprises**

This is interpreted[23] in the context of the objectives of the Regulations to include:

(i) persons that are *'associates'*, as defined in the Companies and Allied Matters Act, CAP C20, LFN 2004 (as amended); and

(ii) persons that are business associates in any form and two enterprises are considered to be associated where –

(a) one enterprise participates directly or indirectly in the management, control or in the capital of the other, or

(b) the same person or persons participate directly or indirectly in the management, control or in the capital of both enterprises;

Controlled Transaction[24] means a commercial or financial transaction between connected taxable persons and a taxable[25] person in the context of these regulations is as defined in paragraph 10 of these Regulations as including persons, individuals, entities, companies, partnerships, joint ventures, trusts or associations (collectively referred to as *'connected taxable person'*) and includes the persons referred to in –

(i) section 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. P13, Laws of the Federation of Nigeria, 2004 (as amended)
(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.

It has been held in the case of *Inland Revenue Commissioner v. Lithgows*, *Ltd*.[26] that co-trustees who hold shares in their capacity as co-trustees do not individually control the company in which they hold shares because, by virtue of the fiduciary duties they owe to the beneficiaries of the trust, and to each other, they may not direct that the affairs of the company are carried on in accordance with their own wishes; rather, they are bound collectively to ensure that the affairs of the company are carried on in accordance with the best interests of the beneficiaries.

**Control Issues**

The statutory provisions referred to in paragraph 10 indicates the types of connected taxable person control envisaged by the Regulations as follows –

**Section 13 (2) (d) CITA 2004**

Where the trade or business or activities is between the company and another person controlled by it or which has a controlling interest in it and conditions are made or imposed between the company and such person in their commercial or financial relations which in the opinion of the Board is deemed to be artificial or fictitious, so much of the profit adjusted by the Board to reflect arm's length transaction.[27]

includes obtaining a 'relief or increased relief from, or repayment or increased payment of, tax' and secondly, 'the avoidance or reduction of a charge to tax or an assessment to tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains.' See *I.R.C* v *Parker* (1966) 43 T.C. 39 at p. 441; *I.R.C.* v *Cleary* (1966) 44 T.C. 399; *I.R.C.* v *Clark* (1978) S.T.C. 614; *I.R.C.* v *Joiner* (1973) S.T.C. 244.

[22] *Tax Law in the Melting Pot* (1985) A Study by the Revenue Law Committee of Law Society of the *Ramsay* doctrine after *Furniss* v *Dawson,* with proposals. The Law Society of England and Wales p. 59; See *Peale* v *F.C. of T*. (1964) 111 CLR 443 per Kitts. J. at 283

[23] Para 19 (c)

[24] Para 19 (i)

[25] Para 10

[26] 39 T.C. 270 (1960).

[27] Section 13(2)(d) CITA

**Section 18(2)(b) of CITA 2007 (as amended)[28]**
Transactions between persons one of whom either has control over the other or, in the case of individuals, who are related to each other or between persons both of whom are controlled by some other person, shall be deemed to be artificial or fictitious if in the opinion of the Board those transactions have not been made on terms which might fairly have been expected to have been made by persons engaged in the same or similar activities dealing with one another at arm's length.[29]

**Section 15 (2) PPTA 2004**
For the purpose of this section, the following transactions shall be deemed to be artificial or fictitious, namely, transactions between persons one of whom has control over the other or between persons both of whom are controlled by some other person which, in the opinion of the Board, have not been made on the terms which might fairly have been expected to have been made by independent person engaged in the same or similar activities dealing with one another at arm's length.[30]

**Section 17 (3) (b) PITA 2004**
Transactions between persons one of whom either has control over the other or in case of individuals who are related to each other or between persons both of whom are controlled by some other person, shall be deemed to be artificial or fictitious if in the opinion of the tax authority those transactions have not been made on terms which might fairly have been expected to have been made by independent persons engaged in the same or similar activities dealing with one another at arm's length.[31]

Where a connected taxable person has entered into a transaction or a series of transactions to which these Regulations apply, the person shall ensure that the taxable profits resulting from the transaction or transactions is in a manner that is consistent with the arm's length principles. In a situation where a connected taxable person fails to comply with the provisions of this Regulations, the Federal Inland Revenue Service shall make adjustments where necessary if it considers that the conditions imposed by connected taxable persons in controlled transactions are not in accordance or consistent with the arm's length principle.[32] Under the regulations, arm's length principle[33] means the principle that the conditions of a controlled transaction should not differ from the condition that would have applied between independent persons in comparable transactions carried out under comparable circumstances. 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:
(i) perform the comparability analysis set out in regulation 9 of these Regulations.[34]

**The Comparable Uncontrolled Price Method**
In these Regulations[35], unless the context otherwise requires –

(f) *'Comparable Uncontrolled Price (CUP) Method'* means a method in which the price changed 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.

(g) *'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.

The easiest method of determining an arm's-length price in any transaction is to compare the prices paid on a particular transaction with prices which are generally paid on the open market for similar types of transactions between unconnected persons. The principal difficulty with the operation of this method is that the likelihood of finding another transaction where all of the surrounding circumstances, apart from the connection between the parties, coincide with the circumstances surrounding the relevant transaction is remote. The Organization for Economic Co-operation and Development (OECD)[36] recognized the difficulties surrounding this method and

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[28] This section appears in the 2007 Amendment Act as Section 18 but Section 22 in the 2004 Act.
[29] Section 22(2)(d) CITA
[30] Section 15(2) PPT
[31] Section 17(3)(b) PITA
[32] Para 4 (1) & (2)
[33] Para 19(b)
[34] Para 5(1)
[35] Para 19(f) and (g)
[36] The OECD was established under the Convention for European Economic Co-operation, Dec. 14, 1960, 888 U.N.T.S. 143.

identified a number of factors which may affect comparability of transactions, such as the nature of the goods, packaging and brand name.[37] A review of these factors shows clearly how difficult in practice the comparable transactions method is to operate effectively, particularly as the Federal Inland Revenue Services is likely to be prevented by confidentiality rules from disclosing information concerning the pricing arrangements of other companies who are competing with the company whose pricing arrangements are under investigation.[38] Accordingly, although in theory examination of comparable transactions is the easiest and fairest method of evaluating any transaction under investigation, in practice it will usually be very difficult to operate effectively. Therefore, the Federal Inland Revenue Service would invariably falls back on the other methods of determining an arm's-length price, at least in the first instance.

**The resale prices method**

*'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.[39]

The critical issue in arriving at an arm's-length price using this method is the appropriate level of profit margin for the purchasing company. Factors which frequently are taken into account include: (1) the exclusiveness of the purchaser's marketing rights;[40] (2) the level of risk assumed by the company which will sell the goods into the open market;[41] and (3) the amount of work, if any, performed by the purchasing company on or in respect of the goods in question.[42] Determining the level of profit invariably involves comparison with similar transactions undertaken by other companies. This brings the Federal Inland Revenue Service back to the practical difficulty of obtaining the necessary information to make this comparison.

**The cost plus method**

*'Cost Plus Method'* means a method in which the mark up on the costs directly or 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.[43] The OECD has acknowledged the difficulties of operating this method in isolation[44] and, in particular, has identified a number of disadvantages of the method. For example, this method: (1) overemphasizes historical cost, (2) ignores user demand, (3) fails to reflect competitive conditions adequately, (4) assumes a guaranteed profit in all circumstances, and (5) ignores abnormal factors such as increased costs due to poor management.[45] Notwithstanding these stated difficulties, the method is used particularly in circumstances where the resale prices method is inappropriate[46] -for example, on a sale of semi-finished products between connected parties, perhaps involving further processing by the purchaser-or as a method of checking figures obtained under one of the other methods.[47] However, regardless of the method adopted, the Federal Inland Revenue Service has stated that it will be guided by the principles set out by the OECD[48] in arriving at an arm's-length price.[49] On this basis the following principles are applied in practice:

(1) The Revenue authorities should not form their own commercial judgment on any transactions and should rely on real and not hypothetical cases in reaching their evaluation.

(2) Reasonable and consistently applied pricing arrangements should not, as a general rule, be challenged, even where on occasions such arrangements give rise, for whatever reason, to an unusually high or low price.

(3) Subsidies, grants and price controls, other than those imposed between connected parties, should be taken into account.

(4) All benefits, and not just pure profit or loss, accruing to either party must be given appropriate consideration. For example, under certain circumstances it should be possible to justify uneconomic pricing policies where such policies are part of a long-term coordinated strategy within the multinational group involved.

In this way it is hoped that commercial realities can be observed whilst, at the same time, the aims of the transfer pricing rules, namely, to 'ensure that Nigeria is able to tax on an appropriate taxable basis corresponding to the economic

[37] OECD COMM. ON FISCAL AFFAIRS, TRANSFER PRICING AND MULTINATIONAL ENTERPRISES 13, 35-38 (1979).

[38] See, eg., Taxes Management Act, 1970, ch. 9, § 6.

[39] Para 19(w)

[40] OECD COMM. ON FISCAL AFFAIRS, supra note 39, at 40.

[41] Id. at 39.

[42] Id.

[43] Para 19 (k)

[44] OECD COMM. ON FISCAL AFFAIRS, supra note 39, at 40.

[45] Id.

[46] Id. at 41.

[47] Id. at 40.

[48] See OECD COMM. ON FISCAL AFFAIRS, supra note 39.

[49] Transfer Pricing, supra note 7, at 44.

activities deployed by taxable persons in Nigeria, including in their transactions and dealings with associated enterprises'[50] can be achieved.

**The transactional net margin method**
*'Transactional Net Margin Method'* means a method in which the net profit margin relative to the appropriate base, including cost, 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.[51]

**The transactional profit split method**
*'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.[52]

**The residual profit split method**
*'Residual Profit Split Method'* means method in which 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.[53]

**3. Conduct of Transfer Pricing Enquiries**
**Documentation**
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.[54] The documentation referred to in this regulation must be prepared taking into account the complexity and volume of transactions.[55]

**Information Requirements**
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 Federal Inland Revenue Service to request for additional information which in the course of audit procedures it deemed necessary to effectively carry out it functions.[56] What additional information will be required depends upon individual circumstances. The following matters are likely to be of interest to the Federal Inland Revenue Service in connection with the taxpayer itself:
(1) ownership and/or control of the taxpayer;
(2) the nature of its trade;
(3) the organization of the group of which the taxpayer is a member;
(4) the functions of particular companies within the group; and
(5) how far the profitability of particular companies within the group has come up to expectations.[57]
In addition, it is likely, depending on which arm's-length pricing method is adopted, that the Revenue will at some stage need to enquire into some or all of the following matters:
(1) the open market prices of goods or services comparable to those supplied by or to the taxpayer;
(2) production costs;
(3) research and development costs; and
(4) the price at which the multinational group of which the taxpayer is a part ultimately sells the goods into the open market.[58]

**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.[59]

**Retention of documents**
All records including ledgers, cashbooks, journals, cheque books, bank statements, deposit slips, paid cheques, invoice, stock list and all other books of account, as well as data relating to any trade carried out by the taxpayer, inclusive of record 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.[60]

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[50] Para 2(a)
[51] Para 19 (aa)
[52] Para 19 (ab)
[53] Para 19 (ac)
[54] Para 6(1)
[55] Para 6(3)
[56] Para 6(2)
[57] Transfer Pricing, supra note 7, at 43.
[58] See supra notes 35-54 and accompanying text.
[59] Para 16
[60] Para 18

**Transfer pricing manipulation**

Transfer pricing has come to stay in Nigeria and would continue to be a major tax issue particularly in view of the motivation for transfer pricing manipulation.[61] Transfer pricing manipulation is the over or under invoicing of transfer price in order to avoid or evade tax regulations and policies. This is done by deliberate setting of transfer prices either too high or too low in order to avoid or evade taxation.

The motivations for transfer price manipulation are:

1. Through under invoicing, the Multinational Enterprises can avoid paying customs duties.
2. By shifting tax-deductible costs to the high-tax country and taxable revenue to the low-tax country, the Multinational Enterprise can minimize the total tax paid to the two Countries.
3. If the foreign subsidiary cannot directly remit profits to its parent firm because of host Country foreign exchange restrictions, profits can be shifted out of the host country by over invoicing intra firm exports to, and under invoicing exports from, the foreign affiliate.

It is with this likelihood of manipulation that has led to the provision of penalties to deal with these transgressions.

**Offences, penalties and dispute resolution**

A taxable person who contravenes any of the provisions of these Regulations shall be liable to a penalty as prescribed in the relevant provision of the applicable tax law.[62]

The Federal Inland Revenue Service shall set up a Decision Review Panel ('the Panel') for the purpose of resolving any dispute or controversy arising from the application of the provisions of these Regulations.[63]

A taxable person may, within thirty days of the receipt of the assessment on the adjustment refer the assessment to the Panel.[64] 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.[65]

The Panel shall issue a formal adjustment or assessment –

(a) based on the decision rendered by it on matter presented by the parties; or
(b) where 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.[66]

The decision of the Panel on any adjustment or assessment before it shall be final and conclusive without limiting the right of a taxpayer to refer the matter, where dissatisfied with the decision of the Panel to a court of competent jurisdiction.[67]

**4. Transfer Pricing Planning**

The first planning option is provided by the safe harbour provisions in paragraph 15 in which a connected person may be exempted from the requirements for documentation and disclosure where –

(a) the controlled transactions are priced in accordance with the requirement of Nigerian statutory provisions, or
(b) the prices of the 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.[68]

The second option is policy consistency and every multinational group should examine on a regular basis its intra-group pricing policies to ensure that they clearly are established and able to stand up to detailed investigation. The policies should, wherever possible, be documented and should be applied consistently with any exceptions to the stated policies being clearly justifiable. Where possible, any major transactions between connected entities which may be vulnerable should be documented individually, and any unusual items or considerations involved in the transaction highlighted with the thought process behind them made clear. The third option is the application of UN and OECD documents. The

[61] Eden and Smith (2001) Not at Arm's Length: A Guide to Transfer Pricing Resources. Journal of Business and Finance Librarianship, Vol 6 (4) pp 4,5.
[62] Para 13
[63] Para 14(1)
[64] Para 14(3)
[65] Para 14(4)
[66] Para 14(5)
[67] Para 14(6). Is the Decision Review Panel equivalent to the Tax Appeal Tribunal or why would an appeal from it lie to a court of competent jurisdiction? Would the rules of natural justice be met by the FIRS setting up an adjudicatory panel in which it has an interest in the outcome of the matter before it? The proper forum for this should have been an independent Arbitration Panel or a Tax Ombudsman.
[68] Para 15(a)(b)

OECD has produced a number of reports on transfer pricing[69] which examine the area in some detail and which throughout give practical information which may provide guidance when seeking to establish and maintain a transfer price policy. The reports provide at the very least, an invaluable bench mark against which multinational groups can start to evaluate their own pricing policies. It must however be noted that where any inconsistency exists between the provisions of any applicable law, rules, regulations, the UN Practical Manual on Transfer Pricing, the OCED documents referred to in regulation 11 of these Regulations, the provisions of the relevant tax laws shall prevail.[70] The provision of this regulation shall prevail in the event of inconsistency with the other regulatory authorities' approvals.[71]

## 5. The Controversy

Two issues of controversy will define the immediate future in the implementation of these regulations. The first is the need to reconcile the Nigerian Customs and Excise Valuation Methods with those under the TP Regulations and whether it was proper to have made the TP Regulations under Ministerial Powers rather than by way of a statute properly promulgated by the National Assembly.

### Customs Valuation Methods

This is provided for in the First Schedule of the Customs and Excise Management Acts 2004 (CEMA) which is an Act to regulate the management and collection of duties of customs and excise, and for purposes ancillary thereto. Section 45 of CEMA 2004 provides that

(1) Where a duty of customs is chargeable on imported goods by reference to their value, their value shall be taken to be that laid down in the First Schedule to this Act, and duty shall be paid on that value.
(2) The Board may require any importer or other person concerned with the importation of goods to furnish to the Board, in such form as it may require, such information as is in the opinion of the Board necessary for a proper valuation thereof, and to produce any books of account or other documents of whatever nature relating to the purchase, importation or sale of the goods by that person.

The First Schedule of CEMA 2004 provides the following in respect of the determination of the value of imported goods into Nigeria:

### Transaction value of goods general

The customs value of goods bought or imported for use in Nigeria shall be the transaction value of the goods adjusted in accordance with the provisions of paragraph 7 (1) of this Schedule, provided that-
(a) there are no restrictions as to the disposition or use of the goods by the buyer, other than restrictions which-
(i) are imposed or required by law or by any public authority in Nigeria; or
(ii) limit the geographical area in which the goods may be resold; or
(iii) do not substantially affect the value of the goods;

(b) the sale or price of the goods is not subject to some condition or consideration for which a value cannot be ascribed or determined with respect to the goods being valued;
(c) no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer shall accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of paragraph 7 (1) of this Schedule; and
(d) the buyer and seller are not related as defined in paragraph 16 (2) (c) of this Schedule and if related, that buyer has proved to the satisfaction of the Board that the relationship has not influenced the price of the goods by showing that-
(i) the price of identical or similar goods in a transaction between persons for export to Nigeria, at or about the same period of time, closely approximates to the price of the goods to be valued;
(ii) the customs value of identical or similar goods as determined under the provisions of paragraph 4 of this Schedule in a transaction between unrelated persons, at or about the same period of time, closely approximates to the price of the goods to be valued;
(iii) the customs value of identical or similar goods as determined under the provisions of paragraph 5 of this Schedule in a transaction between unrelated persons, at or about the same period of time, closely approximates to the price of goods to be valued.

### Transaction value of identical goods

(1) If the Customs value of and goods imported into Nigeria cannot be determined under the provisions of paragraph 1 of this Schedule, the Customs value of the imported goods shall be transaction value of identical goods already accepted under paragraph I of this Schedule sold for export to Nigeria and exported at or about the same time, at the same commercial level and in substantially the same quantity, as the goods being valued, adjustment having been made under paragraph 10 (1) and (2) of this Schedule to take account of significant difference in costs and charges between the imported goods and the identical goods arising from differences in distances and modes of transport.

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[69] See, eg., OECD COMM. ON FISCAL AFFAIRS, ISSUES IN INTERNATIONAL TAXATION (1987); OECD COMM. ON FISCAL AFFAIRS, TRANSFER PRICING AND MULTINATIONAL ENTREPRISES-THREE TAXATION ISSUES (1984); OECD COMM. ON FISCAL AFFAIRS, supra note 39. See also paragraphs 11 and 12 of the Regulations.
[70] Para 12(1)
[71] Para 12(2)

(2) Where identical goods as mentioned in subparagraph (1) of this paragraph are found but are not at the same commercial level and in substantially the same quantity as the goods being valued, the transaction value of the goods shall still be used as the Customs Value of the goods being valued, provided that-
(a) adjustment can be made by demonstrated evidence to take account of the differences attributable to commercial level and quantity; and
(b) where the adjustment of the transaction value of the identical goods as stated in this subparagraph leads to a value different in figure from the transaction value already accepted for the identical goods under paragraph 1 of this Schedule, the higher value or figure shall be used as the customs value of the goods being valued.

**Transaction value of similar goods**
(1) If the Customs value of any goods imported into Nigeria cannot be determined under the provisions of paragraph 2 of this Schedule, then the customs value of the imported goods shall be the transaction value of similar goods already accepted under paragraph 1 of this Schedule sold for export to Nigeria and exported at or about the same time, at the same commercial level and in substantially the same quantity, as the goods being valued, adjustment having been made under paragraph 10 (1) and (2) of this Schedule to take account of significant difference in cost and charges between the imported goods and the similar goods arising from differences in distances and modes of transport.
(2) Where similar goods as mentioned in paragraph 2 (1) of this Schedule are found but are not as the same commercial level and in substantially the same quantity as the goods being valued, the transaction value of such goods shall still be used as the customs value of the goods being valued, provided that-
(a) adjustment can be made by demonstrated evidence to take account of the differences attributable to commercial level and quantity;
(b) where the adjustment of the transaction value of the similar goods as stated in this subparagraph leads to a value different in figure from the transaction value already accepted for the similar goods under paragraph 1 of this Schedule, the higher value or figure shall be used as the customs value of the goods being valued.

**Sale value**
(1) Where the customs value of goods imported into Nigeria cannot be determined under the provisions of paragraph 1, 2 or 3 of this Schedule, the customs value shall be based on the unit price at which the imported goods, identical or similar goods (in that order) are sold in Nigeria in the conditions as imported, in the greatest aggregate quantity, at or about the time of importation of the goods being valued, to persons who are not related to the persons from whom they buy those goods, subject to deductions for the following-
(a) commissions usually paid, or agreed to be paid, additions usually made for profit, and any general expenses in connection with the sales in Nigeria of goods of the same class or kind, whether imported from the same country or not;
(b) the usual costs of transport and insurance and associated costs within Nigeria of the same, identical, or similar goods (in that order) whether imported from the same country or not; and
(c) the customs duties, other Federal, State or Local Government taxes payable in Nigeria by reason of the importation or sale of the same, identical or similar goods (in that order).
(2) Where identical or similar goods to the goods being valued are used to calculate the customs value as mentioned in subparagraph (1) of this paragraph, the goods should have been imported into Nigeria at the earliest date but not later than 90 days from the date of importation of the goods to be valued.
(3) If the goods imported into Nigeria, identical or similar goods are not sold in Nigeria in the condition as imported, the Customs value of the goods shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons in Nigeria, who are not related to the persons from whom they buy those goods, due allowance being made for the value added by the processing and the deductions provided for in subparagraph (1) of this paragraph.

**Computed value**
(1) If the customs value of goods imported into Nigeria cannot be determined under the provisions of paragraph I, 2, 3 or 4 of this Schedule, the Customs value shall be based on a computed value which shall consist of-
(a) the cost of value of materials and fabrication of other processing employed in producing the imported goods;
(b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to Nigeria; and
(c) the cost or value of all other expenses made under paragraph 7 (2) of this Schedule.

(2) For the purposes of determining a computed value of any goods-
(a) no person who is not resident in Nigeria shall be required or compelled to produce for examination, or to allow access to, any account or other record;
(b) information supplied by the producer of the goods or any other person, may be verified in another country by the Board through the Federal Government of Nigeria, with the agreement of the producer of the goods, provided sufficient advance notice is given to the Government of the producer's country and that Government does not object to the investigation.

**Reasonable value**
(1) Where the Customs value of goods imported into Nigeria cannot be determined under the provisions of paragraphs 1, 2, 3, 4 or 5 of this Schedule, the Customs value shall be determined using reasonable means consistent with the principles and general provisions of this Schedule, and on the basis of data available in Nigeria.
(2) No Customs value shall be determined under the provisions of subparagraph (1) of this paragraph on the basis of-
(a) the selling price in Nigeria of identical or similar goods produced in Nigeria; or
(b) a system which provides for the acceptance for Customs value purposes of the higher of two alternatives; or
(c) the price of goods on the domestic market of the county of exportation; or
(d) the cost of production of the goods being valued, other than computed values determined for identical or similar goods in accordance with the provisions of paragraph 5 of this Schedule; or
(e) the price of goods for export to a country other than Nigeria; or
(f) minimum Customs values; or
(g) arbitrary or fictitious values.
(3) For purposes of determining Customs value under subparagraph (1) of this paragraph, the Board may-
(a) use to the greatest extent possible, Customs value previously determined under paragraphs 1,2,3,4 and 5 of this Schedule; and
(b) be reasonably flexible in the application of the methods already enumerated in paragraphs 1,2,3,4 and 5 of this Schedule.

**Additions for purposes of determining Customs value**
(1) For the purposes of determining the Customs value under the provisions of paragraph 1 of this Schedule, there shall be added to the price actually paid or payable for the goods imported into Nigeria-
(a) to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods-
(i) commission and brokerage, except buying commission;
(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
(iii) the cost of packing, whether for labour or materials;
(b) to the extent that the value has not been included in the price actually paid or payable, the value, apportioned as appropriate, of the following goods and services, where supplied directly or indirectly by the importer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods-
(i) a material, component, part and similar items incorporated in the imported goods;
(ii) a tool, die, mould, and similar item used in the production of the imported goods;
(iii) a material consumed in the production of the imported goods;
(iv) engineering, development, art work, design work, plan, and sketch undertaken elsewhere than in Nigeria and necessary for the production of the imported goods;
(c) royalty and licence fee related to the goods being valued which the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalty and fee are not included in the price actually paid or payable; and
(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods which accrues directly or indirectly to the exporter.
(2) In determining the Customs value under the provisions of paragraph 1 of this Schedule, there shall also be added to the price actually paid or payable-
(a) the cost of transporting the imported goods to the port or place of importation;
(b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and
(c) the cost of insurance.
(3) An addition or a deduction to the price actually paid or payable shall be made, in any valuation under this Schedule only on the basis of objective and quantifiable data, and as provided for in this Schedule.

**Sequential order of valuation**
(1) The valuation methods enumerated in paragraphs 1,2,3,4,5 and 6 of this Schedule shall be followed sequentially, so however that the buyer of the goods being valued shall have the right, on a request in writing to the Board made within three days of the valuation, to demand that the sequential order as enumeration in paragraphs 4 and 5 of this Schedule be changed, stating in the request the reasons for the demand.
(2) On receipt of a request in writing from the buyer under subparagraph (1) of this paragraph, the Board shall consider the request and shall, if satisfied with the reasons contained in the request, accordingly change the sequential order of valuation, and communicate the change in writing to the buyer or his agent not later than 7 days from the date of receipt of the request.
(3) Where the Board is not satisfied with the reasons given by the buyer for a change in the sequential order of valuation, it shall, within 7 days of receipt of the request, communicate its decision to the buyer or his agent and the decision of the Board on the issue shall be final.
(4) Every buyer shall have the right, on a written request to the Board, to have a written explanation from the Board, not later than 10 days from the date of receipt of the letter containing the determination, as to how the Customs value of goods imported by him into Nigeria was determined.

**Currency conversion**
(1) Where the conversion of currency is necessary for the determination of the Customs value of any good, the rate of exchange to be used shall be that duly published by the Federal Ministry of Finance and shall reflect as effectively as possible, in respect of the period covered by the document of publication, the current value of the currency in commercial transaction in terms of the naira.
(2) The conversion rate to be used shall be that in effect at the time of entry of the goods into Nigeria.

**Delayed valuation**
(1) If, in the course of determining the Customs value of goods imported into Nigeria, it becomes necessary to delay the final determination of the Customs value, the buyer of the goods shall be permitted by the Board to clear and take possession of the imported goods if, where so required, the buyer provides-
(a) adequate surety for payment of any customs duty that may be payable; or
(b) a deposit or some other appropriate instrument, covering the ultimate payment of any customs duty that may be payable; or
(c) any other form of guarantee which in the opinion of the Board, is sufficient to ensure payment of any customs duty that may be payable on the delayed valuation.
(2) Delay in the final determination of Customs value as stated in subparagraph (1) of this paragraph shall not be later than 30 days from the date of valuation commenced.

The possible controversy in respect of the Customs Valuation Methods would be resolved if paragraph 15(b) of the TP Regulations is allowed to operate and these valuation methods are accepted as satisfactory to the Federal Inland Revenue Service.

**Power to make Regulations**
The power to make regulations and under which the Income Tax (Transfer Pricing) Regulations of 2012 was enacted is contained in Section 61 of the FIRS (Establishment) Act of 2007 and provides that the Board may, with the approval of the Minister, make rules and regulations as in its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions and may in particular, make regulations prescribing the—

(a) forms for returns and other information required under this Act or any other enactment or law; and
(b) procedure for obtaining any information required under this Act or any other enactment or law.

The question is, in making these regulations was the Minister of Finance acting within the powers conferred by section 61 or was the Minister simply making new laws and acting beyond the powers conferred by the Act? The future would be defined by the response to this question. Nigeria is not alone in making of Transfer Pricing rules by way of Executive or Ministerial Regulations as Countries like Kenya which enacted the Income Tax (Transfer Pricing) Rules of 2006 and Uganda which enacted their own Transfer Pricing regulations in 2011 were all made by Executive Regulations. However, in some Countries the transfer pricing rules are enacted as part of the Income Tax Code such as South Africa by way of Section 31 of the Income Tax Act 58 of 1962 and Namibia through Section 95 of the Income Tax Act of 2005.

**6. The Future and the Way Forward**
The future of the implementation of the Nigerian Transfer Pricing Regulations would depend on the reporting and compliance requirement not being in conflict[72] with or amending[73] any of the sections of the Nigerian Tax Acts. The regulations must also be in accordance with the enabling law, that is, section 61 of the Federal Inland Revenue Service (Establishment) Act No 13 of 2007.[74] Finally, the regulations must not have a life of their own[75] and must be solely for the purpose of giving effect to the provisions of paragraph 1 as follows:

a. section 17 of the Personal Income Tax Act, CAP P8, Laws of the Federation of Nigeria, 2004 (as amended by the Personal Income Tax (Amendment) Act, 2011)
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 Profits Tax Acts, CAP. P13, Laws of the Federation of Nigeria, 2004.

In so far as these limits are kept, Nigeria can begin to look forward to a high tax yield from the implementation of the Income Tax (Transfer Pricing) Regulations of 2012.

[72] *Ewete v. Gyang* (1997) 3 NWLR (pt 496) 728
[73] *Kuusu v. Udom* (1990) 1 NWLR (pt 127) 421
[74] *Onazulike v. COS Anambra State* (1992) 3 NWLR (pt 232) 791
[75] *Din v. Attorney – General of the Federation* (1988) 4 NWLR (pt 87) 147