

Dispute resolution under Nigeria's TP Regulations: Is the DRP necessary?

The growth and development of the TP regime in Nigeria should not be complicated by avoidable convoluted tax dispute resolution mechanism or platforms and/or issues

Section 59 (1) of the Federal Inland Revenue Service (Establishment) Act, 2007 (FIRSEA) established the Tax Appeal Tribunal (TAT) with powers to settle disputes between tax authorities and taxpayers in Nigeria.

The dispute settlement powers of the TAT is very broad and covers the principal tax legislations – Companies' Income Tax Act (CITA), Petroleum Profits Tax Act (PPTA), Capital Gains Tax Act, (CGTA), Value Added Tax Act (VATA), Stamp Duties Act (SDA), the Taxes and Levies (Approved List for Collection) Act, as well as:

- All regulations, proclamation, government notices or rules issued in terms of these legislation
- Any other law for the assessment, collection and accounting of revenue accruable to the Government of the Federation as may be made by the National Assembly from time to time or regulation incidental to those laws, conferring any power, duty and obligation on the Service
- Enactment or Laws imposing Taxes and Levies within the Federal Capital Territory.
- Enactment or Laws imposing collection of taxes, fees and levies collected by other government agencies and companies including signature bonus, pipeline fees, penalty for gas flared, depot levies and licenses, fees for Oil Exploration License (OEL), Oil Mining License (OML), Oil Production License (OPL), royalties, rents (productive and non-productive), fees for licenses to operate drilling rigs. Fees for oil pipeline licenses, haulage fees and all such fees prevalent in the oil industry but not limited to the above listed

Under CITA (and by extension all regulations, proclamation, government notices or rules issued under it as envisaged under schedule 1 of FIRSEA), an aggrieved taxpayer may appeal to TAT within 30days of receiving a tax assessment or Notice of Refusal to Amend (NORA) from the FIRS or any of the State Boards of Internal Revenue (SBIR).¹



However, Regulation 14 (3) of the Income Tax (Transfer Pricing) Regulations No 1, 2012 ("TP Regulations") has added another layer to the administrative dispute resolution mechanism for taxpayers aggrieved by tax assessments raised by FIRS under Nigeria's Transfer Pricing regime.

Reg. 14 of the TP Regulations provides for the establishment of a Decision Review Panel (DRP) whose mandate is to receive and review contested TP assessments from aggrieved taxpayers and issue formal adjustments or assessments. The DRP is to be comprised of the head of the FIRS TP Department and two other FIRS staff not below the rank of Deputy Director. The decisions of the DRP is without prejudice to the taxpayer's right of appeal for further adjudication.

Introduction of the DRP into the Nigeria tax adjudication procedure; though well intentioned, may have only succeeded in complicating the review process, creating room for extended contest and cost to taxpayers. It is noteworthy that the proceedings of the DRP appear to be open-ended as no timeframe is limited from the point of appeal by the taxpayer to the DRP until the final decision of the DRP is given. .

Some of the complications that may arise would include the following questions:

- where appeals should lie from the decisions of the DRP - the TAT or the formal courts? This is against the backdrop of provisions of the TP Regulations that decisions of the DRP are without prejudice to the taxpayers' right of appeal to a court of competent jurisdiction. Is this provision attempting to circumvent taxpayers' right of recourse directly to TAT? Can it indeed legally succeed in doing so?
- what yardstick should taxpayers apply in deciding which forum to approach when faced with the choice of either proceeding to the DRP and the TAT? The concern



here is whether all assessments raised by the TP Division of FIRS and labeled "transfer pricing assessments" automatically mandate aggrieved taxpayers to proceed to DRP as forum of first appeal – even if the assessment did not directly arise as a result of an adjustment done by FIRS on the taxpayer's profits from related party transactions in order to make such profits align with the arm's length principle.

One argument would be that the provisions of the TP Regulations contemplates ensuring that profits declared by taxpayers from related party transactions comply with the arm's length principle, while determination of issues of taxability of income to Nigerian taxes can only be made under the principal tax acts (CITA, PPTA, PITA, CGTA, etc.)

- Is the DRP a quasi/pseudo re-incarnation of the defunct Body of Appeal Commissioners? For instance, there are concerns as to the ability of the DRP to fairly review decisions and assessments raised by FIRS given its composition. It is pertinent to note that the top management of TP Division of FIRS are the issuing authorities of TP assessments, it will therefore amount to breach of natural justice for the prosecutor to also be the judge in its own cause. The maxim "nemo judex in causa sua" (a man shall not be a

judge in his own cause) remains a cardinal principle of all adjudicatory processes in our legal system whether administrative or judicial.

Experience has shown that only on very few occasions do aggrieved taxpayers refer the outcomes of tax audits in Nigeria to the appropriate judicial forum for resolution - Federal High Court, the Court of Appeal and the Supreme Court. This reluctance is generally attributable to the slow pace of resolution and high cost of adjudication associated with the Nigerian judicial system.

An appropriate landing to clarify the relevance and/or status of the DRP within the tax dispute resolution procedures in Nigeria would be most welcome. The growth and development of the TP regime in Nigeria should not be complicated by avoidable convoluted tax dispute resolution mechanism or platforms and/or issues.

¹ Of course, there is a TAT ruling that held that the aggrieved taxpayer need not wait for the NORA before it initiates appropriate processes at the TAT.

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