CHAPTER SIX

AN OVERVIEW OF THE REPORTING AND COMPLIANCE REQUIREMENTS UNDER THE INCOME TAX (COUNTRY BY COUNTRY REPORTING) REGULATIONS 2018

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1. INTRODUCTION

The technological advancements in transportation and communication led to the emergence of Multinational Corporation (MNC) groups. A MNC group consist of a 'parent company' and 'subsidiary companies' that are located in different countries thereby creating a 'parent-subsidiary relationship'. The geographical boundaries between companies within the group means that it is possible for international transfer of goods and services to occur. The process of setting the price of such transaction is known as 'transfer pricing' while the price charged is known as 'transfer price'.

The MNCs sometimes exploit their 'parent-subsidiary relationship' to avoid tax which can impact negatively on revenue accruable to the

government.This is commonly referred to as abuse of transfer pricing, transfer pricing manipulation, transfer mispricing, incorrect pricing, unjustified pricing or non-arm's length pricing.[1]Abuse of transfer pricing simply means the intentional over-invoicing or pricing or under-invoicing or pricing of the transfer prices of goods and services of an intra-company transaction[2] for the purpose of reducing the global tax burden of a MNC group.[3]In this regard, overpricing of outbound transfers can be used to shift pro□ts or income out of a subsidiary located in a high-tax jurisdiction or country to a low tax jurisdiction/country while underpricing of inbound transfers can be used to minimise the tax payable in a high tax jurisdiction.[4]Abuse of transfer pricing is now generally considered as a major threat to the tax base of many countries impacting negatively on their revenue generation.[5]

To regulate transfer pricing in order to prevent the possibility of its abuse by MNCs, the Organisation of Economic Cooperation and Development (OECD) through its Model Tax Convention of 1963

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[1] Cooper J, Fox R., Loeprick J., and Mohindra K., 'Transfer Pricing and Developing Economies A Handbook for Policy Makers and Practitioners' <http://dx.doi.org/10.1596/978-1-4648-0969-9> 19 accessed on 29 October 2017

[2] Eden L., 'Taxes, Transfer Pricing, and the Multinational Enterprise' in Rugman A. M., The Oxford Handbook of International Business (2nd Ed.) (Oxford: Oxford University Press, 2009) 593

[3] Kobetsky M., *International Taxation of Permanent Establishments: Principles and Policy* (Cambridge University Press, Cambridge 2011) 71

[4] Eden L., 'Transfer Price Manipulation' in Reuter P., 'Draining Development? Controlling Flows of Illicit Funds from Developing Countries' The World Bank Report 2012 http://ww.worldbank.org accessed on 20 October 2016

[5] *Ibid*

recommended the 'arm's length principle' (ALP) as the international standard for assessing and regulating transfer pricing.[6] The application of the ALP is predicated on treating the members of a MNC group (that is, the parent-company and its subsidiaries located in different countries) as separate, distinct or independent entities[7] and using the price charged by independent entities in a similar comparable transaction to benchmark the transfer price to be charged.[8]

In its effort to provide guidance on the application of the ALP, the OECD released a Transfer Pricing Guidelines in 1979 which was later updated in 1995 known as the 'OECD Transfer Pricing Guidelines (OECD TPG 1995)'.[9] The 1995 OECD TPG was in 2010 with the introduction of another guideline known as the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' which was in response to the enormous changes and challenges posed by the new globalised economy.[10]

One of the criticism often levied against the OECD TPG 2010 is that it did not specify the documents to be included in a transfer pricing

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[6] Ruiter D. M., 'Overview of the OECD work on transfer pricing' <https://www.taxjustice.net/.../Marlies-de-Ruiter> accessed on 15 July 2017

[7] Article 9(1) of the OECD Model Tax Convention. See <http://www.oecd.org/tax/treaties/2014-model-tax-convention-articles.pdf>accessed on 15 July 2014

[8] OECD, 'Commentaries on the articles of the Model Tax Convention' <http://www.oecd.org/berlin/publikationen/43324465.pdf> p.397 accessed on 23 December 2016

[9] OECD, 'Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' (2010) <http://www.oecd.org/ctp/transfer-pricing/45763692.pdf> 41-51 accessed on 15 July 2014

[10] *Ibid*

documentation package as taxpayers were only required to provide reasonable documents to show that their intra-company transactions were conducted at arm's length.[11] The absence of specific documents in this regard constitute a serious challenge to the application of the ALP because both the taxpayers and the tax authorities may not necessarily have ideas about the types of documents to be provided.

To correct this anomaly, the OECD recommended the introduction of a three-tiered standardised transfer pricing documentation namely: (i) Master File; (ii) Local File; and (iii) a Country-by-Country Report.[12] This recommendation was part of the 15-Action Plan developed by the OECD and the G20[13] to address the issue of Profit Shifting under a general package known as Base Erosion and Profit Shifting (BEPS) Project.[14]

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[11] OECD, Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project' <http://dx.doi.org/10.1787/9789264241480-en> 15 accessed on 17 July 2017

[12] OECD, 'Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project' (2015) <http://www.oecd.org/tax/beps-explanatory-statement-2015.pdf> 15-16 accessed on 17 July 2017

[13] The G20 (or G-20 or Group of Twenty) is an international forum for the governments and central bank governors from 20 major economies. Currently, these are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, United Kingdom, United States, and the European Union. See <https://www.g20.org/Webs/G20/DE/Home/home_node.html> accessed on 17 July 2017

[14] OECD, 'OECD/G20 Base Erosion and Profit Shifting Project 2015' <http://www.oecd-ilibrary.org/taxation/oecd-g20-base-erosion-and-profit-shifting-project_23132612> accessed on 17 July 2017

In Nigeria, prior to 2018, transfer pricing was regulated in the country through the Income Tax (Transfer Pricing) Regulations 2012[15] which was based on the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. This means that the Income Tax (Transfer Pricing) Regulations 2012 was not immune from the criticism levied against the 2010 OECD TPG in that it did not specify the documents to be included in a transfer pricing documentation package. For example, the Income Tax (Transfer Pricing) Regulations 2012 did not specify the list of documents to be included in the transfer pricing documentation package, it only requires the MNCs to provide sufficient information or data to verify that their controlled transactions are consistent with the ALP.[16]

This created a lot of uncertainties with regard to the minimum transfer pricing documentation requirements. The uncertainties in this regard resulted in conflict between the MNCs and the FIRS as to the documents to be provided.[17] It also created ambiguities in transfer pricing documentation leading to an increment in compliance cost on the part of the taxpayer and also leading to conflict between the taxpayers and the FIRS.[18]

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[15] Income Tax (Transfer Pricing) Regulations, No. 1 Government Notice No. 206 Page 815-839 21st September, 2012 Federal Republic of Nigeria Official Gazette Vol. 99.

[16] Paragraph 6 (1) of the Income Tax (Transfer Pricing) Regulations 2018

[17] *Ibid*

[18] *Ibid*

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It was therefore in response to the OECD recommendation and to ensure certainty in transfer pricing documentation that the Nigerian government through the Federal Inland Revenue Service (FIRS) released the Income Tax (Country by Country Reporting) Regulations 2018 (the Regulation) on 19th June 2018.This is seen as a significant attempt by the Nigerian government to ensure certainty in transfer pricing documentation requirements and to reduce compliance burdens on the MNCs in line with the OECD recommendation.

This article examines Action 13 of the OECD/G20 BEPS Project and the reporting and compliance requirements under the Income Tax (Country by Country Reporting) Regulations 2018.

2. ACTION 13 OF THE OECD/G20 BEPS PROJECT

Base Erosion and Profit Shifting (BEPS) is a term generally use to refer to various tax avoidance schemes/strategies such as abuse of transfer pricing and other forms of tax avoidance employed by taxpayers to artificially shift profits to low or no-tax locations.[19] BEPS schemes enables taxpayers to move profits to where they are taxed at lower rates and expenses from where they are taxed at higher rates. The result of this is the reduction of revenue accruable to the government.[20]

[19] OECD, 'Base Erosion and Profit Shifting' <http://www.oecd.org/tax/beps/> accessed on 15July 2017

[20] *Ibid*

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In acknowledging the global revenue loss from BEPS, the OECD in its Explanatory Statement to Base Erosion and Profit Shifting Project Final Report of 2015 at page 4 paragraph 2 estimated that global corporate income tax (CIT) revenue losses to BEPS schemes could be between USD 100 to 240 billion annually[21].

Addressing the issue of BEPS was therefore a key priority of governments around the globe. It was in this respect that in 2012, the OECD countries and the G20 countries,[22] working together embarked on the most significant and ambitious objective of re-writing the international tax rules that has been in existence for a century.[23] This ambition was to revise the ALP rule and align it to developments in the world economy to ensure that profits are taxed where economic activities are carried out and where value is created.[24]

Beyond securing revenues, the OECD/G20 BEPS Project also aim to create a single set of consensus-based international tax rules to address

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[21] OECD, 'Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project' (2015) <http://www.oecd.org/tax/beps-explanatory-statement-2015.pdf> accessed on 17 July 2017

[22] The G20 (or G-20 or Group of Twenty) is an international forum for the governments and central bank governors from 20 major economies. Currently, these are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, United Kingdom, United States, and the European Union. See <https://www.g20.org/Webs/G20/DE/Home/home_node.html> accessed on 17 July 2017

[23] OECD, 'OECD/G20 Base Erosion and Profit Shifting Project 2015 Final Reports: Information Brief' <www.oecd.org/ctp/beps-reports-2015-information-brief.pdf> accessed on 15 July 2017

[24] *Ibid*

BEPS and to protect tax bases while offering increased certainty and predictability to taxpayers.[25] While the OECD and G20 countries recognised the need to address the issue of BEPS internationally, they did not want to unravel the existing consensus-based international framework such as the ALP which has been internationally accepted as the standard for regulating transfer pricing. Their fear is that unraveling the ALP might lead to decreased international cooperation and uncoordinated unilateral actions in the tax sphere which would multiply uncertainty and unpredictability.[26]

Thus, the process of addressing BEPS issues internationally did not only involve the OECD and G20 countries alone but it also involved the developing countries who provided direct input to the process through their various regional tax organisations such as the African Tax Administration Forum (ATAF), Centre de Rencontres et d'Etudes des Dirigeants des Administrations Fiscales (CREDAF), Intra-European Organisation of Tax Administrations (IOTA), Inter-American Center of Tax Administrations (CIAT), and other international organisations such as the United Nations (UN), International Monetary Fund (IMF), World Bank Group (WBG).[27] There were also contributions from stakeholders in which more than 1,400 submissions were received from industry,

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[25] OECD, 'OECD/G20 Base Erosion and Profit Shifting Project 2015' <http://www.oecd-ilibrary.org/taxation/oecd-g20-base-erosion-and-profit-shifting-project_23132612> accessed on 17 July 2017

[26] *Ibid*

[27] OECD, 'Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project' (2015) <http://www.oecd.org/tax/beps-explanatory-statement-2015.pdf> accessed on 17 July 2017

advisers, NGOs and academics, totalling approximately 12,000 pages of comments.[29] Eleven public consultations were held, gathering a variety of stakeholders for open and frank discussions of their views and suggestions and to ensure full transparency, these public consultations were streamed live on webcasts while the OECD Secretariat periodically updated the public on the status of the project.[29]

All of the above efforts paid off on 12th February 2013 when the OECD issued a lengthy report to address BEPS known as the BEPS Report.[30] This was followed up with the publication of a concrete 15-Action Plan on BEPS on 19th July 2013.[31] The 15-Action Plan otherwise known as the BEPS Package was meant to equips the governments with the domestic and international instruments needed to tackle various tax avoidance schemes.

The BEPS Report was eventually endorsed by the G20 Finance Ministers during their meeting of 8th October 2015 in Lima while the G20 Leaders followed suit by endorsing the BEPS package during their summit held in Antalya, Turkey between 15 and 16 November 2015.[32] The 15-Action Plan are listed below:

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[28] *Ibid*

[29] OECD, 'OECD/G20 Base Erosion and Profit Shifting Project 2015 Final Reports: Information Brief' <www.oecd.org/ctp/beps-reports-2015-information-brief.pdf> accessed on 15 July 2017

[30] OECD, 'Addressing Base Erosion and Profit Shifting 2013'<http://www.oecd.org/ctp/beps.htm> 42 accessed on 17 July 2017

[31] OECD, 'Action Plan on Base Erosion and Profit Shifting 2013' <http://www.dx.doi.org/10.1787/9789264202719-en> accessed on 17 July 2017

[32] OECD, 'Base Erosion and Profit Shifting (BEPS)' 'https://www.oecd.org/g20/topics/taxation/' accessed on 15 July 2017

i. Address the tax challenges of the digital economy;
ii. Neutralise the effects of hybrid mismatch arrangements;
iii. Strengthen Controlled Foreign Company rules;
iv. Limit base erosion via interest deductions and other financial payments;
v. Counter harmful tax practices more effectively, taking into account transparency and substance;
vi. Prevent treaty abuse;
vii. Prevent the artificial avoidance of PE status;
viii. Assure that transfer pricing outcomes are in line with value creation- Intangibles;
ix. Risk & capital;
x. Other high-risk transactions;
xi. Establish methodologies to collect and analyse data on BEPS and the actions to address it;
xii. Require taxpayers to disclose their aggressive tax planning arrangements;
xiii. Re-examine transfer pricing documentation;
xiv. Make dispute resolution mechanisms more effective;
xv. Develop a multilateral instrument.[33]

Action 13 of the BEPS Project (Re-examine transfer pricing documentation) was meant to address the challenges associated with the unclear documentation rules and procedure under Chapter 5 of the

[33] OECD, 'Action Plan on Base Erosion and Profit Shifting' <http://dx.doi.org/10.1787/9789264202719-en> accessed on 15 July 2017

OECD TPG 2010. Specifically, BEPS Action 13 requires the OECD to 'develop rules regarding transfer pricing documentation to enhance transparency for tax administrations, taking into consideration the compliance costs for business'.[34] The purpose of Action 13 is also to ensure that governments are provided with the needed information on the global allocation of income, economic activity and taxes paid by MNCs among various countries'.[35] The objective here is to enable tax authorities evaluate the presence of significant transfer pricing risk by being able to monitor the MNCs' global income and profit to know the level of their economic activities in different tax jurisdiction and to know the amount of taxes that has been paid in those jurisdictions.

Therefore, to achieve this objective, the OECD/G20 BEPS Project recommended that countries all over the world should adopt a three-tiered standardised transfer pricing documentation namely: (i) Master File; (ii) Local File; and (iii) a Country-by-Country Report.[36] The Master File is expected to contain information relating to an overview of a MNC group business, including but not limited to the nature of its global business operations, its overall transfer pricing policies, its global allocation of income and profits and the level of economic activities of each of its permanent establishments in different countries in order to

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[34] OECD, 'Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project <http://dx.doi.org/10.1787/9789264241480-en> 15 accessed on 17 July 2017

[35] *Ibid*

[36] OECD, 'Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project' (2015) <http://www.oecd.org/tax/beps-explanatory-statement-2015.pdf> 15-16 accessed on 17 July 2017

assist in tax collections.[37] The essence of the Master File is to provide an overview of the MNC's global business operations, structure and transfer pricing policies. The Master File is expected to be filed in every tax jurisdiction where the MNC has permanent establishment.[38]

The local file on the other hand provides more detailed information relating to intra-company transactions in specific jurisdictions. The local file is meant to supplement the master file and to meet the objective of ensuring that taxpayers comply with the ALP in a specific jurisdiction. The information to be included in a local file includes information that are material in the context of a country's tax system and information on transactions taking place between associated entities in different countries.[39] The local file just like the master file is also expected to be filed in every tax jurisdiction where the MNC has permanent establishments.

The third document which is the Country-by-Country Report (CbC) is expected to be filed annually with the tax authority of the country where the MNC is headquartered. The CbC Report is expected to contain information regarding the amount of revenue, profits before income tax and income tax paid and other relevant economic activities.[40] The CbC

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[37] *Ibid*
[38] *Ibid*
[39] *Ibid*
[40] OECD, Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project' <http://dx.doi.org/10.1787/9789264241480-en> 15 accessed on 17 July 2017

Report provides a clear overview of where profits, sales, employees and assets of MNCs are located and where taxes are paid.[41]

The BEPS Project further recommended that both the master file and local file be implemented through local legislations or administrative procedures.[42] In respect of implementation of the CbC Report, BEPS Project recommended that it should be implemented through local legislations or administrative procedures which will mandate the ultimate parent entity of an MNC group to file a CbC Report with the tax authority of the country where the MNC is headquartered.[43] The CbC Report will then be shared by tax authorities where the MNC is headquartered with other countries' tax authorities through the government-to-government bilateral exchange of information.

To facilitate this exchange of information, the BEPS Project recommended three model Competent Authority Agreements to activate the exchange of CbC report.[44] The first of the model Competent Authority Agreements is the Multilateral Competent Authority Agreement on the Exchange of CbC Reports (MCAA CbC). It is expected that every country will be a signatory to this agreement including non-OECD member countries. The purpose of the MCAA CbC is to set rules and procedure for countries to automatically

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[41] *Ibid*
[42] *Ibid*
[43] *Ibid*
[44] *Ibid*

exchange CbC reports filed with the tax authorities of the country where the parent company of the MNE is headquartered with other countries' tax authorities where the MNE has permanent establishment.[45] The second and third model Competent Authority Agreements are the Competent Authority Agreement on the Exchange of CbC reports on the basis of a Double Tax Convention (CAA DTC) and the Competent Authority Agreement on the exchange of CbC reports on the basis of a Tax Information Exchange Agreement (CAA TIEA).

As at 6 July 2017, 63 countries have signed the MCAA CbC[46] while the first ever CbC reports are expected to be exchanged by June 2018 among countries who are signatories to the MCAA CbC. The OECD, in its report of October 2017, indicated that over 1000 exchange of CbC report has been activated by more than 40 countries.[47] It should be noted that the exchange of CbC reports between two countries can only be activated when necessary legal framework has been put in place to exchange the CbC Reports. According to the OECD, the following are the legal frameworks that must be in place before CbC can be exchanged between two countries:

i. both countries must be signatories to the MCAA CbC;

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[45] OECD, 'Country-by-Country Exchange Relationships' <http://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm> accessed on 27 September 2017

[46] OECD, Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) and signing dates' <www.oecd.org/tax/beps/country-by-country-reporting.htm> accessed on 3 August 2017

[47] *Ibid*

ii. both countries must have in place a legislation requiring MNCs to file a CbC report with the tax authority of the country where the parent company of the MNC group is headquartered;

iii. both countries must have ratified a Double Taxation Agreement to activate the automatic exchange of information as contained in Article 26 of the OECD Model Tax Convention;

iv. where there is no Double Taxation Agreement between the countries, the countries must have entered a Tax Information Exchange Agreement to activate the automatic exchange of information for the sole purpose of exchanging CbC reports; and

v. both countries must execute an agreement setting out the procedure for the exchange of CbC reports such as the time of exchange, manner of exchange of information, confidentiality, data safeguards and appropriate use of the information in the CbC reports.[48]

Nigeria signed the MCAA CbC on 27 January 2016 and was subsequently ratified by the Federal Executive Council in August 2016.[49] Due to fact that Nigeria did not have in place the legal framework for the exchange of CbC as at the time it signed the MCAA CbC, the country is not expected to among to exchange CbC with other countries in 2017 and 2018. For example, there is no legislation or

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[48]OECD, 'Country-by-Country Exchange Relationships' <http://www.oecd.org/tax/beps/country-by-country-exchange-relationships.html> accessed on 14 October 2017

[49]PricewaterCoopers 'Nigera Signs country-by-country report exchange agreement' <https://www.pwc.com/us/en/tax-services/publications/insights/nigeria-signs-country-by-country-report-exchange-agreement.html> accessed on 12 September 2017

administrative procedures mandating MNCs operating in the country to file their CbC reports, master file and local file with the FIRS.[50]

However, with the release of the Income Tax (Country by Country Reporting) Regulations 2018, the country now has the legal basis to request and exchange of CbC Report with other countries that are signatories to the MCAA CbC. This is unlike in the past when the country had no legal framework needed to activate the automatic exchange of CbC. The release of the Income Tax (Country-by-Country reporting) Regulations (CbCR Regulations) is therefore a right step in the right direction to ensure consistency in transfer pricing documentation in the country.

4. THE INCOME TAX (COUNTRY BY COUNTRY REPORTING) REGULATIONS 2018

The Nigeria government, on 19th June 2018, through the Federal Inland Revenue Service (FIRS) released the gazette of the Income Tax (country by country reporting) Regulations 2018 (Regulation).[51] The Regulation, with a commencement date of 1st January 2018, was released by the FIRS in exercise of the powers conferred by Section 61 of the Federal

[50] *Ibid*

[51] Income Tax (Country by Country Reporting) Regulations, No. 1 Government Notice No. 16 Pages B69-80 21st 8th January 2018, 2018 Federal Republic of Nigeria Official Gazette Vol. 105

Inland Revenue Service (Establishment) Act and with the approval of the Honourable Minister of Finance.[52]

The purpose of the Regulation as stated in paragraph 1 is to give effect to the provisions of[53]

(a) the Country-by-Country Multilateral Competent Authority Agreement (CbC MCAA) signed by Nigeria on the 27th January 2016 and ratified by the Federal Executive Council (FEC) on the 31st August 2016 Report;

(b) sections 8(1)(i), 8(1)(t), 8(2), 36, 37(1)of the Federal Inland Revenue Service (Establishment) Act;

(c) section 58 and 60 of the Companies Income Tax Act CAP C21, Laws of the Federation of Nigeria, 2004 (as amended);

(d) section 31 and 32 of the Petroleum Profits Tax Act, CAP P13, Laws of the Federation of Nigeria, 2004; and

(e) regulation 6 of the Income Tax (Transfer Pricing) Regulations No. 1 2012

The objectives of the Regulation is to provide the FIRS with information about Multinational Corporations (MNCs) global activities, profit and taxes and also to provide the FIRS with information to better assess international tax avoidance risks.[54] Another objective of the Regulation

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[52] See the Preamble to the Income Tax (Country by Country Reporting) Regulations 2018

[53] Paragraph 1 of the Income Tax (Country by Country Reporting) Regulations 2018

[54] Paragraph 2(a and b) of the Income Tax (Country by Country Reporting) Regulations 2018

is to improve transparency of MNC's in their tax practices and to prevent tax evasion or avoidance through base erosion and profit shifting.[55]

The FIRS is the body saddled with the statutory powers to administer the Regulation. This is done through a separate and dedicated unit known as 'Transfer Pricing Division (TPD)'created to administer transfer pricing issues in the country. This is to ensure proper and effective administration and implementation of the Regulation in line with international best practices as recommended by the OECD.[56] The TPD is currently situated on the 3rd Floor of the FIRS office Building along Awolowo Road, Ikoyi, Lagos State.

a. Filing Obligation and Requirements under the Regulation

The official language for the filing of a Country-by-Country Report under the Regulation is English Language.[57]It is however hopeful that where a document is not in English language, the FIRS may allow the MNC to produce a translation in the official language at its own expense. Such translation is only be acceptable if prepared and certified by a sworn translator or another person approved by the FIRS.

The Regulation makes it mandatory for the Ultimate Parent Entity[58] of an MNC group with a consolidated group revenue of ₦160 billion or

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[55] Paragraph 2(c and d) of the Income Tax (Country by Country Reporting) Regulations 2018

[56] Deloitte, 'Transfer Pricing Regime in Nigeria – How far have we gone?' <http://www.doingbusiness.org/data/exploreeco nomies/nigeria/> accessed on 15 June 2016

[57] Paragraph 14 of the Income Tax (Country by Country Reporting) Regulations 2018

[58] Paragraph 16 of the Income Tax (Country by Country Reporting) Regulations 2018 defined an Ultimate Parent Company to mean a constituent entityof a MNC group that

above and which is resident in Nigeria for tax purposes to file a Country-by-Country Report with the Federal Inland Revenue Service (FIRS)[59] not later than 12 months after last day of the Reporting Accounting Year of the MNC group.[60]

A Country-by-Country Report is expected to be filed using a model template as set out in the First Schedule to the Regulation as may be modified by the FIRS from time to time[61] and it must disclose information relating to the amount of revenue, profit or loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, tangible assets with regard to each of the jurisdiction in which the MNC group operates.[62] In addition, the Report must also set the various jurisdictions in which the MNC group have subsidiaries and the nature of the mind business activity or activities of the subsidiaries.[63] Specifically, the Country by Country Report is expected to disclose the following information:

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owns directly or indirectly a sufficient interest in one or more other constituent entities of such MNC group such that it is required to prepare a consolidated financial statements under the accounting rules generally applied in its jurisdiction of tax residence .

[59] Paragraph 3 of the Income Tax (Country by Country Reporting) Regulations 2018

[60] Paragraph 3 of the Income Tax (Country by Country Reporting) Regulations 2018

[61] Paragraph 8(1 & 2) of the Income Tax (Country by Country Reporting) Regulations 2018

[62] Paragraph 7(a) of the Income Tax (Country by Country Reporting) Regulations 2018

[63] Paragraph 7(b) of the Income Tax (Country by Country Reporting) Regulations 2018

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b. Overview of allocation of income, taxes and business activities by tax jurisdiction

i. Name of the MNC group: Fiscal year concerned: Currency used:

ii. Tax Jurisdiction

iii. Revenues: Profit (Loss) before Income Tax

iv. Income Tax Paid (on Cash Basis)

v. Income Tax Accrued – Current Year

vi. Stated Capital

vii. Accumulated Earnings

viii. Number of Employees

ix. Tangible Assets other than Cash and Cash Equivalents Unrelated Party

c. List of all the Constituent Entities of the MNC group included in each aggregation per tax jurisdiction

i. Tax jurisdiction

ii. Constituent Entities Resident in the Tax Jurisdiction

iii. Tax Jurisdiction of Organisation or Incorporation if Different from Tax Jurisdiction of Residence

iv. Main Business Activity(ies)

v. Research and Development

vi. Holding or Managing Intellectual Property

vii. Purchasing or Procurement

viii. Manufacturing or Production

ix. Sales, Marketing or Distribution

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x. Administrative, Management or Support Services
xi. Provision of Services to Unrelated Parties
xii. Internal Group Finance
xiii. Regulated Financial Services
xiv. Insurance
xv. Holding Shares or Other Equity instruments

It is important to note that the FIRS can only use any Country-by-Country Report filed by a MNC for the purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting related risks in Nigeria, assessing the risks of non-compliance by members of the MNC Group with applicable transfer pricing rules and for economic and statistical analysis.[64] The implication of this is that a Country-by-Country Report filed by a MNC cannot be a basis of transfer pricing adjustment where there is an abuse of transfer pricing.[65] Thus, in order to ensure the confidentiality and proper use of the Country-by-Country Report filed by a MNC, the Regulation mandate the FIRS to preserve confidentiality of the information contained in the Country-by-Country Report in compliance with the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.[66]

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[64]Paragraph 10(1)(a) (i-iii) of the Income Tax (Country by Country Reporting) Regulations 2018
[65]Paragraph 10(1)(b) of the Income Tax (Country by Country Reporting) Regulations 2018
[66] Paragraph 10(2) of the Income Tax (Country by Country Reporting) Regulations 2018

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The requirement to file a Country-by-Country Report is also mandatory for any subsidiary of the MNC if the following conditions are met:[67]

i. the subsidiary is resident in Nigeria for tax purposes;[68]

ii. the Ultimate Parent Entity of the subsidiary is not obliged to by a Country-by-Country Report in its jurisdiction of tax residence;[69]

iii. the jurisdiction in which the Ultimate Parent Entity of the subsidiary is resident for tax purpose has a current international agreement to which Nigeria is a party but does not have a Qualifying Competent Authority Agreement in effect to which Nigeria is a party by time not later than 12 months after last day of the Reporting Accounting Year of the MNC group;[70]and

iv. there has been as systemic failure[71] of the jurisdiction of the tax residence of the Ultimate Parent Entity which Hs been

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[67]Paragraph 4(1) & (2) of the Income Tax (Country by Country Reporting) Regulations 2018

[68] Paragraph 4 (2)(a) of the Income Tax (Country by Country Reporting) Regulations 2018

[69] Paragraph 4(2)(b)(i) of the Income Tax (Country by Country Reporting) Regulations 2018

[70] Paragraph 4(2)(b)(ii) of the Income Tax (Country by Country Reporting) Regulations 2018

[71]The term systemic failure is defined under the Regulation to mean 'a tax jurisdiction which has a Qualifying Competent Authority Agreement in effect with Nigeria but has suspended automatic exchange (for reasons other than those that are in accordance with the agreement). See Paragraph 16 of the Income Tax (Country by Country Reporting) Regulations 2018

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notified by the FIRS to the subsidiary resident for tax purpose in Nigeria.[72]

In a situation where more than one subsidiaries of the same MNC group are resident in Nigeria for tax purpose, the MNC group may designate one of such subsidiary to file a Country-by-Country Report with the FIRS in this respect.[73] The MNC Group is expected to notify the FIRS that such filing is intended to satisfy the filing requirements of all its subsidiaries resident in Nigeria for tax purposes.[74]

A subsidiary of a MNC Group resident in Nigeria for tax purpose is however exempted from filling a Country-by-Country Report provided the MNC Group makes available a Country-by-Country Report conforming with the requirements of Paragraphs 7 and 8 of the Regulations through a Surrogate Parent Entity.[75]The exemption in this regard is only applicable when the following conditions are satisfied:

i. the jurisdiction of tax residence of the Surrogate Parent Entity requires filing of Country-by-Country Reports conforming with the requirements of Paragraphs 7 and 8 of the Regulations;

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[72] Paragraph 4(2)(b)(iii) of the Income Tax (Country by Country Reporting) Regulations 2018

[73] Paragraph 4(3) of the Income Tax (Country by Country Reporting) Regulations 2018

[74] *Ibid*

[75] Paragraph 5(1) of the Income Tax (Country by Country Reporting) Regulations 2018. A Surrogate Parent Entity is defined under the Regulation to mean a subsidiary of a MNC that has been appointed by such MNC Group as a sole substitute for Ultimate Parent Entity to file Country-by-Country Report in that subsidiary's jurisdiction of tax residence on behalf of such MNC Group. See Paragraph 16 of the Income Tax (Country by Country Reporting) Regulations 2018

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ii. the jurisdiction of tax residence of the Surrogate Parent Entity has a Qualifying Competent Authority Agreement in effect to which Nigeria is a party;

iii. the jurisdiction of tax residence of the Surrogate Parent Entity has not notified the FIRS of a systemic failure;

iv. the jurisdiction of tax residence of the Surrogate Parent Entity has been notified that the subsidiary resident in that jurisdiction for tax purpose is the Surrogate Parent Entity; and

v. a notification has been provided to the FIRS as required under Paragraph 6 of the Regulation.[76]

d. Notification of the FIRS

Every subsidiary of a MNC Group that is resident in Nigeria has obligation to submit yearly notification to the FIRS pursuant to the provision of Paragraph 6 of the Regulation. In this regard, the subsidiary will notify the FIRS whether it is the Ultimate Parent Entity or Surrogate Parent Entity of the MNC Group not later than the last day Reporting Accounting Year of such MNC group.[77] An Ultimate Parent Company means a Constituent Entity of a MNC group that owns directly or indirectly a sufficient interest in one or more other constituent entities of such MNC group such that it is required to prepare a consolidated financial statements under the accounting rules generally applied in its

[76] Paragraph 5(2a-e) of the Income Tax (Country by Country Reporting) Regulations 2018

[77] Paragraph 6(1) of the Income Tax (Country by Country Reporting) Regulations 2018

jurisdiction of tax residence.[78] On the other hand, a Surrogate Parent Entity is defined under the Regulation to mean a subsidiary of a MNC that has been appointed by such MNC Group as a sole substitute for Ultimate Parent Entity to file Country-by-Country Report in that subsidiary's jurisdiction of tax residence on behalf of such MNC Group.[79]Where the subsidiary is neither Ultimate Parent Entity nor a Surrogate Parent Entity of the MNC Group, such subsidiary is mandated to notify the FIRS as to its identity and tax residence not later than the last day Reporting Accounting Year of such MNC group.[80]

e. Penalties for Non-Compliance

In line with international best practices as recommended by the OECD, the Regulation imposed administrative penalties for non-compliance with filing obligations and compliance requirements stipulated under the Regulation.[81]This represent an attempt on the part of the FIRS to ensure compliance with the various filing and compliance requirements of the Regulation as well as to ensure efficient implementation of the Regulation. It is therefore important for relevant taxpayers to ensure compliance with the various filing obligation and compliance requirements under the Regulation to avoid exposure to penalty for non-compliance

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[78] Paragraph 16 of the Income Tax (Country by Country Reporting) Regulations 2018
[79] Paragraph 16 of the Income Tax (Country by Country Reporting) Regulations 2018
[80] Paragraph 6(2) of the Income Tax (Country by Country Reporting) Regulations 2018
[81] Part IV of the Income Tax (Country by Country Reporting) Regulations 2018

Where a MNC fails to file a Country-by-Country within 12 months after the last day of its Reporting Accounting Year,[82] the FIRS is empowered to impose an administrative penalty of ₦10,000,000.00 (Ten Million Naira) in the first instance and ₦1,000,000.00 (One Million Naira) for every month in which the defaults continues.[83] Likewise, filing of an incorrect or false Report will attract an administrative penalty of ₦10,000,000.00 (Ten Million Naira).[84]In the same vein, failure to give proper notification as required under Paragraph 6 of the Regulation will attract an administrative penalty of ₦5,000,000.00 (Five Million Naira) in the first instance and ₦10,000.00 (Ten Thousand Naira) for everyday in which the default continues.[85]

The Regulation also contain an anti-avoidance provision to the effect that where a MNC enters into any arrangement and the purpose of that arrangement or one of the main purposes of entering into the arrangement is to avoid the filing obligations and requirements impose under Paragraphs 3 and 4 of the Regulation, such an arrangement will be deemed as if it has never been entered into.[86]

4. SIGNIFICANCE AND IMPLICATION OF THE REGULATION

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[82] By Paragraph 9 of the Regulation, a Country-by-Country Report must be filed with the Federal Inland Revenue Service (FIRS) not later than 12 months after last day of the Reporting Accounting Year of the MNC group

[83] Paragraph 11 of the Income Tax (Country by Country Reporting) Regulations 2018

[84] Paragraph 12 of the Income Tax (Country by Country Reporting) Regulations 2018

[85] Paragraph 13 of the Income Tax (Country by Country Reporting) Regulations 2018

[86] Paragraph 15 of the Income Tax (Country by Country Reporting) Regulations 2018

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The introduction of the Income Tax (Country-by-Country Reporting) Regulations is highly significant in the regulation of transfer pricing in Nigeria. It represents a willingness on the part of the Nigerian government to implement some of the Action Plan recommended by both the ORCD and the G20 to strengthen the application of the Arm's Length Principle to prevent abuse of transfer pricing. The FIRS therefore deserve commendations for taking steps to implement one of the Action Plan recommended of the OECD even though the country is not a member of the OECD.

As a member of the Inclusive Framework, a group of jurisdictions, committed to the implementation of the minimum standard of the BEPS related measures, Nigeria, through the FIRS had continued to show commitment to implement recommendations of the OECD such as the signing of Multilateral Competent Authority Agreement on Country-by-Country Reporting (CbC MCAA) which has now led to the introduction of the Income Tax (Country-by-Country Reporting) Regulations 2018. The Regulation provides a more structured legal framework and guidelines with regard to filing of a Country-by-Country Report and the information to be included in such Report thereby ensuring transparency with limited arbitrariness and discretion.

This is a significant departure from what was previously obtainable in the past when there was no guide to taxpayers as to the particular transfer pricing documents to be provided to verify compliance with the

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arm's length principle. In addition, the introduction of the Regulation based on the recommendations of the OECD/G20 BEPS Action Plans will ensure consistency between the law in Nigeria and other jurisdictions which will enable the country to exchange a Country-by-Country Report with other countries that have also introduce similar Regulation in their jurisdictions.

Accordingly, the introduction of the Regulations now allows the FIRS to obtain and share relevant information on the global business operations, financial results and tax position of MNC Groups.[87] This implies that the FIRS now have the legal basis to obtain information about the MNC operations which will give it greater capability to assess transfer pricing risks and other Base Erosion and Profit Shifting (BEPS) related risks.

It is therefore important for MNC Groups to evaluate their Transfer Pricing and BEPS risks and proactively take necessary actions to address them.[88]The implication of this is that the FIRS will have access to more information on the global operations of the MNC Groups which may lead to aggressive transfer pricing audits and investigations.[89] The FIRS may therefore query transactions with related parties and in extreme cases make adjustment to the income of the local entity if it observed

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[87] See the explanatory note to the Income Tax (Country by Country Reporting) Regulations 2018

[88] KPMG Transfer Pricing Newsletter, 'FIRS issues Country-by-Country Reporting Regulations' <https://home.kpmg.com/ng/en/home/insights/2018/06/Transfer-Pricing-Country-by-Country-Reporting.html>accessed on 15 September 2018

[89] Onyeani A. S. and Yahaya S., 'Implication of Country by Country Reporting Regulations Multinational Enterprises in Nigeria' <https://www.andersentax.ng> accessed on 15 September 2018

that there are limited economic activities but high profits recorded in entities especially where those entities are located in tax havens.[90] Thus means that relevant taxpayers will need to review their global operations to ensure that taxes are aligned to economic activities and and or value creation.[91]

The introduction of administrative penalties for non-compliance with the filing and compliance requirements of the Regulation represent another significant departure from what was previously obtainable under the Income Tax (Transfer Pricing)Regulation which had no specific penalty for non-compliance with filing requirements. The administrative penalty introduced in this regard will go a long way to discourage non-compliance filing and compliance requirements of the Regulation. It is therefore important for MNCs operating in the country to take strategic measures to ensure full compliance with filing and compliance requirements under the Regulation bearing
in mind that the penalty for noncompliance is very significant.

5. CONCLUSION

The article examined the filing obligation and compliance requirements of MNCs under the Income Tax (Country-by-Country Reporting) Regulations 2018. The finding of the article revealed that the Regulation imposes some filing obligations and compliance requirements on the

[90] *Ibid*
[91] *Ibid*

MNC Groups. Therefore, MNC Groups with headquarters in Nigeria and their subsidiaries carrying on business in Nigeria have an obligation to comply with these filing obligations and compliance requirements as from 1st of January 2018.Non-compliance with such filing obligations and compliance requirements will attract administrative penalties. Considering the magnitude of the penalties that can arise because of non-compliance, it is important for MNCs to ensure accurate compliance to avoid penalty. It is the recommendation of this article that MNCs should as a matter of urgency take necessary steps to proactively examine the potential gaps that may arise from full implementation of the Regulations, as well as perform an in-house review to help mitigate potential tax risk exposures.

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