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THE INCOME TAX (TRANSFER PRICING) REGULATIONS, 2014

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Income Tax (Transfer Pricing)

G.N.No. 27 (contd.)

THE INCOME TAX ACT,
(CAP. 332)

REGULATIONS

(Made under section 33 and 129)

THE INCOME TAX (TRANSFER PRICING) REGULATIONS, 2014

PART I

PRELIMINARY PROVISIONS

- Citation 1. These Regulations may be cited as the Income Tax Transfer Pricing Regulations, 2014 and shall come into operation on the date of publication.
- Applica- 2. These Regulations shall apply to a controlled transaction if a
tion person who is a party to the transaction is located in, and is subject to tax in the United Republic of Tanzania and the other person who is a party to the transaction is located in or outside the United Republic of Tanzania.
- Interpre- 3. In these Regulations, unless the context requires otherwise-
tation “Act” means the Income Tax Act;
- Cap. 332 “arm’s length price” means the price between independent persons operating under the same or similar circumstances;
- “arm’s length principle” means the principle whereby commercial or financial transaction between associates is taking place on the same terms as if such transaction had taken place between independent persons under comparable conditions and circumstances;
- “associates” has the meaning ascribed to it under Section 3 of the Act;
- “Advance Pricing Arrangement” means an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria for determination of transfer pricing over a fixed period of time;
- “branch” in relation to a person means;

- (a) where there is a tax treaty applicable to the person, a permanent establishment as defined in the treaty; or
 - (b) in any other case, a permanent establishment as defined in the Act;
- “Commissioner” has the same meaning ascribed to it under section 3 of the Act;
- “comparability factors” means the factors specified in regulation 6;
- “comparable transactions” means transactions between which there are no material differences, or in which reasonably accurate adjustments can be made to eliminate material differences;
- “comparable uncontrolled price method” means a method where the price charged in a controlled transaction is compared with the price charged in a comparable uncontrolled transaction;
- “comparable uncontrolled transaction” means a transaction between two independent parties that is comparable to the controlled transaction under examination;
- “contemporaneous transfer pricing documentation” means type of documentation which brought into existence when a person is developing or implementing any controlled transactions;
- “controlled transaction” means a transaction between associates;
- “cost plus method” means a method where the mark up on the costs directly and indirectly incurred in the light of the functions performed, assets used and risks assumed, in the supply of property or services in a controlled transaction is compared with the mark up on those costs directly or indirectly incurred in the supply of property or services in a comparable uncontrolled transaction;
- “financial indicator” means-
- (a) in relation to the comparable uncontrolled price method, the price;
 - (b) in relation to the cost plus method, the mark up on costs;
 - (c) in relation to the resale price method, the resale margin;
 - (d) in relation to the transaction net margin method, the net profit margin; or
 - (e) in relation to the transactional profit split method, the division of profit and loss;

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- “intangible property” includes patent, invention, secret formula or process, design, model, plan, trademark, know how, or marketing intangibles;
- “intragroup services” mean services rendered between companies in the same group;
- “intragroup financing” includes loans, interest bearing trade credit, advance or debt and the provision of any security or guarantee;
- “interest” has the meaning as defined in the Act;
- “marketing intangible” includes an intangible that is concerned with marketing activities, which aids in a commercial exploitation of the property or have an important promotional value for the property concerned.
- “person” has the meaning ascribed to it in the Act and includes a branch person; “headquarters person” means a person referred to under regulation 8;
- “resale price method” means a method whereby 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;
- “traditional transaction methods” means the comparable uncontrolled price method, the resale price method and the cost plus method;
- “transaction” includes an arrangement, understanding, agreement, or mutual practice whether or not legally enforceable or intended to be legally enforceable, and includes a dealing between a branch of a person and another part of the person;
- “transactional net margin method” means the method whereby the net profit margin relative to the appropriate base including costs, sales or assets that a person achieves in a controlled transaction is compared with the net profit margin relative to the same basis achieved in a comparable uncontrolled transaction;
- “transactional profit methods” means transactional net margin method; “transactional profit split method” means a method whereby 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; and
- “uncontrolled transaction” means a transaction between persons who are not the profit split method and the associates.

PART II

THE ARM'S LENGTH PRINCIPLE, TRANSFER PRICING METHODS,
COMPARABILITY FACTORS AND DOCUMENTATIONS

4.-(1) Where a person has entered into a transaction or: a series of transactions to which these Regulations apply, such person shall determine the income and expenditures resulting from the transaction in a manner that is consistent with the arm's length principle.

Consistency with the arm's length principle

(2) Where a person fails to comply with sub regulation (1), the Commissioner may, make the necessary adjustments to ensure that the income and expenditures resulting from the transaction are consistent with the arm's length principle.

(3) In determining whether the result of a transaction or series of transactions is consistent with the arm's length principle, the most appropriate transfer pricing method shall be used by taking into account-

- (a) the respective strengths and weaknesses of the transfer pricing methods in the circumstances of the case;
- (b) the appropriateness of a transfer pricing method having regard to the nature of the controlled transaction determined, in particular, through an analysis of the functions undertaken by each person that is a party to the controlled transaction;
- (c) the availability of reliable information needed to apply the transfer pricing methods; and
- (d) the degree of comparability between controlled and uncontrolled transactions, including the reliability of adjustments, if any, that may be required to eliminate differences.

(4) Where a person is used an appropriate transfer pricing method in accordance with regulations 5(5) and 6(3), the Commissioner shall based on the transfer pricing method used by the person as to whether income and expenditures resulting *from* the person's transaction or transactions are consistent with the arm's length principle.

(5) A person who contravenes this regulation commits an offence and shall be liable to a penalty equal to 100% of the underpayment of tax.

5.-(1) The following transfer pricing methods shall apply in determining the arm's length price of a controlled transactions-

The transfer pricing methods

- (a) Comparable Uncontrolled Price(CUP) Method;
- (b) Resale Price Method;

Income Tax (Transfer Pricing)

G.N. No. 27 (contd.)

- (c) Cost Plus Method;
- (d) Profit Split Method;
- (e) Transactional Net Margin Method; and
- (f) any other method as may be prescribed by the Commissioner from time to time.

(2) In application of the methods referred to in sub regulation (1), a person shall first apply the traditional transaction method.

(3) Where the traditional transaction method is reliably applied at all, the person shall apply the transactional profit method.

(4) Where the methods referred to under sub-regulations (2) and (3) are not applied the other methods may be used as prescribed by the Commissioner.

(5) Notwithstanding the provisions of sub regulations (1), (2), (3) and (4) a person shall apply the most appropriate method, having regard to the nature of the transaction, or class of transaction, or class of associated persons or function performed by such persons in relation to the transaction.

- (a) none of the listed methods can reasonably be applied to determine whether a controlled transaction is consistency with the arm's length principle; and
- (b) the method used gives rise to a result that is consistent with that between independent persons engaging in comparable uncontrolled transactions in comparable circumstances.

Compara-
bility
factors
and
analysis

6.-(1) In determining whether two or more transactions are comparable to the extent that they are economically relevant to the facts and circumstances of the transactions the following factors shall be considered-

- (a) the characteristics of the property or services transferred or supplied; (b) the functions undertaken by the person entering into the transaction taking account of assets used and risks assumed;
- (c) the contractual terms of the transactions;
- (d) the economic circumstances in which the transactions take place; and
- (e) the business strategies pursued by the associate to the controlled transaction.

- (2) An uncontrolled transaction may be used as a comparable if-
- (a) the comparability factors of such uncontrolled transaction and the controlled transaction are sufficiently similar to provide a reliable measure of an arm's length result; or
 - (b) none of the differences in respect of the comparability factors between such uncontrolled transaction and the controlled transaction, or between persons entering into those transactions are likely to materially affect the price, cost charged, paid or the profit arising out of those transactions in the open market; or
 - (c) reasonably accurate adjustments can be made to eliminate the material effects of such differences referred to in paragraph (b).

(3) When applying the comparability factors in determining the arm's length price, the results of a controlled transaction shall be compared with the results of uncontrolled transaction for the same basis year for a year of income.

7.-(1) Any person participating in a controlled transaction shall prepare contemporaneous transfer pricing documentation.

Documen-
tations

(2) The contemporaneous documentation shall include records and documents that provide description of the following:-

- (a) organisation structure, including an organization chart covering persons involved in a controlled transaction;
- (b) nature of the business or industry and market conditions;
- (c) the controlled transactions;
- (d) strategies and assumptions regarding factors that influenced the setting of any pricing policies;
- (e) comparability, functional and risk analysis;
- (f) selection of transfer pricing method;
- (g) application of the transfer pricing method;
- (h) documents that provide the foundation for or otherwise support or were referred to in developing the transfer pricing analysis;
- (i) index to document; and
- (g) any other information, data or document considered relevant by the commissioner.

(3) The documentation referred to in sub regulation (2), for a year of income, shall be in place prior to the due date for filing the income tax return for that year.

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(4) The documentation referred to in sub regulation (3) shall, upon request by the Commissioner be submitted within thirty days from the date of request.

(5) A person who fails to comply with this regulation commits an offence and is liable on conviction to imprisonment for a term not exceeding six months or to a fine not less than Shillings fifty million shillings or to both.

PART III

BRANCH AND HEADQUATER PERSONS, AND OECD APPLICATION

Branch
person
and
headquarter
person

8. For the purposes of these Regulations-
- (a) a branch shall be deemed to be a separate and distinct person referred to as
 - (c) referred to as the “branch person” from the person in respect of whom it is a branch referred to as the “headquarters’ person”; a branch person and headquarters’ person shall be deemed to be associates; and a branch person and a headquarter person are located where their activities are located.

Application
of
OECD/
UN
documents

- 9.-(1) Subject to sub regulation (2), these Regulations shall be construed in a manner consistent with-
- (a) the arm’s length principle in article 9 of the OECD/UN model of Tax Convention on Income and Capital for the time being in force; and
 - (b) the OECD Transfer Pricing Guideline for Multi-national Enterprises and Tax Administration approved by the Council of the OECD as supplemented and updated from time to time.
 - (c) the UN Transfer Pricing Practical Manual for developing countries as supplemented and updated from time to time.

(2) Where there is any inconsistency between the Act, these Regulations and the OECD/UN documents referred to in sub regulation (1), the Act shall take precedence

PART IV

INTRA GROUP SERVICES, INTANGIBLE PROPERTY AND INTRA GROUP FINANCING

10.-(1) A person in a controlled transaction shall, apply the methods in accordance with regulation 5 to determine the arm's length transfer price for intra group services in applying any of the method and shall demonstrate that-

Intra
group
services
and
financing

- (a) the intra group services have been rendered and the provision of Intangible Property such services has conferred an economic benefit or commercial value to the business;
- (b) and the charge for the intra group service is justifiable and at arm's length.

(2) Any charge made by a person in a controlled transaction in respect of the intra group services shall be disregarded if it involves-

- (a) shareholder or custodial activities;
- (b) duplicative services; services that provide incidental benefits or passive association benefits; on call services; or
- (e) any other service the commissioner may deem not appropriate.

(3) A person in a controlled transaction who provides or receives intra group financing directly or indirectly, with or without consideration shall determine the arm's length interest rate for such assistance.

11.-(1) Where in a controlled transaction an intangible property is sold or licensed out-

- (a) the owner or licensee shall charge an arm's length price, and
- (b) the value of that property to the purchaser or licensee shall be the benefit that the intangible property is expected to generate.

(2) For the purposes of sub regulation (1), the arm's length price for such sale or license shall be determined by applying the comparable uncontrolled price method or in the case where the property is highly valuable or unique, the residual profit split method.

(3) Notwithstanding sub regulation (2), the Commissioner may allow the application of other methods if the method provides the highest degree of comparability between transactions.

(4) Where the legal ownership of the intangible property is not vested with the person that has developed that property, such person shall receive an arm's length consideration for the development of such property.

(5) Where a person who is not the owner of a trade mark or trade name undertakes marketing activities and bears marketing costs of such trade mark or trade name in excess of those of a comparable independent person, the person shall be entitled to an arm's length consideration for undertaking such activities from the owner of the trademark or trade name.

(6) In this regulation, a person shall be deemed to be the owner of an intangible property and is entitled to any income attributable to that property if the expenses and risks associated with the development of the intangible property are borne by that person.

PART V

ADVANCE PRICING ARRANGEMENTS AND CORRESPONDING ADJUSTMENTS

Advance
Pricing
Arrangements
(APA)

12.-(1) A person may request the Commissioner to enter into advance pricing arrangement for establishing an appropriate set of criteria for determining whether the person has complied with the arm's length principle for certain future controlled transactions undertaken by the person over a fixed period of time.

- (2) A request under sub regulation (1) shall be accompanied by-
- (a) a description of the person's activities, controlled transactions, and the proposed scope and duration of the Advance Pricing Arrangement;
 - (b) a proposal by the person for the determination of the transfer prices for the transactions to be covered by the Advance Pricing Arrangement setting out the comparability factors, the selection of the most appropriate transfer pricing method to the circumstances of the controlled transactions; and the critical assumptions as to future events under which the determination is proposed;
 - (c) the identification of any other country or countries that the person wishes to participate in the advance pricing arrangement; and
 - (d) any other information which the Commissioner may require as specified in Tanzania guidelines on transfer pricing.

(3) The Commissioner shall consider a request made by a person under sub regulation (1) and, after taking account of the matters specified in the request and the expected benefits from an Advance Pricing

Arrangement in the circumstances of the case, he may decide to enter into an Advance Pricing Arrangement or to reject the request.

(4) Where the Commissioner agrees to enter into an Advance Pricing Arrangement with a person, he may-

- (a) accept the person's proposal under sub regulation (2)(b);
- (b) reject the proposal; or
- (c) modify the proposal;

(5) Subject to the provision of sub-regulation (4), the commissioner shall notify the applicant.

(6) The Commissioner may enter into an Advance Pricing Arrangement with the person either alone or together with the competent authorities of the country or countries of the person's associate or associates identified under sub regulation (2)(c).

(7) Where the Commissioner approves a proposal under sub regulation (4) (a) or modifies it under sub regulation (4)(c), he shall enter into an advance pricing arrangement that will provide confirmation to the person that no transfer pricing adjustment will be made under regulation 4(2) to controlled transactions covered by the agreement where the transactions are consistent with the terms of the agreement.

(8) An Advance Pricing Arrangement entered into under sub regulation(7) shall apply to the controlled transactions specified in the agreement that are entered into on or after the date of the agreement and the agreement shall specify the years of income for which the agreement applies.

(9) An Advance Pricing Arrangement entered into under sub regulation (7) shall be for a period not exceeding five years of income but may be reviewed.

(10) The Commissioner may cancel an Advance Pricing Agreement with a person by notice in writing if-

- (a) the person has failed to materially comply with a fundamental term of the agreement;
- (b) there has been a material breach of one or more of the critical assumptions underlying the agreement;
- (c) there is a change in the tax law that is materially relevant to the agreement; or
- (d) the agreement was entered into based on a misrepresentation, mistake or omission by the person.

(11) Cancellation of an Advance Pricing Agreement under sub

Income Tax (Transfer Pricing)

G.N.No. 27 (contd.)

regulation (10) takes effect-

- (a) in the case of sub regulation (10)(a) and (c), from the date of the notice of cancellation specified by the Commissioner in the notice of cancellation;
- (b) in the case of sub regulation (10)(b), from the date that the material breach occurred; and
- (c) in the case of sub regulation (10)(d), from the date the agreement was entered into.

(12) The Commissioner shall treat as confidential any trade secrets or other commercially sensitive information or documentation provided to him in the course of negotiating an Advance Pricing Arrangement.

(13) Where a taxpayer has entered into an Advance Pricing Agreement shall furnish the Commissioner with a compliance report for each year of income of the covered period on the date of filing the return of income

13. Where-

- (a) an adjustment is made by a competent authority of another country with which the United Republic of Tanzania has a tax treaty, to the taxation of a transaction or transactions of a person subject to tax in the United Republic of Tanzania; and
- (b) the adjustment results in taxation in another country of income or profits that are also taxable in the United Republic of Tanzania; the Commissioner shall, upon request by the person subject to tax in the United Republic of Tanzania, determine whether the adjustment is consistent with the arm's length principle and where it is determined to be consistent, the Commissioner shall make a corresponding adjustment to the amount of tax charged in Tanzania on the income or profits so as to avoid double taxation.

Correspo-
nding
Adjust-
ments

PART VI

GENERAL

14.-(1) Notwithstanding any other provisions of these Regulations, where the Commissioner has reason to believe that any price including the rate of interest imposed or would have been imposed in a controlled transaction is not at arm's length, the Commissioner may make adjustment to reflect the arm's length price or interest rate for the transaction by substituting or imputing the price or interest as prescribed under the Act.

Adjust-
ment by
the
Comm-
issioner

Income Tax (Transfer Pricing)

G.N.No. 27 (contd.)

(2) Any adjustment under this regulations in respect of an assessment made on one of the persons in a controlled transactions may be reflected by an offsetting adjustment on the assessment of the other person in the transaction upon request by that other person.

15. The Commissioner may, make guidelines for better carrying into effect of the provisions of these Regulations.

16. Regulation 6 and 33(1) of the Income Tax Regulations, 2004 are hereby revoked.

Power to
make
guidelines

Dar es Salaam
30th January, 2014

SAADA MKUYA SALUM
Minister for Finance

Revocation
GN.No.
464 of
2004