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THE TAX ADMINISTRATION ACT

—
(CAP. 439)
—

THE TAX ADMINISTRATION (TRANSFER PRINCING) REGULATIONS, 2018

ARRANGEMENT OF REGULATIONS

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THE TAX ADMINISTRATION ACT
(Cap. 348)

REGULATIONS

(Made Under Section 98)

THE TAX ADMINISTRATION (TRANSFER PRICING)
REGULATIONS, 2018

PART I
PRIMARY PROVISIONS

- citation 1. These regulations may be cited as the Tax administration (Transfer Pricing) Regulations, 2018
- Application 2. .-(1) The regulations shall be read together with section 33 of the
- Cap. 332 Income Tax Act.
- (2) These regulations shall apply to a controlled transaction if a person who is a part to the transaction is located in, and is subject to tax in the United Republic and the other person who is a party to the transacted in or outside the United Republic.
- Interpretation 3. In these regulations, unless the context requires otherwise-
- Cap. 332 "Act" means the income Tax Act
- "arm's length price" means the price between independent persons operating under
- "arm's principle" means the principle which states that the price charged between associates must be same as if the parties were not related;
- "associates" has the meaning assigned 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 the 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 assigning to it in section 3 of the Act;

“comparability analysis” means a process of determining comparability between conditions in a controlled transaction and the conditions in uncontrolled transaction; “comparability factors” means the factors specified in regulation 6;

“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 a type of documentation which is 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 service in a comparable uncontrolled transaction;

“financial indicator” means in relation to the-

(a) comparable uncontrolled price method,

the price

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

“intangible property” includes patent, invention secret formula or process, design, model, plan, trademark, know how, or marketing intangibles;

“intragroup services” mean services rendered between persons in the same group; 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 that property;

“OECD documents” include model conventions, commentaries, Guidelines, manual precedents, Article, and journals issues by the OECD;

“person” has the meaning given to it in the Act and includes a “branch person” and “headquarters person” referred to in 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 compare with the resale margin that is earned in a comparable uncontrolled purchase and resale transaction;

“testes party” means a party to the transaction to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparable can be found;

“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 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;

“uncontrolled transaction” means a transaction between person who are not associates;

“transaction” include 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 profit split methods” means the profit split method and the transactional net margin method;

“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 method” means a method whereby the division of profit and loss that a person achieves in a controlled transaction is compared with a comparable uncontrolled transaction;

“uncontrolled transaction” means a transaction between person who are not associates; and

“UN documents” include Model Conventions, Commentaries, Guidelines, Manual, Precedents, Article and Journals issued by the United Nation.

PART II
THE ARM'S LENGTH PRINCIPLE, TRANSFER PRICING
METHODS, COMPARITY FACTORS AND
DOCUMENTATIONS

Consistency
with the arm's
length
principle

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

(3) A person shall be considered to have failed to comply with this regulation after a determination by the commissioner under regulation 6 (4).

(4) In determining whether the result of a transaction or series of transactions is consistent with the arm's length principle, the methods prescribed under regulation 5 shall be used taking into account:

- (a) The respective strengths and weakness 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 transactions 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 transaction, including the reliability of adjustments, if any, that may be required to eliminate

differences.

(5) Where a person has used an appropriate transfer pricing method in accordance with regulations 5 (5) and (6), the commissioner's examination as to whether income and expenditures resulting from the person's transaction or transactions are consistent with the arm's length principle shall be based on the transfer pricing method used by the person provide that the selected transfer pricing method shall be applied appropriately.

(6) Subject to regulation 4 (2) a person who contravenes the provision of regulation 4 (1) shall be liable for penalty equal to 100% of the adjusted amount.

Transfer
pricing
methods

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

- (a) comparable uncontrolled price (cup) method;
- (b) resale price method;
- (c) cost plus method;
- (d) profit split method;
- (e) transactional net margin method; or
- (f) any other method as may be prescribed by the commissioner.

(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 cannot be reliably applied or applied at all, the person shall then apply the transaction profit method.

(4) where the methods mentioned in sub regulation (2) and (3) cannot be reasonably applied, the other method as may prescribed by the commissioner shall apply

(5) without prejudice to 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.

(6) a person may apply a transfer pricing

method other than those listed above, if such a person can establish to the satisfaction of the commissioner that-

- (a) None of the listed methods can reasonably be applied to determine whether a controlled transaction is consistent with 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 circumstance

(7) Where the most appropriate method requires selection of a tested party outside the united republic such a party shall be considered only when a person provided all relevant information of the person.

Comparability factors and analysis

6.-(1) in determining whether two or more transaction 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 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;
 - (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;
 - (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 or cost charged or 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 income
- (4) The commissioner may, upon review of the analysis submitted by a person in respect of a controlled transaction-
- (5) Reject wholly with reason and direct the person to resubmit the analysis basing on the reason given by the commissioner or where the commissioner deems it fit, make his own analysis; or
- (a) Reject partly with reasons and make adjustment as appropriate.
- (5) Where domestic comparable data cannot be obtained external comparable data may be used.
- (6) Where the comparability analysis is conducted such that the most appropriate method is applied on more than four comparable data, the arm's length shall be the data point between thirty fifth percentile and sixty of percentile; otherwise where four or less comparable data is used the average of the data shall be the arm's length result.
- (7) Where a person's results under sub regulation (6), fall outside the arm's length range such shall be the arm's adjusted to the median point of the range.

documentation
s

- 7.-(1) any person participating in a controlled transaction shall prepare contemporaneous transfer pricing documentation.
- (2) the contemporaneous documentation shall include records and documents that provide description of the following-
- (a) organizational structure, including group and operational structure that role and shareholding percentages;
- (b) Nature of the business or industry and market conditions;

- (c) Description of the controlled transactions including volumes and values involved;
 - (d) Strategies and assumptions workings factors that influenced the setting of any pricing policies;
 - (e) The actual computational workings carried out in determining transfer prices;
 - (f) Details of the functions performed, assets employed and risks assumed by each person in relation to the controlled transaction;
 - (g) Comparability analysis,
 - (h) Selection and application of the transfer pricing method tested party and the financial indicator; financial statements for the parties to the controlled transaction including where the tested party has been selected outside the country;
 - (i) Documents that provide the foundation for or otherwise support or were referred to in developing the transfer pricing analysis;
 - (j) Index to document; and
 - (k) Any other information, data or document considered relevant by the person submitting the documents.
- (3) The documentation referred to in sub regulation (2) for a year of income shall be-
- (a) prepare and filed with the income tax return for that year of income by a person whose total transactions with associates amounts to or is above ten billion Tanzanian shillings; and
 - (b) Prepared prior to the data for filing the return of income for that year of income for a person other than persons referred to in paragraph (a) provided that such documentation shall upon request by the commissioner be submitted within thirty days from the date of request.
- (4) A person who contravenes the requirement of regulation 7 shall be liable to penalty not less than three thousand five hundred currency points and prescribed time by the commissioner.
- (5) The commissioner may, by service of a notice in writing, require a person, whether or not liable for tax to produce, including by way of creation of a document, within the time specified in the notice, any other information.

PART III
BRANCH AND HEADQUATER PERSONS, AND
APPLICATION OF OECD OR UN DOCUMENTS

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 the “branch person” from the person in respect of whom it is a branch referred to as the “headquarters’ person,’
 - (b) a branch person and a headquarters person shall be deemed to be associates; and
 - (c) Branch person and a headquarter person are located where their activities are located.

Application of
OECD or UN
documents

- 9.-(1)subject to sub regulation (2) these regulations shall be constructed and applied in a manner consistent with- 9
- (a) the arm’s length principle in article 9 of the OECD or UN Model Tax Conventions on income and capital for the time being in force;
 - (b) the OECD Transfer pricing guideline for multinational enterprises supplemented and updated from time; and
 - (c) The UN transfer pricing manual for developing countries as supplemented and updated from time to time.

(2) Where there is inconsistency between these regulations and the OECD or UN documents referred to in sub regulation (1), these regulations shall take precedence.

(3) In making reference to the OECD or UN documents on matters that have not been covered by these regulations regard may be had by the commissioner to the most appropriate interpretation given the facts and circumstances of each case.

PART IV
INTRA GROUP SERVICES, INTANGIBLE PROPERTY
AND INTRA GROUP FINANCING

Intra group
services

- 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 demonstrate that-

- (a) The intra group services have been rendered;
- (b) The provision of such services has conferred an economic benefit or commercial value to the business that enhances its commercial position; and
- (c) 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;
- (c) Services that provide incidental benefits or passive association benefits;
- (d) On call services; or
- (e) Any other service the commissioner may deem inappropriate.

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

(2) Subject to the provisions of sub regulation (1), the proper method to determine the arm's consideration for intra group services shall be the cost of performing the identified and rendered intra group services.

(3) The requirement under sub regulation (4) shall apply notwithstanding the criteria used by associates engaged in intra group services in their determination of transfer prices.

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

(5) Allocation criteria referred to sub-regulation (6) shall be accepted provided that it is measurable, relevant to the type of services and it includes:

- (a) number of personal computers for information

- technology;
- (b) number of licenses for business management software;
- (c) number of employee for human resources and related matter such as training, health and safety;
- (d) net sales or size of balance sheet for accounting, marketing and related matters;
- (e) Number of cars for vehicle fleet management.

Intangible
property

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

- (a) The owner or licensor shall charge an arm's length price; and
- (b) The value of that property to the transferee or licensee shall be commensurate with 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 transfer or license shall be determined based on an appropriate comparability analysis which shall include a functional analysis in relation to development, enhancement, maintenance, protection and exploitation of the intangible property.

(3) in applying regulation 6 to a transaction involving the license or transfer of intangible property, consideration shall be given to any special factors relevant to the comparability of the controlled and uncontrolled transactions, including-

- (a) The expected benefits from the intangible property'
- (b) The commercial alternatives otherwise available to the acquirer or licenses derived from the intangible property
- (c) Any geographic limitation on the exercise of rights to the intangible property;
- (d) The exclusive or non-exclusive character of the right transferred;
- (e) Whether the transferee has the right to participate in further developments of the intangible property by the transferor ; and
- (f) Any other factor considered relevant for the matter.

(4) Where a person who is not a legal owner of an intangible property and such person is involved in development, enhancement, maintenance or protection of that intangible property, shall receive an arm's length consideration for the contribution made on such intangible property.

(5) in relation to the application of sub regulation (3), where a person who is not the owner of a marketing intangible undertaking intangible 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 marketing intangible

(6) the owner of locally developed intangible that is subsequently transferred outside the united republic shall be compensated appropriately at the time of transfer and of such intangible shall not attract royalty when licensed back for use in the united republic

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

Commodity
transactions

12.-(1) for a controlled commodity transaction, the comparable uncontrolled price method shall be the appropriate transfer pricing method.

(2) the quoted spot price may be used under the comparable uncontrolled price method as a reference to determine the arm's length price for a controlled commodity transaction:

Provided that in case of commodity exported from the united republic the price agreed upon between associates is higher than the quoted spot price, the agreed price shall be considered as the sale price.

(3) For the purposes of this regulation, "commodity" encompasses physical goods for which a quoted spot price is used as a reference by independent parties in the industry to set prices in uncontrolled transactions and includes grains, oil seeds, other goods obtained from the land, hydrocarbons and derivatives thereof.

(4) for the purposes of sub regulations (2) and (3),

“quoted spot price” refer to the price of the commodity in the relevant period obtained in a domestic or international commodity exchange market and includes prices obtained from a recognized and transparent price reporting or statistical agencies, or from governmental price-setting agencies, where such indexes are used as a reference by unrelated parties prices in transactions between them.

PART V
ADVANCE PRICING ARRANGEMENT AND
CORRESPONDING ADJUSTMENTS

Advance
Pricing
arrangements

13.-(1) A person may request the commissioner to enter into advance pricing arrangement, or its acronym “APA”, for establishing an appropriate set of criteria for determining whether the person has complied with 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 transfer prices for the transactions to be covered by the advance pricing arrangement setting out the comparable factors, the selection of the most appropriate transfer pricing method to the circumstances of the controlled

(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 required 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 reject the request.

(4) Where the commissioner agrees to enter into an advance pricing arrangement with person, he may-

- (a) Accept the person's under sub regulation (2)(b)
- (b) Reject the proposal; or
- (c) Modify the proposal.

(5) The commissioner shall, before making decision under sub regulation (4), notify the applicant of the decision

(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, subject to review, be for a period not exceeding five years of income.

(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 regulation (9) shall take effect-

- (a) in the case of sub regulation (10)(a) and (c), from the date of the notice of cancellation specified by 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.

Corresponding adjustments

14.(1) Where-

- (a) an adjustment is made a competent authority of another country with which the United Republic has treaty, to the taxation of a transaction or transactions of a person subject to tax in the United Republic; and

(a) The adjustment results in taxation in another country of income or profits that are also taxable in the United Republic, the commissioner shall, upon request by the person subject to tax in the United Republic, 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 the United Republic on the income or profits to avoid double taxation.

PART VI
GENERAL

Adjustment by
the
commissioner

15 .-(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 the price or interest rate for the transaction by substituting or imputing the price or interest as prescribed under the Act.

(2) Any adjustment under this regulation 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.

Power of
commissioner
to make
guidelines

16. The commissioner General may Guidelines for betterment of putting into effect the provisions of these Regulations.

Revocation
GN No. 27
of 2014

17. The income Tax (Transfer Pricing) Regulations, 2014 are hereby revoked.

Dodoma,
7th February, 2018

PHILIP I. MPANGO
Minister for Finance and Planning