

CHECKPOINT SOFTWARE TECHNOLOGIES B.V NIGERIA LIMITED V. FEDERAL INLAND REVENUE SERVICE.

Introduction:

The Tax Appeal Tribunal sitting in Lagos has allowed an appeal by Checkpoint Software Technologies B.V Nigeria Limited (“the Company”) against the Federal Inland Revenue Service (“the FIRS” or “the Service”) which challenged the imposition of administrative penalties on the Company for failure to comply with the Income Tax (Country-by-Country Reporting) Regulations of 2018 (“the Regulation”). This newsletter considers this decision and related matters thereto.

Background Facts:

The FIRS had served two notices of administrative penalties on the Company for the late filing of the Country-by-Country Report as required under the CBC Regulations for the Company’s 2019 and 2020 financial years. The Company formally objected to these administrative penalties and when the notices were not withdrawn by the Service, the Company approached the Tax Appeal Tribunal (“TAT or “the Tribunal”) questioning the legality of the CBC Regulations and the FIRS’ authority to issue same.

The Company presented the following two issues before the Tribunal for determination.

1. Whether the FIRS was validly constituted to competently issue subsidiary regulations as of the date of issue of the CBC Regulations; and
2. Whether the FIRS can administer the Regulations against the Company.

The thrust of the Company’s grievance was that the FIRS acted in contravention of its enabling Act, the Federal Inland Revenue Service (Establishment) Act (“FIRSE”) 2007 (as amended) by issuing the Regulations which sought to:

- Impose penalties beyond the scope contemplated by the FIRSE Act; and
- Administer a foreign legal instrument which had no force of law in Nigeria as it had not been subjected to the adoption procedure outlined in section 12 of the 1999 Constitution (as amended) which required the ratification of such foreign legal instruments by the National Assembly through passage as an Act of Parliament.

Presentation of the Issues - The Company's Perspective:

The Company presented its case to the Tribunal along three streams:

- The propriety of the FIRS to make the regulations as at the time it made the regulations.
- The legality of the Regulations as a subsidiary legislation administered on the strength of a principal legislation which was not in force in Nigeria.
- The legality of the Regulations imposing a penalty higher than the penalty provisions in the principal act, the FIRS Act 2007 (as amended).

The first thrust of the Company's contention was that the Regulation was issued by the Service pursuant to the Country-by-Country Multilateral Competent Authority Agreement (CBC MCAA). This Agreement, being an international instrument, required the ratification of the National Assembly through passage as an act of Parliament to become enforceable as a law in Nigeria as provided by section 12 of the 1999 Constitution as amended. The Company also referred the TAT to section 1 (a) of the Regulations which provided that the Regulations was issued to give effect to the CBC MCAA, an International Multilateral Agreement, and that since the Agreement has not been ratified by the National Assembly to give it the force of law in Nigeria, it cannot be said to be binding on Nigeria and Nigerians. This naturally would extend to any legislation passed in reference to it.

The second contention of the Company was that the FIRS was improperly constituted to issue the regulations as of the date the Regulation was issued. It referred the Tribunal to section 61 of the FIRSE Act 2007 (as amended) which reposed the authority to issue subsidiary legislation (including the regulations) in the "Board" of the Service, noting that this responsibility was a delegation of authority to make laws (albeit subsidiarily) by the National Assembly, and that this authority could not be further delegated unless so authorised by statute. The Company also noted that following the dissolution of the FIRS Board in 2012, the Service operated without a Board until 2020, some two years after the CBC Regulation was issued and that since there was no functioning Board as of the date of issue of the regulation, the issuance thereof was not made in compliance with section 61 of the FIRSE Act.

The company further contended that the Regulation was an inferior regulation made pursuant to the powers delegated to the FIRS Board to issue regulations in support of the principal act and that according to section 68 of the Act, all legislation, government notices and issues made by the FIRS are subject to the FIRS Act, being the principal Act. In that wise, any regulation that is inconsistent with the FIRS Act will be void to the extent of this inconsistency. The company argued that the administrative penalty advised by the Regulation exceeds the scope set out in section 26 (3) (b) of the principal Act which stipulated a much lower penalty for such types of infractions. The Company contended that section 26 of the FIRSE Act was more relevant in penalizing the infraction as it was not a tax liability.

The Company prayed the Tribunal to allow the appeal on the grounds espoused above.

FIRS Defence

The FIRS maintained that the Regulations was issued pursuant to the FIRS Act and referred the court to the official gazette of the Federal Government giving notice of the issuance of the

Regulations. It also maintained that the Regulations were issued pursuant to several laws and legal instruments including the FIRSE Act, the Companies Income Tax Act (CITA), the repealed Petroleum Profit Tax Act, and the CBC MCAA. It also maintained that the Regulations were issued with the aim to prevent base erosion and profit shifting risks and provide visibility to the operations of Multinational Enterprises (MNEs) with a view to minimizing the BEPS risk. It maintained that the CBC Regulation sufficiently imposes a penalty for noncompliance (including the late filing penalty) and argued that the Company was penalized in line with this provision.

The Service also referred the Tribunal to section 92 of the CITA which provides that other rules or regulations could co-exist with the Act and the penalty provisions in the CITA would apply where these rules or regulation do not provide penalty provisions for non-compliance, and that this is not the case of the CBC Regulations which has amply provided penalties that would apply in the event of noncompliance.

It was also the Service's contention that section 3 of the FIRSE Act establishes the FIRS Board with the overall responsibility of supervising the Service, and that the proceedings of the Board will not be invalidated by reason of vacancy in the membership of the Board or defect in the appointment of a member of the Board.

In conclusion, it prayed the Tribunal to uphold the administrative penalties imposed on the Company by reason of the CBC Regulations.

What the Tribunal Decided

The Tribunal upheld the appeal of the Company in entirety and based its decision on the following grounds:

1. The Regulations were issued at a time when there was no validly constituted Board of the Service which was the only body statutorily empowered to issue subsidiary legislation as a consequence of section 61 of the FIRSE Act.

Delegating this power to any other authority in the Service was not permissible based on the legal principle which enunciates that a delegated authority cannot be further delegated unless the power to so delegate was expressly provided by statute. Since the authority to issue the regulation was delegated by the National Assembly to the Board of the Service, only the Board may exercise that power unless the power to further delegate to any other authority was expressly created by statute.

2. The CBC MCAA which was adopted by the Federal Executive Council in 2016 did not meet the requirement for enforcement in Nigeria. International instruments (including the CBC MCAA) can only be enforceable if it has imbibed the requisite statutory flavour through ratification by the National Assembly and passed as an Act of Parliament as required by the Constitution. In failing to meet this constitutional requirement, the Regulations were robbed of its legality since the principal/founding legal instrument on which it is based is a law unknown to the Nigerian jurisprudence, notwithstanding the adoption of the Agreement by the Federal Executive Council in 2016.
3. The provisions of the CBC Regulations must be made in terms of its principal regulation, being the FIRSE Act. The Tribunal was of the view that the administrative penalties imposed by the Regulations was an attempt to expand the provisions of section 26 (3) (2) of the FIRSE Act which prescribed the penalty for noncompliance with notification or disclosure requirements as may be required by the Service (non-tax liabilities) from time to time. A penalty stipulation significantly lower than as advised in the Regulations.

In light of the foregoing, the appeal was allowed, and the administrative penalties imposed by the Service against the Company were held to be void.

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Commentary:

The decision of the TAT provides an interesting update in the administration of taxes in Nigeria with far reaching consequences in tax practices. The ramifications extend beyond the Regulations with impact on other regulations and subsidiary legislations including the Income Tax (Transfer Pricing) Regulations of 2018, and the Income Tax (Common Reporting Standard) Regulations of 2019, both of which were issued in similar circumstances. It must be noted, however, that while the circumstances surrounding the issuance of these other regulations are substantially similar to the case above, the principles enunciated in this judgment will not apply to these other regulations by default. The legal doctrine which posits that a case is only an authority for what it decides. Thus, the legality of these other legislations would be examined on their own merits in a court of competent jurisdiction.

Nonetheless, this judgment provides a sound legal precedent for challenging the enforceability of similarly issued regulations by the FIRS until if and when the judgment upturned on appeal.

The Service must be alive to the responsibility of ensuring that subsidiary legislations are competently issued in alignment with the provisions of the relevant principal enactments for an effective tax administration regime in Nigeria.

Conclusion:

It is expected that the FIRS will challenge this decision and appeal to the Federal High Court, given the ramifications of the decision and its impact of the FIRS drive to minimize base erosion and profits shifting (BEPS) risks. Another option available to the FIRS is a withdrawal and re-issuance of the impacted subsidiary legislations to cloak them with the requisite legality. It is also necessary to domesticate the founding instruments from which these legislations draw their life force. And while this option would render all actions executed by the Service in furtherance of these legislations a nullity, it is a necessary step to better align tax administration with law and legality.

We will monitor developments and provide updates as may be necessary.

For a deeper discussion, contact us:

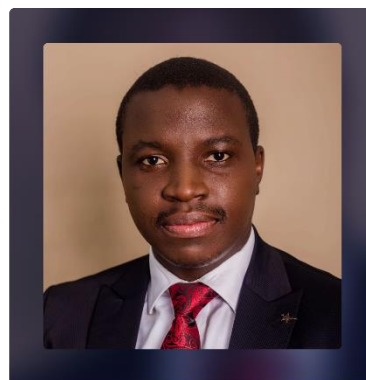


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