

# TAT rules that the administrative penalties stipulated in the Country-by-Country Regulations, 2018 are illegal and ultra vires the powers of the FIRS

KPMG in Nigeria

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**The Tax Appeal Tribunal (TAT or "the Tribunal") sitting in Lagos recently ruled in the case between *Checkpoint Software Technologies B.V Nigeria Limited (CST or "the Company" or "the Appellant")* and *Federal Inland Revenue Service (FIRS or "the Service" or "the Respondent")* that the Income Tax Country-by-Country (CBC) Regulations, 2018 was not made by a legally constituted Board of the FIRS in accordance with the provisions of Section 61 of the FIRS (Establishment) Act, 2007 (FIRSEA), rendering it illegal, unconstitutional and void. Consequently, the administrative penalties for non-compliance with the provisions of the CBC Regulations, 2018 are invalid and unenforceable.**

## Facts of the case

In March 2022, the Appellant received notices of administrative penalties for late filing of its 2019 and 2020 CBC notifications as stipulated in the CBC Regulations, 2018. CST objected to the penalties noting that they were illegal, invalid and beyond the authority granted to the FIRS in the FIRSEA. However, the Respondent refused to withdraw the notices.

Consequently, the Appellant initiated an appeal before the TAT, asserting that the Respondent's action to impose penalties for alleged late filing or non-filing of CBC notifications was beyond the scope of delegated legislative powers of the FIRS Board under Section 61 of the FIRSEA. Therefore, Sections 11 to 13 of the CBC Regulations, 2018 that seek to impose different penalties for non-filing or late filing of CBC notification are illegal, ultra vires and in violation of the provisions of the FIRSEA – an Act of the National Assembly that established the Respondent.

## CST's Argument

The Appellant argued that the FIRSEA established the FIRS Board, its tenure and

powers conferred on it. Under Section 61 of the FIRSEA, the National Assembly granted the FIRS Board powers to make subsidiary Regulations, subject to the approval of the Minister of Finance. The FIRS Board was dissolved in 2012 and was only reconstituted in January 2020. During this period, the appointed Executive Chairmen of the FIRS managed the affairs of the Service. Further, the CBC Regulations were issued in February 2018, which was during the period that the FIRS had no constituted Board. Therefore, the Regulations were not approved by the Board of FIRS as required in the FIRSEA.

The Appellant also asserted that the principal legislation, the FIRSEA, did not establish exceptions nor grant the Board the right to sub-delegate its power to formulate Regulations. Therefore, the delegated legislative power can only be rightfully exercised by the Board, without sub-delegation to other parties. The Appellant further noted that the Country-by-Country Multilateral Competent Authority Agreement (CBC MCAA), a global multilateral accord, requires the ratification of the National Assembly as mandated by Section 12 of the Constitution of the Federal Republic of Nigeria, 1999 ("the Constitution") to be enforceable in Nigeria. Consequently, given that the CBC Regulations, 2018 was not approved by the FIRS Board as required under Section 61 of the FIRSEA,

and the CBC MCAA is yet to be ratified by the National Assembly, the attempt by the FIRS to enforce the CBC Regulations is illegal and unconstitutional.

Further, the Appellant argued that the late filing of CBC notifications is a contravention unrelated to tax liability; therefore, the applicable penalty should be as prescribed under Section 26(3)(b) of the FIRSEA. The Company emphasized that the CBC Regulations, 2018 itself adheres to Section 26 of the FIRSEA and cannot impose penalties that are more than the amounts stipulated in the principal legislation. The Company also noted that where the provisions of a subsidiary law extend to persons, agencies or thing expressly or impliedly placed beyond its scope by the parent statute, the subsidiary legislation becomes invalid to the extent of that inconsistency. The imposition of penalties for non-filing and/ or late filing of CBC notifications is beyond the scope of the powers granted to the FIRS Board under Section 61 of the FIRSEA and therefore unconstitutional and invalid.

## FIRS' argument

FIRS argued that the CBC Regulations, 2018 was made under the authority of the FIRSEA, as clearly stated on *page 869 of the Federal Republic of Nigeria Official Gazette No. 2 Vol. 105 Government Notice No. 16, of 8 January 2018*. The CBC Regulations, 2018 were issued, with the approval of the Minister of Finance, in accordance with powers vested in the FIRS Board under Section 61 of the FIRSEA.

The Respondent emphasized that the Official Gazette explicitly states that these Regulations were made in exercise of the authority granted by Section 61 of the FIRSEA and other enabling powers.

The Respondent contended that Regulation 1 of the CBC Regulations, 2018 comprehensively outlines the laws and agreements that the Regulations enforce, including specific sections of the FIRSEA, Companies Income Tax Act, Petroleum Profit Tax Act, Income Tax (Transfer Pricing) Regulations, 2012 and the CBC MCAA. Also, the CBC Regulations, 2018 aims to address high-level transfer pricing and profit shifting risks within multinational enterprise groups.

The FIRS further noted that the FIRSEA provides the authority for issuing regulations, as stated in Section 92 of the Companies Income Tax Act. These regulations, such as the CBC Regulations, 2018, specify penalties for relevant offences. Relatedly, Paragraph 13 of the Regulation empowers the FIRS to impose penalties for failure to file CBC Report notification. The penalties are clearly specified as ₦5 million in the first instance of non-compliance and ₦10,000 every day the default continues.

In conclusion, the Respondent urged the Tribunal to uphold the validity of the administrative regulations and dismiss the Appellant's appeal, asserting that the appeal was an intentional effort to obstruct the Respondent's lawful duties and responsibilities.



## Issues for determination

Based on the arguments submitted by both parties, the Tribunal adopted the following two (2) issues for determination:

- *Whether the CBC Regulations, 2018 NOT made by the Board of the FIRS as mandatorily required by Section 61 of the FIRS Act is illegal, unconstitutional, null and void and hence liable to be quashed by the Tribunal as well as the Notices of Administrative penalties served on the Appellant by the Respondent on the enforcement of same.*
- *Whether the Respondent can administer the CBC Regulations 2018 against the Appellant.*

## TAT's decision

After considering the arguments of both parties, the TAT held that:

1. The primary matter under consideration pertains to the legality, constitutionality, and validity of the CBC Regulations, 2018. Specifically, whether the CBC Regulations, 2018, which was not issued by a properly constituted Board of the FIRS as mandated by Section 61 of the FIRSEA, can be deemed lawful, or if it is, in fact, null and void to the extent that it does not comply with the Section 61 of the FIRSEA.

Section 61 of the FIRSEA vests the powers to make subsidiary legislation, encompassing regulations, rules, forms, and guidelines, in the FIRS Board. This delegation is exclusively conferred upon the Board for the purpose of ensuring the full implementation and effective administration of the provisions of the Act. The implication is that only a legally constituted and properly composed FIRS Board can exercise the above delegated powers. The Appellant had presented concrete evidence to demonstrate that the Boards of various federal agencies, including the FIRS, were dissolved and had not been reconstituted during the

period that the Regulations were issued. Also, the Respondent did not disprove or refute this fact.

Therefore, the non-existence of a duly constituted Board during the relevant period indicates that the delegated powers, as defined in Section 61, could not have been lawfully exercised. Based on established judicial precedent, the exercise of delegated powers must adhere rigorously to the provisions of the enabling Act, with re-delegation being impermissible. Consequently, the CBC Regulations, 2018, having been enacted during a period when the FIRS Board was dissolved and not reconstituted, is deemed illegal, unconstitutional, and void.

2. While the CBC Regulations, 2018 was duly issued to operationalize the ratified CBC MCAA, international agreements, treaties and conventions executed by Nigeria do not automatically have legal enforcement in Nigeria. Section 12 of the Constitution requires the National Assembly to enact such agreements before they can become enforceable in Nigeria. Thus, the provisions of international treaties are not applicable in Nigerian courts until the treaties are duly domesticated. The above position has been affirmed by the Nigerian Supreme Court in multiple cases, wherein the Apex Court clarified that even a beneficial treaty to which Nigeria is a signatory remains unenforceable if not enacted by the National Assembly.
3. The CBC Regulations, 2018 was made pursuant to the provisions of the FIRSEA. The CBC Regulations, 2018 (being a subsidiary legislation) derives its validity and authority from the substantive law and has no capacity to extend such authority. Therefore, the provisions of the CBC Regulations, 2018, which seek to impose penalties for non-compliance with the Regulations that are higher than the amounts stipulated in Section 26(3)(b) of the FIRSEA, are null and void.

Based on the above, the Tribunal declared that the Notices of administrative penalties issued by

the Respondent, as stipulated in the CBC Regulations, 2018, are unconstitutional and void. The Respondent was further instructed to reissue the penalties in accordance with the relevant provisions of the FIRSEA, 2007 and applicable laws.

## Commentary

The Tribunal's decision introduces an air of concern about the legality of both the Income Tax (Transfer Pricing) Regulations, 2018 and Income Tax (Common Reporting Standards), 2019. Where the decision of the TAT is upheld by higher courts up to the Supreme Court, it may make all actions taken by the FIRS, especially regarding imposition of penalties for any form of non-compliance with these two Regulations, illegal, null and void. The affected taxpayers may, therefore, have a basis to seek for refund of any penalties paid to FIRS in this regard.

More importantly, a major lesson for the Federal Government is to appreciate the importance of Boards of Ministries, Departments and Agencies (MDA) in running the affairs of this country. It should be noted that, as of the time of the publication of this Newsletter, the FIRS does not have a Board as the earlier constituted Board has been dissolved. Thus, there is no adequate structure to address the lacuna in tax administration that is the crux of the TAT judgment.

The decision also raises questions on the applicability of international agreements, such as the CBC MCAA and Income Tax (Common Reporting Standards) signed by Nigeria, which are yet to be enacted by the National Assembly. As clarified by the TAT, a mere ratification of international agreements, even by the Federal Executive Council, does not confer legal force to such agreements in Nigeria. Therefore, to enforce the implementation of such agreements, they must be domesticated through enactment by the National Assembly as provided in Section 12(1) of the Constitution.

In the meantime and pending any appeal, the FIRS will need to review the penalties for non-compliance with issues unrelated to tax liability to ensure that such penalties align with the provisions of the relevant enabling Acts.



## For further enquiries, please contact:

**Adewale Ajayi**

NG-FMTAXEnquiries@ng.kpmg.com

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Ajibola Olomola: [Ajibola.Olomola@ng.kpmg.com](mailto:Ajibola.Olomola@ng.kpmg.com)

Ijeoma Uche: [Ijeoma.Uche@ng.kpmg.com](mailto:Ijeoma.Uche@ng.kpmg.com)

Olatoye Akinboro: [Olatoye.Akinboro@ng.kpmg.com](mailto:Olatoye.Akinboro@ng.kpmg.com)



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