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Nigeria's Income Tax (Transfer Pricing) Regulations 2018: Conceptualizing the Elephant and "Plucking the Goose"

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Abstract

In 2015, the OECD gave the world a template to address base erosion and profit shifting and ensure that profit is taxed in the jurisdiction of value addition and / or where economic activities take place. The world's jurisdictions then embarked on implementing the template. Examining the legal framework subsequently put in place for the taxation of intangibles in Nigeria, this article argues that the distinct regimes for connected and unconnected persons' transactions create flaws. It further asserts that these flaws are consequences of the conflict between the policy that underpins the legal framework and other policies in the country. It concludes that the legal framework may not be a "Swiss army knife" (providing Nigeria with all that is needed to combat transfer pricing issues associated with the transfer of intangibles by connected persons), as it creates issues that have undesired consequences for the taxation as well as the economic system.

Keywords

Connected persons, EBITDA, intangibles, Nigeria, taxation, transfer pricing

INTRODUCTION

The question of what is tax (and / or taxation) has assumed the status of a conundrum as people and institutions perceive and define it differently. The variety of perceptions, definitions, ideologies, etc brings to mind a Hindu fable and an aphorism. In the fable, six blind men were asked to describe an elephant after meeting one, interacting with it and touching different parts of its anatomy for the first time. The story goes that each blind man vehemently

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argued on the basis of his perception of the part of the anatomy with which he interacted. Thus, for the man who touched the swinging tail, the ear, the side, the wriggling trunk, the tusk and a limb, the respective inferences and consequential conclusions were that the elephant was a rope, a fan, a wall, a snake, a spear and a tree trunk respectively.[1] The takeaway from this is that inferences and conclusions, notwithstanding the subject matter, are the product of our methodology of enquiry or questioning.[2]

The aphorism of reference is that credited to Jean-Baptiste Colbert and has to do with "plucking the goose". According to him, taxation is an act that "consists in so plucking the goose [ie the people] as to procure the largest quantity of feathers with the least possible amount of squealing".[3] It is without doubt that the message in this famous aphorism is that taxation (ie tax law, policy and administration) should be such as to inflict the least pain and / or actuate the least protest or resistance from the taxpayer.

With this fable and aphorism as background, this article[4] attempts to synthesize from literature the prevailing perspectives with regard to tax and taxation as well as undertake an appraisal of regulation 7(5) of Nigeria's Income Tax (Transfer Pricing) Regulations 2018 (TPR). In the context of the fable, tax and taxation is the elephant, while economic actors (ie the entities that make trade and / or business decisions for the purpose of profit generation), pundits and the tax administration (as well as the state) are cast in the cloth of the blind men. In the context of the aphorism, economic actors are the geese being plucked by the tax administration (ie the farmer) that acts as the agent of the state.

1 CR Snyder, CE Ford and RN Harris "The effects of theoretical perspective on the analysis of coping with negative life events" in CR Snyder, CE Ford, and RN Harris (eds) *Coping with Negative Life Events: Clinical and Social Psychological Perspectives* (1987, Springer Science + Business Media) 3 at 12.

2 WK Heisenberg *Physics and Philosophy: The Revolution in Modern Science* (1958, Penguin Books) at 58.

3 Technically, geese honk. Plucking geese and other birds has been part of human history, as the feathers are used as stuffing and insulation. However, live plucking is considered inhumane and is at the centre of animal rights anti-cruelty campaigns and policies. See O Milman "'Ethical down': Is the lining of your winter coat nothing but fluff?" (14 January 2016) *The Guardian*, available at: <https://www.theguardian.com/world/2016/jan/14/winter-coat-ethically-produced-down-goose-feathers> (last accessed 9 April 2020); and European Food Safety Authority (EFSA) Panel on Animal Health and Welfare "Scientific opinion on the practice of harvesting (collecting) feathers from live geese for down production" (2010) 8/11 *EFSA Journal* 1, available at: <https://efsa.onlinelibrary.wiley.com/doi/epdf/10.2903/j.efsa.2010.1886> (last accessed 9 April 2020).

4 This article builds on the analysis of the TPR in M Ndajiwo and IA Aniyie "Adoption of BEPS in Nigeria" in K Sadiq, A Sawyer and B McCreddie (eds) *Tax Design and Administration in a Post-BEPS Era: A Study of Key Reform Measures in 18 Countries* (2019, Fiscal Publications) 229.

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CONCEPTUALIZING THE ELEPHANT

Taxation is everything that goes into the process of levying or administering a tax. Taxation is driven and shaped by policy, law and administration. This trio are the pillars on which any tax system stands. Tax policy is a function of the prevailing socio-political, as well as economic, factors in the state.[5] It heralds and shapes the state's tax law. Tax law is the gamut of primary and secondary legislative instruments that form the basis of taxation. Their importance stems from the fact that no tax can be imposed on an entity without words in an act of Parliament clearly showing an intention to lay a burden on it.[6] In some jurisdictions, this principle has been made constitutional. Section 149 of the Gambian Constitution expressly provides: "[N]o taxation shall be imposed except by or under the authority of an Act of the National Assembly".[7] Tax administration or the administrative dimension of taxation is established by tax law[8] and gives value to tax policy. In the absence of tax administration, tax policy is inconsequential and of no effect.[9] For a tax administration to be effective, it is essential that it entrenches a system that facilitates taxpayer compliance. As a matter of fact, this is the first obligation of tax administration. The enforcement of compliance and the improvement of internal governance are second and third[10] respectively.

That said, a consequential question is what is tax? The literature is replete with definitions of tax.[11] What is obvious from the definitions is that taxes are essentially levied on individuals and companies and are one of the

5 RM Bird and EM Zolt "Introduction to tax policy design and development" (draft prepared for World Bank course on practical issues of tax policy in developing countries, April 2003) at 4, available at: <http://www1.worldbank.org/publicsector/LearningProgram/PracticalIssues/papers/introduction%20to%20tax%20policy/WBI%20Module%201(Bird&Zolt)April10.doc> (last accessed 9 April 2020).

6 See *Coltness Iron Company v Black* (1881) 6 App Cas 315 (per Lord Blackburn). See also *IRC v Holmden* [1968] AC 685 at 712, where Lord Wilberforce stated: "A man is not to be taxed by a dilemma: He must be taxed by positive provision under which the Crown can satisfactorily show that he is fairly and squarely taxed."

7 See Constitution of the Republic of the Gambia 1997 (effective 16 January 1997), available at: <https://www.refworld.org/docid/4811c33f2.html> (last accessed 9 April 2020).

8 For example, see Federal Inland Revenue Service (Establishment) Act 2007, secs 1 and 2, pursuant to which the Federal Inland Revenue Service was established. See also sec 87(1) of the Personal Income Tax Act cap P8 Laws of the Federation of Nigeria 2004 (LFN) (as amended), under which each of the states of Nigeria was to establish a State Board of Internal Revenue.

9 Bird and Zolt "Introduction to tax policy", above at note 5 at 23.

10 RM Bird "Smart tax administration" (October 2010) 36 *Economic Premise* 1 at 2, available at: <http://siteresources.worldbank.org/INTPREMNET/Resources/EP36.pdf> (last accessed 9 April 2020).

11 See R Musgrave and P Musgrave *Public Finance in Theory and Practice* (5th ed, 2004, Tata McGaw-Hill) at 212; V Thuronyi *Comparative Tax Law* (2003, Kluwer Law International); P Black et al (eds) *Public Economics* (5th ed, 2012, Oxford University Press) at 163; LE Burman and J Slemrod *Taxes in America: What Everyone Needs to Know* (2013, Oxford University Press) at 5.

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means by which a government raises revenue to fund public expenditure, and that there is no *quid pro quo* [nothing is specifically provided in return] for the tax paid.[12]

Of interest to the authors is the absence of a *quid pro quo*. This absence means that the imposition of taxes does not leave the state with a liability to the taxpayer. It also does not make the state obliged to distribute, or put to use, the proceeds in a manner that would guarantee that the enjoyment or utility to be derived by the taxpayer is equivalent to or contemporaneous with its contribution. This distinction is important as it sets taxes apart from fines, penalties,[13] regulatory or user charges and fees for a service.[14] The absence of any *quid pro quo* also means that the capacity to levy tax is not a function of a state's ability to offer and / or provide specific recompense to taxpayers. It is a power inherent in the sovereign and an obligation on those upon whom it is imposed.[15]

This is at variance with some theories of taxation that provide a foundation for tax compliance. One such theory is that taxation is the basis for the relationship between the state and the governed.[16] The premise for this opinion

12 BT Kujinga "A comparative analysis of the efficacy of the general anti-avoidance rule as a measure against impermissible income tax avoidance in South Africa" (2014, LLD thesis, University of Pretoria, South Africa) at 12. Also, in *Matthews v Chicory Marketing Board (Victoria)* (1938) 60 CLR 263 at 276, the High Court of Australia defined tax as "a compulsory exaction of money by a public authority for public purposes, enforceable at law, and … not a payment for services rendered".

13 A penalty is a sum paid and received from an individual following a breach or failure to discharge an obligation. See *R v Barger* (1908) 6 CLR 41 at 99 (per Isaacs J).

14 Thuronyi *Comparative Tax Law*, above at note 11 at 45. Bird and Tsiopoulos highlighted a further difference between user charges and taxes when they stated: "The main economic rationale of user charges, therefore, is not the generation of revenue but the promotion of economic efficiency." Thus, user charges promote efficiency in two ways: by providing information to public sector suppliers about how much clients are actually willing to pay for particular services; and by ensuring that citizens value what the public sector supplies, at least at its marginal cost. See RM Bird and T Tsiopoulos "User charges for public service: Potentials and problems" (1997) 45/1 *Canadian Tax Journal* 25 at 36. See *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462, where it was held that, for a financial imposition to be legally defined as a "user charge or fee for a service", the person required to make the payment must either receive the service direct or request its provision; judgment available at: <http://eresources.hcourt.gov.au/showbyHandle/1/11789#XN.7> (last accessed 15 April 2020). However, the existence and consequence of this distinction is not appreciated among scholars. See JJ Odinkonigbo and JJ Ezeuko "Does Nigeria follow the contemporary global trend in tax dispute resolution strategy?" (2014) 12 *Nigerian Juridical Review* 151 at 152–53, where, after a review of definitions proffered by other authors that lack the same distinction, the authors reach a conclusion that does not take this distinction into account.

15 The Constitution of the Federal Republic of Nigeria 1999 (as amended), sec 24(f) makes this a constitutional obligation for every citizen.

16 See R Mohdali et al "A cross-cultural study of religiosity and tax compliance attitudes in Malaysia and Turkey" (2017) 15/3 *eJournal of Tax Research* 490 at 491, where it was

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is the idea that states that desire and seek the expansion of tax revenue are more likely to be faced with demands for reciprocity in the form of service provision and accountability from the citizens who are the source of the tax revenue. While asserting that this perception has the propensity to yield broad as well as diverse governance gains,[17] Prichard opined that the perception is reflected in well-known accounts of the role of tax bargaining in the emergence of representative political institutions in early modern Europe and the well-known American revolutionary slogan "no taxation without representation". Berenson is of the opinion that:

> "… without extracting revenue from society, a state cannot function and cannot do what it sets out to do. Taxation is the sine qua non of the contemporary state and the social contract. When taxpayers pay their taxes, they enter into a financial relationship with their state, a financial reconciliation, if you will, relinquishing private information about their economic activities while trusting the state to treat them and that information fairly and confidentially".[18]

These opinions highlight the fact that taxes and taxation amount to more than the state putting the largest possible shovel into the stores of its citizens.[19] They affirm that taxation is the most critical of all the activities assumed by the state and provides a justification for the existence of tax in society. However, the difference between Berenson's opinion and the lack of a *quid pro quo* variant is that the latter conceives taxation within the penumbra of sovereignty,[20] while the former conceives taxation in terms of the cost and benefit for both the state and the taxpayer (ie the governed).

Whether taxes are perceived as resources forfeited by the taxpayer to the government in exchange for the public goods and services provided or the price paid by the governed for democratization and its benefits,[21] Prichard

contd
described as a "mechanism that determines the level of social solidarity and social participation of the country".

17 W Prichard *Taxation, Responsiveness and Accountability in Sub-Saharan Africa: The Dynamics of Tax Bargaining* (2015, Cambridge University Press) at 1. See also W Prichard "What have we learned about taxation, statebuilding and accountability?" (May 2016) 4 *International Centre for Tax and Development Summary Brief* 1.

18 MP Berenson *Taxes and Trust: From Coercion to Compliance in Poland, Russia and Ukraine* (2018, Cambridge University Press) at 1.

19 Lord Clyde in *Ayrshire Pullman Motor Services and Ritchie v CIR* (1929) 14 TC 754 at 764–65.

20 At the core of this argument is the proposition that taxation is an inherent or essential component of sovereign status. For highlights of this relationship and a copious review of relevant literature, see A Christians "Sovereignty, taxation and social contract" (University of Wisconsin Law School legal studies research paper series, paper no 1063 of 2008) at 6–16, available at: <https://ssrn.com/abstract=1259975> (last accessed 9 April 2020).

21 M Ross "Does taxation lead to representation" (2004) 34 *British Journal of Political Science* 229 at 234.

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and Berenson's position gives taxation the hue of a contract.[22] It makes the existence of a *quid pro quo* in the form of public goods and services an essential prerequisite for the state's claim to the right to levy a tax and vice versa. From this perspective, the right to tax is not absolute and a demand by a taxpayer for a *quid pro quo* could be interpreted as a challenge to the sovereign power of the state to levy tax. It also raises the question of what the state's fate should be when the goods and services for which the citizens pay through their taxes are provided by non-state actors or the citizens themselves.

Furthermore, Bird and Zolt have stated:

> "The dominant tax policy ideas in different countries (such as equity, efficiency, and growth), along with the dominant economic and social interests (such as capital, labor, regional, ethnic group, rich, and poor) and the key political institutions (democracy, decentralization, budgetary), and economic institutions (free trade, protectionism, macroeconomic policy, and market structure) all interact in tax policy formulation and implementation. Taxation - its level, structure, and administration - is one of the major battlegrounds on which these complex forces meet."[23]

This highlights that taxation is the melting pot for a plethora of issues. Although von Haldenwang and von Schiller chose a path that focuses on the political economy of taxation, they affirmed the foregoing when they stated that "[t]here are probably few issues in everyday politics as contested and conflictive as taxation. Citizens and companies tend to have strong opinions on how much they pay (usually too much) and how much they get in return (usually too little)".[24] Berenson's description of tax falls within this paradigm, as he avers that:

> "Tax collection is a great policy arena to investigate the role and function of the state. Taxation is such a wonderful and increasingly popular topic for study … because it lies at the centre of state-society interactions, at the heart of the fiscal state and at the foundation of a successful market economy. Getting citizens to

22 See RM Bird and EM Zolt "Fiscal contracting in Latin America" (2015) 67 *World Development* 323; JF Timmons "The fiscal contract: States, taxes and public services" (2005) 57/4 *World Politics* 530, where the author suggests that optimum taxation would be achieved where the state approaches taxation like a contract: negotiating, agreeing and actually keeping terms so as to ensure greater compliance. Also see, O-H Fjeldstad et al "Peoples' views of taxation in Africa: A review of research on determinants of tax compliance" (Chr Michelsen Institute working paper 2012:7) at 4, where it was argued that the existence of government expenditure has the potential to encourage tax compliance, especially where the former is directed at or focused on the provision of goods and services that are a priority for citizens.

23 Bird and Zolt "Fiscal contracting", above at note 22 at 325.

24 C von Haldenwang and A von Schiller "The politics of taxation: Introduction to the special section" (2016) 52/12 *The Journal of Development Studies* 1685 at 1685.

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> pay taxes … presents a major, if not the central, problem for states pursuing greater economic development and growth."[25]

Nevertheless, it should be noted that, irrespective of how and through which prism taxes and taxation are conceptualized, they are bound to have an effect on economic actors and systems. For example, it is now beyond conjecture that the privileges associated with incorporation as well as the existence of different regimes for business and wage (personal) income taxation influence the decision of economic actors with regard to business form,[26] structure and location,[27] the valuation of the assets of the business,[28] profitability and profit distribution,[29] etc. This consequence is a premise for the positive[30] and negative[31] perspectives of the impact of taxes on economic actors and systems. It also leads to intended and unintended consequences, such as the substitution

25 Berenson *Taxes and Trust*, above at note 18 at 8–9.

26 JB Cullen and RH Gordon "Taxes and entrepreneurial risk-taking: Theory and evidence for the US" (2007) 91 *Journal of Public Economics* 1479.

27 T Legwaila "Tax reasons for establishing a headquarter company" (2011) *Obiter* 126. See also, MJ Boskin and WG Gale "New results on the effects of tax policy on the international location of investment" (1986, National Bureau of Economic Research working paper 1862). See also T Legwaila "Tax characteristics of an ideal holding company location" (2012) 1 *De Jure* 22 at 45 where, after a review of the South African tax provisions relating to the corporate tax rate, dividend tax rules, capital gains tax regime, transfer pricing provisions, etc, the author concluded that the jurisdiction is suitable for the location of a holding company.

28 The method and rate of depreciation of an asset determine the tax written down value and consequential value of the asset.

29 This is because profit from the perspective of the business is the difference between income and the total cost (including tax) associated with the generation of income. This impacts on the return on investment (including dividends and interest).

30 JE Stiglitz "Using tax policy to curb speculative short term trading" (1989) 3 *Journal of Financial Services Research* 101; M Mashkoor et al "Tax revenue and economic growth: An empirical analysis for Pakistan" (2010) 10/11 *World Applied Science Journal* 1283; and B Exelby "The impact of taxation on mobile growth and its associated socio-economic contribution" (2011), available at: <https://www.itu.int/ITU-D/finance/work-cost-tariffs/events/tariff-seminars/Gaborone-11/Documents/Session4GSMA.pdf> (last accessed 15 April 2020).

31 See E Ferede and B Dahlby "The impact of tax cuts on economic growth: Evidence from the Canadian provinces" (2012) 65/3 *National Tax Journal* 563; BW Poulson and GJ Kaplan "State income taxes and economic growth" (winter 2008) 28/1 *Cato Journal* 53; E Engen and J Skinner "Taxation and economic growth" (1996) 49/4 *National Tax Journal* 617; S Djankov et al "The effect of corporate taxes on investment and entrepreneurship" (2010) 2/3 *American Economic Journal: Macroeconomics* 31; *Pope & Talbot Inc v Government of Canada* interim award, 26 June 2000, para 99, available at: <https://www.italaw.com/sites/default/files/case-documents/ita0674.pdf> (last accessed 9 April 2020); T Epps "Taxation and expropriation" (2013) 13 *Otago Law Review* 145; PB Stephan "Taxation and expropriation: The destruction of the Yukos oil empire" (2012) 48 *Virginia Public Law and Legal Theory Research Paper* 1; M Doran "Tax penalties and tax compliance" (2009) 46 *Harvard Journal on Legislation* 111; and M Sornnarajah *The International Law on Foreign Investment* (2017, Cambridge University Press) 480.

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effect,[32] deadweight loss and the adoption of tax minimization strategies.[33] The conclusion is that the perception of an assessor is anchored in either its situation, ideology, disciplinary orientation or a combination of these. Thus, the perception of economic actors may vary from that of the tax authority or its principal and, when this is the case, the opportunity for dispute is created. It is against this backdrop that the next section appraises the TPR as a tool for "plucking the goose".

PLUCKING THE GOOSE USING THE TPR

The *fons et origo*

There has been a surge in global attention on the importance of taxation as a revenue raising tool. This has been catalysed by the global financial crisis,[34] the need for revenues to fund infrastructure critical to the achievement of the sustainable development goals and growing concern about increasing inequality in the world's tax systems,[35] the possibility that expanded taxation may offer a platform and opportunity for strengthening the fiscal contract between taxpayers and governments,[36] the nexus between transfer pricing and illicit financial flows,[37] etc. The Organisation for Economic Co-operation and Development (OECD) / G20 Base Erosion and Profit Shifting (BEPS)

32 Substitution effect is the variation in consumer preference or the quantity demanded of goods, occasioned by a change in the price of the goods or disposable income, with income remaining constant. Where a price increase is occasioned by taxes, a consumer eschews expensive goods in favour of cheaper alternatives. The effect also applies where a taxpayer favours strategies and arrangements that would generate and / or guarantee a disposable income that is greater than would otherwise have been the case. In this case, the taxpayer adjusts his options or substitutes noncompliant behaviour to reduce the tax due on the income.

33 These are strategies implemented by the taxpayer to ensure that he pays the lowest tax possible. They are legal insofar as they fall within the confines of what is referred to as tax avoidance. See *Ayrshire Pullman Motor Services and Ritchie v CIR* (1929) 14 TC 754; *IRC v Duke of Westminster* (1935) All ER 259; *Helvering v Gregory* 69 F 2d 809, 810 (2nd cir 1934). Also see *CIR v Willoughby* (1997) 4 All ER 65 at 73, per Lord Nolan.

34 B Gurtner "The financial and economic crisis and developing countries" (2010) 1 *International Development Policy* 189, available at: <https://journals.openedition.org/poldev/144?lang=fr> (last accessed 9 April 2020).

35 For a discourse highlighting the relationship between taxation and inequality, see, for example, C Hallum and KW Obeng "The West Africa inequality crisis" (Oxfam briefing paper, July 2019) at 27–29, available at: <https://www.oxfam.org/en/research/west-africa-inequality-crisis> (last accessed 9 April 2020).

36 W Prichard "Improving tax and development outcomes: What next for civil society engagement?" (2018) at 2, available at: <https://www.ictd.ac/publication/improving-tax-and-development-outcomes-what-next-for-civil-society-engagement/> (last accessed 15 April 2020).

37 See generally, *Report of the High Level Panel on Illicit Financial Flows from Africa* (2015, commissioned by the African Union/Economic Commission for Africa Conference of Ministers of Finance, Planning and Economic Development), available at: <https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf> (last accessed 9 April 2020).

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Project and other post-BEPS outputs[38] are testament to this orientation. In relation to Nigeria, the TPR[39] are a product of the current orientation. The TPR are considered a means for "plucking the goose" (ie the economic actors), as they gave effect to the general anti-avoidance rules that are part of Nigeria's tax jurisprudence.[40] Regulation 2 of the TPR provides that the TPR's objectives are to:

"(a) ensure that Nigeria is able to tax on an appropriate taxable basis corresponding to the economic activities deployed by taxable persons in Nigeria, including in their transactions and dealings with related persons;
(b) provide the Nigerian authorities the tools to fight tax evasion that may arise through over or under pricing of transactions between related persons;
(c) reduce the risk of economic double taxation;
(d) provide a level playing field for both multinational enterprises and independent enterprises carrying on business in Nigeria; and
(e) provide taxable persons with certainty of transfer pricing treatment in Nigeria."

Regulation 12 of the TPR provides that, for benchmarking and interpretative guidance, recourse is to be had to the OECD Transfer Pricing Guidelines (OECD TPG)[41] and the UN Practical Manual on Transfer Pricing for

38 These include: (i) the signing of the Convention on Mutual Administrative Assistance in Tax Matters on 29 May 2013 without any reservation and its entry into force on 1 September 2015; (ii) the signing of the Multilateral Competent Authority Agreement on the Exchange of Country-By-Country Reports (MCAA) on 27 January 2016 and its ratification by the Federal Executive Council on 3 August 2016; (iii) the legislation of the Income Tax (Country by Country Reporting) Regs 2018 in January 2018, which give effect to the MCAA, secs 8(1)(i) and (t), 8(2), 26 and 27(1) of the Federal Inland Revenue Service (Establishment) Act, secs 58 and 60 of the Companies Income Tax Act cap C21 LFN (CITA), secs 31 and 32 of the Petroleum Profits Tax Act cap P13 LFN and reg 6 of the TPR; and (iv) the signing of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting on 17 August 2017. Note that this last convention is yet to enter into force in Nigeria as Nigeria has not deposited its instrument of ratification; see OECD "Signatories and parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Status as of 11 March 2020", available at: <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf> (last accessed 9 April 2020).

39 The TPR were preceded by the Income Tax (Transfer Pricing) Regs (No 1) 2012, which were revoked by reg 26(1) of the TPR.

40 These provisions are the Personal Income Tax Act, cap P8 LFN, sec 17; CITA, secs 13(d) and 22; and Petroleum Profits Tax Act, sec 15. See AO Abdulrazaq "Nigeria: Effect of the OECD BEPS initiative on Nigerian transfer pricing regulations" (2016) 23/6 *International Transfer Pricing Journal* 535, where these provisions are described as providing guidance for enforcement of the TPR.

41 "OECD transfer pricing guidelines for multinational enterprises and tax administrations 2017", available at: <https://doi.org/10.1787/tpg-2017-en> (last assessed 9 April 2020).

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Developing Countries[42] (UN MTP). However, where there are inconsistencies between a provision of a municipal law, rule or regulation and the provisions of the OECD TPG and the UN MTP, the municipal law, rule or regulation shall prevail.[43]

Noteworthy is the fact that, under the TPR, the Federal Inland Revenue Service (FIRS)[44] can: disregard a transaction or disposition where it is of the opinion that it is not in fact given effect to or that the transaction reduces or would reduce the amount of tax payable; or effect corresponding adjustments to offset the tax savings effected by the transaction or disposition. Once a choice has been made, the affected party is assessed and taxed accordingly. In the context of the fable and against the background of the TPR, it is surmised that transfer pricing (a critical part of the tax discourse) is a risk that can impact on the outcome of FIRS's efforts and objectives. For the taxpayer, the opposite is the case, as a result of the opportunities provided by transfer pricing methodologies for increasing profits after tax.

Regulation 7

Regulation 7 of the TPR is dedicated to providing guidance for determining the arm's length conditions for transactions involving the transfer or use of intangibles.[45] Although the intention is to avoid the pitfalls associated with definitions, it should be noted that intangibles in the context of transfer pricing are essentially non-physical or non-financial assets that: are capable of being owned or controlled for use commercially; and whose use or transfer would be associated with compensation, had it occurred in a transaction between unrelated parties in comparable circumstances.[46] Compared to the old transfer pricing regulations, regulation 7 is one of the novelties of the TPR. This is because it introduced a performance cum risk-oriented approach to the determination of whether the pricing of an intangible asset is or was at arm's length.[47] According to Ndajiwo and Aniyie, the presence of regulation 7 conforms the TPR with the OECD TPG.[48] They further argue that the provision

42 "UN practical manual on transfer pricing for developing countries 2017", available at <https://www.un.org/esa/ffd/wp-content/uploads/2017/04/Manual-TP-2017.pdf> (last assessed 9 April 2020).

43 This provision is not peculiar to Nigeria. See for example, Zambia's Income Tax (Transfer Pricing) (Amendment) Regs 2018, sec 20.

44 This is the government agency saddled with responsibility for assessing economic actors within the stratum of the Nigerian tax system that comes within the purview of the federal government, as well as collecting and accounting for the taxes collected. See Federal Inland Revenue Service (Establishment) Act, sec 2. Also see IA Aniyie "Nigeria" in C Evans et al (eds) *Improving Tax Compliance in a Globalised World* (2018, International Bureau of Fiscal Documentation) 601 at 622–23 for an overview of the administrative jurisdiction of the tiers of government in Nigeria.

45 OECD TPG, above at note 41 at 247.

46 See id at 249 and 252–57; and UN MTP, above at note 42 at 18.

47 Ndajiwo and Aniyie "Adoption of BEPS", above at note 4 at 235.

48 Ibid.

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makes the determination of an arm's length price a functional analysis that takes into cognisance the role of a licensor (and the specific risks they assume) in connection with the development, enhancement, maintenance, protection and exploitation of the intangible property in question.[49] Noteworthy is the fact that this provision is relevant even in situations of shared use or where the constituents of a group are able to derive income that could be described as a consequence of group synergy and would not be possible for similarly situated independent enterprises. Thus, where a bank shares its client list with its insurance affiliate for commercial exploitation, a transfer that is subject to scrutiny pursuant to this regulation has occurred within the group. Hence, a profit split measure that utilizes allocation keys (ie risks relating to the development, enhancement, maintenance, protection or exploitation (DEMPE) of the intangible property or their contribution to the control of economically significant risks associated with the intangible asset)[50] would be utilized to bring about corresponding adjustments (which would take cognisance of the price of the client list if the shared use was between unconnected parties) in the income statement of each group affiliate.

Although regulation 7 has the potential to ensure that Nigeria is able to tax juristic economic actors to the extent that is commensurate with the proceeds from the economic activities embarked upon in or attributable to Nigeria, sub-regulation 5 merits a closer look. It states:

> "Notwithstanding any other provision of the Regulations, where a person engages in any transaction with a related person that involves the transfer of rights in an intangible, other than the alienation of an intangible, the consideration payable in that transaction that is allowable for deduction for tax purposes shall not exceed 5% of the earnings before interest, tax, depreciation, amortisation and that consideration, derived from the commercial activity conducted by the person in which the rights transferred are exploited."

From the perspective of a plain meaning approach to interpretation,[51] the effect of regulation 7(5) is that, for any transaction between connected persons[52] other than a sale of tangible property, the portion of the consideration

49 Ibid.

50 See *Aligning Transfer Pricing Outcomes with Value Creation, Action 8–10: Final Reports OECD / G20 Base Erosion and Profit Shifting Project* (2015, OECD Publishing) at 63–65. This was subsequently referred to as "DEMPE-control risk associated with intangibles".

51 See *Niger Progress Ltd v NEI Corp* (1989) 3 NWLR (pt 107) 68; *Garba v Federal Civil Service Commission* (1988) 1 NWLR (pt 71) 449; *Odua Investment Limited v Talabi* (1997) 10 NWLR (pt 523) 1; *Bamaiyi v AG of Federation* (2001) 90 LRCN 2738; *Ainabeholo v ESUWFMPCS Ltd* (2007) 2 NWLR (pt 1017) 33 at 37 where it was affirmed that the plain meaning approach to interpretation (also referred to as a contextual approach) should be utilized when the statute's language is clear and unambiguous.

52 Generally, persons are deemed connected when one has the ability to control or influence the other in making financial, commercial or operational decisions. They are

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that would be recognized for tax purposes is capped at 5 per cent of its earnings before interest, tax, depreciation and amortization (EBITDA).[53] Thus, for tax purposes, an entity would be allowed the portion of consideration given for the acquisition of a licence (or other third party intangible property) that represents the equivalent of 5 per cent of its EBITDA. It also means that, in a situation where the transaction involves unconnected persons or is between connected persons but relates to tangible property, regulation 7 (5) of the TPR would not apply. In this scenario, it would be logical to conclude that the entire consideration paid would be recognized and treated as an allowable deduction for tax purposes.

It should be noted that, although the OECD TPG and UN MTP provide the benchmark against which the TPR are to be construed, they both lack a provision that caps EBITDA. What exists in both are recommendations geared towards ensuring that the allocation of profit or loss associated with connected persons transacting intangible assets is a function of the parties' exposure to the DEMPE-control risk associated with the intangible.[54] Instead, credit for the origins of regulation 7(5) of the TPR goes to the African Tax Administration Forum's (ATAF) suggested approach to drafting transfer pricing legislation (ASADTPL).[55] Ordinarily, the ASADTPL is of no legal moment as it is a guide to what transfer pricing legislation should contain. Thus, its adoption is optional. Nevertheless, ATAF recommends in the ASADTPL that:

> "Where a person engages in a transaction with a connected person that involves the transfer of rights in an intangible, other than the alienation of an intangible, the deduction allowable for tax purposes in that transaction shall not exceed X% of the [tax EBITDA + plus royalties payable] derived from the commercial activity conducted by the person in which the rights transferred are exploited."[56]

Situating regulation 7(5) in the social space

The following examination of regulation 7(5) of the TPR deviates from typical legal scholarship. The basis of this endeavour is that, although taxation starts

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also connected when a third person has the ability to control or influence both persons in making commercial or operational decisions. Hence, transactions between principal and subsidiary or affiliate companies, or between subsidiaries or affiliates are connected persons transactions. See TPR, reg 12(1).

53 The EBITDA of a taxpayer is generally the same as the net profit per account. It is arrived at after the cost of revenue and other operating expenses have been deducted from total revenue.

54 See *Aligning Transfer Pricing Outcomes*, above at note 50 at 63–65 for a summary of the guidelines proffered for the treatment of intangibles.

55 "Suggested approach to drafting transfer pricing legislation" (2017, ATAF), available at: <http://ataftaxevents.org/media/documents/10/documents/ATAF_Suggested_Approach_Eng_green_LR_print.pdf> (last assessed 9 April 2020).

56 Id at 4.

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with law,[57] the subject and mechanics of taxation are beyond the realm of law,[58] and the solution(s) to problems and or answer(s) to questions are never within the boundaries of a single academic discipline.[59] The latter is true with regard to the issues of interest to this study. For example, the gamut of tax morale literature has put beyond conjecture the inadequacy of sanctions and / or the economic deterrence model in relation to tax compliance.[60] In the same vein, amid the tax compliance discourse, manifestations like the "puzzle of compliance" and the Peter Pan syndrome[61] do not make sense from an economic perspective. Hence, relying solely on economic theories like rationality[62] and a profit maximization[63] solution would not do justice to the discourse.

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57 See *Coltness Iron Company v Black* 6 App Ca 315 at 330, which enunciated the principle that tax cannot be imposed (or deviations be introduced) without a law to that effect. See also *SA Authority v Regional Tax Board* (1960–2000) 2 NTLR 686 at 700 for judicial enunciation of this principle in Nigeria.

58 See V Mangioni and M Mckerchar "Strengthening the validity and reliability of the focus group as a method in tax research" (2013) 11/2 *eJournal of Tax Research* 176 at 176, where it was argued that taxation is an area of research populated by scholars from diverse disciplines including law, accounting, economics, psychology, sociology and political science. Van Oordt described taxation as a large pile of sand that consists of other piles of sand (ie disciplines): ML van Oordt "A quantitative measurement of policy options to inform value-added tax reform in South Africa" (unpublished PhD thesis, submitted to the University of Pretoria, South Africa, 2005) at 12.

59 PD Leedy and JE Ormrod *Practical Research: Planning and Design* (10th ed, 2013, Pearson) at 74.

60 See B Togler "What do we know about tax morale and tax compliance?" (2001) 48 *International Review of Economics and Business* 395; LP Feld and BS Frey "Deterrence and tax morale: How tax administrations and taxpayers interact" (2002, unpublished manuscript), available at: <http://www.oecd.org/dataoecd/9/51/2789923.pdf> (last accessed 9 April 2020).

61 Dilling-Hansen opines that the Peter Pan syndrome is a characteristic of "life-style" firms (ie firms that were established primarily as a vehicle to create revenue to support their owners' basic costs of living). He further argues that, when the owner(s) of such firms accumulate the wealth needed to afford basic luxury goods, profit maximization becomes less important: M Dilling-Hansen "SMEs: Peter Pan syndrome of firms not grown up?" (2017) 3/1 *Athens Journal of Business and Economics* 7 at 14–15.

62 Rationality is at the core of the rational choice theory, which has its origins in economics. At its centre is the abstraction *homo economicus*: a consistently rational, self-interested individual with unlimited cognitive capabilities, acting to maximize his own utility or the attainment of a pre-determined goal and the means to it. See NJ Vriend "Rational behavior and economic theory" (1996) 29 *Journal of Economic Behavior and Organization* 263 at 264. See also R Selten "What is bounded rationality" (1999, Sonderforschungsbereich discussion paper B-454) at 3, available at: <http://www.wiwi.uni-bonn.de/sfb303/papers/1999/b/bonnsfb454.pdf> (last accessed 9 April 2020); SD Levitt and JA List "Homo economicus evolves" (2008) 319/5865 *Science* 909. See also S Schneider "Homo economicus: Or more like Homer Simpson" (29 June 2010) *Deutsche Bank Research* 1, available at: <https://www.dbresearch.com/PROD/RPS_EN-PROD/PROD0000000000475711/Homo_economicus_%E2%80%93_or_more_like_Homer_Simpson%3F.PDF> (last accessed 9 April 2020); G Barros "Herbert A Simon and the concept of rationality: Boundaries and procedures" (2010) 30/3 *Brazilian Journal of Political Economy* 455 at 457, where the author defined rationality in a similar manner.

63 See generally RB Coffman "Is profit maximization vs value maximization also economics

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It is on this premise that this examination of regulation 7(5) of the TPR is deemed socio-legal in nature. That being said, it should be reiterated that regulation 7(5) creates two regimes for determining the profit after tax of licensees of intangibles: one involving connected persons (Taxpayer A-type regime) and one relating to unconnected persons (Taxpayer B-type regime). Hence, the following comments attempts to situate regulation 7(5) as a tool for "plucking the goose" within the context of society and other aspects of it.

(Mis)alignment of commercial, fiscal and monetary policy

According to Henry Simons, taxation is:

> "[A] small element in the structure of rules and conventions which constitute the framework of our existing economic systems; and problems of taxation can be clearly apprehended only as phases of a broad problem of modifying this framework (the rules of the game) in such a manner as to make the system more efficient and more secure".[64]

The gist of this is that: as a part of an economic system, taxation is of no greater importance than the functioning of free enterprise or any other subset of the economy; and any modification to the tax system to fix a problem should be actuated and done with the goal of making the entire economic system more efficient. Thus, it is contended that, in the light of regulation 19(2) of the TPR, which provides that "the provisions of these Regulations shall prevail in the event of inconsistency with other regulatory authorities' approval", regulation 7(5) is not in line with Simons's thesis. This is because, instead of furthering the synching of policies relating to the pricing of intangibles in Nigeria, it introduces misalignment and uncertainty. For example, there is the question of reconciling the difference between the National Office for Technology Acquisition and Promotion (NOTAP)[65] regime and the TPR caps on the pricing of intangibles. NOTAP is saddled with responsibilities[66] that are underpinned by developmental and promotional objectives. Its existence also contributes to making Nigeria attractive to foreign technologies,

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vs finance?" (1983) 12 *Journal of Financial Education* 37, where the author highlights the shortcoming of profit maximization as a decision function.

64 See W Hettich "Henry Simons on taxation and the economic system" (1979) 32/1 *National Tax Journal* 1 at 5.

65 NOTAP was established pursuant to the NOTAP Act cap N62 LFN 2004.

66 These include registering all agreements for the transfer of foreign technology to Nigerian parties (ie technology transfer agreements) and the imposition of a regulatory cap on the fees payable for licences, royalties, etc. See NOTAP Act, secs 4 and 20. For a restatement of NOTAP's responsibilities, see Financial Reporting Council of Nigeria, *Regulatory Decision in the Matter of Financial Statements of Stanbic IBTC Holdings Plc for Years Ended 31st December 2013 and 2014* (2015), available at: <https://drive.google.com/file/d/0BxB1-bqcIt35aHh2OXBFNFBneWM/view> (last accessed 15 April 2020).

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investment and the development of indigenous technology.[67] In addition to being part of the fiscal architecture for the mobilization of revenue, the TPR, among other things, provide Nigeria with a means of imposing on economic actors taxes that correspond to their economic activities in Nigeria.[68]

In the context of revenue mobilization for development, it is surmised that the objectives associated with NOTAP and TPR are in tandem. Also, the NOTAP and TPR regimes have the capacity to impact on the pricing of intangibles in the books of owners and users. It is at this point that differences leading to misalignment become apparent. First, their consequences are different. From NOTAP, there is approval to utilize the official foreign exchange remittance channel[69] to pay fees for licences, franchises, royalties, etc. The TPR are part of the template used for determining whether the price paid is recognizable as a deductible expense for tax purposes. Secondly, what a Nigeria-based user remits through the official foreign exchange remittance channel to a foreign owner of an intangible is that which NOTAP has approved. Where the transaction is between connected persons, FIRS would only allow the Nigeria-based user 5 per cent of its EBITDA as a deductible expense, notwithstanding the existence of NOTAP approval for the entire remitted fee. These differences make both legislation (ie the NOTAP Act and the TPR) distinct and specialized in terms of their scope and effect.

A corollary of this is uncertainty with regard to the superiority of the legal frameworks and / or policies that underpin the pricing of intangibles. Thus, for resolution, recourse is had to the reasoning and decision in *Oando PLC v FBIR*[70] and the TPR. In the former, the issue before the court was the determination of superiority between section 19 of the Companies Income Tax Act (CITA) and section 380 of the Companies and Allied Matters Act[71] (CAMA). This question was asked in the context of the taxation of dividends. The court held inter alia that:

> "While section 380 of CAMA provides a general guideline for companies on the source of payment of dividends, section 19 of CITA in its own right deals with when and how tax is to be paid on dividends so declared. In other words, it regulates the mode and manner of payment of tax payable by a company where dividends are declared and paid to shareholders. Besides, where CAMA deals generally with the modus operandi of companies by providing

67 NOTAP "History", available at: <https://www.notap.gov.ng/content/history> (last accessed 9 April 2020).

68 For the TPR objectives, see TPR, reg 2.

69 This channel is managed by the Central Bank of Nigeria (CBN). Under the CBN Act 2007, sec 2, the CBN is saddled with the responsibility of ensuring monetary and price stability in Nigeria. The CBN issued the CBN Foreign Exchange Manual under the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, cap F34, LFN 2004, sec 1(1) to provide guidance to authorized foreign exchange dealers, authorized buyers and the general public in processing foreign exchange applications.

70 (2015) 18 TLRN 1.

71 Cap C20 LFN 2004.

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> the necessary guideline, CITA deals strictly with the assessment and payment of tax by companies taxation. It follows that in any matter pertaining to companies taxation the provisions of CITA will prevail over that of the CAMA in the event of any conflict of application of relevant provisions."[72]

Furthermore, regulation 19(2) of the TPR provides that the provisions of the TPR shall prevail in the event of inconsistency with other regulatory authorities' approval. Thus, the verdict with regard to the superiority of the legal frameworks and / or underpinning policies is in favour of the TPR.

Economic reality and equity issue

Transfer pricing is underpinned by the arm's length principle, which provides the framework for international taxation. The arm's length principle entails that the terms for the settlement of liability or the consideration for the disposal of an asset are those that would be acceptable to unconnected willing buyers and sellers focused on profit maximization. Thus, where this principle is utilized in fixing a transfer price, what is due to the parties should be the product of the economic reality surrounding the transaction.

With regard to the restriction of the deductible income for Taxpayer A, the deduction is that economic reality is no longer the key criterion for determining whether the transaction was at arm's length. What is relevant is the relationship between the parties: whether they are connected persons or not. In the circumstances, it is deemed that there has been a transfer pricing breach where the parties to the transaction are connected persons, not because the transaction is not in line with economic reality. Consequently, it is concluded that, within the transfer pricing space, regulation 7(5) of the TPR has effectively made connected party transactions a strict liability offence for which there is no respite.

This raises equity issues, especially relating to horizontal equity. The principle of horizontal equity demands that persons in like (but not identical) circumstances should be taxed equally or bear equal tax burdens.[73] Other factors remaining equal, in the context of this discourse, horizontal equity means that similarly circumstanced taxpayers in terms of income level (notwithstanding whether or not they transact with connected parties) should enjoy similar provisions and / or suffer similar restrictions, have similar tax liabilities and profit after tax or disposable income.

Furthermore, the effect of the existence of distinct regimes for the Taxpayer A and Taxpayer B types is that the profit after tax of the former would be less than that of the latter. This disrupts any existing horizontal equity in the tax

72 *Oando v FBIR*, above at note 70 at 31. Also see *Independent Television / Radio v Edo State Board of Internal Revenue* (2014) 16 TRLN 37 at 58–59, where the Court of Appeal reiterated the superior position of special provisions in the course of statutory interpretation.

73 D Elkins "Horizontal equity as a principle of tax theory" (2006) 24/1 *Yale Law & Policy Review* 43; and JA Miller "Equal taxation: A commentary" (2000) 29/2 *Hofstra Law Review* 529 at 532.

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system, as regulation 7(5) of the TPR makes the determinant of the size of the deduction for Taxpayer A the function of whether or not there is a connection with the licensor. This is not the fate of a licensee (ie Taxpayer B) of intangible property belonging to an unconnected party, since regulation 7(5) would not apply to the transaction and / or be used in determining the consequential allowable deductions. This imbalance impacts on the efficiency of the tax system, as it provides Taxpayer A with an incentive for more "squealing" and an impetus for the formulation of structures to hide connectedness to the licensor as well as the (mis)allocation of resources to the adjustment of the equity of the tax system in its favour.

Homogenizing heterogeneity

Related to the foregoing is the view that regulation 7(5) of the TPR provides a homogenized approach to dealing with the heterogeneity that constitutes the spectrum that is taxpayer compliance behaviour. The consequence of this is that every connected party transaction involving intangibles will be deemed not at arm's length, notwithstanding the compliance orientation or behaviour of the parties to the transaction. In addition, the provision does not provide the licensee with the opportunity to have the transaction assessed on its merits to determine whether or not it was at arm's length.

In the context of conceptualizing taxation, it is argued that regulation 7(5) of the TPR is underpinned by the perception that economic agents orientate toward noncompliance and would favour the latter where it is rewarding. This thinking is premised on the economic deterrence theory.[74] Nevertheless, regulation 7(5) of the TPR neglects, as is the case with the economic deterrence theory, to contemplate within the tax system the existence of compliant taxpayers who, notwithstanding the existence of opportunities

74 Credit for the origin of this theory goes to Becker, who developed the "Simple model of rational crime" to combat illegal behaviour, including white collar crimes such as tax evasion: GS Becker "Crime and punishment: An economic approach" (March – April 1968) 76/2 *Journal of Political Economy* 169. The current form is the product of the work of Allingham and Sandmo, Srinivasan as well as Yitzhaki. See generally, MG Allingham and A Sandmo "Income tax evasion: A theoretical analysis" (1972) 1 *Journal of Public Economics* 323; TN Srinivasan "Tax evasion: A model" (1973) 2 *Journal of Public Economics* 339; and S Yitzhaki "A note on income tax evasion: A theoretical analysis" (1974) 3 *Journal of Public Economics* 201 at 201–02. The theory has two assumptions at its core. The first is that individuals respond to incentives (whether positive or negative) and the prevalence of crime in a jurisdiction is inversely proportional to the effectiveness of the crime detection apparatus of the jurisdiction as well as the severity of the punishment on detection. The second is that, after a rational analysis of their situation to gauge the probability of apprehension (or success) as well as the consequence of failure, individuals commit crime and / or indulge in illegal behaviour only when there is an incentive to so do. From an economic point of view and in the context of taxation, the theory suggests that a taxpayer will embrace avoidance or evasion if the expected gain or incentive (ie the hidden taxable income) would exceed the utility (ie income) derivable from the use of economic resources (ie time and other resources, such as tax intermediaries) for purposes other than tax evasion (or avoidance).

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for and the benefits to be derived from noncompliance, would do everything according to the prevailing legal regime as well as transact at arm's length with connected parties. Such taxpayers do not fit the mould cast by the economic deterrence theory. Therefore, as there exist taxpayers who are oriented towards compliance, notwithstanding the gains derivable from noncompliance,[75] the homogenized approach to the treatment of the heterogeneity of compliance orientation and behaviour subsumed in the provision is considered erroneous.

CONCLUSION

Transfer pricing (whether connected persons transactions involving intangibles or otherwise) presents substantial risks to the tax base of the mineral-rich and capital exporters in Africa, as it is a prominent route for revenue leakage from the continent.[76] This makes combating it of utmost importance. However, it would be extremely naïve and utterly simplistic to think that regulation 7(5) of the TPR is a "Swiss army knife" providing FIRS and, by extension, the government of Nigeria with all that is or would be needed to "pluck the goose" to best effect or combat the transfer pricing issues associated with transactions between connected persons involving intangibles. Rather, it should be recognized that the existence of regulation 7(5) is bound to catalyse the design and implementation of strategies (including tax avoidance and evasion) by the parties (connected or otherwise) to guarantee return on investment. This is because it defines for taxpayers as well as their advisors the space for creativity. Thus, regulation 7(5) qualifies to be described as a harbinger of further deadweight loss[77] in the economy.

It is therefore recommended that the objective should be to identify the root cause of the issues associated with transfer pricing and countering them. Prominent is the issue of manpower resourcing of the tax authority. It is considered a priority. Thus, where the number of personnel dedicated

75 See JT Manhire "There is no spoon: Reconsidering the tax compliance puzzle" (2015) 17/8 *Florida Tax Review* 623 at 628–29, where taxpayer rationality, non-rationality, morality, social and cultural norms, trust in government and alignment of government policies with those of the citizenry were listed as factors that motivate the compliance orientation and behaviour of taxpayers. See R Aiko and C Logan "Africa's willing taxpayers thwarted by opaque tax system, corruption" (2014, Afrobarometer policy paper no 7), highlighting data pointing to the fact that Africans are willing to pay tax, notwithstanding the existence of psycho-social referents that could catalyse noncompliant behaviour. Also see B Togler "Speaking to theorists and searching for facts: Tax morale and tax compliance in experiments" (2002) 16/5 *Journal of Economic Surveys* 657 at 662–69 for a review of some of the non-economic variables that often propel compliance.

76 See *Report of the High Level Panel*, above at note 37 at 13, stating that Africa has lost USD 1 trillion in the last 50 years and loses USD50 billion annually in illicit financial flows.

77 Deadweight loss is the efficiency loss associated with tax-induced substitution in the decision function of an economic agent. In real terms it is the loss suffered, whether real or intrinsic, because of choices made to reduce or avoid the impact of taxes.

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to transfer pricing issues at FIRS is less than half the staff capacity of the transfer pricing department of one the "Big 4"[78] accountancy firms operating in Nigeria,[79] little would be achieved with regard to combating transfer pricing and associated issues. Related to this is the issue of manpower turnover, which is plaguing the majority of tax authorities, including FIRS.[80] The African Capacity Building Foundation recommends that more and better trained staff must be hired and retained with the right financial incentives to stem this tide.[81] In addition, there is the issue of the cost and difficulty associated with obtaining relevant information, as well as the lack of comparable data, knowledge and experience within tax administrations.[82]

Furthermore, with regard to the achievement of the Musgravian objectives[83] and the goals of taxation,[84] it cannot be categorically stated that the TPR are of much assistance. This is because there exist consequences that, in the context of extracting tax from the citizenry, may elicit "squeals" instead of applause from the goose (ie the taxpayer). Another is that the provision has the potential to generate dialectics that could motivate taxpayers to approach an already burdened conventional adversarial dispute resolution system for redress.[85]

78 These are the four largest accounting firms in terms of global revenue: Deloitte, PricewaterhouseCoopers, Ernst & Young and KPMG. See: "Revenue of the Big Four accounting / audit firms worldwide in 2019" *Statista*, available at: <https://www.statista.com/statistics/250479/big-four-accounting-firms-global-revenue/> (last accessed 9 April 2020).

79 In 2016, attention was drawn to the inadequate number of staff within the FIRS transfer pricing unit, at that time numbering approximately half the number of KPMG Nigeria staff dedicated to advising clients on the subject. See T Ogungbenro et al "Transfer pricing in Nigeria: The journey so far" (2016) 84 *Tax Notes International* 789 at 791.

80 2015 ATAF statistics show that 43.7% of staff disengage from FIRS after nine years and put average disengagement from the service of African tax authorities after nine years of employment at 68.2%: ATAF *African Tax Outlook* (2nd ed, 2017, ATAF) at 150–51. See also *Dealing Effectively with the Challenges of Transfer Pricing* (2012, OECD Publishing) at 58, available at: <http://dx.doi.org/10.1787/9789264169463-en> (last accessed 9 April 2020), where the OECD affirmed this.

81 *Africa Capacity Report 2015: Capacity Imperatives for Domestic Resource Mobilization in Africa* (2015, African Capacity Building Foundation) at 6, available at: <https://www.acbf-pact.org/sites/default/files/ACR_2015_11_2015_Web_v2.pdf> (last accessed 9 April 2020). Also see *African Tax Outlook* (3rd ed, 2019, ATAF) at 169 for some of the staff retention and motivation schemes employed by tax administrations in Africa.

82 See *Dealing Effectively*, above at note 80 at 58–73.

83 See Musgrave and Musgrave *Public Finance*, above at note 11 at 3–14, where it was proposed that the function of the state is to allocate resources, stabilize the economy and redistribute income.

84 RS Avi-Yonah "The three goals of taxation" (2006) 60 *Tax Law Review* 1, where the Musgravian objectives were described as the "three goals of taxation".

85 This is often the source of uncertainty for the taxpayer, as the court has been known to hand down conflicting decisions. See the decisions in *Gazprom Oil & Gas Nigeria Limited v FIRS* (2015) 19 TLRN 66 and *Vodacom Business Nigeria Limited v FIRS* (unreported, appeal TAT/LZ/VAT/016/2015, delivered 12 February 2016); in these two cases the Tax Appeal Tribunal handed down conflicting decisions with regard to the VAT obligation of a

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Also, it is a disincentive to trade and investment as, among other things, it alters the operating environment and conditions for connected persons within the jurisdiction as well as presenting as a non-tariff measure[86] in the context of international trade and investment.

CONFLICTS OF INTEREST

None

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Nigerian company that consumes goods or services provided by a non-resident company. The conflict stood until the Federal High Court, sitting in its appellate jurisdiction in *Vodacom Business Nigeria Limited v FIRS* (unreported, appeal FHC/L/4A/2016, per Kuewumi J, delivered 19 December 2017) affirmed the decision in *Vodacom Business Nigeria Limited v FIRS*.

86 These are alternative trade policy measures with the potential to have an economic effect on the international trade in goods, changing quantities traded, prices or both. They encompass non-customs tariff measures like sanitary / phytosanitary or environmental protection measures, quotas, price control and export restrictions, or contingent trade protective measures and behind-the-border measures like competition, trade-related investment measures, government procurement and distribution restrictions. See UN Conference on Trade and Development "Non-tariff measures: Evidence from selected developing countries and future research agenda" (2010, UN) at XVI, available at: <https://unctad.org/en/Docs/ditctab20093_en.pdf> (last accessed 9 April 2020).

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