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New Transfer Pricing Regime

On 31 July 2012, Ghana became the latest sub-Saharan African country to publish regulations governing the application of the basic transfer pricing provision contained in the main income tax law. This article reviews and comments on the details of these regulations.

1. Introduction

On 31 July 2012, Ghana published the Transfer Pricing Regulations[1] (the Regulations) in the Official Gazette, making it the latest sub-Saharan African country to have issued detailed regulations in this field.[2] The publication of the Regulations is to be viewed against the backdrop of recent developments in the country, in particular the country's new-found status as an oil producer, concerns about the level of contributions to government revenue from investors operating in key sectors of the economy and the publicity given to reports of tax abuses by certain multinational enterprises (MNEs) doing business on the African continent, including through subsidiaries and branches in Ghana.

The Regulations are the result of the exercise by the Minister of Finance of the powers conferred on him under the principal income tax law (i.e. Internal Revenue Act 592 of 2000, as amended, IRA) to make regulations for the effective implementation of the provisions of the law.[3] The IRA does contain a basic provision governing transfer pricing which incorporates the internationally known arm's length principle, but the provision is couched purely as an anti-avoidance measure. The Regulations are designed to apply alongside this basic provision. There are, in addition, a number of provisions both within the IRA and in other statutes that touch on the issue of transfer pricing, including in relation to the administrative aspects of the Regulations and in cases involving technology transfers.

This article provides an overview of, and comments on some aspects of, the details of the Regulations and how they shape the new transfer pricing regime of Ghana. A summary is provided of the regime that has traditionally been applied to transfer pricing issues prior to the publication of the Regulations and upon which the Regulations are built, including the definitions of key terms used in the IRA. The scope of the Regulations is reviewed with reference to the persons and transactions covered. Also considered are the provisions governing the application of the arm's length principle, both in general and with reference to two areas that are dealt with specifically in the Regulations: transactions involving intellectual property and management services. The administrative dimension of the Regulations is analysed, and additional comments are offered as regards the realization of the objectives behind the Regulations.

2. Existing Provisions Governing Transfer Pricing

Prior to the publication of the Regulations, transfer pricing cases were addressed under a number of provisions in the IRA. These provisions continue to apply, although the manner in which they do so is likely to be affected by the Regulations. The main provision in this regard is the basic transfer pricing provision contained in section 70 of the IRA, which provides as follows:

> (1) In a transaction between persons who are associates, the Commissioner-General may distribute, apportion, or allocate inclusions in income, deductions, credits, or personal reliefs between those persons as is necessary to reflect the chargeable income or tax payable which would have arisen for these persons if the transaction had been conducted at arm's length
> (2) Where,
> (a) in the case of an associated resident entity of a non-resident person, the Commissioner-General is satisfied that some adjustment is warranted under subsection (1) of section 69, or
> (b) in the case of a permanent establishment of a non-resident person in Ghana, the Commissioner-General is not satisfied with a return of income of that person made under section 72
> the Commissioner-General may adjust the income of the permanent establishment or entity for a basis period so that it reflects an amount calculated
> (c) by reference to the total consolidated income of the non-resident person and all associates of that non-resident person, other than individuals but irrespective of residence;
> (d) by taking into account the proportion which the turnover of the permanent establishment or entity bears to the total consolidated turnover of the non-resident person and those associates; and
> (e) by taking into account any other relevant considerations in determining the proportion of the total consolidated income which should be attributed to the permanent establishment or entity.
> (3) In making an adjustment under subsections (1) or (2), the Commissioner-General may recharacterise the source of income and the nature of any payment or loss as revenue, capital, or otherwise.

Thus, section 70 consists of two main rules: one applicable to all transactions between associates regardless of their residence, and the second to cases involving an associated resident entity of a non-resident person or the permanent establishment in Ghana of a non-resident person.

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1. L.I. 2188.
2. Other African countries that are known to have issued such detailed guidelines include Congo, Egypt, Kenya, Malawi, Namibia, Nigeria, South Africa, Uganda and Zambia.
3. Sec. 114(1)(d) IRA.

A number of key terms used in section 70 are defined in the IRA, which is necessary to state here to clarify the scope of application of the provision. As a general rule, two persons are considered to be associates of each other if one of them, not being an employee, acts in accordance with the directions, requests, suggestions or wishes of the other person, whether or not in the context of a business relationship and whether or not the directions, requests, suggestions or wishes are communicated to the first-mentioned person. In particular, the following are treated as associates of each other:[4]

- an individual and a relative of that individual;
- a person and a partner of that person; and
- in the case of an entity:
  - a person who, either alone or together with an associate or associates, controls or may benefit from 50% or more of the rights to income or capital or voting power of the entity, either directly or through one or more interposed entities; or
  - a person who is an associate of the person referred to in the immediately preceding paragraph.

The term "associated resident entity" is not defined as such, but the term "resident entity" is defined in the context of the thin capitalization provision (*see* below) to mean " a resident partnership, resident company, resident body of persons, or a permanent establishment of a non-resident person in Ghana".[5]

A partnership is treated as being resident in a particular year of assessment if any partner in the partnership is resident in Ghana at any time during that year.[6] A company is resident in Ghana if it is incorporated under the laws of Ghana or has its management and control exercised in Ghana at any time during the year of assessment.[7] A body of persons (defined to exclude a company or partnership, but including a trust (other than a unit trust), cooperative, a government, a political subdivision of a government and a public international organization)[8] is resident in Ghana if it is established in Ghana or has a resident person as a manager at any time during the year of assessment, or is controlled, directly or indirectly, by a resident person or persons at any time during the year of assessment.[9]

A permanent establishment is defined as a place where a person carries on business and:

- a place where a person carries on business through an agent, other than a general agent of independent status acting in the ordinary course of business as such;
- a place where a person has, uses or installs substantial equipment or machinery; or
- a place where a person is engaged in a construction, assembly or installation project for 90 days or more, including a place where a person conducts supervisory activities in relation to such a project.[10]

Section 70 is not the only statutory provision applied to transfer pricing cases. The other main provision that has been applied is the general anti-avoidance rule. This rule provides that in order to determine liability to tax under the IRA, the Commissioner-General may recharacterize or disregard an arrangement or part of an arrangement that is entered into or carried out as part of a tax avoidance scheme which is fictitious or does not have substantial economic effect, or the form of which does not reflect its substance.[11] For this purpose, a "tax avoidance scheme" is defined to include "an arrangement, one of the main purposes of which is the avoidance or reduction of liability to tax".[12] The term "arrangement" is in turn defined to refer to "any arrangement, action, agreement, course of conduct, promise, transaction, understanding, or undertaking, whether express or implied, whether or not enforceable by legal proceedings and whether unilateral or involving more than one person".[13]

To the above should be added the provision against income splitting, which permits the Commissioner-General to make appropriate adjustments to taxable income to counter the tax reduction effect sought to be achieved through the transfer of income or property (including through the interposition of one or more entities) by a person to an associate.[14] Finally, the IRA also includes thin capitalization provisions designed to counter a specific form of tax base erosion involving the exploitation of inter-affiliate relationships, i.e. that resulting from the excessive financing of resident affiliates through debt instead of equity. Accordingly, such provisions operate to disallow any interest deductions on inter-affiliate debts that exceed the prescribed debt-to-equity ratio of 2:1.[15]

3. Scope of Application of the Regulations

3.1. Persons covered

The Regulations apply to the following:[16]

- transactions between persons who are in a controlled relationship;
- dealings between a permanent establishment and its head office;
- dealings between a permanent establishment and other related branches of that permanent establishment;
- transactions between a taxpayer and another taxpayer who are in a controlled relationship; and
- transactions between a taxpayer and another taxpayer who are in an employment relationship.

4. Sec. 164 IRA.
5. Sec. 71(2) IRA.
6. Sec. 163 IRA.
7. Sec. 161 IRA.
8. Sec. 167 IRA.
9. Sec. 162 IRA.
10. Sec. 167 IRA.
11. Sec. 112(1) IRA.
12. Sec. 112(2) IRA.
13. Sec. 112(2) IRA.
14. Sec. 69 IRA.
15. Sec. 71 IRA.
16. Regulation 1(1) Transfer Pricing Regulations. Except where indicated otherwise, all references to regulations are to the Transfer Pricing Regulations.

Thus, the Regulations apply to dealings or transactions involving three broad categories of persons: (i) persons or taxpayers in a controlled relationship, (ii) permanent establishments and their head offices or other related branches and (iii) taxpayers in an employment relationship.[17] The term "person" is defined in the IRA to refer to an individual, a company or a body of persons,[18] but the term "taxpayer" is not defined as such, and may thus be understood in its ordinary meaning as referring to any person liable to pay tax. A "controlled relationship" refers to a relationship between one person and another person the terms of which enable the relationship to influence the transfer price set in a transaction, and in which that other person is:[19]

– an associate of the first person;
– a relative of the first person. The term "relative" is defined to include "in the case of an individual, a child, parent, grandchild, grandparent, brother, sister, great-grandchild, great-grandparent, uncle, aunt, nephew, niece, spouse and the extended family relations of a spouse";[20]
– a person in a trust relationship with that first person;
– a person who is in a partnership relationship with that first person;
– a holding company, a subsidiary or a subsidiary of a holding company to which that first person is a subsidiary;
– a member of a closed corporation together with that first person; and
– a relative of a person who is a member of a closed corporation together with that first person.

The Regulations also apply to all dealings between a permanent establishment and its head office or between the permanent establishment and other related branches of the permanent establishment. For this purpose, the permanent establishment is "deemed to be a separate legal entity".[21] The treatment of permanent establishments for this purpose is consistent with the general approach under the IRA to the taxation of permanent establishments, according to which the gain or profit attributable to a permanent establishment of a non-resident person in the country is calculated as that which the permanent establishment might be expected to make if it were a distinct and separate person engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the person of which it is a permanent establishment.[22]

The third main category of transactions to which the Regulations apply are those between two taxpayers in an employment relationship. The term "employment" is defined in the IRA to mean:[23]

(a) the position of an individual in the employment of another person; or
(b) the holding of or acting in any office or a position entitling the holder to a fixed or ascertainable remuneration other than an office or position as director of a company or manager of a body of persons.

However, the Regulations do not provide any further details regarding their applicability to persons in such a relationship.

3.2. Transactions covered

The transactions covered by the Regulations are commercial transactions that affect the profits or losses of persons covered by the Regulations. These include:[24]

– the purchase and sale of goods;
– the purchase, sale, lease or use of a tangible asset;
– the purchase, sale, lease or use of an intangible asset;
– the provision of management services, technical services or other intra-group services;
– the provision of finance or other financial arrangements;
– rent and hire charges; and
– any other transaction that may affect the profit or loss of the entity.

The application of the Regulations to some of these listed transactions is covered in greater detail in the Regulations. These comprise transactions involving intangible property and the provision of services, and are reviewed below (*see* section 4.3.)

4. The Arm's Length Principle and Its Application

The arm's length principle represents the generally recognized international benchmark against which the acceptability of the methods used by a taxpayer in setting its transfer pricing are tested. While the principle may be invoked by the Commissioner-General under the general transfer pricing provision referred to above to counter an avoidance transaction, the Regulations formulate it in the form of an obligation imposed upon the taxpayer. Consequently, any person that engages in a transaction with another with whom that person has a controlled relationship is required to compute the profit or loss from the transaction on an arm's length basis. An arm's length transaction for this purpose is defined as one the terms of which "do not differ from the terms of a comparable transaction between independent persons".[25] The term "independent persons" is defined in this connection to refer to "persons who are not associates or are not in relation to each other".[26]

4.1. General comparability indicators

Essential to the application of the arm's length principle is the selection of a transaction to which the non-arm's length transaction is to be compared, referred to as a *com-*

17. Id.
18. Sec. 167 IRA.
19. Regulation 10.
20. Id.
21. Regulation 1(3).
22. Sec. 65 IRA. A tax at the rate of 10% is imposed on the repatriated profits of the permanent establishment. Except to the extent restricted under an applicable income tax treaty, the branch profits tax is in addition to the tax imposed on the non-resident person (sec. 66; 1st Sch., Part VI; and Reg. 24(6) of L.I. 1675).
23. Sec. 94 Internal Revenue Act.
24. Regulation 1(2).
25. Regulation 2.
26. Regulation 10.

parable transaction. This is defined in the Regulations as a commercial transaction engaged in by an independent person, in respect of which:

(a) there is no significant difference between that transaction and a transaction engaged in by a person in a controlled relationship that could materially affect the financial indicator being examined by use of the most appropriate transfer pricing method; and
(b) differences exist between that transaction and a transaction engaged in by a person in a controlled relationship, but a reasonably accurate adjustment may be made to the relevant financial indicator being examined in order to eliminate the effect of the differences on the comparison.[27]

The selection by the Commissioner-General of such a comparable transaction involves a two-pronged approach. Firstly, the Commissioner-General should determine whether there are any economically relevant characteristics of the transactions to be compared. This determination is to be made with reference to the following:[28]
– the characteristics of the goods, property[29] or services transferred;
– the relative importance of the functions performed;
– the contractual terms and conditions governing the transactions;
– the assets used;
– the relative risk assumed by the associated persons and any independent party that is considered as a possible comparable;
– the economic and market circumstances in which the transaction takes place; and
– the business strategies pursued by the connected persons in relation to the transactions.

Secondly, it involves the determination of "whether significant differences do not exist between the transactions being compared that can materially affect the financial indicator being examined and if a difference exists, what reasonable comparability adjustment can be made to the uncontrolled transaction to eliminate the effects of the difference on the comparison".[30]

4.2. Approved transfer pricing methods

The Regulations endorse the five following internationally recognized methods for determining the arm's length price. However, no clear indication is given as to how far the international standards governing their application, particularly those of the OECD and UN, may be relied upon by a taxpayer to the extent to which there is no clear guidance in the Regulations.[31]

The comparable uncontrolled price method, i.e. the method whereby the arm's length range is determined by comparing the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction.

The resale price method, according to which the arm's length range is determined by comparing the resale margin that a purchaser of property in a controlled transaction earns from reselling that property in an uncontrolled transaction with the resale margin earned in comparable uncontrolled purchase and resale transactions.

The cost-plus method, according to which the arm's length range is determined by comparing the mark-up on the direct and indirect costs incurred in the supply of property or services in a controlled transaction with the markup on the direct and indirect costs incurred in the supply of property or services in a comparable uncontrolled transaction.

The transactional profit split method, according to which the arm's length range is determined by comparing the net profit margin relative to an appropriate base (e.g. costs, sales, assets) achieved by an enterprise in a controlled transaction with the net profit margin relative to the same base achieved in comparable uncontrolled transactions.

The transactional net margin method, according to which the arm's length range is determined by allocating to each associated enterprise participating in a controlled transaction the portion of the common profit (or loss) derived from the transaction that an independent enterprise would expect to earn from engaging in a comparable uncontrolled transaction.[32]

In recognition of the complexity of transfer pricing issues and the uniqueness of transactions in some cases that often render the recognized methods inadequate, the Regulations incorporate a degree of flexibility by permitting the application of alternative methods by a taxpayer, provided that prior approval is sought from the Commissioner-General.[33] In such cases, the person is required to prove that none of the prescribed methods "can reasonably be applied to determine arm's length conditions for the transaction" and that the alternative method proposed would yield a result that is consistent with what independent persons engaged in a comparable independent transaction would achieve.[34]

The choice of an alternative method is not reserved to the taxpayer alone. The Regulations also permit the Commissioner-General to apply an alternative method if, considering the nature of the transaction, he is of the opinion that none of the five listed methods could be used to determine the arm's length price.[35] In this connection, there is no requirement in the Regulations for the Commissioner to accept the alternative method chosen by the taxpayer in such cases. However, if the alternative method applied by the taxpayer has been approved beforehand by the Commissioner-General as provided for in the Regulations, it is unlikely that this will become a contentious issue.

27. Id.
28. Regulation 2(3)(a).
29. The term "property" is defined to mean "tangible and intangible property" (Regulation 10).
30. Regulation 2(3)(b).
31. Regulations 3(1), 3(2) and 4(1); Schedule to the Regulations.
32. Para. 5 Schedule to the Regulations.
33. Regulations 3(3)(b) and 4(2).
34. Regulation 4(3).
35. Regulation 3(3)(a).

4.3. Application of the arm's length principle to intangible property transfers and service charges

Intellectual property transfers and service charges often raise special problems for host countries. Intra-firm transfers involving high fee payments by subsidiaries to their foreign parents are often seen as one of the many ways through which MNEs make use of their inter-affiliate relationships to minimize their taxable profits in the countries in which they operate.[36] Judging from reports published in the early 1970s, it appears that the government of Ghana has long held the suspicion that some non-resident enterprises and foreign-controlled resident enterprises may overstate the cost of foreign expenses incurred by them.[37] The singling out of transactions involving intangible property and service charges between persons in a controlled relationship for particular attention in the Regulations in addition to the rules covered above, is thus not surprising.

The freedom with which foreign residents may negotiate the terms governing intellectual property transfers and service charges to their Ghanaian affiliates has traditionally been regulated under a separate statute, namely the Technology Transfer Regulations of 1992.[38] The provisions of these regulations have had implications for the government's response to transfer pricing since. For example, these regulations restrict royalty payments in respect of know-how, patents and other industrial property rights to between 0% and 6% of net sales, and fees for technical services or assistance (including know-how) to between 0% and 5% of net sales.[39] In the case of management fees, payments are restricted to between 0% and 2% of profit before tax, although for projects in which profit is not expected during the early years, the fee is restricted to between 0% and 2% of net sales for the first three to five years, with possible reductions in the permitted amounts to reflect a substantial (i.e. at least 60%) equity share capital of the transferee company.[40]

The Regulations approach the matter differently by specifying when a service charge between persons in a controlled relationship will be considered by the Commissioner-General as being consistent with the arm's length principle.[41] What remains unclear at this stage, however, is how the provisions of the Regulations in this area will interact with those of the Technology Transfer Regulations.

As regards the application of the arm's length price to intangible property (defined in this context to include licences, sales and any other transfer of an intangible property), the Regulations address two principal issues: (i) what must be taken into account in determining the arm's length conditions between persons in a controlled relationship and (ii) what factors are to be considered in determining what constitutes a comparable transaction.

As regards what must be taken into account in determining the arm's length conditions between persons in a controlled relationship, the Regulations provide that the Commissioner-General must take into account:
– the perspective of both the transferor and transferee of the property, including the price that a comparable independent person would pay for the property transfer; and
– how useful the intangible property is to the business of the transferee.[42]

As regards the factors that are to be considered in determining what constitutes a comparable transaction, a number of special factors relevant to the comparable transaction must be considered by the Commissioner-General, including:[43]
– the benefit expected from the intangible property;
– any geographic limitations on the exercise of a right in relation to the intangible property;
– the character of the right transferred, whether exclusive or non-exclusive; and
– whether the transferee has a right to participate in a further development made by the transferor to the intangible property.

In order for a service charge between persons in a controlled relationship to be considered as being consistent with the arm's length price, it must satisfy three key tests. Firstly, the charge must be for a service actually rendered. Secondly, it must provide economic or commercial value to the recipient of the service. Thirdly, it must be one that an independent person in a comparable circumstance would pay for.[44]

However, certain specified services paid for by a person based on the ownership interest of that person's shareholder in one or more companies belonging to a group of companies, will not be regarded as being consistent with the arm's length principle. These include:[45]
– a service rendered in relation to the juridical structure of the parent company of the person, for example, meetings of shareholders of the parent company, the issuing of shares in the parent company and costs of the supervisory board of the parent company;
– a service rendered in relation to reporting requirements of the parent company of the person, including the consolidation of reports; and
– a service rendered in relation to the raising of funds for the acquisition of a participation, except where the participation is directly or indirectly acquired by the person and the acquisition benefits the person or is expected to benefit the person.

Where the Commissioner-General is unable to identify the specific service performed for each of the persons in

36. ActionAid, *Calling Time: Why SABMiller Should Stop Dodging Taxes In Africa* (ActionAid, 2010), at 23. See also OECD Ctr. for Tax Policy and Admin., *Dealing Effectively with the Challenges of Transfer Pricing* (OECD 2012), at 72 (recounting the experience of an African Tax Commissioner in the area of transfer pricing).
37. UN, *Tax Treaties Between Developed and Developing Countries. Fourth Report* (UN, 1973), at 142-146.
38. L.I. 1547.
39. Regulations 14 and 15 of L.I. 1547.
40. Regulation 16 of L.I. 1547.
41. Regulation 5.
42. Regulation 6(1).
43. Regulation 6(2).
44. Regulation 5(1).
45. Regulations 5(2) and (3).

the controlled relationship, the Regulations permit him to allocate the total charge among the persons in that relationship based on reasonable allocation criteria. The law will consider the allocation criteria used in such cases to be reasonable if they are based on a variable that meets any of three key conditions. Firstly, the variable must take into account the nature of the services, the circumstances under which the services are provided and the benefit derived or expected to be derived by the persons in the controlled relationship, from the service. Secondly, it must relate exclusively to a transaction between independent persons, and allow the cost to be shared at arm's length. Thirdly, it must be "capable of being measured in a reasonably reliable manner".[46]

5. Administrative Issues

5.1. Documentation and information requirements

It is generally recognized that a sound documentation requirement is at the heart of any effective transfer pricing regime. Access by the tax authorities to comprehensive and reliable information, not only of the taxpayer's affairs, but also of the economic environment within which the latter's transactions are carried on, is essential to enable the administration ensure that the transfer pricing standards set by the law are being complied with by taxpayers. On the other hand, the ability of taxpayers to establish and defend the basis upon which their transfer pricing policy has been implemented is often crucial to the resolution of any misunderstanding or disputes with the tax administration.

The Regulations dedicate a section to the documentation requirements taxpayers will have to comply with in support of their transfer pricing practices for purposes of establishing that such practices are consistent with those prescribed in the Regulations. These requirements are not to be read in isolation, but in combination with other provisions in the IRA that confer broad powers of information collection on the Commissioner-General for purposes of administering the tax law.

5.1.1. Existing provisions governing the collection of information

The Commissioner-General may require any person (whether or not liable to tax) to produce any information by a specified time or to appear at a particular place and time to be examined on oath on the affairs of that or of another person. The person examined may also be required to produce any book, record or computer-stored information in that person's control.[47] Other powers conferred on the Commissioner-General and other officers of the Ghanaian tax authorities are to enable them gain access to information and records of taxpayers. Thus, the Commissioner-General and any officer authorized in writing by him have full and free access at all times to any premises, place, property, book, record or computer, and are entitled to make extracts of copies from any such book, record or computer-stored information. If a hard copy or computer disk of computer-stored information is not provided, the computer itself may be seized and retained for as long as is necessary for the required information to be copied. Furthermore, the Commissioner-General or officer may seize any book or record which is considered to offer material evidence for the determination of any person's tax liability, interest or penalty. The book or record may then be retained for as long as is required for the determination of a person's tax liability or for any proceeding under the IRA. The person whose books, records, or computer have been removed and retained is permitted to examine and make extracts from them during regular office hours under supervision determined by the Commissioner-General.[48] All of these powers override any rule of law pertaining to the privilege or the public interest in respect of the production of, or access to documents.[49]

The above information collection measures are supported by the requirement that a taxpayer maintain records or keep evidence necessary to explain information provided in a tax return or any other document accompanying the return so as to enable the taxpayer's tax liability to be accurately determined. In the case of a person carrying on a business, the record maintained must include all receipts and payments, all revenue and expenses, and all assets and liabilities of the business. All such records or evidence are to be retained by the taxpayer for at least six years unless otherwise specified by the Commissioner-General.[50] Furthermore, the IRA permits the Commissioner-General to send a written request to any person who has already submitted a tax return to provide additional details regarding that person's income for a particular year.[51]

While the above provisions may generally cater to the specific needs of documenting transfer pricing practices, they do not provide enough clarity to taxpayers regarding the sufficiency of documentation required in such cases. The Regulations provide greater clarity in this area by detailing the types of information that will be considered to satisfy this general requirement.

5.1.2. Documentation requirements under the transfer pricing regulations

Persons engaged in transactions with others with whom they have a controlled relationship are required to maintain contemporaneous documentation of such transactions for each tax year.[52] Specifically, the information that may be required to be supplied with the annual tax return in a form prescribed by the Commissioner-General concerning their transfer pricing practices comprise the following:[53]

– the selected transfer pricing method. This should include information on:

46. Regulation 5(5) and (6).
47. Sec. 125(1) IRA.
48. Sec. 124(1) and (5) IRA.
49. Secs. 124(7) and 125(5) IRA.
50. Sec. 122 IRA.
51. Sec. 72(9) IRA.
52. Regulation 7(1).
53. Regulation 7(3).

    - any adjustment made as a result of applying the selected method;
    - any assumption made in applying that method;
    - the justification for the use of that method;
    - the comparables chosen and the screening criteria for choosing those comparables; and
    - the comparability analysis of the associated party transactions and the comparables;
- the calculations made by the person, along with the price adjustment factors that were considered necessary for purposes of achieving the comparability;
- the arm's length range determined by the taxpayer and the reasons in support of that determination and the use of the range;
- the taxpayer's global organizational structure, including the location and ownership linkages amongst associated persons;
- a description of the nature of the business in which the relevant transaction took place, the property that was used and the extent of any other commercial or financial relationship;
- details of transactions between the taxpayer and other associated persons, including:
    - contracts or agreements detailing the terms of the transactions; and
    - segmented financial accounts for the transactions and the assumptions made to obtain the segmented information;
- the strategies and policies applied and information analysis the taxpayer relied on to determine and ensure that the transaction is at an arm's length;
- the person's identity and the relation between that person and other persons in the controlled relationship;
- details regarding:
    - the principal business activities of each person in the group; and
    - the business relationships amongst the associated persons, including services provided, goods sold and intangible used;
- the group's consolidated financial statements; and
- information about each associated party, including:
    - the line of business; industry dynamics; and the market, regulatory and economic conditions in which the person operates;
    - the person's functions and risks, as well as the assets used by the person; and
    - financial statements.

Also, the Commissioner-General may require any additional information he considers relevant.

In addition to the above, the Regulations permit the Commissioner-General to address a specific request to a person to provide additional information, including contemporaneous documentation for transactions undertaken by the person during that tax year, in accordance with the standard provision under the IRA.[54]

54. Regulation 7(4) and (6).

5.2. Transfer pricing audits and rulings

The primary objective behind a transfer pricing audit conducted by the Commissioner-General is to determine whether the method used by the taxpayer in determining the transfer price of transactions it has engaged in are in accordance with the arm's length principle, particularly as elaborated in the Regulations. For this purpose, the Commissioner-General may apply any of the methods permitted under the Regulations which he considers appropriate.[55] Where he finds, following such an exercise, that the amount charged or credited to the taxpayer's final accounts do not fall within the arm's length range, he may make an appropriate adjustment to the taxable profits of the taxpayer.[56]

The Regulations make no explicit provision for secondary adjustments by the Commissioner-General in cases where an initial adjustment of profits has been made by the foreign country of residence of the taxpayer. It would appear, then, that such secondary adjustments may be available only under the tax treaties to which Ghana is a party.[57] It should be noted in this connection that the treaty with France requires that such secondary adjustment be made where the country concerned considers the initial adjustment to be justified.[58]

The Regulations also make no clear mention of the possibility for a taxpayer to conclude an advance pricing agreement with the tax authorities covering a planned transaction. However, the legal framework already exists for a taxpayer to obtain a binding private ruling from the Commissioner-General regarding the application of the IRA to that taxpayer with respect to a transaction proposed or entered into by the taxpayer.[59] Such a binding ruling is conditional upon (i) the taxpayer's making "a full and true disclosure to the Commissioner-General of all aspects of the transaction relevant to the ruling" and (ii) the transaction's proceeding "in all material respects as described in that person's application for the ruling".[60]

5.3. Penalties

Additional taxes raised following a transfer pricing adjustment made by the Commissioner-General will be treated in the same manner as an additional assessment to tax under the IRA.[61] The additional tax will thus be deemed to be tax that has been underpaid and will therefore be subject to the normal penalties under the IRA governing such underpayments. Furthermore, failure by a company

55. Regulation 8(2) and (3).
56. Regulation 8(4).
57. Ghana has concluded income tax treaties that are currently in force with Belgium, France, Germany, Italy, the Netherlands, South Africa, Switzerland and the United Kingdom. Additional treaties have been signed with Barbados, Montenegro and Serbia that are yet to enter into force.
58. *Convention between the Government of the French Republic and the Government of the Republic of Ghana for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains* art. 9(2) (5 Apr. 1993), Treaties IBFD.
59. Sec. 116(1) IRA.
60. Sec. 116(2) IRA.
61. Regulation 9(1).

requested to supply additional information under the Regulations is penalized with a fine.[62] Beyond this, the Regulations do not introduce any specific penalties governing transfer pricing cases in addition to the standard administrative provisions (e.g. those pertaining to fraud or failure to file returns) contained in the IRA.

6. Realizing the Objectives of the Transfer Pricing Regulations

As mentioned above, the introduction of the Regulations is a clear statement of the government's desire to raise increased revenue from economic operations carried on within the country's borders. The extent to which the government could use the Regulations as a tool for this purpose should, however, not be exaggerated. Whether the revenue-raising objective behind the Regulations will be realized will also largely depend on the administrative mechanisms in place for their implementation. Having transfer pricing regulations on the statute books is only the initial step towards a robust regime governing transfer pricing. Indeed, even the laudable objective of providing greater clarity for taxpayers rests largely on the manner in which the regulations will be implemented in actual cases by the Ghanaian tax officials.

A familiar refrain in the literature on taxation in developing countries in general, and sub-Saharan Africa in particular, is the challenge faced by tax administrations in the implementation of their tax laws. While tax administrations have undergone and are still in the process of undergoing improvements, it is broadly recognized that there continue to be significant barriers to an effective and efficient administrative machinery in most of such countries. These will undoubtedly also affect the success with which the objectives behind the Regulations will be achieved. However, clear strides are being made, including at the regional level, where the platform provided by institutions such as the African Tax Administration Forum provides an opportunity for strengthening administrative capacity in the implementation of domestic tax laws.

While there are no easy ways through which any government may increase its tax revenue collections, it is also well understood that the success of such measures may be achieved only as part of a wider effort towards tax base broadening, which in turn requires a holistic examination of the tax system governing such operations. This is especially so considering that the tax treatment of many of the investments in the country's key natural resource sector may be affected by the terms of agreements that are insulated from the standard tax regime, as, for example, in the mining sector, where stability and development agreements between the government and holders of mining leases may shield the investment from changes to the tax system over a period of time.

7. Conclusion

With the introduction of the Regulations, the issue of the tax treatment of transfer pricing has been clarified for taxpayers not only in relation to the acceptable methods for use in support of their transfer pricing practices but also the type of documentation required to substantiate such practice. The clarity introduced to the tax law in this area may further enhance the attractiveness of the environment for doing business to the extent that the absence of such clarity has been a source of uncertainty that has deterred such investment.

Nevertheless, a number of issues remain in respect of which greater clarity may be required, including the application of the Regulations to employer-employee relationships; the degree to which the application of OECD or UN standards by taxpayers will be accepted in the absence of clear guidance in the Regulations; and the interaction between the Regulations and the existing regulations governing technology transfers. It is to be expected that these issues will be addressed in due course, either through amendments to the Regulations or the publication of practice notes by the Ghanaian tax authorities.

From the government's perspective, the Regulations would at least equip it with the basic tools to counter the detected instances of artificial profit-shifting techniques employed by firms operating in the country, thereby reducing the extent of erosion of the tax base. The full realization of such an objective will, however, require significant improvements in administrative capacity at the level of the tax authorities.

62. Regulation 7(5); sec. 142 IRA.

