100 days of global drama

And the key tax events that should be of interest to you

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By Seun Adu

The past few months have been full of events the world over. In this period, we have seen: Mohammed Ali pass on; Melanie Trump's controversial (some would say part copied) speech; the Brexit referendum and the outcome that shocked many; Boris Johnson appointed as Foreign Secretary (and getting hell from journalists at his first press briefing); Portugal's first ever major football trophy (no prizes for guessing who wins the Ballon d'Or this year); The Rio Olympics and the amazing individual medals record set by Michael Phelps; A failed military coup in Turkey; amongst other things. So much seems to have happened in several global spheres.

How about the global tax space? Things have not been quiet here either. By now you've probably read about the $14.5b fine the European Union has asked Apple to pay in Ireland. But there are a number of developments that may not have made the news as prominently and which could have implications for the Nigerian tax system. Here are a few recent global tax events and the reason Nigerian taxpayers should know about them.

The OECD Transfer Pricing guidelines have been officially amended

Actions 8 to 10 and Action 13 of the BEPS actions recommended changes to the OECD's Transfer Pricing (TP) guidelines. The recommendations from Actions 8 to 13 were to reflect the increased emphasis on the substance of transactions over their form while those from Actions 13 targeted increased transparency through a standardised TP documentation approach and information exchange.

On May 23, 2016 the OECD adopted the BEPS amendments to its transfer pricing guidelines. The amendments include changes to Chapters I, II, V, VI, VII, and VIII. In some instances only parts of a Chapter have been amended (e.g. Chapters I and II) in other instances the Chapters have been deleted entirely and completely replaced with new ones (Chapters V, VI, VII and VIII).

This means Nigerian TP regulations will now be applied in line with the changes

Effective from the date the amendments to the OECD guidelines were adopted, the Nigerian TP regulations will now be applied in line with the amended guidelines. This is based on Regulation 11 of the TP regulations.

Historically Nigerian taxpayers have relied more on the legal form of related party transactions to prove the facts and determine the TP consequences of their transactions. With the renewed focus on substance, the details in a contract or other documents will no longer be enough. The TP implications of related party transactions will be largely driven by the actual facts (or substance) of the transactions. Substance will take priority over the legal and documented form. The documentation standard adopted in the revised guidelines will also give the FIRS access to more information that will allow for better TP risk assessment and risk identification.

Concerns have been raised in some quarters that some of the changes to the OECD guidelines could be applied retroactively and to periods prior to 2016 since many of these changes are not necessarily an introduction of completely new principles but rather further clarifications of existing principles. It remains to be seen how this will play out in Nigeria.

There has been widespread introduction of Country by Country (CbCR) legislation

Nearly half of the 44 countries that signed up to the multilateral CbCR agreement have introduced the required legislation into their domestic laws. In a separate step, EU member countries approved the introduction of EU wide CbCR legislation in May. In June, the OECD released further guidance on the implementation of CbCR reporting.

CbCR legislation will allow tax authorities in different countries automatically exchange information on Multinational Enterprises (MNEs) operating in their jurisdiction. The information to be exchanged includes: revenues, profits, no of personnel, value of assets, taxes paid etc. in each of the countries where the MNE group turnover above 750m l to prepare annual CbCR the tax authority where ated within 12 months of their financial year end. The tax authority of the head office will then be required to automatically share this information with the tax authorities of other countries that have CbCR legislation within 3 months of receiving this information.

This will put pressure on Nigeria to quickly join the ranks of CbCR adopters

Nigeria has committed to introduce CbCR legislation. All the paper work has been done and the required multilateral agreements have been signed, ratified and submitted to the OECD. The only thing left is to introduce local legislation. Even for that, there is already a template of CbCR legislation in place.

If Nigeria introduces the legislation this year and follows the OECD recommendations, Nigerian headquartered MNEs /taxpayers may need to prepare CbCR reports for financial years starting on or after 1 January 2016. These reports could be due for submission by 31 December 2017. Nigeria will also be able to access CbCR reports on MNEs not headquartered in Nigeria through the automatic information exchange requirement of the CbCR agreement.

The OECD issued a draft of the proposed changes to the report on the profit attribution of profits to permanent establishments

The OECD's report on the attribution of profits to permanent establishments (the Report) provides guidance on the application of transfer pricing rules to situations involving permanent establishments (PEs). Following the changes to the PE definitions and threshold under the BEPS actions, the OECD has drafted revisions to the Report to further clarify the application of the TP rules for PEs. The draft paper does not introduce new rules; it only clarifies existing rules. The paper introduces several scenarios to help clarify the concepts discussed in the Report and how they should be applied for PEs; particularly those created as a result of the lower PE thresholds.

The Report could be relevant for Non Resident Companies (NRCs) operating in Nigeria

Two years after the introduction of actual profit filing for Nigerian NRCs, many NRCs are still struggling with the practical challenges of determining the profits that should be attributable to their Nigerian operations. There are many unanswered questions and it does not help that the guidance promised by the FIRS is yet to materialise.

While the Nigerian TP regulations do not formally adopt or directly reference the Report, it could serve as persuasive authority for interpreting and applying TP principles in PE situations as well as for the attribution of profits to PEs. This will particularly be the case where guidance is not provided under Nigerian law.

The Report provides the answers (or at least an analytical framework for arriving at the answers) to some of the common questions such as those relating to the attribution of: assets, risks, functions, contractual obligations and revenues to PEs. Nigerian NRCs that intend to apply any of the principles in the Report will have to ensure that they do not apply portions of the guidance that are clearly inconsistent with the income tax laws of Nigeria.

Other developments

Some other developments of interest include: the release of a discussion draft on the application of the profits splits method by the OECD – this will impact the Nigerian TP regulations when finalised and adopted; the first meeting of the new inclusive framework for the implementation of the BEPS package held in late June - 85 countries have now committed to implement the BEPS actions and Nigeria is one of the 15 African countries on the list; the OECD, UN, IMF and World Bank have set up the Platform for Collaboration on tax matters to better coordinate their contributions on tax matters – one of the first assignments of the Platform is to develop a toolkit to help developing countries implement the BEPS package.

Conclusion

The OECD has continued to make progress with finalising all BEPS deliverables and participants (OECD and non-OECD countries) in the BEPS project have already started implementing the actions. There is significant global acceptance of the initiative and measures are being put in place to assist developing countries such as Nigeria implement the BEPS actions. The changes to the OECD's TP guidelines have already become effective in Nigeria and implementation of the other actions is expected to continue. Nigerian taxpayers and MNEs who have not done so should start to take steps to evaluate the impact of the BEPS initiative on their tax positions to ensure they are not caught out.

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