Tax Updates

FIRS Loses, as the Federal High Court upholds the Tax Appeal Tribunal judgement and declares Country-By-Country Regulations, 2018 Illegal

May 2025

Background

The Federal High Court, on 5th May 2025, upheld the decision of the Tax Appeal Tribunal ("TAT" or "Tribunal") in the case of **Federal Inland Revenue Service v. Check Point Software Technologies B.V. Nigeria Ltd**, and ruled in favour of the taxpayer.

It will be recalled that in August 2023, the TAT declared that the Income Tax (Country-by-Country Reporting) Regulations, 2018 ("CbCR Regulations") was unconstitutional and illegal, and as such, cannot be enforced by the Federal Inland Revenue Service ("FIRS"). Consequently, the Tribunal further held that the administrative penalties contained in the CbCR Regulations purported to be imposed by FIRS were null and void.

Fidelis Chukwu
Partner,
Transfer Pricing & Tax Advisory

Oluwasanmi Ogunsanwo
Manager,
Tax Services

For enquiries: technical@krestonpedabo.com

Lagos Offices:

67, Norman Williams Street
SouthWest, Ikoyi
Lagos - Nigeria
Tel: 01-2919041; 0808 820 8747

27, Alhaji Bashorun Street
SouthWest, Ikoyi
Lagos - Nigeria

Abuja Office:

Ground Floor, Amb. Albert Osakwe House
1473, Inner Block Street
Central Business District
Abuja FCT - Nigeria

Tel: 0706 546 89824

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Brief Summary of the Case

In 2022, FIRS issued Notices of Administrative Penalties on Check Point Software Technologies B.V. Nigeria Limited ("Check Point" or "the Company") for late filing of 2019 and 2020 CbC Notifications under the CbCR Regulations. The Company objected on the grounds that the notices issued by the FIRS were illegal and ultra vires for imposing a penalty beyond the stipulations in the principal statute, the FIRS Establishment Act.

The arguments put forward by Check Point at the Tribunal are broadly summarised as follows:

i. Section 61 of the FIRS Establishment Act permits only the Board of FIRS to make regulations as it deems fit to give effect to the provisions of the Act.

ii. The Boards of all federal parastatals and agencies, including FIRS, were dissolved between 2012 and 2020.

iii. Therefore, the CbCR Regulations do not have legal effect as there was no constituted authority at the time of its issuance as required by Section 61 of the Act.

iv. Assuming but not conceding that the Regulations are valid, the imposed administrative penalty significantly exceeds the penalty stipulated by the Principal Act, and a departure from the provision of the Act is null and void.

v. The CbCR Regulations was issued to give effect to the OECD Country-by-Country Multilateral Competent Authority Agreement (CbC MCAA), which is yet to be ratified and domesticated by the National Assembly in Nigeria, thus falling short of the requirement for implementation in Nigeria, as encapsulated in Section 12 of the 1999 Constitution of the Federal Republic of Nigeria.

vi. The administrative penalties under the CbCR Regulations attempted to be imposed by the FIRS, are illegal as it has no legal basis.

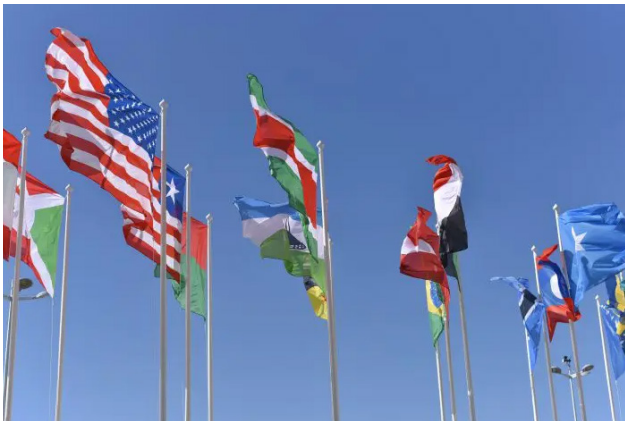
On the other hand, FIRS argued that:

i. The CbCR Regulations was made in pursuant to the FIRS Establishment Act, and that a vacancy in the membership of the Board does not invalidate the Board's decisions.

ii. The penalties imposed on Check Point are validly provided for under the CbCR Regulations, which remain valid.

iii. Nigeria signed the CbCR MCAA in 2016, only as a precursor to the issuance of the CbCR Regulations, which became effective in January 2018, and the Regulations are not an international document requiring domestication, but a local legislation passed pursuant to the FIRS Establishment Act.

iv. Since Check Point failed to file its CbCR Notification at the appropriate time, it is liable to pay a penalty of ₦5m in the first instance and an additional ₦10,000 for every day in which the default continues, as prescribed in the CbCR Regulations.



The Decision of the Tribunal

The Tribunal resolved in favour of the Company and dismissed the penalty for failure to file CbCR Notification imposed on the Company by the FIRS. This decision was hinged mainly on the fact that Section 61 of the FIRS Establishment Act specifically provides that only the Board of the Service may issue regulations. The interpretation of this section is that where there is no Board, no regulations can be validly issued. In the instant case, the CbCR Regulations was issued in 2018, a period during which the Board of FIRS was dissolved, therefore rendering the Regulations invalid.

In respect of the penalties imposed under the CbCR Regulations, the Tribunal held that a subsidiary legislation is enacted under and pursuant to the power conferred by the principal legislation, and the former must derive its force from the latter. Thus, the penalty imposed by a subsidiary legislation, that is the CbCR Regulations, cannot be higher than that prescribed by the principal Act, which is the FIRS Establishment Act.

The Decision of the Federal High Court (FHC)

Dissatisfied with the decision of the TAT, FIRS instituted an appeal against the judgment of the TAT at the FHC on the basis that the Tribunal erred in law when it declared the CbCR Regulations invalid and ruled in favour of Check Point.

The FHC followed the same rationale as the TAT and ruled in favour of the Company, citing the non-existence of a Board at the FIRS at the time the CbCR Regulations was issued. Accordingly, the CbCR Regulations was once again declared illegal, and the penalties imposed on the Company were squashed and the appeal dismissed.

Our Comments

The nod of the FHC to the Tribunal's judgement is a testament to the literal interpretation of Section 61 of the FIRS Establishment Act. For ease of reference, the section is reproduced below:

> *"The **Board** may with the approval of the Minister, make rules and regulations as in its opinion are necessary or expedient for giving full effect to the provisions of this Act and for the due administration of its provisions and may in particular, make regulations prescribing the-*
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> *a. forms for returns and other information required under this Act or any other enactment or law; and*
>
> *b. procedure for obtaining any information required under this Act or any other enactment or law." **(Emphasis ours).***

In determining the import of this section, the legal concept of *delegatus non potest delegare* applies. That is, a delegate cannot re-delegate functions assigned to it. Section 61 of the Act names the "Board" of FIRS as the authority responsible for making regulations; thus, the specificity of the authority implies the exclusion of others. This must be strictly applied to give legal backing to any regulations stemming from the section.

In the instant case, the FIRS did not deny the dissolution of its Board between 2012 and 2020. It is therefore safe to conclude that the requirement of the Act was not satisfied, and thus the CbCR Regulations was not issued pursuant to a competent authority as provided for by law.

Although the original appeal instituted by Check Point was in respect of Country-by-Country Regulations, the judgement of the FHC can be extrapolated to other regulations issued further to Section 61, within the period FIRS' Board was dissolved. Specifically, the FIRS has issued the following Regulations within this period: Income Tax (Transfer Pricing) Regulations 2018 (replacing the 2012 regulations); Income Tax (Country by Country Reporting) Regulations 2018; and the Income Tax (Common Reporting Standard) Regulations 2019. This portends a floodgate of lawsuits against the tax authority for filings made and, more likely, penalties wrongly imposed under these regulations and paid by taxpayers.

It is uncertain whether FIRS would further appeal this judgement at the Court of Appeal or accept the judgement of the Federal High Court in good faith. Where the latter option is adopted, it is expected that the CbCR Regulations and indeed all Regulations which may be affected by this judgement are re-issued with a commencement date that reflects a period where there is a functional Board of the FIRS. We also expect that the OECD CbCR MCAA will be domesticated and passed by the legislature to fulfil constitutional conditions for the implementation of international instruments. Where the regulations are reissued, it will only be applied prospectively, thus dismissing any current exercise or penalties imposed under the current Regulations, as retrospective application of a legal instrument is prohibited.

Notwithstanding the possible backlash from this judgement, we urge taxpayers to continue to comply with tax laws and regulations, including the CbCR Regulations, where applicable. This is especially so as the CbCR Regulations and other international tax-related regulations are further to multilateral agreements signed by Nigeria, and compliance with such agreements puts the country in good standing in the international tax environment and aligns with global best practice.