NIGERIA: LEGAL & REGULATORY

DOING BUSINESS IN NIGERIA[1]

Nigeria is essentially a free market economy. All business enterprises must be registered with the Corporate Affairs Commission. A foreign investor wishing to set up operations in Nigeria should take all steps necessary to obtain local incorporation of the Nigerian branch or subsidiary. Legal entities in Nigeria may take any of the following forms, although not all of these are permitted to trade commercially:

(i) Limited liability company (private or public);
(ii) Unlimited liability company;
(iii) Company limited by guarantee;
(iv) Foreign Company (branch or subsidiary of foreign company);
(v) Partnership/Firm;
(vi) Sole Proprietorship;
(vii) Incorporated trustees;
(viii) Representative office;

INCORPORATING A BUSINESS ENTERPRISE:

The following information relates to the entity forms suitable for doing business for profit, namely: (a) private company limited by shares, (b) public company limited by shares, (c) private company unlimited by shares, and (d) public company unlimited by shares. Aspects of this information documents are also relevant for companies limited by guarantee, which typically are deployed to charitable purposes including humanitarian or aid organisations, development organisations, and private donor foundations and funds. \

[1] This document is from the law firm of Synergy Law Partners, and intended to provide general information on the subject areas covered and is not published as the legal opinion of the law firm of Synergy Law Partners or any of its partners or fee earners on any specific legal situation. Accordingly, the firm shall accept no responsibility for any actions or steps taken by reliance only on the contents of this document

The Companies and Allied Matters Act, 1990[2] (CAMA) is the principal law governing the incorporation of businesses. The Corporate Affairs Commission (CAC) is charged with the registration of companies in Nigeria. The minimum authorised share capital is N10,000[3] in the case of private companies or N500,000 in the case of public companies. However, a company wishing to employ expatriates must be registered with a minimum share capital of NGN10,000,000 in order to comply with existing share capital requirements applicable to an application for an expatriate quota. In addition to the memorandum and articles of association, the following documents must be delivered to the CAC for verification and registration:

i. Availability/reservation of name Form
ii. Duly completed notice of situation of registered address in the prescribed form
iii. Duly completed particulars of first directors in the prescribed form
iv. Statement of authorized share capital and return of allotments in the prescribed form
v. A sworn statutory declaration of compliance by a Nigerian legal practitioner engaged in the formation of the company
vi. Copies of data page of Identification of directors (International Passport, Driver's Licence, or National Identification Card)
vii. Proof of competency/proficiency of at least one director where objects of proposed company are of professional or specialised nature

There must be a minimum of 2 shareholders and 2 directors. Shareholders may be individuals or corporations, but directors must be individual, natural persons

[2] Chapter C20, Laws of the Federation of Nigeria, 2004
[3] US$ = NGN156 (FY2012)

even if they represent corporations. All categories of company shares carry one vote. Shares with “weighted” voting rights are prohibited. All shares (i.e. whether ordinary or preferential) issued by a company must carry one vote in respect of each share.

FOREIGN ENTERPRISES, IMMIGRATION AND EXPATRIATES

A non-Nigerian may invest and participate in the operation of any enterprise in Nigeria. However, a foreign company wishing to set up business operations in Nigeria should take all steps necessary to obtain local incorporation of the Nigerian branch or subsidiary as a separate entity in Nigeria for that purpose. Until so incorporated, the foreign company may not carry on business in Nigeria or exercise any of the powers of a registered company.

Foreign investors may incorporate a Nigerian branch or subsidiary. The locally incorporated branch or subsidiary company must then apply to the Nigerian Investment Promotion Commission (NIPC) for Business Permit and other requisite permits and licences. Where such a company wishes to engage expatriates for the running of its operations, then it will need to apply to the Federal Minister of the Interior for an expatriate quota. Expatriate Quota is the ministerial approval granted to a company registered in Nigeria to employ non-Nigerians for work to be done in Nigeria on a permanent basis. Successful applications for expatriate quotas typically are followed by the issuance of residency cards[4] to individuals named in the relevant application. The Nigeria Immigration Service may also issue Temporary Work Permits to named expatriates engaged for a short periods by a Nigerian company. Proof of local skills gap may be necessary in order to win a permit.

[4] Combined Residence Permit and Alien Control Card (CERPAC) is issued by the Nigeria Immigration Service

Exempted Foreign Companies

A foreign company may apply to the Federal Executive Council, through the office of Secretary to the Government of the Federation for exemption from the requirement of incorporating a local subsidiary in the following cases

a) foreign companies invited to Nigeria by or with the approval of the Federal Government of Nigeria to execute any specified individual project;

b) foreign companies which are in Nigeria for the execution of a specific individual loan project on behalf of a donor country or international organisation;

c) foreign government-owned companies engaged solely in export promotion activities; and

d) engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments in the Federation or any of their agencies or with any other body or person, where such contract has been approved by the Federal Government.

Representative Offices

Foreign companies may set up representative offices in Nigeria. A representative office, however, cannot engage in business or conclude contracts or open or negotiate any letters of credit. It can only serve as a promotional and liaison office, and its local operational expenses have to be in-flowed from the foreign company. A representative office has to be registered with the CAC.

TAX AND FISCAL REGIME

Several different taxes are imposed and collected by the three tiers of government in Nigeria: the federal, state and local authorities. Each tier of government has its taxation authority clearly defined by the Taxes and Levies (Approved List for Collection) Act, 1998. Companies are required (and indeed would be well advised) to obtain tax clearance certificates (TCC) soon after incorporation. This is because most business-to-government transactions (and major business-to-business relations) cannot be concluded without a TCC showing that all taxes due for the preceding three years have been paid in full. Taxes are both direct and indirect, with some of the indirect taxes being merely administrative mechanisms for the collection of some of the direct ones. Some of the applicable taxes are outlined below.

Personal Income Tax

Every individual taxpayer is liable to pay tax on the aggregate amount of his income whether derived from, received in, or brought into Nigeria. Chargeable income for personal income tax purposes includes salaries, wages, commission, fees, allowances, dividends, etc. Certain items, though, are exempt from personal income tax, including medical or dental expenses incurred by employee, retirement gratuities and compensation for loss of office, cost of any passage to or from Nigeria incurred by an employee, interest on loans for developing an owner-occupied dwellinghouse, etc. Special note ought to be taken of the Residency Rule which determines whether and where an individual is chargeable to personal income tax in Nigeria. By operation of law, a person is deemed resident in Nigeria if he stays in Nigeria for 183 days in any 12-month period. Expatriates holding residence permits are chargeable to personal income tax even if they actually reside in Nigeria for less than 183 days. Personal income taxes are collected by state governments and governed by the Personal Income Tax Act, a federal statute of general application.

Companies Income Tax

This is a tax on the assessable profits of registered companies, at a rate of 30%. This must be distinguished from personal income tax withheld at source upon distribution of dividends to shareholders.

Petroleum Profits Tax

Companies engaged in petroleum extraction or transportation are liable to pay on income from the proceeds of sale of oil and related products used by the company in its own refineries plus any other income of the company incidental to its petroleum operations. The PPT rate is 85% but reduced to 65.75% during the first five years of operations. Companies under production sharing contracts pay PPT at a lower rate of 50%. Capital allowance and petroleum investment allowance. Capital allowance compensates for expenditure on equipment, pipelines, storage facilities, building and drilling costs, and these are described as ‘qualifying assets’. Capital allowance is computed at 20% of the cost of qualifying assets on a straight-line basis for the first four years and 19% in the fifth provided that amount of PPT payable after deduction of capital allowance does not fall below 15% of the PPT before capital allowance.

Value Added Tax

This is a consumption tax levied each stage of the consumption chain and borne by the final consumer. This is charged at a flat rate of 5% and is meant to be collected by all providers of goods or services. All business organisations are required to register with the Federal Inland Revenue Service as collection agents.

Withholding Tax

This is an administrative arrangement contained in the Personal Income Tax Act, Companies Income Tax Act and the Petroleum Profits Tax Act for the withholding at source, by anyone paying for goods or services supplied, of the applicable tax and remitting to the relevant tax authorities within 30 days of such deduction.

Capital Gains Tax

All gains accruing to a taxpayer from the sale, lease or other transfer of proprietary rights in a chargeable interest are subject to capital gains tax at rates varying with the taxing authority.

Other taxes

These include stamp duty, customs and excise duty, pension contributions, business premises registration levies, etc.

Tax Treaties

Nigeria has concluded reciprocal tax arrangements with a number of countries and these are designed to prevent double taxation by ensuring that the tax payable in Nigeria on the profits of a Nigerian company being remitted into Nigeria are reduced by the amount of the foreign tax paid abroad in the relevant country, and vice versa. Some of these countries include the United Kingdom, The Netherlands, Belgium, France, Canada, and Pakistan.

REPATRIATION OF CAPITAL AND RETURNS ON INVESTMENT

Profits and Capital: Under the Foreign Exchange (Miscellaneous Provisions) Act 1995, foreign investors in approved enterprises are guaranteed unconditional repatriation through an authorized dealer, in freely convertible currency, of (a) dividends or profits attributable to investment in Nigeria, (b) payments in respect of loan servicing where foreign loans have been obtained, as well as (c) capital in the event of liquidation, net of withholding tax of 10% in each case. This is subject to the production of a certificate of capital importation usually obtained from licensed banks, acting as agents of the Central Bank of Nigeria.

Consultancy Fees: Payments to a foreign consultant may be made directly abroad, but subject to a maximum of 5% of the costs of the relevant project. Consultancy fees are permitted for projects demonstrably involve high technologies. Fees are subject to 10% Withholding Tax.

Management Fees: Management Fees are permitted where there is Management Services Agreement registered with the National Office for Technology Acquisition and Promotion (NOTAP). The amount allowed is 5% of net sales or profit before tax where sales value is not applicable. Management fees as well as royalty payments are subject to 10% Withholding Tax. Note must be taken that failure to register a management services or a similar agreement does not invalidate the agreement or the obligations therein committed; rather, it would mean that any fees payable under such an unregistered agreement cannot be remitted out of Nigeria. The fees must then be applied within Nigeria.

INDUSTRY-SPECIFIC GOVERNMENT AGENCIES

Department of Petroleum Resources: Companies involved in the oil and gas industry including oilfield services, marine assistance, contracting and supply chain participation are required to register with the DPR in the relevant category (General, Major, or Specialised) depending on the type and scope of service involved.

Nigerian Communications Commission: Companies seeking to operate in telecommunications and information technology require prior licensing by the NCC.

NAFDAC[5]: Companies involved in the importation or manufacture of food, drugs, cosmetics, chemicals and related controlled substances are required to obtain the necessary approvals from the NAFDAC

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[5] National Agency for Food and Drug Administration and Control