

Ngex TM **REPORTS**

ESTABLISHING ENTERPRISES IN NIGERIA:

CORPORATE STRUCTURES & REGULATORY ISSUES

**WITH
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**ESTABLISHING ENTERPRISES IN NIGERIA
CORPORATE STRUCTURES & REGULATORY ISSUES**

1. Background

- 1.1. This report will focus on the suitable structure that will enable investors seeking to do business in Nigeria comply with all regulatory requirements needed to properly establish their enterprise in the Country.
- 1.2. It will also emphasise on the requisite permits, approvals and licenses that may be required to comply with the laws of the Federal Republic of Nigeria as well as the relevant tax obligations.

2. Enterprise Establishment in Nigeria

- 2.1. Nigeria is essentially a free enterprise country, subject only to such regulations as are necessary for national interest. As such, any person can participate in the Nigerian Economy. Participation may be through sole proprietorship, partnerships, and unincorporated joint ventures, limited and unlimited liability companies.
- 2.2. The Company and Allied Matters Act (CAMA) provides, under different parts, for the following types of business organizations:
 - 2.2.1. Part A
 - 2.2.1.1. Limited Liability Company: a company where the liability of its members is limited by the memorandum of association as to the amount, if any, unpaid on the shares respectively held by them.
 - 2.2.1.2. Unlimited Liability Company: a company not having any limit as regards the liability of its members.
 - 2.2.1.3. Company limited by Guarantee: a company without a share capital. (Most times a not for profit organization)

2.2.2 Part B

- 2.2.2.1 Business Name registrations for
 - i. Partnership/Firm
 - ii. Sole proprietorship

2.2.3 Part C

2.2.3.1 Incorporated trustees

2.2.3.2 Foreign Company (branch or subsidiary of a foreign company)

2.2.3.3 Representative Office

- 2.3 Any two or more persons may form and incorporate a company in Nigeria as long as the laid down requirements for doing so are followed. With regards to foreigners, however, there are additional requirements which must be met before a business can be establishment in Nigeria.
- 2.4 A foreigner or foreign company may participate in forming a company, subject to the provision of any law regulating the rights and capacity of foreigners to engage and trade in business in Nigeria.
- 2.5 By virtue of the *Nigerian Investment Promotion Decree (now Act) of 1995*, non-Nigerians can freely **invest** and **participate in the operation** of any enterprise in Nigeria, with the exception of those enterprises in the negative list of the Act.
- 2.6 The negative list includes the production (not rendering of service) of arms, ammunition, military and paramilitary wears and such other items as the Federal Executive Council may from time to time determine. "Invest" refers to shareholding, while "participate in the operation" refers to management of the enterprise.
- 2.7 Where the area of investment is not prohibited, a foreign investor may engage in any enterprise in Nigeria in any of two ways.
- 2.8 The investor can start a business on his/her own or in a joint venture with Nigerians by forming and registering a company at the Corporate Affairs Commission (CAC) www.cac.gov.ng, and then registered with the Nigerian Investment Promotion Commission (NIPC) www.nipc-nigeria.org.
- 2.9 The NIPC acts as a liaison between the foreign enterprise and relevant government departments from which the foreigner may need to obtain certain permits.
- 2.10 Although all foreign companies intending to do business in Nigeria must take necessary steps to obtain incorporation as a separate entity in Nigeria, a foreign company may apply to the Federal Executive Council for exemption from registration locally if it belongs to one of the following categories, that is:
- 2.10.2 Foreign companies invited to Nigeria by or with the approval of the Federal Government to execute only specified individual projects.
- 2.10.3 Foreign companies which are in Nigeria to execute special loan projects on behalf of donor countries.
- 2.10.4 Foreign Government owned companies engaged solely in export promotion activities.

2.10.5 Engineering consultants and technicians engaged on any individual specialist project under contract with any governments in the Federation or Government Agencies where the contract has been approved by the Federal Government.

3 Returns on Investment & Repatriation Mechanisms

3.2 The *Nigerian Investment Promotion Commission Decree 1995* and the *Foreign Exchange Monitoring & Miscellaneous Provisions Decree 1995* guarantee to foreign investors unrestricted **remittance of dividends or profits** (net of applicable tax - 10%) deriving from the foreign investment in Nigeria. This is conditioned upon proper "Evidence of Capital Importation" usually issued by the banks as agents of the Central bank of Nigeria. The law also allows the repatriation of the capital at the end of the project (in this case on liquidation).

3.3 **Management fees** (limited to 5% of turnover) can be paid subject to proper registration with the National Office for Technology Acquisition and Promotion (NOTAP). Management and Technical services fees attract 10% withholding tax. So do Royalty payments.

3.4 **Consultancy fees** can be paid directly abroad. Payments to a foreign consultant can therefore be made but subject to a maximum sum of 20% of the costs of the project. A higher percentage can be negotiated depending on the level of technology involved or demonstrated to be involved. Consultancy fees are however subject to 10% withholding tax.

4 Getting By

4.2 Returns on investment, interest payments, dividends, etc can be repatriated using a combination of the mechanisms allowed under the existing foreign exchange guidelines through banks as agents of the Central Bank of Nigeria.

4.3 However, some of these mechanisms can be filled with inefficiencies, delays and wastage. Here lies the practicality of a PARENT-SUBSIDIARY relationship and the effective use of a Domiciliary Account and the dispensation of the "No Third party transfer" occasional restrictions.

5 Regulatory Issues

5.2.2 Where a foreigner incorporates a company, certain permits have to be obtained before the foreigner can do business in Nigeria. They are:

- 5.2.3 *Business Permit*: an operational and permanent permit for the local operation of a business with expatriate investment either as a branch or subsidiary of a foreign company or otherwise country.
- 5.2.4 *Expatriate Quota*: the permission given to a business to employ foreigners. The number of the quota depends on the share capital of the company and a minimum share capital of Ten Million Naira is necessary for a company to qualify for expatriate quota.
- 5.2.5 *Combined Expatriate Residence Permit and Alien Card*: Registration permits an expatriate to live and work in Nigeria on a long-term basis. For an expatriate to obtain Resident permit, he must obtain employment with a company that has expatriate quota position. Such a person will be expected to come into the country with a special type of entry visa know as STR (Subject To Regularization) visa after which his resident permit will be processed.

Other approvals, which may be necessary, are:

- 5.2.6 *Registration of securities*: a foreigner who owns shares in any Nigerian company must apply to the Security and Exchange Commission (SEC) for the registration of those shares this is because the Investment and Securities Decrees of 1999 provides that the SEC must keep a register of foreign direct investment and foreign portfolio investments. Further enquiries may be made to secng@compuserve.com
- 5.2.7 *Registration with the Department of Petroleum Services* www.dprnigeria.com: Registration with the Department of Petroleum Resources may be necessary where you seek to provide services, equipment supplies and maintenance services to companies in the oil industry. This registration can be done in two categories, i.e.
- 5.2.7.1 General Purpose Category: These are those companies that do not render highly specialized or technical services. The registration process here is fairly routine and there is no requirement to show expertise in any field.

5.2.7.2 Specialized Categories: This is for companies rendering specialized services such as Equipment Supply services; Consultancy services; laboratory services; Calibration services; Applicants in this category will amongst other things be required to show evidence of expertise and technical Know-how in the specialized area of activity where their services will be required.

5.2.8 *Registration with National Office of Technology Acquisition and Promotion (NOTAP)*: Every contract or agreement involving the transfer of foreign technology to a Nigerian company must be registered with the NOTAP within sixty (60) days of execution or conclusion of the agreement.

An agreement involves transfer of technology if its purpose is connected with any of the following matters:

- i. The use of trade marks
- ii. The right to use patented inventions,
- iii. The supply of technical expertise in the form of the preparation of plan, diagrams, operating manuals or any other form of technical assistance of any description whatsoever,
- iv. The supply of basic or detailed engineering,
- v. The supply of plants and machinery, and
- vi. The provision of operating staff or managerial assistance and the training of personnel.

Registration with NOTAP is necessary, as non-registration will mean that the foreigner will not be able to repatriate any payment due him from the agreement.

RELEVANT TAX REGULATIONS COMPANIES INCOME TAX PERSONAL INCOME TAX TRANSACTIONAL TAXES

Under current Nigerian law, taxation is enforced by the 3 tiers of Government, i.e. Federal, State, and Local Government with each having its sphere clearly spelt out in the Taxes and Levies (approved list for Collection) Decree, 1998. Of importance at this juncture however are tax regulations pertaining to investors both foreign and Local.

The importance of tax regulations cannot be over-emphasized, as most transactions with any Ministry, department, or government agency cannot be concluded without evidence of tax clearance. i.e. a Tax Clearance Certificate certifying that all taxes due for the three immediately preceding years of assessment have been settled in full. The following are some of the relevant tax regulations in the country.

1. **Value Added Tax (VAT):** This was introduced by the VAT decree No. 2 of 1993, to replace the old sales tax. It is a consumption tax levied at each stage of the consumption chain, and is borne by the final consumer. It requires a taxable person upon registering with the Federal Board of Inland Revenue to charge and collect VAT at a flat rate of 5% of all invoiced amounts of taxable goods and services.

VAT paid by a business on purchases is known as input tax, which is recovered from VAT charged on company's sales, known as output tax. If output exceeds input in any particular month the excess is remitted to the Federal Board Of Inland Revenue (FBIR) but where input exceeds output the taxpayer is entitled to a refund of the excess from FBIR though in practice this is not always possible.

A Taxpayer however has the option of recovering excess input from excess output of a subsequent period. It should be stated at this point that recoverable input is limited to VAT on goods imported directly for resale and goods that form the stock-in-trade used for the direct production of any new product on which the output VAT is charged.

2. **Capital Gains Tax:** This accrues on an actual year basis and it pertains to all gains accruing to a taxpayer from the sale or lease or other transfer of proprietary rights in a chargeable interest which are subject to a capital gains tax of 10%, such chargeable assets may be corporeal or incorporeal and it does not matter that such asset is not situated in Nigeria. Where however the taxpayer is a non-resident company or individual the tax will only be levied on the amount received or brought into Nigeria.

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Computation of capital gains tax is done by deducting from the sum received or receivable from the cost of acquisition to the person realizing the chargeable gain plus expenditure incurred on the improvement or expenses incidental to the realization of the asset.

3. **EDUCATION TAX:** An education tax of 2% of assessable profits is imposed on all companies incorporated in Nigeria. This tax is viewed as a social obligation placed on all companies in ensuring that they contribute their own quota in developing educational facilities in the country.
4. **PERSONAL INCOME TAX:** The legal basis for this tax is found in the provisions of the Personal Income Tax Decree [now Act]. 104 of 1993.

Every taxpayer in Nigeria is liable to pay tax on the aggregate amount of his income whether derived from within or outside Nigeria, the salaries, wages, fees, allowances, and other gains or benefits, given or granted to an employee are chargeable to tax. The Employers of labor are deemed to be agents of the tax authority for the purposes of remitting taxes deducted from salaries due to employees.

However residency of the Taxpayer determines the extent of a taxpayer's liability in Nigeria. A person's place of residence for this purpose is defined as a place available for his domestic use in Nigeria on a relevant day, excluding hotels and rest houses. A person is deemed resident in Nigeria if he resides in Nigeria for 183 days in any 12-month period, expatriates holding residence permits are liable to tax in Nigeria even if they reside in the country for less than 183 days in any 12-month period. Once residence can be established, the relevant tax authority of the territory is the tax Authority in which the taxpayer has his place of residence or principal place of business.

The following are however exempted from tax: -

- Medical or Dental expenses incurred by the employee;
- Retirement gratuities and compensation loss of office;
- The cost of passage to or from Nigeria incurred by the employee;
- Interest on loans for developing an owner-occupied residential house;
- Leave allowance, which is computed as 10% of annual basic salary subject to a maximum of N7, 500 per annum.

5. **COMPANIES INCOME TAX:** Tax is payable for each year of assessment of the profits of any company at a rate of 30%. These include profits accruing in, derived from brought into or received from a trade, business or investment. Also companies paying dividends to its shareholders are first obliged to pay tax on its profits at the companies tax rate. Generally in Nigeria company dividends or other company distribution whether or not of a capital nature made by a Nigerian

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company is liable to tax at source of 10%, however dividends paid in the form of bonus share or scrip shares to individual share holders are not subject to tax, where also a company is a shareholder in another company then such dividends are excluded from the profits of the company for the purposes of computation of the tax.

6. **NIGERIAN SOCIAL INVESTMENT TRUST FUND (NSITF):** This is governed by the NSITF Decree, and requires everybody employed in a Nigerian incorporated company to contribute a certain percentage of their salary to the fund. This contribution is based on the assumption that the maximum basic salary in Nigeria is ₦48, 000 per annum; Expatriates are excluded from this requirement where they can show proof of a similar contribution in their home country. The rate of contributions is defined as follows, where the contributor is an employee, 2.5% of his salary subject to a maximum of N 1,200 per annum; Where the contributor is an employer, 5% of basic salary subject.
7. **WITHHOLDING TAX:** Nigerian law subjects certain activities and services to Withholding Tax. This basically means that where during transactions in any of the specified activities or services, a payment is due from one person to another, the person making the payment is expected to deduct tax at the applicable rate and remit it to the relevant tax authority. This should be done not later than 30 days after the deduction. This provision can be found in sections 68 to 72 of the Personal Income Tax Decree No. 104 of 1993; Sections 60 to 64 of the Company Income Tax Act (as amended), and Section 51(a) of the Petroleum Profits Tax Act (as amended). Some of these activities and Services and their current applicable rates include:-

Payment	%Corporate	%Individual/Partnership
Rent	10	10
Construction	5	5
Dividend	10	10
Royalties	10	5
Commission	10	5
Professional Fees	10	5
Technical Fees	10	5
Consultancy Fees	10	5

8. **Tax Treaties:** Nigeria has a number tax treaties referred to as “double taxation” agreements with a number of countries, these are designed to ensure that the tax payable in Nigeria on the profits of a Nigerian company being remitted into the country are reduced by the amount of “foreign Tax” paid abroad and vice versa where an overseas company receives profits from Nigeria that have already been taxed in Nigeria. Some of these countries include the UK, France. The Netherlands, Belgium, Canada and Pakistan.

CONCLUSION

With the present policy of liberalization of the Nigerian Economy being vigorously pursued by the Federal Government, Nigeria is fast becoming an investors haven albeit with a few teething problems. What is required for the foreign investor however is a careful approach to the following areas:

- Proper enterprise set-up.
- Procurement of necessary permits and approvals.
- Access to the best professional advice.

ABOUT NgEX (“NigeriaExchange”)

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