

THE LEGAL FRAMEWORK FOR UNDERTAKING BUSINESS IN NIGERIA

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INTRODUCTION

Investor Friendly Environment

- Repeal of protectionist/regulatory legislations
- 100% foreign ownership now permitted
- Liberalized capital importation

BREAKING INTO THE MARKET

- n Compliance with Industry Regulations
- Dependable/Resourceful Local Contacts
- Local Embassy for verification of contacts and information
- Reputable Legal Adviser and other relevant consultants – invaluable source of reference.

MAIN LEGISLATIONS

- Companies and Allied Matters Act (CAMA) 1990
- National Investment Promotion Act 1995
- Foreign Exchange (Monitoring & Miscellaneous Provisions) Act 1995

BUSINESS VEHICLES

- Agency/Franchising
- Acquisition of shares in existing local company
- Establishment of a company – 100% foreign ownership/joint venture

AGENCY/FRANCHISING

- Incorporation not required
- Suitable for sale and supply of branded goods and services
- Define the nature of transaction – exclusive/non exclusive relationship
- Protect trademarks and other intellectual properties
- Establish mechanism for dispute resolution and determination of contract
- Agencies no longer encouraged.

Acquisition of shares in existing local company

- Incorporation not required
- Suitable for portfolio investment
- Conduct Due Diligence
- Not common except if buying into joint Venture (JV) enterprise

Establishment of a company

- **100% Foreign Equity Shareholding**
- **Joint Venture with Nigerians**

100% Equity Shareholding

- Structural Simplicity
- Uncomplicated management and Financial Control
- Uncomplicated Profit/Capital Repatriation arrangement

Joint Venture

- knowledge of local terrain and relevant contacts
- Joint venture agreement before incorporation to define the following issues;
 - * Scope, objective and duration of the venture
 - * Equity Structure and returns on investment
 - * Management and Technical functions and control
 - * Buyout and Termination
 - * Supremacy of JV agreement
 - * Dispute Resolution

GENERAL REQUIREMENT FOR ESTABLISHING A COMPANY

- INCORPORATION
- OBTAIN PRE-OPERATIONAL TAX CLEARANCE CERTIFICATE AND VAT REGISTRATION
- OBTAIN FOREIGN INVESTMENT APPROVALS
- CONCLUDE IMMIGRATION FORMALITIES FOR EXPATRIATE EMPLOYEES

INCORPORATION

STATUTORY REQUIREMENTS

- Minimum authorised share capital of N10,000.00 of which 25% must be allotted to the subscribers – for foreign investors minimum paid up share capital of N10,000,000.00 (approx US\$75,200.00) required for the grant of a business permit
- Minimum of 2 Shareholders – foreign shareholder + local nominee, individuals/corporate citizens allowed

- Minimum of 2 Directors - both may be non - resident but one Nigerian advisable

PROCEDURE

- Obtain Incorporation Forms
- Prepare memorandum and Articles of Association (Memart)
- Have a designated registered office in Nigeria, which cannot be a post office box or private mail bag address
- Pay Statutory Charges
- File Incorporation forms and Memart at the CAC, obtain Certificate of Incorporation

PRE-OPERATIONAL TAX CLEARANCE CERTIFICATE AND VAT REGISTRATION.

- Registration with the Federal Board of Inland Revenue (FIRS) for corporate tax and VAT purposes
- Obtention of a pre – operational tax clearance certificate and VAT certificate. These documents are required to process the company's business permit.

FOREIGN INVESTMENT APPROVALS.

- National Investment Promotion Council (NIPC) - Registration
- Business permit – to enable a foreign investor to hold shares in a company incorporated in Nigeria. In practice, it is possible to incorporate and then obtain a business permit later

- Expatriate quota – to enable the company to employ expatriate staff to fill key (usually management or technical) positions. Multiple quota positions are more favourably considered in respect of highly capitalised companies.

CONCLUDE IMMIGRATION FORMALITIES

- Obtain Residence permit for expatriate employees.
- Apply to the Nigerian embassy in the country in which the expatriates reside, requesting that they be granted business visas subject to regularisation (STR) on their arrival in Nigeria.
- Expatriate employee to call at the Nigerian embassy with the following documents:

- letter of appointment
- letter of acceptance of the employment offer.
- The NIPC or Federal Ministry of internal Affairs letter granting the company expatriate quota positions
- Original and certified true copies of the professional qualification certificate of the employee or certified translations if not in English.
- a copy of the company's letter applying for the STR Visa.

- Certified copies of marriage documents/birth certificates in respect of any accompanying spouse or children.

After the documents have been vetted and approved, an STR visa is granted. The expatriate is also given a package by the embassy officials containing authenticated documents. These are submitted to the immigrations department after arrival in Nigeria and will be used to process his residence permit.

CAPITAL IMPORTATION

Investment capital can be in cash or kind i.e. equipment/machinery.

CASH

- foreign capital can be imported into Nigeria through domiciliary accounts operated with any of the licensed banks in Nigeria and may be repatriated through the same channels
- Importation evidenced by CCI issued by the bank.

EQUIPMENT

- Importation of plant, machinery and raw materials
- CCI issued by local bank upon receipt of shipping, customs documents evidencing the importation and board resolution of company

TECHNOLOGY TRANSFER

- Any contract or agreement involving the importation or transfer of foreign technology must be registered with the National Office of Technology Acquisition and Transfer (NOTAP)
- Fees/royalties are regulated and range from 1% to 5% of net sales for technical assistance and 2% to 5% profits before tax for management services.

OIL INDUSTRY ACCREDITATION (DPR PERMIT)

- All companies operating in the oil and gas sector must be accredited annually by the Department of Petroleum Resources (DPR)
- Accreditation process involves the completion and submission of application form with relevant documentation.

TAXATION

- **Companies Income Tax**
- **Withholding Tax**
- **Personal Income Tax**
- **Value Added Tax**
- **Other taxes**
- **Double Taxation Treaty (DTT)**

COMPANIES INCOME TAX

- Nigerian registered companies in the oil service sector are subject to companies income tax chargeable at the rate of 30% on the profit
 - * accruing in
 - * derived from
 - * brought into or
 - * received in Nigeria

- Foreign companies liable to tax on a deemed profit basis (presently 20%) on the turnover of the company's operations in Nigeria

- Effective tax rate would amount to 6% arrived as follows:

- deemed profit 20% of turnover
- tax liability (CITA) 30% of deemed profit
- final tax liability 6%

WITHHOLDING TAX

The Companies Income Tax Act (CITA) provides for tax to be withheld at source from a receiving company or individual at various rates depending on the income generating activity as follows;

- dividends 10%
- all aspects of building, construction and related services 5%
- contracts for supply 5%

- commission 10%
- rents 10%

Withholding tax is treated as an advance tax on a company's final tax liability. Accordingly, a non-resident company assessed on a deemed profit basis would only be obliged to pay the balance of 1%, having already had 5% withheld at source.

VALUE ADDED TAX

Imposed by the provisions of the Value Added Tax (VAT) Act 1993 and made payable on the value of goods and services listed in the schedule to the Act at the rate of 5%

Machinery and equipment imported by a local subsidiary subject to 5% VAT, calculated on an aggregate value of cost, insurance and freight, customs duties and all other charges on the imported machinery or equipment

It is the statutory responsibility of persons registered to collect on supplying taxable goods or services and render monthly returns to the Federal Inland Revenue Service (FIRS).

PERSONAL INCOME TAX

- On a sliding Scale from 5% to 25%
- Liability based on 183 day residence in a consecutive 12 month period
- Expatriates generally assessed on a deemed salary basis by revenue Authority but open to negotiations

DOUBLE TAXATION TREATY

BETWEEN NIGERIA AND THE UK

The taxes covered by the DTT between Nigeria and the UK is embodied in Article 2 of the Federal Republic of Nigeria and the United Kingdom of Great Britain and Northern Ireland) Order made pursuant to Section 34(1) of CITA as follows;

- Income tax;
- Corporation tax;
- Capital gains tax; and
- Petroleum revenue tax.

The general principles, which guide the taxation of companies in one contracting state in the other contracting State, are the principles of “Permanent Establishment” and “Attribution of Profits”

“the profits of an enterprise of a contracting state shall be taxable only in that state unless the enterprise carries on business in the other contracting state through a permanent establishment situated therein....”

OTHER TAXES

- Educational Tax – chargeable at the rate 2% of the assessable income of the company
- State and Local Governments rates and levies as may be levied e.g.
 - Tenement rate
 - Business Premises levies
 - etc

GOVERNMENT POLICIES

- Local Content Policy
- Coastal and Inland Shipping Regulations

LOCAL CONTENT POLICY

- To enforce the deliberate utilisation of Nigerian human and material resources and services in the exploration, development, exploitation, transportation and sale of Nigerian crude oil and gas resources.
- To ensure sustained and measurable increase in the use of Nigerian personnel, materials and services and increase quantum of composite value added to or created in the Nigerian economy.

COASTAL & INLAND SHIPPING REGULATIONS

The Coastal and Inland Shipping(Cabotage) Act
2003

Prohibition

Every vessel other than those wholly owned, manned, built and registered in Nigeria prohibited from engaging in domestic coastal carriage of cargo or passengers within Nigerian territorial waters.

Exemptions

- foreign salvage vessels
- licenses

Waivers

On application waivers may be granted to the following classes of vessels amongst others;

- Shipping companies and vessels owned by a JV between Nigerians/Non-Nigerians with at least 60% beneficial Nigerian holding;
- Nigerian registered vessels owned by Nigerian registered companies, provided they are in compliance with the Act.

EXPORT FREE ZONE BUSINESS INCENTIVES

- CALABAR - Cross River State
General Export free Zone
- ONNE - Rivers State
Platform for oil and gas industry support

AVAILABLE INCENTIVES:

- Exemption from local incorporation requirements
- Exemption from local corporate taxes, custom and excise duties within the zone
- Unrestricted remittances of dividends, profits and capital repatriation
- Deregulated foreign exchange dealings – goods and services may be traded in foreign currency

SUMMARY

- n FAMILIARISE YOURSELF WITH REGULATORY FRAMEWORK – SEEK PROFESSIONAL ADVICE EARLY
- n REGISTER LOCAL SUBSIDIARY – 100% EQUITY RECOMMENDED UNLESS OTHERWISE REQUIRED BY CONTRACT ACTIVITY
- n ALLIANCE/PARTNERING, NOT AGENCY, THE WAY TO GO
- n HAVE DEMONSTRABLE LOCAL CONTENT STRATEGY
- n ENSURE EFFECTIVE EXIT STRATEGY