BANWO & IGHODALO

DOING BUSINESS IN NIGERIA: SOME OF THE INCENTIVES AVAILABLE TO INVESTORS

INTRODUCTION

Given Nigeria's vast human and natural resources (which position her as a frontier market and potential investment haven) and against the background of the recent rebasing of her GDP (which resulted in her emergence as Africa's largest economy), Nigeria should ordinarily not be rated among countries with low competitiveness. However, the World Economic Forum Global Competitiveness Report 2014–2015 placed Nigeria in the 127th position out of the 144 countries rated. This is the case, notwithstanding an array of investment incentives put in place by the Nigerian government in order to engender competitiveness and attract investments.

This article presents an overview of some of the various investment incentives available in Nigeria and the legal framework underpinning such investment incentives.

BASIC CONSIDERATIONS

In conceptualizing and formulating incentive packages, the Nigerian government has largely been driven and guided by a number of key considerations including the following:

1. Support for infant industries;

2. Encouragement of investment in industries which have potential multiplier effects on the growth of the economy, including but not limited to employment generation & manpower development;

3. Promotion of non-oil exports, with potential attendant positive impact on foreign exchange earnings; and

4. Local Content Development.

FORMS OF INCENTIVES

In Nigeria, some of the various investment incentives provided under the relevant laws and regulations include tax holidays; tax credits; capital allowances; investment allowances; tax exemptions; duty drawback; subsidies; export expansion grants; export development funds; double taxation reliefs; and investment promotion and protection agreements, among others.

LEGAL FRAMEWORK

One of the key legislation enacted for the purpose of encouraging enterprises in Nigeria is the Nigerian Investment Promotion Commission Act ("NIPC Act"), 1995 (Cap N117, Laws of the Federation of Nigeria ("LFN") 2004). The Nigerian Investment Promotion Commission (the "NIPC") is established by the NIPC Act as the agency of the Federal Government of Nigeria charged with the duties of encouraging and promoting investment in the Nigerian economy and for other related matters (See generally Section 4 of the NIPC Act).

By the provisions of Section 21 of the NIPC Act, ownership of enterprises in Nigeria has generally been liberalized. To this effect, a foreign enterprise can generally invest in all or a portion of the shares of any Nigerian enterprise (other than few business activities expressly prohibited by the NIPC Act) in any convertible foreign currency; thereby opening up the Nigerian economy to foreign investment capital.

By virtue of Section 23 of the NIPC Act, the NIPC is empowered to issue guidelines and procedures designating certain sectors of the Nigerian economy as “priority areas” for the purpose of receiving targeted incentives. Further, Section 30 of the NIPC Act grants the NIPC power to generally make regulations for the implementation of the objectives for which the NIPC was set up, as well as exercise its powers. Pursuant to such powers and those conferred by the Industrial Development (Income Tax Relief) Act (“IDITRA”), Cap I7, LFN 2004 (note that Section 1 of IDITRA empowers the President to cause to be published in the gazette of the Federal Government of Nigeria, a list of such industries and products that may be considered as pioneer industries and pioneer products, having regard to national industrial development plan and public interest), the NIPC has published several lists of pioneer industries/products that are eligible for the conferment of “Pioneer Status” – a major investment incentive in Nigeria, which effectively operates as a tax holiday for a specified period, up to a maximum period of five (5) years. The Pioneer Status Incentive Regulations 2014 issued by the NIPC and which became effective from 30th January 2014 specify the conditions for eligibility, application fees and other requirements for benefitting from this incentive.

It is instructive to note that most of the incentives provided to enterprises in Nigeria come in form of tax reliefs. For instance, the Companies Income Tax Act, Cap C21, LFN 2004 (“CITA”), permits deduction, from taxable income, of expenses incurred wholly exclusively and necessary in the promotion of a business venture, provides for capital allowances for qualifying capital expenditure incurred in the course of doing business (as provided for under the Second Schedule to the CITA) and grants tax exemption for interest payable in relation to foreign and agricultural loans invested in Nigeria under certain circumstances, as provided for under the Third Schedule (pursuant to Section 11) to the CITA, amongst other incentives.

Also, as a way of encouraging international trade and investment by cutting down on costs of international transactions, Nigeria has entered into Double Taxation Agreements (“DTAs”) with a number of countries to provide relief from double taxation, in respect of taxes which are payable on any taxable profit in Nigeria and any taxes of similar character imposed by the laws of the foreign country involved. Countries with which Nigeria has signed subsisting DTAs include Belgium, Canada, China, France, the Netherlands, Pakistan, Philippines, Romania, South Africa, and the United Kingdom.

Further, for the purpose of encouraging rapid industrial and local content development, attracting foreign direct investment and promoting public-private-partnership for economic development (especially in export-orientated industries), the Nigerian government has designated certain areas as free zones or export processing zones where enterprises enjoy exemption from taxes on their profits and other fiscal incentives and benefit from economies of scale and concentration of infrastructure. In this connection, Section 2 of the Nigeria Export Processing Zones Act (“NEPZ Act”), 1992 (Cap N107 LFN 2004) establishes the Nigeria Export Processing Authority (the “NEPZA”) as the agency charged, under Section 4 of the NEPZ Act, with general administration, supervision and coordination of the activities within Export Processing Zones (“EPZ”) in Nigeria. The President is empowered (under

Section 1 of NEPZ Act), on the recommendation of the NEPZA, to designate any area in Nigeria as an EPZ.

There is also the Oil and Gas Free Zone Onne, Rivers State ("OGFZ") administered by the Oil and Gas Free Zone Authority (the "OGFZA"), which was created by the Oil and Gas Export Free Zone Act ("OGFZ Act"), 1996 (Cap O5, LFN 2004). The OGFZ Act provides for incentives to oil & gas companies operating within the OGFZ, as well as companies providing services and supplying equipment to such oil & gas companies within the OGFZ. The regulatory and operational guidelines applicable within the OGFZ are similar to those applicable in other (general) EPZs, save that while the former is created specifically for oil and gas businesses, the latter cater for the development of multiple industries. Registration of enterprises within the OGFZ should generally be easier and faster while residence and work permits for expatriates are seamlessly processed and obtained within the OGFZ. Procedures for customs clearing of cargoes in the OGFZ are without the usual bureaucratic hassles experienced by shippers and operators at the regular ports.

Some of the other incentives enjoyed within the OGFZ include exemption of "Form M" prior to shipment; possibility of breaking bulk goods into smaller units to be repackaged, sold and even exhibited; exemption from payment of customs duty on goods exported from, and consumed within the OGFZ; and exemption from import and export licences for investors. Notably also, foreign exchange ("FOREX") regulations are relaxed within the OGFZ. In this connection, the Central Bank of Nigeria in its "Guidelines for Banking Operations in the Free Trade Zones in Nigeria, 2015" makes provisions for seamless foreign exchange transactions in all free trade/export processing zones.

In addition to the foregoing, there are specific incentives available to investors in Nigeria's extractive sectors, such as the petroleum and mining sectors. Fiscal arrangements applicable to companies operating in the Nigerian petroleum upstream sector depend on the nature of petroleum arrangement under which they operate. By virtue of the Petroleum Profits Tax Act, Cap P13, LFN, 2004 ("PPTA"), upstream petroleum operations are generally taxed at the rate of 85% of assessable profits. However, during amortization of pre-production allowance, tax is calculated at 65.75% as against the usual rate of 85%. Also, by virtue of the Deep Offshore and Inland Basin Production Sharing Contracts Act ("DOIBPSCA"), companies conducting petroleum operations under production sharing contracts with the Nigerian National Petroleum Corporation in deep offshore and inland basin terrains enjoy a reduced tax rate of 50%. Marginal field operators enjoy a reduced tax rate of 55%. Further, income that has been subject to tax under the PPTA is not subject to any further tax. Thus, dividends earned by investors in such companies do not suffer withholding tax.

In addition, all expenses which are wholly, exclusively and necessarily incurred in furtherance of the petroleum operation of the company are tax deductible against the company's revenue before ascertaining the taxable profit. By the provisions of paragraph 5 and Table 1 of second schedule to the PPTA, capital allowance can be claimed in respect of qualifying capital expenditure at the rate of 20% per annum for four years and 19% in the fifth year and the remaining 1% in the books. In addition to the capital allowance, upstream companies also enjoy an investment allowance on capital expenditure (of 50% in relation to production sharing contracts and 5-20% for lease/licence holders).

In order to encourage offshore production, the DOIBPSCA provides a graduated scale for royalties applicable to production sharing contracts, which results in a reduction in royalties based on water depth (from 12% in areas from 201 to 500 metres water depth, to 0% for areas above 1,000 metres depth).

To encourage gas production, profits from gas production are taxed at the CITA rate (i.e. 30%), rather than under the PPTA. Further, section 39 of CITA provides certain incentives for gas utilization (gas utilization typically means the marketing and distribution of natural gas for commercial purposes). These incentives include: tax free period of three (3) years which may be renewed for another period of two (2) years or alternatively 35% investment allowance; investment allowance of 25% on plant and machinery; accelerated capital allowance after the tax free period; interest on loans for gas project is tax deductible provided the prior approval of the Minister of Finance was obtained; and tax free dividend during the tax free period. Section 10(a) of the PPTA also provides for certain gas incentives, under this provision, funds invested in the separation of crude oil and gas from the reserves into suitable products are considered as part of the oil field development and taken as deductibles for tax purpose.

There are also a number of incentives available to companies operating in the mining and minerals sector. Mining companies enjoy an accelerated capital allowance of 95% on qualifying capital expenditure incurred in the year in which the investment is incurred. Provision is also made for loss relief by which losses can be relieved for a maximum period of four (4) years after which all un-relieved losses will lapse. Further, by the combined provisions of section 36 of CITA and section 28 of the Nigerian Minerals and Mining Act 2007 (the "Mining Act"), a tax relief period of three (3) years and a further extension of up to two (2) years can be granted to companies engaged in mining operations.

By the provision of section 25 of the Mining Act, operators in the mining sector are granted exemption from payment of custom/import duties in respect of plants and machineries imported specifically and exclusively for mining operations. Also note that where a holder of a mineral title earns foreign exchange from the sale of its minerals, it may be permitted by the Central Bank of Nigeria to retain in a portion of same for use in acquiring spare parts and other inputs required for mining operations which otherwise would not be readily available without use of such earning. The Mining Act also gives allowance to a mining company to set up a tax deductible reserve for environmental protection, mine rehabilitation, reclamation and mine closure costs. Further, mining companies may benefit from waiver of applicable royalties (of 3-5%, depending on the nature of minerals being mined).

Apart from tax and other fiscal reliefs, a number of legislation provide for other forms of benefits, particularly to foreign investors, in that they protect investments from expropriation as well as guarantee the repatriation of proceeds of investments. For instance, the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (Cap F34, LFN 2004), provides a conducive regime for the repatriation of foreign capital inflow into Nigeria for investment purposes. Similarly, by virtue of Section 24 of the NIPC Act, "unconditional transferability of funds through an authorised dealer in freely convertible currency" is guaranteed to foreign investors with respect to dividends/profits on investments, payments made in servicing of foreign loans, and proceeds from sale of liquidation of enterprises. In Section 25 of the NIPC Act, statutory guarantee is given against expropriation of any private business enterprise by the government. In effect, foreign investors are free from the fear of having their lawful and legitimate enterprises nationalised or taken away from them by any means whatsoever.

The Nigerian government, in collaboration with private sector stakeholders, is continually taking steps to review available investment incentives with a view to deepening economic competitiveness of the country. However, in addition to investment incentives, the Nigerian government should consider other salient ingredients such as security, consistency and sanctity of laws and policies, democratic values, the rule of law and anti-corruption, which are some of the key enablers of economic growth and factors which international investors evaluate when selecting investment destinations.

The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo