

Legal Alert for January 2010 – Taxation of Charities, Trustees and NGOs in Nigeria

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Charities, Trustees and NGOs in Nigeria – Legal and Tax Regulations

The separation of the Church from state political power has always historically being a matter of conflict and apprehension. The same could be said of Trustees and registered or unregistered charitable organisations, which are more popularly referred to as Non-Governmental Organisations (NGOs) in Nigeria. The regulation of the latter is primarily hampered in the practice by the non-separation of the individual trustees from the direct personal ownership and benefits of the trust assets belonging to the NGOs.

Attempts by governments to apply existing statutory regulations to the above organisations are always met with political resistance as a result of the government's inability to explain clearly the remarkable legal distinction between the incomes of the individual operators of the charities or trusteeship or NGOs, from the organisations that they are entrusted to administer.

This Alert is a summarisation of the legal and tax requirements for registered companies in Nigeria that are limited by guarantee and therefore entitled to carry on charitable objectives without the shareholders distributing the profits of the company among themselves. This Alert also summarises the legal and tax obligations of registered trustees under Nigerian Law.

REGISTERED CHARITABLE COMPANIES IN NIGERIA

Generally in Nigeria, only companies that are registered under the Companies and Allied Matters Act ("CAMA") can carry on business in Nigeria. The nature of such business or businesses are those approved and incorporated as the company's objects at the time of registration with the Corporate Affairs Commission ("CAC"). Companies that are not

registered under CAMA are deemed to be associations lacking the capacity to enter into any legally binding agreements within the territory of Nigeria.

There are three forms of business associations recognised under Nigeria Law. These are: (a) Companies; (b) Partnerships; and (c) Sole Proprietorship. The First form of business, which are Companies, do in turn have three different types namely: Companies limited by shares, unlimited companies and companies limited by guarantee. A company limited by guarantee will be treated in this presentation.

COMPANIES LIMITED BY GUARANTEE

A company limited by Guarantee is one that is incorporated primarily to promote the objects of such a company with its shareholders barred from distributing its profits among its members, as dividend or otherwise. Also, the liability of the shareholders of a company limited by guarantee is restricted to the amount that they have subscribed to pay in the event that the company limited by guarantee is wound up or dissolved.

A company limited by guarantee is not registered with a share capital and requires the prior approval of the Attorney General of the Federation before it can be incorporated.

In practice, companies limited by guarantee are registered in Nigeria to undertake strictly charitable objectives. The members/shareholders of such a company are aware that the income and other assets of the company must be applied solely towards the promotion of the objects of the company and no portion of its profits can inure to the private benefit of the members or shareholders of the company. In the event of the dissolution or winding up of a company limited by guarantee, its assets, after the liquidation of its liabilities, cannot also be distributed to its shareholders; in its stead, such profits must be transferred to another charitable organisation with objects similar to that of the company that is been dissolved.

Where however a company limited by guarantee carries on business for the purpose of distributing profits among its members, such members or officers of such a company who are aware of this statutory contravention shall be liable for the payment and discharge of all the debts and liabilities of the company. The infringing officers or members shall also be liable to a fine not exceeding ₦100 for every day during which the company carries on business for the profit of its members.

EXEMPTION FROM TAXATION OF COMPANIES LIMITED BY GUARANTEE

All companies in Nigeria are liable to pay Companies Income Tax on their global profits accruing in, brought into, derived from or received in Nigeria. However, the profits of any statutory, charitable, ecclesiastical, educational or other similar associations are exempted from Companies' Income Tax obligations provided such profits are not derived from any trade or business carried on by such an organisation or association, and distributed among the members, trustees or shareholders of such a company, association or organisation. See Section 23 of the Companies Income Tax Act ("CITA").

What constitute a "trade" or "business" is however not defined or described in the Companies Income Tax Act (as amended). Because of this difficulty, Dr. J. Orojo, in his book "Company Law and Practice in Nigeria", Fifth Edition, referred to the Supreme Court of Nigeria decision in the matter of Arbico v. FBIR (1966) NCLR 401 @ 410 where the Supreme Court applied the dictionary meaning which is that a trade or business is "..... The practice of some occupation, business or profession habitually carried on especially when practiced as a means of livelihood". It was also decided in this case that the question of whether or not the activity in question is a trade or business is a matter of fact and not of law.

LEGAL REPORTING FOR LIMITED LIABILITY COMPANIES

The Company and Allied Matters Act requires every company in Nigeria, including companies limited by guarantee, to keep proper accounting records that sufficiently show and explain the financial affairs and position of the company.

At the end of every financial year, each company must deliver to CAC an annual returns filing, duly accompanied by a copy of its balance sheet, profit and loss account, and notes on the statement. Failure to discharge this duty is an offence.

REGISTERED ASSOCIATION OR TRUSTEES

An unregistered body or association is not recognised under Nigerian law. It cannot enter into legally binding contracts; it cannot sue or be sued in the name of the association save where each individual member or principal officers of the association are sued or sue others in their individual capacity. To assume legal protection, every association must be registered under Nigerian law.

The Companies and Allied Matters Act provides that where one or more trustees are appointed by a community of other people, bound together by a common custom, religion, kinship or nationality, for the promotion of specific religious, educational, literary, scientific, social development, cultural, sporting or other charitable purpose, such trustees are required, with due authorisation of its members, to apply to the Corporate Affairs Commission for registration as a body corporate.

It is the law that from the date of registration or incorporation, the association becomes a body corporate with perpetual succession and a common seal, the power to sue or be sued in their corporate name and the power to hold and acquire, transfer, assign or otherwise dispose of any property or interest belonging to or held for the benefit of the association.

The income and property of an incorporated body or association shall be applied solely towards the promotion of the objectives of such a body or association. It is legally forbidden for any portion of the income or property of a registered body or association to be paid to or transferred directly or indirectly, by way of dividend, bonus or otherwise, or by way of profit, to any of the members or trustees of the association. See Section 603(1) CAMA.

The exception to the above rule is that "... payments, in good faith, of reasonable and proper remuneration to an officer or servant of the body in return for any service actually rendered to the body or association..." is exempted from the rule against the distribution of trust income.

Also exempted from the rule against the distribution of trust income are the reimbursements of out-of-pocket expenses or reasonable and proper rent or reasonable fees for services rendered by members of the association to the association.

The penalty for breach of the restrictive provisions on the non distribution of trust income is captured in Section 603(3) of CAMA which provides that "if any person knowingly acts or joins in acting in contravention of this Section, he shall be liable to refund such income or property so misapplied to the association".

LEGAL REPORTING FOR REGISTERED TRUSTEES

The trustees of all incorporated associations must not earlier than the 30th of June and not later than the 31st day of December of each calendar year file the annual returns of their registered Associations. Such a return must show the name of the association, the names,

addresses and occupation of the trustees of the association, the members of its Governing Council, particulars of any changes which may have taken place with regard to the constitution of the association during the preceding year, etc.

Where the trustees of an association fail to comply with the above reporting requirement, they shall individually be liable to a fine of ₦5 for each day that the default continues unremedied.

TAXATION OF CHARITIES AND TRUSTEES

The tax exemption provisions enumerated above, with regard to companies limited by guarantee, are also applicable to associations also known as incorporated trustees.

Whether income derived by the trustees of an association are liable to personal income tax has been a matter of much political debate. The Personal Income Tax Act provides that the income of individuals, communities, families and others arising from or due to a trustee or estate are liable to the imposition and payment of personal income tax.

Also, the income of all individuals from any source within or outside Nigeria including income from any trade, business, profession or vocation, or profit from any employment including compensation, bonuses, premiums or benefits are liable to personal income tax.

The tax exemption provision in Section 13 of the Third Schedule of the Personal Income Tax Act (as amended) only exempts the income of the associations themselves and not the income of the individual trustees, their employees, etc from the payment of tax.

OTHER TAX EXEMPTIONS FOR REGISTERED CHARITIES

The Capital Gains Tax Act requires that a capital gains tax must be paid on the gains accruing to any person on the disposal of such a person's asset. The rate of this tax on such a gain is ten per cent (10%).

Section 26 of the Capital Gain Tax Act however grants an exemption to the payment of this tax by any ecclesiastical, charitable, educational institutions of a public character, any statutory or registered friendship society, any registered co-operative society of any state and trade union registered under the Trade Unions Act, provided that such a "... gain is derived from any disposal of any asset acquired in connection with any trade or business carried or by the institution or society and

the gain is applied purely for the purpose of the institution or society, as the case may be.”

The Customs, Exercise Tariff, etc (Consolidation) Act 2004, Section 8, Second Schedule, exempts from the payment of import duty, certain goods meant for charitable or humanitarian purposes. The exemption from the payment of this duty is granted by the Minister of Finance.

CONCLUSION

The income of charitable organisations and other similar associations are exempted from tax liability. It is arguable in law whether the profit of a registered association is liable to tax assessment and payment where such profits are channeled exclusively to the promotion of the objectives of the charitable institution.

It is also the law that income derived by the members of a charitable organisation, save for the exempted items like reimbursable out-of-pocket expenses, are also liable to the payment of personal tax. A contrary interpretation will lead to an inequitable tax system and tax evasion.

Ultimately, tax compliance will only be enhanced when good corporate governance and responsibility, in accordance with the rule of law, are practised by both the governed and especially those in government. The opposite situation will be maintained when the governing class disregards the rule of law.

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