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Legal and Tax Alert



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2015 Updates

It would be quite fair to say that the legal and tax environment for investors to do business in Guinea has evolved during the year 2014. The 2015 financial Act also provides some changes.

The updates are as follows:

- The deadline for the second advance payment related to the corporate income tax is now on 15 September.
- NTIC companies are now subject to pay a new tax based on the turnover achieved, called TARTEL tax. Those companies shall also attach to their monthly tax return a statement showing the turnover declared whether it is subject to VAT or not.

In addition, under penalties, any company shall now :

- Indicate the tax identification number at the entrance of the head office.
- Indicate on any document issued all relevant reference allowing to identify the company (bank details, telephone number, TIN, address, etc.).

Transfer pricing rules

Already provided in 2012, the tax authority is entitled to go through financial transactions between an entity based in Guinea and another related entity located abroad to make sure that financial transactions between such entities are based in the arm's length principles. The 2014 Finance Act provided new rules regarding this.

Now such companies are encouraged to prepare and keep a documentation allowing the tax authority to understand the method of pricing agreed between related entities. For that purpose, are considered as being related entities when one of those two entities holds more than half of the capital share or voting rights in the other company. However, for the time being, there is no administrative guideline regarding the method to adopt for the pricing policy, so preparing such documentation requires referring to specialists.

The documentation to keep is mandatory for companies based in Guinea and whose annual turnover excluding taxes or gross assets in the balance sheet (or controlling or controlled by such companies) exceeds 175 billion local currency.

Furthermore, the tax code provides to reintegrate within thin-capitalized companies taxable income the portion which exceeds some limits. In this regards, the company is considered being thin-capitalized when the total amount of remittances received from one related entity exceeds 1.5 times the total equity valued at the year end.

Incentives measures for increasing businesses investments

With the aim to involve more local and foreign investors in the country, the Government took some measures to encourage individuals or companies willing to invest and create jobs in sectors other than mining, oil, banking and financial, sales of arms and explosives sectors.

Those sectors, and below is not a limited list, are corresponding to:

- Cultural Industries
- Remediation work of roads, waste treatment
- Electricity production activities or water for commercial purposes
- NTIC
- Health
- Education
- Tourism and hotel industries
- Real estate social programmes.

The fiscal advantages provided by the financial act are as follow :

- **During the installation phase:** fiscal advantages during the installation phase are limited to a maximum period of 3 years after the first date of import of equipment and concern the VAT on imported equipment and materials, the business tax, some payroll taxes and a privileged custom duties regime.
- **During the operating phase:** during the operating phase, the corresponding fiscal advantages are applicable for a period going up to 10 years and include a privileged custom duties regime, an exemption for the payment of tax on profits, the business tax and others. The rate of reduction or exemption depends on the location.

Any entity willing to benefit those incentives measures should be granted by the administration with a specific decree. Furthermore and for strategic reasons, these benefits may be extended for an additional period of exemption from 8 years up to 10 years and only in the following cases:

- the investment has actually created more than 500 jobs
- the total investment exceeds the threshold of US \$ 100 million
- investment focuses on new technologies
- the investor increases its production capacity and performance.

American FATCA Act and the financial institutions

Since 1 July 2014, a so-called American law FATCA (Foreign Account Tax Compliance Act) came into force and has fixed tax compliance obligations on banks worldwide. The law aims to avoid tax fraud involving accounts held by US taxpayers.

Non-US financial institutions are responsible to identify and report their clients US taxpayers holding an account in their books. The statement relates to their income directly or indirectly earned. Then that information is transmitted to the IRS in the US either by the Guinean tax authorities on the basis of a tax agreement or by the bank itself. These institutions must register with the US administration which then delivers an identification number. Any breach of this obligation may be sanctioned by a penalty of 30% withholding on certain payments.

All non-US banks are potentially affected by this new law, so the law may also be applicable to active banks in Guinea since they are either directly involved or indirectly through the group (eg banks owned by a French company, since France has integrated this new measure in its legal positive law).

The revised Uniform Act related to commercial companies

The Uniform Act relating to commercial companies of 17 October 1997 was revised by the Council of Ministers of the member states of the Organization for the Harmonization of Business Law in Africa (OHADA) met in Ouagadougou, Burkina Faso, on January 30, 2014. The new provisions are into force since May 5, 2014 in all member states and apply automatically to any entity within the area i.e. commercial companies and economic interest groups. The law is also applicable to companies in which the Government or any other public entity is a shareholder.

There is no doubt that that reform is an important step in modernizing the legal environment. By way of introduction, below are detailed some updates:

- The appointment of an auditor (CAC) in a limited liability company (LLC) becomes mandatory since at least two of the following three criteria are met: a balance sheet above than XOF 150 million, a annual turnover exceeding XOF 250 million and a number of employees exceeding 50 employees.
- Investors who wish to create a company with the characteristics of a public limited company (SA) with more flexibility will be able to create the joint stock company (SAS). No minimum is required for the share capital. Also the conditions of appointment of a CAC are those applicable to the LLC and investors may anticipate more flexibility in the Articles. This type of company is generally convenient for "holding" structures.
- The share capital of an SA or SAS can be anticipated as being variable in the Articles.
- Terms of inalienable clause that shareholders used to introduce in their shareholders agreement cannot be no longer valid than 10 years.
- A shareholder can attend the meeting of Board via webcam only if specified within the Articles.
- Foreign entities which want to operate in Guinea without setting up a local company can open a representative office which is different from branch or subsidiary.
- Branches shall be incorporated after 2 years operation except renewal by prior administrative authorization. Starting from Lay 5 2014, those authorization can be renewed only one time and not even more.
- In case of disagreement between shareholders or partners, they have now the legal basis to apply the appointment of temporary administrator to the jurisdiction of Commerce.

- Shareholders holding at least 10% of the share capital are also concerned by provisions of the Uniform Act related to regulated agreements between the company and shareholders or directors.

In addition, as well as in other member states of Ohada, the Guinean authorities have introduced, by a decree of May 30. 2014, more flexibility concerning SARL companies as follow:

- the Articles: the filing of Articles drafted by private deed in the minutes of a notary is no longer required (art 2).
- the share capital: the certificate of payment can be delivered either by the Notary or drafted by simple declaration (art. 6) and the minimum capital is reduced to 100,000 GNF (art. 3-4.).

The subcontractors regime

The MPs has introduced a new legal regime related to subcontracting. As surprising as it may be, the regime was introduced in the Labour Code (Book 1, Title 3, Chapter 5).

According to that code, the subcontracting is an activity performed by a subcontractor on behalf of a company called main contractor that contributes to the implementation of the company purpose or the execution of a portion of contract for the main company. Subcontracting business differs from any ordinary supply of services.

The law gives the priority to local individuals or companies subcontractors in allowing businesses and a minimum holding of 60% in the share capital of subcontracting firms should be reserved for nationals.

The Labour Law Reform

The labor code has been revised on January 30. 2014 and welcomed by professionals. The reform provided new rules as follow :

- Any employee and any person acting as a witness is now protected against any form of sexual and psychological harassment in the workplace. Contrary to what provided for the psychological harassment, are not incriminated behaviors whose purpose is a sexual harassment but are only concerned behaviors whose affect the employee.
- The legal regime applicable to the hiring of foreign workers is much detailed. The duration of the employment contract with a foreign worker may not exceed 4 years including renewals. However, there is no indication if the initial 2 years period under the 1960 decree remains the reference. The visa application is the employer's responsibility and the labor administration shall reply within 30 days.
- Temporary work is given much detailed regime.
- In terms of subcontracting, subcontractors companies having the same corporate purpose can negotiate their own collective convention.
- Pregnant women just have 9 months after their child birth to freely resign their contracts of employment without notice. Before the reform, that period was corresponding to 15 months.
- Companies that used to resort to internships shall now refer to the law.
- Employees who want to have unpaid leaves cannot be refused by the employer in following cases : breastfeeding after maternity leave, widowhood of women, mutation the spouse working for the same employer resulting in a change of residence, serious illness of father, mother, spouse or child when they need the assistance by the worker. The leave period shall not exceeding 2 years including renewals.

At Grant Thornton, we hope you will find this useful. We will continue to advise you of all developments in this area.

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