



# TAX AND LEGAL PAPER

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The challenge of financing African SMEs

The law No. 2015-38 dated 27 May 2015 (the “Amended Finance Act – AFA 2015”) amending the law No. 2014-73 dated 4 December 2014 or Finance Act for 2015, entered into force on 1 June 2015.

We will hereafter comment the AFA 2015 provisions relating to the tax clearance certificate and tax claims’ procedure.

#### **Tax clearance certificate**

The tax clearance certificate provided for by article 355 of the Niger General Tax Code (GTC) is delivered by the Directorate General of Taxation (the “*Direction Générale des Impôts*”) and certifies that the company complies with its tax obligations.

As from 1 June 2015, such tax clearance certificate is mandatory for all traders, importers, industrial operators, producers, entrepreneurs in public works and in the construction industry, service providers, for any claim relating to:

- Exemption from VAT withholding;
- VAT refund; and
- Refunds of any taxes unduly collected by the tax authorities.

In addition, as from 1 June 2015, the tax clearance certificate is mandatory including for forwarding agents, commission agents and other licensed customs brokers carrying out operations for third parties, for their customs clearance.

#### **Tax claims**

The provisions of articles 1005 to 1007 of the Niger GTC relating to tax claims’ procedure are amended as from 1 June 2015, after such provisions were previously amended by the Finance Act for 2015.

Indeed, the Finance Act for 2015 reduced the time limit to file a tax claim from 3 to 2 months (article 1005 GTC), and specified that when the decision issued by the Directorate General of Taxation is not satisfactory for the claimant, the latter can file within 15 days as from reception of such decision, an appeal with the Tax claims’ Arbitral Committee (“*Comité arbitral des recours fiscaux – CARFI*”) which has 2 months to issue a decision (article 1006 GTC).

The GTC as amended by the Finance Act for 2015 also provided that when the *CARFI* decision is not satisfactory for the claimant, the latter can, within 1 month as from the reception of such decision, file another appeal before the relevant court, subject to payment of 50% of amounts disputed by the claimant (article 1007 GTC).

As per the AFA 2015:

- The time limit to file a tax claim is increased from 2 to 3 months (the 3-month time limit was the one in force before the Finance Act for 2015) as from unforced payment or collection of tax by the tax authorities; it is now specified that no claim can be filed if not filed within the statutory 3-month time limit;
- The Head of the Directorate General of Taxation or his/her representative can answer within 3 months as from the date of claims' presentation, by deciding either rejection or total or partial acceptance of such claims;
- It is now specified that the *CARFI* is an arbitral authority created next to the Ministry of Finance; new article 1006 provides that the *CARFI* has 3 months, instead of 2 months previously, to rule on disputes submitted to its jurisdiction; in addition, article 1006 now provides that not taking a dispute to the *CARFI* within above mentioned 15 days triggers the continuation of the tax collection procedure;
- A new article 1006 bis provides that if the *CARFI* does not rule within 3 months, the claimant can take the dispute to the relevant court. The claimant must however constitute guarantees covering one quarter of amounts claimed by the tax authorities;
- A new article 1006 ter adds that any procedure before the *CARFI* adjourns proceedings and tax collection until notification of the decision. However, the Collector of Tax can request the constitution of guarantees. Please note that until now, there was no obligation in the Niger GTC to constitute guarantees to file an appeal with the *CARFI*;
- Article 1007 of the GTC has a new paragraph addressing the situation where the *CARFI* decision is not satisfactory for the Tax Administration; in such a case, the Tax Administration has the possibility within 1 month as from notification of the decision, to take the dispute to the relevant jurisdiction. In addition, it is specified that the Collector of Tax can also request the constitution of guarantees.

## Headlines

### Ghana

#### Double tax agreements with Denmark and Mauritius

##### *Double tax agreement with Denmark*

The Ghanaian Parliament has ratified the double tax agreement concluded with Denmark.

The Danish government wishes this treaty will strengthen Danish investments in Ghana.

We will keep you informed of the entry into force of this agreement.

## Double tax agreement with Mauritius

Further to a meeting dated 24 August 2015 held in Port Louis between Ghanaian and Mauritius authorities, negotiations relating to the double tax treaty between Ghana and Mauritius are on-going (source: IBFD).

We will keep you informed of any further developments.

## Headlines

### Senegal

#### Double tax agreement with Czech Republic

On 13 August 2015, Senegal and Czech Republic initialed a double tax agreement, after a third round of negotiations held in Prague, Czech Republic (source IBFD).

We will keep you informed of any further developments.

## Insight

### Prevention of tax evasion and fraud in Cameroon

In order to prevent tax evasion and combat tax fraud, the Cameroonian Tax Administration is using, *inter alia*, transfer pricing control of which rules are set-forth in the Cameroonian General Tax Code (GTC). These rules are strongly inspired from the OECD<sup>1</sup> transfer pricing guidelines<sup>2</sup>.

As per the OECD, a transfer price is “a price, adopted for bookkeeping purposes, which is used to value transactions between affiliated enterprises integrated under the same management at artificially high or low levels in order to effect an unspecified income payment or capital transfer between those enterprises”.

Transfer pricing control rules in Cameroon considerably strengthened since their institution by the 2012 Finance Act.

However, the implementation of the control as established by the 2012 Finance Act has not in practice reached the expected results. Indeed, in the absence of any data base of financial information available on companies, it has been quite difficult for the Cameroonian Tax Administration to challenge

<sup>1</sup> Organisation for Economic Co-operation and Development

<sup>2</sup> OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, the latest edition of which was published in 2010

intra-group transactions reviewed by it and prove the absence of any arm's length price used to value such transactions.

Despite these difficulties, transfer pricing controls are becoming more and more recurrent in tax audits carried out in Cameroon.

In addition, the recent ratification by Cameroon of the multilateral Convention on Mutual Administrative Assistance in Tax Matters, which is commented in paragraph 2.3 below, certainly marks a turning point in fighting tax evasion and tax fraud, especially through transfer pricing control.

In this context, we think it is important to come back on the main rules in force in Cameroon to combat tax evasion and fraud.

## **I. Rules relating to the determination of the taxable basis**

### *1.1 Remuneration paid to entities located in tax havens*

Article 8 ter of the GTC introduced by the 2012 Finance Act provides that remuneration booked by an individual or a legal entity domiciled or established in Cameroon and relating to transactions with individuals or legal entities domiciled or established in a territory or State considered as a tax haven, are not tax deductible.

The same article specifies that a State or territory of which Corporate Income Tax (CIT) rate or Personal Income Tax (PIT) rate is less than one third of that in force in Cameroon is considered as a tax haven.

As per the Circular implementing the 2012 Finance Act (the 2012 Circular), the tax rate in force in the foreign jurisdiction should be compared with the nominal CIT or PIT rates in force in Cameroon i.e. the rate excluding municipal surcharges<sup>3</sup>.

Since the Finance Act for 2015 reduced the CIT nominal rate from 35% to 30%, it should now be considered that a tax haven is a territory or a State where the CIT rate does not exceed 10%, instead of 11,66% previously.

### *1.2 Head office and technical assistance fees*

According to article 7-A-1 d-1) of the GTC, subject to double tax treaties, head office costs for their part relating to operations carried out in Cameroon and remuneration in consideration for certain services (studies, technical, financial or accounting assistance) provided to Cameroonian enterprises by Cameroonian or foreign individuals or legal entities, are tax deductible.

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<sup>3</sup> Municipal surcharges apply to taxes levied in Cameroon at the rate of 10%. CIT rate in force in Cameroon including municipal surcharges is thus of 33%.

However, the tax deduction of these costs/fees is limited to 5% of taxable income before deduction of said costs, except for technical assistance fees and studies relating to plant assembly.

This limit is fixed to 2.5% of the turnover for companies operating in public works and to 7.5% of the turnover for engineering offices operating in accordance with regulations applicable thereto.

Please note that several socio-professional associations including the *GICAM*<sup>4</sup> requested the suppression of the limit above mentioned for amounts charged within Cameroonian groups.

We support this proposition because as indicated by the *GICAM*, such suppression could improve the management of Cameroonian companies; in addition, in the perspective of preventing tax evasion and fraud, the cancellation of the tax deduction limit for internal flows should not entail any indirect transfer of profits.

### *1.3 Interest paid to shareholders and affiliates*

As it is often the case in Central and West African countries, the GTC provides for a limitation of the tax deduction of interest paid in consideration for current accounts loans granted by shareholders. Such interest is tax deductible up to the rate applied by the Bank of Central African States (BEAC) plus two points. The BEAC key lending rate was reduced from 2.95% to 2.45% on 9 July 2015; therefore, interest is tax deductible in Cameroon up to 4.45%.

The Finance Act for 2014 introduced two additional conditions for the deduction of interest directly or indirectly charged by shareholders or affiliated entities holding more than 25% of the share capital.

Since 1 January 2014, on top of the interest rate limitation, companies having access to finance through loans granted by their shareholders saw interest deduction being limited to:

- Equity: the total amount of the loan shall not exceed 1.5 equity, namely the sum of contributions (share capital and premiums), revaluation surplus, profits other than those for which a distribution occurred, losses, investment subsidies and regulated provisions;
- Earning before interest, taxes, depreciation and amortization (EBITDA): the total amount of interest shall not exceed 25% of EBITDA.

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<sup>4</sup> The GICAM or « *Groupe Inter Patronal du Cameroun* » is an association grouping Cameroonian employers

## 1.4 Royalties

The Finance Act for 2015 amended article 7 A-1-d of the Cameroonian GTC by limiting the tax deduction of remuneration paid in consideration for the use of valid patents, trademarks, drawings and models, to 2.5% of taxable profits before deduction of such payments.

The above mentioned provision applies to amounts paid to both Cameroonian and foreign companies. Please note that the GICAM has also recommended that the Finance Act for 2016 cancel such limitation especially for sums paid to affiliated companies located abroad. Indeed, according to the GICAM this tax ceiling is a barrier to Cameroonian industrial development.

Please note that non tax deductible expenses are subject to CIT, but also to tax on movable capital at the rate of 16.5% including the municipal surcharges.

When these amounts are paid to a company located out of the Central African Economic and Monetary Community<sup>5</sup>, directly or indirectly holding the share capital of a Cameroonian company, such amounts are considered as distributions subject to tax on movable capital at the rate of 16.5%.

## II. Tax procedure rules

### 2.1 Transfer pricing documentation requirement

Article L19 bis 1) of the GTC provides that when in the frame of a tax audit, the Tax Administration has collected information showing that a company has presumably operated an indirect transfer of profits, the Tax Administration can request such audited company to provide detailed information on:

1. Operating relationships between this company and any other affiliated companies, enterprises or groups based out of Cameroon;
2. The methods used in determining the price for industrial, commercial or financial intercompany transactions and a justification for the use thereof;
3. Activities carried out by companies, corporations or group entities in the intercompany transactions;
4. The tax treatment pertaining to intercompany transactions.

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<sup>5</sup>The Central African Economic and Monetary Community is also known as CEMAC, in French: *Communauté Economique et Monétaire des Etats d'Afrique Centrale*

Paragraph 2) of same article L19 bis provides that for corporations domiciled out of Cameroon and falling in the jurisdiction of the Tax Administration department in charge of large-sized companies, the detailed information mentioned above must be automatically communicated to the Tax Administration at the beginning of the tax audit when:

- more than 25% of their share capital or voting rights are held, directly or indirectly, by an entity located out of Cameroon;
- such large-sized companies hold, directly or indirectly, more than 25% of a legal entity domiciled out of Cameroon.

In the absence of publication by the Cameroonian Tax Administration of any guidelines detailing the content of the transfer pricing documentation, companies required to submit such documentation generally face difficulties to comply with article L19 bis and meet the Tax Administration's expectations.

A good illustration of such difficulties is for instance this European Group with one of its subsidiaries in Cameroon, which decided to create a procurement center in Europe to procure raw materials to the Group's subsidiaries. The transfer pricing documentation submitted to the Cameroonian Tax Administration included the price paid by the Cameroonian subsidiary to purchase raw materials, but not the cost price including transportation and customs duties, as requested by the Tax Administration during the tax audit.

In view of this context, we strongly recommend that international groups/companies having subsidiaries in Cameroon prepare a very detailed transfer pricing documentation pertaining to transactions involving their Cameroonian entities, but we also urge the Cameroonian Tax Administration to publish detailed guidelines on the content of transfer pricing documentations.

## *2.2 Tax auditors without borders*

Article L18 paragraph 2 of the Cameroonian GTC as amended, introduced the concept of tax auditor without borders.

This means that as from 1 January 2015, for certain tax audits, the Cameroonian Tax Administration can request the assistance of the tax administrations of any States with which Cameroon has concluded agreements providing for such administrative assistance.

As per the Circular implementing the Finance Act for 2015 (the 2015 Circular), the assistance provided by international tax auditors shall exclusively be carried out *"in the frame of complex investigations for which the Cameroonian Tax Administration considers it relevant to request the assistance of external tax auditors"*.



The 2015 Circular wording is purposefully vague and it should be noted that the Tax Administration was initially much more precise on the international tax auditors' scope of activity:

*“ Requests for foreign administrative assistance can be exclusively addressed in the frame of tax audits relating inter alia to the following subject matters and operations:*

- *Transfer pricing policy pertaining to transactions between Cameroonian and foreign companies;*
- *Taxation of natural resources;*
- *Support for the collection and conservancy of tax information;*
- *Complex tax audits or tax audits with important stakes”<sup>6</sup>.*

Based on the above, it is very likely that this procedure will be used in the frame of future transfer pricing audits/controls.

However, the point to know which countries will be effectively involved in this cooperation with Cameroon is still pending.

Indeed, double tax agreements concluded by Cameroon and currently in force are those with France, Canada and Tunisia.

Double tax agreements with Canada and Tunisia only comprise clauses for exchange of information. Only that concluded with France has a clause for administrative assistance, but limited to assistance for recovery of tax claims and taking measures of conservancy, and this agreement does not explicitly provide for the possibility to request the assistance of foreign tax inspectors for tax audits carried out in Cameroon.

Double tax agreements signed by Cameroon with Morocco and South Africa but not yet in force only provide for exchange of information and, in the case of Morocco, also assistance in recovery of tax claims.

We should therefore pay a very close attention to agreements to be concluded by Cameroon, either double tax agreements or specific conventions relating to tax matters.

For your information, Cameroon is currently running negotiations for double tax agreements with Belgium, Egypt, Czech Republic, Romania and Turkey.

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<sup>6</sup> Source: Draft 2015 Circular

### 2.3 Multilateral Convention on Mutual Administrative Assistance in Tax Matters

On 26 June 2014, the OECD announced that Cameroon became a signatory of the multilateral Convention on Mutual Administrative Assistance in Tax Matters (the OECD Convention), as amended in 2010 so as to allow all countries, especially developing ones, to benefit from this very transparent frame for their international exchanges.

As at the date of this publication, more than 65 countries have already signed this Convention, thus increasing significantly Cameroon tax cooperation power.

According to article 1 of the OECD Convention, the administrative assistance consists of:

- The exchange of information, including simultaneous tax audits and the participation to tax audits carried out abroad;
- The collection of tax receivables including measures of conservancy; and
- The documents notification.

In the frame of tax audits carried out abroad, the OECD Convention states in its article 9 that *“at the request of the competent authority of the applicant State, the competent authority of the requested State may allow representatives of the competent authority of the applicant State to be present at the appropriate part of a tax examination in the requested State”*.

In other words, this clause enables Cameroon to solicit the tax administration of any of the signatory States to participate to tax audits/examinations carried out in such States. More than sixty countries could therefore be requested by Cameroon for that kind of administrative assistance, including participating to transfer pricing controls abroad.

Thus, the OECD Convention does not explicitly provide for the possibility to request foreign tax auditors for tax examinations held in Cameroon as introduced by article L 18 GTC commented above, but for the participation of Cameroonian tax inspectors to tax audits carried out abroad.

Both measures however complement one another. Article 27 of the OECD Convention confirms our position by stating that *“the possibilities of assistance provided by this Convention do not limit, nor are they limited by, those contained in existing or future international agreements or other arrangements between the Parties concerned or other instruments which relate to co-operation in tax matters”*.

Article 28.5 of the OECD Convention stipulates that the Convention shall enter into force on the first day of the month following the expiration of a period of

three months after the date of deposit of the instrument of ratification with one of the depositaries.

In the case at hand, since the instrument of ratification was deposited on 30 June 2015, the OECD Convention enters into force on 1 October 2015.

As per article 28.6, the provisions of the OECD Convention shall have effect in Cameroon for administrative assistance related to taxable periods beginning on 1 January 2016, unless otherwise provided in a separate agreement.

In conclusion, we should pay a very close attention to the implementation of this OECD Convention and its impact on the Cameroonian Tax Administration's practices.

We will also keep you informed of any specific agreements or arrangements entered into by Cameroon in application of this Convention.

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## Business

## The challenges of financing African SMEs

***Given its strong growth and the emergence of its middle class, Sub-Saharan Africa arouses great interest from several investors, among which China, the United States and Europe. However, for such investment opportunities to have a sustainable impact on the economic development of the continent, SMEs' effective participation is essential and remains a major issue.***

The perception of Sub-Saharan Africa has noticeably evolved over the last fifteen years. From a lost continent, Africa is now considered as a land of opportunities, one of the last regions in the world enjoying growth rates close to 10%. Even though the increase in raw materials prices and the improvement of business governance have explained this situation for many years, one cannot ignore the impact of the radical change in Africans' consumption habits.

According to the International Monetary Fund, the African continent should benefit from a growth rate of 5.8% in 2015, a growth rate that is largely supported by the rise of the middle class, which is synonymous with the development of a new consumer society. This represents a business opportunity that large foreign groups anxious to win new markets increasingly

take advantage of. By 2017, Africa could become the region receiving the largest part of investments from European consumer goods companies. Other example: the South African retail group Shoprite Holdings (equivalent to the French Carrefour or Auchan) will open 35 stores in Sub-Saharan Africa in 2015, of which 14 in Nigeria only, up from 20 stores opened in 2014.

### **SMEs, the real African growth levers**

In this context, Africa needs to provide itself with the means to meet its emerging and demanding middle class' expectations, as the middle class aspires to consume fridges, televisions or cell phones like its European or American counterparts. In this regard, the role of SMEs is essential to meet that domestic demand and, in so doing, to speed the pace of the continent's economic development. In fact, 95% of African companies are SMEs (less than 500 employees); they are the main contributors to the GDP of numerous countries. For instance, SMEs represent 91% of companies in South Africa and 70% of the manufacturing sector in Nigeria; they are the source of 61% of job creations in Tanzania and contribute to 70% of Ghana's GDP. However, even though the essential role of SMEs in Africa's development is widely recognized, SMEs still face numerous challenges, among which access to funds that are vital for their growth. Given banks' apprehensiveness when it comes to lending money to SMEs because of a very high risk perception, more and more private equity funds step into the breach to grab the growth opportunities offered by African companies.

### **The profile of investors is evolving**

Local and international investment funds have therefore raised 4.2 billion US dollars<sup>7</sup> in 2014, which represents more than double the average funds raised in Africa over the preceding five years. But contrary to the industry's first years when investments were mainly done in telecommunications, financial services and utilities (water, electricity, etc.), investors are now seeking opportunities in sectors growing with the emergence of the middle class such as health, education, logistics or consumer goods. In addition, next to large funds who sometimes invest more than 100 million US dollars per transaction, we observe an increasing specialization of the industry with the creation of funds that invest much smaller tickets (less than 5 million US dollars), the emergence of more SME-focused funds like Investisseurs & Partenaires and the development of sectorial funds like Uqalo (consumer goods), IFHA (health) or Silk Invest (food and beverages). For those funds that are looking to support the African consumer, the issue is to get experienced teams that are familiar with local cultures, which is key to identify the best investment opportunities. This translates into the creation of many "100% Africans" funds that lever on

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<sup>7</sup> Source: Emerging Markets Private Equity Association (EMPEA)

their in-depth knowledge of local environments; for example, we can mention AFIG in Senegal, Cauris in Togo and Cote d'Ivoire or Oasis Capital in Ghana.

### **Inadequate funding solutions for SMEs**

Despite their undisputable contribution to SMEs' development, notably in terms of financial and strategic support, the impact of private equity funds remains limited because they can generally close not more than two or three transactions every year. It is therefore essential that banks support SMEs in a more systematic way if African economies are to grow sustainably. Unfortunately and more often than not, African banks only support export activities or large local and international companies that intervene in infrastructure, mining and oil projects. In Africa, banks are still unwilling to support SMEs over the long term, or they do it at very high costs (in West Africa, interest rates vary between 15% and 30 %!). In the meantime, for many microfinance institutions (MFIs), SMEs' funding requirements are largely beyond MFI's capacity and countless SMEs therefore fall out of their reach. Consequently, we observe the arrival of mesofinance institutions that position themselves as a third finance option for the missing middle between traditional banks and MFIs, and that propose financing solutions adapted to SMEs' needs and realities. For instance, the Cofina Group<sup>8</sup> that has been present in Cote d'Ivoire, Guinea and Senegal since 2013 is the first mesofinance institution in Africa and has already funded 3,500 projects from 1,509 SMEs.

### **Entrepreneurs need to be accountable**

Providing SMEs with appropriate financing solutions is a priority, but this should not hide the fact that SMEs rarely propose projects with a quality of financial analysis and information that is sufficient to attract interest from investors. Several capacity building formulas have been set up to support entrepreneurs, generally in the form of free training seminars. This capacity building support must get out of the grant and "free money" approach to evolve towards a model that would allow to measure its effective impact and to encourage entrepreneurs to "own" that support and to firmly change the way they manage their operations. By working with entrepreneurs on their governance, their cash management processes and a credible strategy, initiatives like the PFI<sup>9</sup> Program developed in West and Central Africa allow several African SMEs to respond successfully to the challenge of growth and to become efficient market players in Africa and beyond.

**Carole Ramella,**  
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<sup>8</sup> <http://groupecofina.com>

<sup>9</sup> "Preparing for Finance and Investment" – [www.pfi-africa.com](http://www.pfi-africa.com)

*GFA Consulting Ltd is an independent corporate finance, business support, tax and legal consultancy services company based in Accra (Ghana) and dedicated to high growth businesses operating in West and Central Africa and African entrepreneurs who want to leverage on their entrepreneurial experience.*

*GFA Consulting Ltd specializes in:*

- *Analyzing and optimizing of the way African businesses finance their growth;*
- *Assisting management in the context of strategic transactions; and*
- *Supporting African SMEs' fundraising efforts through dedicated business support programs.*



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