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C/M/S/ Bureau Francis Lefebvre

Newsletter on North Africa

Contents

Editorial

2009: tempered optimism for North African countries

Algeria, Morocco and Tunisia should be able to resist the current global economic and financial crisis in spite of a forecast slowdown in growth. According the World Bank's most recent forecasts, Algeria should lose almost one point (4% compared to 4.9%), Morocco two and a half points (4% compared to 6.5%) and Tunisia more than one and a half points (3.7% compared to 5.5%). This relative solidity mainly results from their financial systems, which are still not very globally integrated. Moreover, Algeria has large foreign currency reserves, which were reaped when oil and gas prices soared.

Nevertheless, the recession is already affecting the important tourism industry in Tunisia and Morocco and the majority of export-focused industries – from textiles to car spare parts. The raw material sector in Algeria is obviously also feeling the impact. If the global economic situation deteriorates in the mid-2009 as feared, the countries in North Africa countries will consequently endure a difficult period like the rest of the world. This explains their governments' vigilance, in particular in this presidential election year in Algeria and Tunisia. Moreover, one of the articles in this Newsletter presents the Algerian government's reaction to this situation. ■

فتوى

FATWA

The term "fatwa" means an opinion given by a mufti on a given question relating to the interpretation of Muslim religious law. In particular, a fatwa may relate to the interpretation of legal or tax rules under Islamic law.

Provision of Services

Foreign operators in North Africa

North Africa, with its small service industry and insufficient State funds for research and development, continues to depend extensively on Western operators for technical or scientific studies.

Financial flows between the North African region and foreign countries providing services remain very high. They represent significant foreign currency outflows for countries which keep a close watch on their balance of payments and whose currency is not exchangeable. They also constitute an opportunity cost from a tax standpoint for some of these services where the remuneration is only taxable in the supplier country in light of bilateral tax treaties. Finally, some of these services may limit the development of local production. Therefore, the authorities in the North Africa region pay close attention to imports of services and have drawn up strict tax and financial regulations.

Taxation applying to the remuneration of services imported to North Africa

The majority of States in the North Africa region have established a rather extensive network of tax treaties. Therefore, taxation applying to the payment of a service provided by a foreign country is often controlled by an OECD or UN-style bilateral double tax treaty. Some forms of remuneration defined as fees are clearly identified in the treaty as being liable for double taxation in the country of origin and also in the country receiving the service by means of a tax deduction at source. However, such double taxation is limited or even cancelled as the tax deduction at source withheld by the debtor generally constitutes a tax credit in the country of origin.

Other types of services for which the remuneration is not defined as fees generally only trigger taxation in the supplier country.

However, we note that the tax authorities throughout the entire region have a very wide interpretation of the concept of fees and consider that the application of the tax deduction at source is practically automatic for all payments of services.

The problem lies in the fact that the tax deduction at source may not give rise to a tax credit in the supplier country whose tax authorities have a restrictive interpretation of the concept of fees. This attitude adopted by the tax authorities can be understood: it is the only way for them to regulate transfer pricing and forecast income.

In this respect, the 10% tax deduction at source under Moroccan law is almost systematically applied to all remuneration of services.

In Algeria, the 24% tax deduction at source applies but it is possible to benefit from an exemption in some cases (in particular, in a country subject to a tax treaty where studies are fully carried out in the supplier country and invoiced separately). The 12% tax deduction at source provided for some fees in the Franco-Algerian tax treaty is more problematic in terms of application and an advance ruling is occasionally required to ensure application to the case in point.

In Tunisia, a 15% tax deduction at source applies to the base including VAT of the remuneration. In Libya, the traditional

system of tax deductions at source does not exist and very few bilateral tax treaties have been concluded. However, a flat-rate corporate income tax has been elaborated and registration fees apply as from the registration of the supply agreement, even before the payment of the remuneration by the debtor.

Foreign exchange regulations applying to the remuneration of services imported to North Africa

The exchange control office or central bank are the keepers of the flame and authorise, limit or refuse fund transfers to pay for services supplied by foreign service providers.

The debtors' commercial banks, acting on the authority of the central bank or exchange control office, ensure compliance with regulations.

Therefore, an agreement providing for contractual warranties can be drawn up and performed but the debtor can be prevented from making payment due to a prohibition by the relevant authorities.

In this respect, the central banks or exchange control offices still had a form of pre-eminence a few years ago and accordingly controlled all inflows and outflows of foreign currency.

"The problem lies in the fact that the tax deduction at source may not give rise to a tax credit in the supplier country"

KEY FIGURES

370

This is the number of franchise networks registered in Morocco by the Ministry of Industry, Trade and New Technologies.

Their authorisation opened doors from a customs and tax standpoint. In this respect, it is not rare that the tax authorities continue to base their judgments on the decisions of the regulatory authorities for the purpose of approving tax treatment, in particular with regard to transfer pricing. Moreover, the policies relating to foreign exchange control are contrasted. In Algeria and Tunisia, it is not possible to transfer funds as remuneration for a franchise or trade mark licence. However, Morocco authorises such transfers and was furthermore one of the first countries on the African continent to do so with regard to franchises.

Management fees are one of the most criticised forms of remuneration. Foreign companies are generally content to send a letter to their subsidiaries explaining the group's policy in this respect and stipulating remuneration in proportion to the subsidiary's turnover. However, this type of approach is purely and simply rejected in Algeria and Tunisia. In Morocco, it is likely that the bank would balk at carrying out the transfer, in particular if the rate or absolute value of the amount appeared to be excessive. Moreover, in Algeria, it is now necessary to refer any request for remuneration of services abroad to the tax authorities in order to settle any tax deduction at source owed and obtain a tax certificate to carry out the transfer. Therefore, it is advisable to be extremely cautious when planning to provide services, in particular between companies in the same group. It is consequently recommended submitting the draft agreement to the debtor's commercial bank for assessment prior to implementation. ■

KEY POINTS

- **Expect that a tax deduction at source** may apply in spite of the provisions of the bilateral tax treaty;
- **Application of a tax deduction at source** not expressly stipulated in the tax treaty may not give rise to a tax credit;
- **Always check the foreign exchange regulations** and, where necessary, ask the local bank of the beneficiary of the service to approve the draft agreement;
- **Transfers of fees abroad** for some services between companies in the same group, such as management fees, may be limited or even prohibited.

Special zones

Export Free Zones and Nearshore Zones in Morocco

The Kingdom of Morocco is looking to attract foreign and national investors by creating export free zones and nearshore zones to carry on high added value activities for external markets.

This offer launched by the Development plan – comprised of a section relating to industry and a section relating to services – is intended to diversify the national economy, which up until now has been mainly focused on natural resources and business relocations with limited added value.

Export Free Zones (ZFE)

Export free zones were introduced and defined by Framework Act No. 19-94 of 15 February 1995. Six zones have been created to date further to three Decrees (dated 1997 and 2002). These zones located in the Tangiers area are solely intended for industry and are classified according to the activities which may be carried on in these zones (car manufacturing, aeronautics, port activities, etc.).

Investors wishing to carry on business in an export free zone must submit a setting up authorisation application to the Tangiers-Mediterranean Special Agency (TMSA), which is the development and management body for the zones. After examination of the application, TMSA refers the application to the commission in charge of free zones for its opinion. The Wali or Governor issues the final setting up authorisation. Such authorisation releases investors from carrying out all other formalities relating to planning or development permission for the premises required to carry on activities. A company incorporated under Moroccan law or a branch must be formed when setting up in an export free zone.

As the activities are not subject to foreign exchange regulations in force in Morocco, the share capital, accounting records, bank accounts and all of the company's transactions are denominated in a foreign currency.

Companies (except for companies carrying out building or assembly work) are consequently entitled to a total exemption from corporate income tax for five years, followed by taxation at a reduced rate of 8.75% (compared to 30% under ordinary law) for 20 years, and an exemption from business tax for the first 15 years following the launch of the business activities. From an indirect taxation standpoint, the export free zone is treated as a non-VATable territory.

KEY POINTS

Export Free Zones:

- reserved for industrial activities for export;
- exemption for customs duties, VAT and registration taxes on capital increases;
- total exemption from corporate income tax for five years, followed by a rate of 8.75% for 15 years;
- exemption from business tax for 15 years with effect from the launch of business activities;
- no tax deductions at source on dividends and interest paid abroad;
- transactions conducted in foreign currency subject to no controls by the exchange control office.

Nearshore Zones:

- reserved for service activities for export;
- offer of premises ready for output;
- income tax on salaries deducted at source subject to a 20% upper limit subject to concluding a memorandum of understanding with the government;
- entitlement to the exemption from corporate income tax under ordinary law applying to service exporters: 0% for five years on the export turnover, and subsequently 17.5% on a permanent basis.

Therefore, supplies and services for an export free zone are VAT-exempt. Dividends distributed by a company located in an export free zone are exempt from tax deductions at source if they are paid abroad (the tax deduction at source is 10% when dividends are paid to Moroccan residents). Moreover, interest paid to a foreign company by a borrowing company located in an export free zone is exempt from any tax deductions. However, remuneration relating to technical support paid by a company located in an export free zone is subject to a 10% tax deduction at source under standard conditions.

Nearshore Zones

Nearshore zones are special zones reserved for service activities, which were introduced by Circular No. 9/2007 issued by the Prime Minister on 7 May 2007. They are formed as business parks with office premises ready for output managed by a special body (MEDZ, a subsidiary of Caisse de Dépôts du Maroc). Eligible services must fall within the scope of Business Process Outsourcing (BPO) or Information Technology Outsourcing – ITO). Two nearshore zones are currently operating in Casablanca (Casa Nearshore Park) and Rabat (Rabat Technopolis). Two other business parks are being constructed at Fès and Marrakech.
Setting up in a nearshore zone is carried out on the basis of an application, following a request accepted by the management body. Authorisation results in the conclusion of a business lease with a company incorporated under Moroccan law, which is required to do business. From a tax standpoint, the nearshore system is governed by ordinary law applying to export services: exemption from corporate income tax for five years, followed by a reduced rate of 17.5% on a permanent basis; VAT exemption with the possibility for reimbursement of any VAT credit; exemption from business tax during the first five years following the launch of the business activities. Apart from access to the zones, the incentive offered relates to income tax. In this respect, companies doing business in these zones are entitled to a 20% upper limit on income tax (deducted monthly at source by employers in Morocco) in the form of a cash refund of the tax paid in relation to the total payroll and on a pro rata basis of the export turnover over this threshold (the marginal rate of income tax is 40% in Morocco). It is necessary to conclude a memorandum of understanding with the Moroccan State to apply this measure. The subsidy accordingly received should be treated as a taxable subsidy for corporate income tax purposes as the original tax expense is deductible.
At the same time as creating specialized zones, the Moroccan government has implemented some training courses specific to nearshore activities.
We highlight in this respect that companies setting up in an export free zone or nearshore zone are entitled to qualify for training subsidies. These subsidies (provided by the Moroccan Employment Agency) apply to companies, which decide to train Moroccan nationals with a view to recruiting them as permanent employees. The subsidies are calculated based on the employees' qualification level and profile and may reach EUR 5,800 for an engineer.

ECONOMIC STATISTICS

400 companies

based in the Tangiers export free zone, which generates 40,000 jobs and almost MAC 5 billion in private investments.

300 millions EURO

in turnover and 17,000 jobs generated by nearshore zones.

Taxation

The Algerian tax authorities' response to the global financial crisis

Some provisions of the 2008 and 2009 Finance Acts implemented new procedures for foreign investments. Since December 2008, instructions issued by the Algerian Prime Minister, M. Ahmed Ouyahia, have supplemented the restrictive system.


M. Ahmed Ouyahia, Algerian Prime Minister.

The latest instructions issued by the Algerian Prime Minister, M. Ahmed Ouyahia, were not officially released to the general public but have already prompted significant coverage*. They appear to replace directives and are consequently subject to interpretation. One area of uncertainty relates to the obligation for foreign investors to pay back a majority of the capital to Algerians whether in the scope of a public-private relationship or a purely private framework.

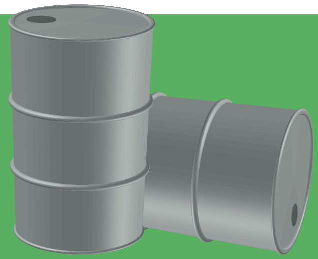
Directives relating to partnerships with nationals and limitation on foreign currency transfers outside of Algeria

Before December 2008, all foreign investors wishing to set up a subsidiary in Algeria were able to submit an investment

ECONOMIC STATISTICS

42 USD

This was the price of a barrel of oil in January 2009 whereas it was USD 88 in January 2008 and peaked at USD 131 in July 2008.



Source: OPEC

KEY POINTS

- **Reserve the majority** stake in investment projects for nationals, depending on the business sectors to be specified at a later date;
- **for importing companies, reserve 30% of the capital for nationals;** measure applicable to existing companies;
- **provide exclusively for financing in Dinars** except for the company's capital;
- **ensure that the trading income** in foreign currency exceeds all foreign currency transfers;
- **declare all transfers of funds** abroad to the financial authorities and pay tax deductions at source to carry out such transfers;
- **pay a 15% branch tax** in relation to its permanent establishment for the amounts deemed to be transferred to the head office.

statement to the National Investment Development Agency *(Agence nationale de développement et d'investissements)* and accordingly qualify for (i) guarantees relating to transferring investment gains and (ii) benefits mainly in relation to taxation provided for by the Algerian Investment Code.
Supervision of investment applications has now been removed from the National Investment Development Agency and granted to the National Investment Board (Conseil national d'investissement), which is normally in charge of projects of national interest. Apparently, applications which have already been submitted to the National Investment Development Agency are currently blocked and it is advisable to submit them to the National Investment Board.
Public-private partnerships, in particular privatisations, or contracts coming under the authority of a public contracting authority, which are performed in various sectors yet to be defined, must be drawn up to ensure that a foreign partner's holding in the capital is limited to 49% at most. It is provided that the foreign investor remains the main shareholder in terms of stakes in the capital. In theory, this new measure will only apply to negotiations in progress or in the future and should not affect contracts already concluded. However, uncertainty remains regarding whether this public offering to nationals is limited only to PPPs and public contracts.
We assume that this rule applies to other types of foreign direct investments. In this respect, as regards importing companies which are excluded from this measure introduced by the National Investment Development Agency, the national partnership will be limited to 30% of the share capital but also apply to existing companies. Importing companies will be treated as special cases, insofar as they previously formed part of the National Investment Development Agency's negative list and consequently were not entitled to the benefits provided for by the Investment Code and were not even authorised to transfer dividends abroad.
From a financing standpoint, foreign investors will be obliged to use the local financial market, except for the initial capital. In this respect, it is useful to note that the Bank of Algeria has just ordered a capital increase to EUR 100M for all banks present in Algeria. Investment projects should include a clause whereby the relevant project must generate a surplus balance in foreign currency for Algeria (to this end, it is necessary that more foreign currency is collected than transferred outside of Algeria). If our understanding is correct, this assumes that if the balance is not favourable to Algeria it is not possible to transfer dividends abroad. Finally, principals to public contracts are asked to strictly and systematically apply the principle of the preferential margin to the minimum 15% rate granted to Algerian suppliers laid down by the Public Contracts Code.

Finance Acts relating to cross-border taxation
From a tax standpoint, the 2008 Supplementary Tax Act lays down the following provisions:
- obligation to reinvest the profits exempt from tax in the scope of the National Investment Development Agency's incentive schemes. The tax authorities stated in an internal memorandum that the obligation to reinvest should relate to an amount, which corresponds to the tax saving granted to foreign investors.
- introduction of a 15% branch tax for all Algerian branches and permanent establishments of foreign companies. This type of tax paid by means of a tax deduction at source applies to profits after tax deemed to be transferred to the registered office. These transferred funds are treated like dividends and taxed as such.
- obligation to declare all fund transfers abroad to the tax authorities (mainly services and not goods) by justifying the payment of the taxes paid by the tax deduction at source in order to obtain the authorisation of the fund transfer.
- introduction of a 20% tax deduction at source on the capital gains of sales of shares in Algerian companies carried out by non-residents. ■

*Our comments are subject to the official publication of the laws and regulations commenting on or clarifying these instructions.

Sub-Saharan Africa

Increase in North African investments

By Pierre Marly, Lawyer specializing in corporate law in CMS Bureau Francis Lefebvre's African team.

A brief overview of the latest large mergers and acquisitions in the continent shows that operators in North Africa, and in particular Morocco, are doing business in Sub-Saharan Africa.

The Moroccan commercial banks have become major players in Sub-Saharan Africa over the last few years: investments by the Moroccan bank, BMCE Bank, in the Bank of Mali and the pan-African group, Bank of Africa, takeover by the Moroccan bank, AttijariwafaBank of Compagnie Bancaire d'Afrique de l'Ouest in Senegal and five banking subsidiaries of Crédit Agricole in Western and Central Africa. In the aeronautics industry, North African national companies have increased links with the capitals of Western and Central Africa and are seeking to create capital partnerships. The telecommunications and infrastructure sectors are not being outdone: the Moroccan National Electricity Board was awarded a contract for water and electricity services in Cameroon, Morocco Telecom won the privatisation bid for ONATEL in Burkina Faso, SOTELMA in Mali and Gabon Telecom in Gabon. Moreover, a bilateral or multilateral institutional framework, which did not exist a short while ago, is being implemented in the North African countries and the French-speaking sub-Saharan countries. The negotiations in progress between North African countries and the West-African Economic and African Union (UEMOA) demonstrate the efforts applied to forge closer economic links.

In this respect, an agreement was concluded between Morocco and UEMOA in November 2008, which provided for mutual pricing concessions. UEMOA is holding similar negotiations with Algeria and Tunisia. The creation of a free trade zone is also being envisaged between the Member States of the Community of Sahel-Saharan States by 2010.
From a tax standpoint, an agreement was concluded between Mauritius and Tunisia on 12 February 2008 and an agreement between Morocco and Burkina Faso is currently being negotiated. Therefore, political activities are as intense as the economic operators' activities, which results in an increase in economic relations between these two zones on the African continent. ■

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