**TO:**

**FROM:** Jan Forest

**DATE:** February 17, 2017

**SUBJECTS:**  Optimal Legal Structure for Avoidance of Duties on Raw Materials

You have requested advice about the optimal legal structure for [X] in light of the fact that you are now sourcing cotton fabric and sewn cotton items from Asia and Africa and paying high duty rates in Ghana. Duties on imported products in Ghana are very high (generally 20-25%). For this reason, it is important to look at ways of paying less duty on imported raw materials to be used in manufacturing products in Ghana to be exported. There are three major ways to accomplish this:

1. Drawback
2. Ghana Free Trade Zone
3. Concessions
4. **Drawback**

Drawback is the refund of part or all of the duties paid on imported goods when those goods are exported or used in a prescribed manner. Drawback may be paid for goods exported in the same condition as they were imported or for goods used to manufacture articles which are then exported. In certain circumstances, drawback may also be paid on goods that have been lost or abandoned. Ghana law provides for drawback in sections 40-42 of the Customs Management Act 1993 and in section 106 of the Customs Act 2015 (Act 891). The Customs Regulations 1976 (L.I. 1060) also address drawback.[[1]](#footnote-1)

To claim a duty drawback, a claimant is required to provide documentary proof endorsed by the Customs division of GRA as evidence of re-export.[[2]](#footnote-2) The documents required include certified copies of the import documents; import duty payment receipts; drawback debenture form (Form C3) (copy attached); container and sealed number; export documents and statement of composition form (Form C2A) (copy attached) if it is a material drawback. Additionally, claimants must attach their copy of the Import Bills of Entry and Bill of Lading or Airway bill. At most five working days are required to process claims for refunds following which Government has to pay the duty drawback to exporters through an escrow account established with the Bank of Ghana for the purpose. Operationally, refunds are administered via a check drawn on the CEPS Refund Reserve Account (Escrow Account controlled by Bank of Ghana) with the following signatories: Commissioner General of Ghana Revenue Authority (GRA) or representative, Minister of Finance or representative and Executive Secretary or representative of GRA. Exporters have a twelve-month time frame beginning from the date of the first export within which the duty drawback can be claimed. The Commissioner-General is required by law to pay a drawback claim within twelve months after verifying the claim.

You have indicated that you have had issues in the past with receiving drawback refunds. A separate fund for refunds was established in July 2016 and there are reports that refunds are now being made more quickly. In addition, CEPS is working on trying to make the process electronic. It does take some effort to set up a system for using drawback, but it should be worthwhile in the long run.

1. **Ghana Free Trade Zone**

Raw materials imported into the free zone to be used in the manufacture of goods for export are exempt from taxes and duties. The Minister for Trade and Industry may also authorize the sale of goods from a free zone up to 30 percent of the annual production. Such goods will be treated as imports into Ghana and are subject to all laws related to imports. The sale of goods and services by a domestic enterprise to the free zone will be considered exports from Ghana.

However, a company may not use the free zone unless it registered as a body corporate registered under the Companies Code 1963 (Act 179) or the Private Partnership Act 1962 (Act 152) and it has a license to develop or manage the free zone or to carry on a trade, business or industry within the free zone. In addition, a free zone must meet the requirements of the law with respect to buildings, the provision of utilities, fencing or any other necessary infrastructure and the cost of CEPS on-site services.

Thus, although operating in the free zone could provide many benefits, you would have to change your registration in Ghana. Also, the costs of being in the free zone and of making the necessary structural changes may be prohibitive for [X].

1. **Concessions**

It may be possible to register as a manufacturer in Ghana and receive some concessions on the amount of duties paid on raw materials for use in manufacture for export. However, this option also requires that the company be registered as a for-profit company. It is also not clear that this option has been used yet in Ghana.

1. **Recommendations**
2. **Legal Structure**

After researching this issue, I do not see a need for you to change your registration, unless you decide to use the free trade zone or apply for concessions. While it is true that a Company Limited by Guarantee may not generally engage in trading, there are exceptions. So long as the primary purpose of the organization is not to make a profit, the business activity is closely related to the purpose of the non-profit company and all of the income and proceeds are applied to the charitable purpose of the company, the organization will not lose its non-profit status.

U.S. law covering non-profit companies (generally covered under section 501(c) (3) of the Internal Revenue Code) states that there are four main activities that can jeopardize the organization’s tax-exempt status:

1. Activity that results in private benefit or inurement;

2. Lobbying activity, if it is a substantial part of the organization’s overall activities;

3. Political campaign activity; and

4. Unrelated business activity that is substantial in comparison to the exempt activities.

The fourth of these is relevant here. In determining whether a business activity is an unrelated business activity, U.S. law looks at whether the activity is substantially related to the charitable purpose for which the organization was set up. If so, the activity may be exempt, even if it is a trade or business. However, if an exempt organization carries on a trade or business that is unrelated to its exempt purpose, except that it provides funds for the exempt purpose, it will be taxed on its income from that trade or business. The business is not considered substantially related to the exempt purpose if it does not contribute importantly to that purpose beyond the provision of funds. For example, selling of products that result from the performance of an exempt function is not an unrelated business subject to tax where the product is sold in the condition it is in at the time the exempt function is completed, but if the product is used in further business activity beyond what is necessary to dispose of it as is, it may be considered an unrelated business activity. Any exploitation of the product of the exempt activity beyond that needed to contribute importantly to the exempt purpose can result in the activity being considered a taxable unrelated business activity. An example of a related business activity that would not be taxed is the sale of products made by residents of a halfway house where the production of the product contributes importantly to the exempt purpose and the profits are applied to operating costs for the facility. Similarly, where students of an exempt vocational school make articles as part of their regular course of training, the sale of those articles may not be treated as an unrelated taxable business activity.

The trading business engaged in by [X] should qualify as a tax-exempt related business. The articles exported by [X] are produced as a necessary part of the charitable purpose for which [X] was created and all proceeds and profits go back into the charitable company.

1. Numerous attempts to obtain a copy of these regulations were not successful. CEPS indicated that they are under review and not available. [↑](#footnote-ref-1)
2. The person at CEPS responsible for drawback said the company should send a letter to CEPS, on company letterhead, stating its intention to use drawback. This is not mentioned in the law, but it may be a good idea to do it anyway. [↑](#footnote-ref-2)