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EDITOR'S LETTER

Dear Reader:

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In this sense, and taking into account the actual interest that this matter has for the day-to-day business of taxpayers, in so far as it will determine the quantum of tax to which they will be subject in a given fiscal year, we would like to invite the reader to briefly reflect on this matter in the next few lines.Cont. Pág. 2

The capital gains are determined by the difference between the net realizable value (selling price) of the inherent charges and the acquisition value deducted from the reintegration or amortization. These constitute income (Article 20/1 (h)) of the CITC) and as such are added to determine the tax base and subject to the general rate of 32%. The payment of the tax...Cont. Pág. 4

TECHNICAL INFORMATION

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THE TAX CONCEPT OF NOT DULY DOCUMENTED EXPENSES FOR CIT PURPOSES

Very often, in the assessment of tax payable by taxpayers under Corporate Income Tax (CIT), a significant number of commercial transactions are rejected by the tax administration for the purpose of deduction on the taxable income because they are, allegedly, expenses that do not have an adequate legal support or, in common language for tax purposes, are not duly documented.

Although it is a ground that is frequently used by the tax administration to justify the refusal of a certain expense, the real range of this foundation is not entirely clear.

In this sense, and taking into account the actual interest that this matter has for the day-to-day business of taxpayers, in so far as it will determine the quantum of tax to which they will be subject in a given fiscal year, we would like to invite the reader to briefly reflect on this matter in the next few lines.

As is well known, the business activity always implies incurring in certain expenses that cannot always be deducted as costs for the purpose of determining taxable income, primarily because they are not accepted for tax purposes. The Corporate Income Tax Code, approved by Law 34/2007 of 31 December, with subsequent amendments introduced by Laws 20/2009 of 10 September, 4/2012 of 23 January and 19/2013 of 23 September (hereinafter referred to as CITC) lists, in its Article 36, costs that are not deductible for tax purposes, i.e. costs that cannot be deducted for the purpose of determining the taxable income. Among such costs are those that are not duly documented.

Reading the CITC, it is not possible to identify any positive definition (what they are) or negative (what they are not) of expenses duly documented for the purpose of CIT, which puts the interpreter of the tax law, in general, and the taxpayer, in particular, in a sensitive situation, without prejudice to the taxpayer's right to appeal using the appropriate legal remedies, when he feels prejudiced in his rights and interests legally protected.

That said, it seems that the prevailing understanding at the level of the Tax Administration is that expenses are considered to be duly documented for CIT purposes when they are substantiated by an invoice issued under the terms of article 27 of the Value Added Tax Code, approved by Law 32/2007 and amended and republished by Law no. 13/2016 of 30 December (hereinafter "VATC").

As for us, this interpretation does not seem to be so linear, since each tax has its own nature, aims and mechanisms of operation. Thus, if it is certain that for VAT purposes, the expense duly documented will be that which is substantiated by an invoice issued in accordance with what is established in Article 27 of the VATC, the understanding may, in our opinion, be different for purposes of CIT.

It is therefore of paramount theoretical and practical importance to clarify the formalities that a given document must comply with in CIT, so that the corresponding expense is considered "duly documented", insofar as the CITC does not bring us any concept /notion in that regard, contrary to what happens in the case of VAT, as described above, where it is considered duly documented expense that which is substantiated by an invoice which fulfills the requirements of Article 27 of the VATC. Only this invoice, therefore, will grant the right to deduct VAT.

Now, the CITC refers to "not duly documented charges and expenses" which are of a confidential or unlawful nature,[1] and it does not at any time establish that duly documented expenses are only those appearing in the invoice which satisfies the specific requirements set forth in VATC for the specific purposes of that tax.

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In the case of expenses which are not duly documented, it seems that the intent is not to conceal its occurrence, since it is not the existence of the commercial transaction itself that is questioned, but rather the acceptability of the means used to document such a transaction, more specifically the adequacy of this document for tax purposes in CIT. It should be noted that the existence of expenses which are not duly documented results in immediate (i) non-acceptance of the said expense as a deductible cost (when it should be), (ii) additional taxation in CIT at the rate of 32% (when the Taxpayer has not, on its own initiative, excluded that cost in the respective income statement), (iii) separate taxation at the rate of 35%. It is understood here that the legislator intended to attribute a particularly aggravated penalty for cases of not duly documented expenses. Now, in view of the financial impact that the consequences described above may have on any company's accounts, it seems to us that it is more than relevant to clearly and unequivocally establish in the law which documents should be eligible to duly document a transaction in terms of CIT.

As for us, considering the essence and mechanism of operation of the CIT, we understand that the transaction will be duly documented if it is substantiated by a document that is adequate to guarantee the full exercise of the audit activity by the TA, allowing the assessment of the existence and relevance of such cost for the company's business, as well as assessing the level of compliance with tax obligations in regards to suppliers.

Our understanding that the supporting documents and costs justification do not have to assume the essential formalities required for VAT invoices meets with the comparative law where there is extensive jurisprudence in this regard. For example, the South Central Administrative Court of Lisbon considers that *the requirement of documentary evidence should not be confused with or exhausted in the requirement for an invoice, being sufficient a written document, in principle external and mentioning the characteristics of the operation.*[2] This ruling also adds that the supporting document in CIT, must be presented *in a way that is adequate to guarantee the full exercise of the audit activity by the Tax Administration, enabling on the one hand the control of the legality of the deductions made for the purposes of ascertaining the tax to be paid, and on the other hand, the regularity of taxation of the amounts received by service providers.*

With the above lines we do not intend to empty the legal-fiscal value of an invoice issued under the law, but only to safeguard in terms of CIT (as opposed to VAT) against situations in which for various reasons (i) the invoice itself does not contain for example one of its elements or the suppliers of the taxpayer belong to the informal regime[3] or other situations. In our view, in these situations the consequences in terms of VAT are acceptable but those should not affect the CIT, where the concept of not duly documented expenses is not the same as for VAT purposes.

Thus, we believe that it is extremely important to reflect on this topic, which may provide greater clarity of these concepts, allowing greater legal certainty and security on the part of the taxpayers and the Tax Administration itself in their action.

[1] See Article 36 (1) (g). This type of expense does not provide any documentary evidence to substantiate the commercial transaction that gave rise to it.
[2] In ruling relating to Case No. 07833/14 of 21 May 2015
[3] Here we mean the suppliers who does not fall within the formal system and therefore are not registered for tax purposes..

TAX LIABILITIES OF NON-RESIDENT ENTITIES WITH OR WITHOUT A PERMANENT ESTABLISHMENT

With this article I will address the rules and liabilities arising from the incidence of the Corporate Income Tax ("CIT") applicable to entities whose headquarters or effective management is located outside Mozambique, since the form of taxation in Mozambique varies according to whether or not the entity acts through a permanent establishment.

Under article 5 of the CIT Code, approved by Law no. 34/2007 of 31 December, corporate persons and other entities which do not have headquarters or effective management in the Mozambican territory, are subject to CIT only on income obtained therein.

Regarding non-residents, the legislator clearly defined when income is considered to be ob-tained in the Mozambican territory: (i) the situations that constitute the existence of a permanent establishment, taxed for the income attributable to the same, and (ii) the income that will be taxed in the Mozambican territory because they are considered to have been obtained in Mozambique, even if they are not attributable to a permanent establishment.

It should be mentioned that income earned as a result of services rendered, royalties for the use of industrial property or commissions through contract brokerage are considered to be obtained in the Mozambican territory when the debtor of the income is an entity with headquarters and effective management in Mozambique.

A permanent establishment is understood as any fixed facility through which an activity is exercised of a commercial, industrial or agricultural nature, including the provision of services (see Article 3 of the CIT Code). Thus, a fixed facility may be a branch, an office, a building site or a construction, to which it may be imputed the execution of sale transactions or services provision in the Mozambican territory.

In fact, a fixed facility means that it must have a certain degree of permanence in order to be considered a permanent establishment, namely carrying out the activity for more than six months, including in the case of construction, assembly or installation projects or works.

It should be noted that dependent agents are treated as permanent establish-ments for the purposes of profits, since they may have the power to decide and perform functions binding on those non-resident entities. This figure works as a measure to prevent possible tax evasion attempts within the scope of definition of a permanent establishment.

Taxation of non-resident entities without a permanent establishment

In the case of non-resident entities without a permanent establishment, in general, the CIT is levied on individually income by applying a withholding tax, exempting these entities from any reporting obligation.

Thus, according to article 39 of the CIT Code Regulations, approved by Decree No. 9/2008 of 16 April, non-resident entities that obtain income in the Mozambican territory which are not attributable to a permanent establishment, are obliged to submit the income tax return, provided that there has been no definitive withholding tax on the same. These entities are obliged to submit the tax return in respect of the following income:

- Derivatives of property, except gains resulting from the onerous transfer of the property, - until the last working day of May of the year following that to which the income relates, or until the last working day of the 30-day period counting from the date on which the obtainment of income has ceased; and

- Derivatives of gains arising from the onerous transfer of immovable property or share capital or other securities of resident entities or when the payment of the respective income is attributable to a permanent establishment situated in the national territory - until the last working day of the period of 30 Days counting from the date of transfer.

Income obtained by non-resident entities without a permanent establishment is normally taxed by withholding tax at the rate of 20%, except income derived from the provision of telecommunications and international transport services, those resulting from the assembly and installation of equipment by non-residents as well as income from securities listed on the Mozambique Stock Exchange, which are subject to a 10% rate.

It should be noted that in cases where non-resident entities without a permanent establishment obtain income from (i) the sale of a property in Mozambique; or (ii) sale of a shareholding (eg quota or shares) held in a Mozambican company, they are obliged to appoint a legal representative to carry out the tax liabilities inherent to the capital gains obtained.

Taxation of non-resident entities with a permanent establishment

On the contrary of the foregoing, the permanent establishment results from the non-resident entity exercising its activity by means of a fixed installation base in the Mozambican territory from which it carries on a profit-making activity, thereby obtaining income subject to CIT

However, since a non-resident entity is deemed to have a permanent establish-ment in the country as a result of its economic activity carried out here, it will not be subject to withholding tax but is required to register for taxation purposes, in order to comply with the inherent tax liabilities, which are the same tax liabilities to be complied with by resident entities. In general, such tax liabilities are as follows:

Tax registration (obtaining Tax Identification Number - NUIT); Declaration of commencement of activities for tax purposes; Monthly obligations concerning Value Added Tax (VAT) and Withholding tax (for Personal Income Tax - PIT and CIT purposes) and declarative obligations.

In fact, non-resident entities considered to have created a permanent establish-ment in the national territory, are obliged to make advance tax payment, special advance tax payments, as well as to submit the Income Tax Return M / 22 for the determination of CIT to be made through reverse charge.

With this article I hope that I have clarified some of the doubts related to the rules of taxation of non-residents regarding the CIT and compliance with declara-tive obligations, in the national territory.

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THE TAX REGIME OF CAPITAL GAINS APPLICABLE TO THE MINING INDUSTRY IN MOZAMBIQUE

1. Introduction

Nowadays, the topic of capital gains has attracted much attention within the Mozambican society. It should be noted that in Mozambique the largest tax payments were made in capital gains.

In this article we propose to discuss the tax regime of capital gains applicable to the mining industry, more specifically mining and oil activity. Since this is a complex subject, we will stick to the most relevant aspects.

The tax regime applicable to capital gains in Mozambique varies depending on whether it is a resident taxpayer or a non-resident taxpayer.[1]

2. Taxation of capital gains earned by resident taxpayers

The specific taxation rules applicable to resident legal entities[2] carrying out oil operations or mining activities are provided for in Law 27/2014 of 23 September, which approves the Specific Taxation and Fiscal Benefits Regime for Oil Operations ("Law 27/2014") and Law no. 28/2014, of 23 September, which approves the Specific Taxation and Fiscal Benefits Regime for Mining Activity ("Law 28/2014"), respectively. According to the aforementioned laws (Articles 15 and 29 (4) of Law 27/2014 and Articles 23 and 39 (4) of Law 28/2014), the determination of Corporate Income Tax ("CIT"), in addition to the specific rules, is made in accordance with the rules of the respective Code - Corporate Income Tax Code, approved by Law no. 34/2007, of December 31 ("CITC").

Pursuant to Article 37 of the CITC, capital gains are gains obtained by legal entities in respect of items of tangible assets by means of onerous transfer, regardless of the title under which it is operated, as well as those resulting from permanent assignment of those items for purposes unrelated to the activity carried out.

The capital gains are determined by the difference between the net realizable value (selling price) of the inherent charges and the acquisition value deducted from the reintegration or amortization.[3] These constitute income (Article 20/1 (h)) of the CITC) and as such are added to determine the tax base and subject to the general rate of 32%. The payment of the tax resulting from the capital gains is made in the following year to which the gain refers.

It should be noted that the positive balance resulting from the onerous transfer of elements of tangible fixed assets or as a result of claims for losses incurred in these elements does not contribute to the taxable income until the end of the third fiscal year following that of the realization or, until the end of the fourth fiscal year upon a request addressed to the Minister of Economy and Finance when the realizable value is reinvested in the acquisition, manufacture or construction of elements of tangible fixed assets.

3. Taxation of capital gains earned by non-resident taxable persons

Capital gains not attributable to a permanent establishment located in Mozambique obtained by non-resident entities that carry out oil operations or mining activities are taxed observing rules in conjunction with the aforementioned legislation and the Individual Income Tax Code, approved by Law no. 33/2007, of December 31 ("PITC"), applied pursuant to Article 45 of the CIRPC.

Under Law 27/2014 and 28/2014, gains obtained by non-residents in the Mozambican territory, with or without a permanent establishment, resulting from the direct or indirect sale of the mining or oil rights in the Mozambican territory, are taxed as capital gains at the rate of 32%. Thus, the gratuity and the location of the transaction do not affect the taxation in Mozambique, since it involves assets located in Mozambique.

In the case of disposal of social shares and other securities, the gain subject to tax comprises the difference between the realizable value and the acquisition value, net of the part qualified as capital income (Article 13/3 (a) of the PITC). It is important to note that the balance determined and subject to taxation is considered in its entirety, in the case of transfer of shares and securities, regardless of the period of holding equity shares. However, the balance determined in the sale of certain assets such as immovable property, intellectual or industrial property, among others provided by law, is only considered at 50%.

In addition, for the determination of capital gains, certain expenses considered necessary and actually practiced in the disposal of the assets in question are considered, thus reducing, the balance in which the tax is levied (Article 47 of the PITC).

The payment of the tax due is made 30 days counting from the date of the respective disposal.

3.1. Conventions to avoid double taxation

Capital gains earned by non-resident entities that have their headquarters and / or effective management in a country with which Mozambique has ratified a Convention to Avoid Double Taxation and Prevent Fiscal Evasion (DTC) are taxed in accordance with the aforementioned treaty. It should be noted that Mozambique has ratified a DTC with South Africa, Botswana, United Arab Emirates, Italy, India, Portugal, Mauritius, Macao and Vietnam.

Laws 27/2014 and 28/2014 provide that gains arising from the alienation of mining and oil rights, including those from securities, shares or social shares, are for tax purposes, gains related to immovable property with a source in the Mozambican territory. We understand that this provision is intended to allow most of them to be taxed in Mozambique, since the conventions tend to tax in Mozambique the disposals of assets related to immovable property assets located in Mozambique.

3.2. Joint liability

According to the Regulation of Law 27/2014 (Article 19) and Regulation of Law 28/2014 (Article 21), concessionaires holding mining or oil rights must notify the Tax Administration (TA) of any changes in the ownership of the said titles and to report the gains obtained by residents and non-residents in the Mozambican territory for the purpose of capital gains taxation.[4] It should be noted that non-payment of the tax by the non-resident's implies the joint and several liability of the concessionaire[5] and the purchaser of the rights, which must pay the tax due plus compensatory interest, in accordance with applicable legislation.

In sum, capital gains from the mining industry are a substantial source of tax revenue that results from asset and mining and oil rights transactions held by concessionaires in Mozambique. The rules for its taxation are complex and still require some care in its determination, however a great part has already been done in order to avoid that the transactions could occur without taxation.

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[1] We will stick to corporate entities and other similar entities.
[2] According to the CIT Code, resident entities are considered to be those entities with headquarters and effective management in Mozambique and in case of those which do not have, have a permanent establishment here.
[3] The acquisition value can be updated by applying the currency devaluation coefficient, when at the date of the realization, at least two years have elapsed since the date of acquisition, being the value of such acquisition deducted for the purpose of determining the taxable profit.
[4] Where the TA has doubts about the transaction values, it can presume them using best international practices.
[5] In the case of oil activity, joint and several liabilities are attributed to the concessionaire whose oil rights have been transferred.

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