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Editor's Letter

Dear Reader:

In this number you can read: "The Tax Regime for Individual Income Derived Abroad", "The Tax Regime for Individual Income Derived Abroad" and also "Key Issues to Consider in Transgression, Criminal and Administrative Proceedings in Tax Cases".

We wish you a Happy reading!

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The discussion about the taxation of income earned abroad by individuals, resident in Mozambique, for tax purposes is a matter of great importance in our country's current economic situation in which we see ever-increasing movement of foreign workers.

It is in this context that we will address the tax status of an expatriate who has been in Mozambique for more than six months, and receives income from shares held in companies abroad.

The Individual Income Tax Code (CIRPS), approved by Law No. 33/2007 of 31 December, determines that individuals are subject to the payment of tax: (i) on a global basis, if considered resident for tax purposes, i.e. those individuals are required to declare all income, whether earned in Mozambique or abroad; and (ii) in the case of non-residents, taxed only on income earned in Mozambique.

What is the concept of fiscal residence for taxation purposes?

CIRPS indicates that tax residents in Mozambique are natural persons who, in the respective income tax year: have been in Mozambique for a period of more than 180 days continuously or with interruptions; or, having stayed here for shorter periods, have a house in Mozambique the conditions of which lead to the supposition that that house is maintained and occupied as a permanent residence; or who are performing functions or commissions of a public nature abroad in the service of the Republic of Mozambique.

The crew of ships or aircraft belonging to entities which have residence, headquarters or permanent management in Mozambique are also Tax residents.

Therefore expatriates who are considered residents of Mozambique are subject to the same tax and fiscal obligations as Mozambican citizens. This is so because nationality is not the relevant criterion for determining tax residence, but the residence of the individual in Mozambican territory.

On the other hand, expatriates who are not considered resident in Mozambique, are also subject to income tax (IRPS), but with different rules regarding the calculation of taxable income.

What categories of IRPS are established in the CIRPS?

The taxation of individual income focuses on the aggregate annual value of such income, even when derived from unlawful acts. IRPS is divided into 5 categories, namely:

- 1st Category - Income from Dependent Work and Pensions;
- 2nd Category - Business and Professional Income;
- 3rd Category - Income from Capital and Added Value (or Capital Gains);
- 4th Category – Property Income;
- 5th Category - Other Income.

For the purposes of this article we will focus on the third category – income from capital and added value.

From a legal standpoint , the third category of income includes :

a) interest and profits, including those established in settlements, made available to company shareholders, or associates with a contract of association providing for participation or association in shares, as well as the amounts made available to members of cooperatives by way of compensation capital, income from equities , investment fund certificates, bonds and other similar income;
b) income derived by deferring an instalment or late payment; and
c) income from contracts which have as their object the temporary assignment or use of intellectual or industrial property, or providing information concerning experience acquired in the industrial, commercial or scientific sector if not earned by the author or original holder, or deriving from technical assistance and the use or right to use, agricultural, industrial, commercial or scientific equipment.

How is Third Category income taxed, when earned abroad?

Let us assume hypothetically that a Mauritian expatriate has worked in Mozambique for five years and is a partner in a limited liability company headquartered in the Republic of Mauritius. In the meantime, for tax purposes this person is considered a Mozambican tax resident in accordance with the concept of residence discussed above.

As mentioned above, expatriates considered tax residents in Mozambique should be taxed on a global basis, which means that all income earned by them must be declared and taxed in Mozambique. It is therefore the responsibility of the expatriate to pay taxes including on income earned outside Mozambique. Thus the income of the Mauritian expatriate derived from assets and shares in the company based in Mauritius, will be subject to taxation in Mozambique.

However, according to the CIRPS those receiving income obtained in countries with which Mozambique has ratified Conventions to Eliminate Double Taxation ("CDT"), are entitled to a tax credit in respect of international double taxation thus, benefiting from this form of tax relief.

For information purposes only, Mozambique has Double Taxation Conventions with nine countries, including South Africa, Botswana, UAE, India, Italy, Macau, Mauritius, Portugal and Vietnam.

Returning to our example, given that the profits earned by the expatriate derived from Mauritius and assuming that the individual is considered tax resident in Mozambique and not in Mauritius, then according to the CDT ratified between Mozambique and Mauritius double taxation is eliminated when a resident in Mozambique earns income from Mauritius, and therefore the tax paid in Mauritius can be deducted, within the legally established limits, from Mozambican tax owed.

Conclusion

Those who are resident for tax purposes in Mozambique are required to declare all their income, whether earned in Mozambique or abroad. In respect of income earned abroad, taxpayers may be entitled to a tax credit for international double taxation and which is then deductible from IRPS at a rate proportional to their net income.

As such, the deduction to be made under the CDT may not exceed the Mozambican tax (to be computed before the deduction) attributable to the income derived from Mauritius.

For the purposes of the foregoing, those considered resident for tax purposes in Mozambique must apply to the tax authorities in Mauritius for proof of tax paid abroad, so that this can be submitted to the tax authorities in Mozambique.

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In this article we discuss and analyze in brief some of the main criteria to be observed in dealing with transgression, criminal and administrative proceedings in cases involving tax.

It is important to note that transgressions are usually identified by means of inspections which seek to compare tax reality with tax compliance by taxpayers and aim to prevent offences.

Inspections can simultaneously include the taxpayer whose tax situation is under scrutiny, substitutes and/or those who are wholly or jointly responsible, shareholders of companies subject to the tax transparency regime or any other persons who have taken part in the offences under investigation.

In summary some aspects found in these types of cases are: (i) transgression; (ii) criminal; (iii) administrative, as discussed below:

1. Investigation Phase

a) After the inspection, which comprises the verification necessary to confirm the taxpayer's obligations, the taxpayer is informed of the outcome by way of a Findings Notification which should establish a period of 8 - 15 days for the audited entity (the taxpayer) to respond, in accordance with Article 54 of the Tax Inspection Regulation (RPFT), approved by Decree No. 19/2005 of 22 June.
b) Having been notified through the Findings Notification the audited entity may respond in writing or orally (right to a hearing), and if orally their statements shall be reduced to writing in accordance with the legal provision cited above.
c) Having received the taxpayer's statement a final report is drawn up which systematically identifies the findings and their legal and tributary bases in accordance with Article 56 of the RPFT. If the findings alter the tax situation, the taxpayer shall be notified so that it is are aware of its new tax position.

It is important to note that the exercise of the right to a hearing during the investigation phase does not constitute a challenge to the findings, and as such is not subject to the principle of exhaustion because it is a preparatory act, and the final report does not confer the right to an additional hearing meaning that the taxpayer must await notification of transgression, criminal or administrative proceedings if applicable.

d) Therefore, the final report may conclude that: *(i) an infraction was committed, and there may be additional tax to pay; (ii) there is only additional tax to pay or (iii) no infraction was committed nor is there any additional tax payable.*
e) In the first situation mentioned in the previous point, where there is a finding of infraction (transgression or crime), the relevant notifications will be prepared. In the second case whereby there is only additional tax to pay, this is an administrative process, and the taxpayer is notified to pay the tax due. In the third case, since there was no infraction and no additional tax payable, the inspection process is filed (archived) by the tax authorities.

2. Transgression Proceedings

a) As mentioned in the previous point, if the external or internal monitoring procedure conducted by the tax authorities indicates that an offence may have been committed the relevant notification is prepared in accordance with the provisions of Article 20 of the RGIT (General Rules for Tax Offences) in conjunction with Article 8 and the subsequent articles of the Rules for the Prosecution of Tax Offences, approved by Decree n º 783, of April 18, 1942 (RCCI).
b) Upon preparing the notification, the taxpayer is given 30 days to pay the tax and / or a fine, or contest the matter if it wishes to do so. The notification shall be drawn up in compliance with articles 53 and 85 of Law No. 2/2006, of 22 March (LGT) in conjunction with paragraph 1 of Article 11 of the RCCI, and Instruction / GAB - DGI / 2008, dated July 31, 2008.
c) In accordance with Article 9 of the RCCI, the transgression notification shall be presented before two witnesses, and expressly indicate the subject matter of the transgression and article of law breached and shall be signed by the said witnesses, the offender, when the notification is raised in his presence, and if he knows how to or wants to sign, and the entity or functionary who undertook the inspection. If the offender or the witnesses do not know how to write, or refuse to sign or are not present, this shall be expressly indicated.
d) If within the period stipulated the accused taxpayer pays the value indicated the process is concluded with that payment.
e) If the taxpayer contests the offense alleged against him, a defence may be addressed to the Tax Court, the Directorate of the Tax Department (DAF), via the office of the National Treasury providing information to the respective Tax Court in relation to the facts adduced by the taxpayer, which is appended to the file and after completing the process this is sent to the relevant Tax Court for a decision in accordance with articles 11 and subsequent of the RCCI..
f) If after 30 days the transgressor has neither paid nor contested DAF prepares a notification to the Tax Court and remits the case to this court for purposes of sentencing, as outlined in paragraph 2 of Article 11 and subsequent of RCCI.
g) If instead of contesting the taxpayer submits an application to pay the amount in instalments, the administration will analyse the request and not send the case to the Tax Court because the taxpayer is not disputing the facts raised.

3. Criminal Proceedings

In the case of tax crimes the relevant notification document is prepared and this serves to report the crime in accordance with Article 166 of the Criminal Procedure Code. The notification is sent to the representative of the Public Prosecutor at the Tax Court for criminal action in accordance with articles 1 and subsequent of Decree-Law No. 35,007, of 13 October 1945, applied by virtue of Article 192 of Law No. 2/2006, of 22 March, and Article 42 of RGIT

4. Administrative Proceedings

a) Where an internal or external tax audit discovers additional tax payable but where failure to pay does not constitute an offense under sub-paragraph e) of paragraph 1 above, an administrative process is opened and the taxpayer is given 30 days to pay the tax in question.
b) Upon notification, if not in agreement, the taxpayer can petition the author of the decision, pursuant to Article 126 and the following articles of the LGT (General Tax Code).
c) However, the contestation or administrative appeal does not suspend the normal recovery period meaning that if this period passes without the tax being paid the debt is referred to the Tax Enforcement Court, unless a guarantee is lodged or such obligation has been expressly dispensed with in accordance with Article 24 of the RGIT in conjunction with Articles 129, 138 and 165, of the LGT.
d) Total or partial rejection of the administrative contestation and the decision to review or enforce the original decision may be appealed to the superior of the author of original notification, according to the provisions of Article 138 of the LGT. In this situation administrative appeal to the superior is required to complete the process by virtue of the principle of exhaustion, and in accordance with the combined provisions of Articles 52,126,138 and 141, of the LGT, in conjunction with Article 7 of Law No. 2/2004, 21 January, under penalty of a judicial appeal being rejected outright due to non-compliance with the said principle.
e) Indeed, for tax acts, the principle of exhaustion is closely associated with the principle of the double degree of decision, which waives the requirement for the same contestation by the taxpayer to be assessed successively by two bodies in the same tax administration.
f) In this situation the process proceeds at the initiative of the taxpayer and is directed to the Tax Judge in accordance with Law No 2/2004 of 21 January.

Inspection in general, and in particular tax inspection, is always something that makes taxpayers apprehensive however well they have regularized their tax situation, because unfortunately, experience shows that inspections tend to lead to punishment rather than education and training of taxpayers.

It would be beneficial to confer on taxpayers sufficient knowledge of tax law to allow them to organize their bookkeeping in accordance with the law, and this would serve to train them in the methods which the tax framework provides for their protection against possible situations of abuse of discretion and arbitrariness in the exercise of power which sometimes occur.

In this regard, it is worth noting that paragraph 3 of Article 53 of LBST (Law on the Bases of the Tax System), seeks to provide some assurance to taxpayers, so as not to make them vulnerable to frequent, repeated and onerous inspections without any apparent reason.

As can be seen, the procedures for transgressions and criminal and administrative proceedings under the tax framework are lengthy and allow the taxpayer various options for contestation and defence.

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The main aim of any business is to encourage consumers to purchase that company's products in preference to those sold by others. In order to do this, economic operators seek to ensure that their own products respond best to the consumers' needs so that they become market leaders in their chosen business area, and thus competition arises.

Basically competition is what takes place among various businesses as they seek to achieve market supremacy over others. In this context, sometimes certain products, establishments or prestige brands are victims of unfair competition which produces adverse effects on the market, leading to deception of the uninformed consumer and causing harm to the legitimate brand owner by negatively affecting its market share and even its credibility and image.

This article provides information about the legal regime for unfair competition under the Mozambican legal system and describes the various types of act that may result in unfair competition.

Under Mozambican law unfair competition is regulated by the Intellectual Property Code (IPC), approved by Decree n.º 4/2006 of 12 April. Intellectual property is essentially driven by two concepts: (i) the attribution of the right to use, exclusively or otherwise, certain non-material properties; and (ii) the imposition of certain duties in this respect requiring economic agents operating in the market to act honestly. It is noted that the rules on unfair competition complement the protection of intellectual property rights.

Clause 1 of article 174 of the IPC defines unfair competition as the committing of acts contrary to good practice or customs in industrial, commercial or service activities. The law on unfair competition aims to protect economic agents, requiring of competitors a standard of fair competition, and thus by definition unfair competition covers all acts or omissions that are contrary to the principles of honesty and good faith in business and which are liable to prejudice a competitor company by total or partial usurpation of their clientele.

Based on the foregoing definition, it would be possible to argue that there is an act of unfair competition if the following requirements are fulfilled: (i) existence of a competitive act; (ii) that act is contrary to good practice and custom; (iii) in any sector of activity; and (iv) the act is undertaken with intent to cause loss to others or to obtain an illegitimate benefit for the actor or for a third party.

Clause 2 of article 174 of the IPC enumerates various situations in which unfair competition may occur. We understand that this enumeration is provided as an example, since by its nature it does not exhaust the subject, meaning that other acts could constitute unfair competition provided they meet the requirements defined in the law.

The various forms of unfair competition listed in the law are grouped into four categories, namely: acts of confusion; acts of appropriation; discrediting acts; and deceptive acts.

Acts of confusion are those which aim to cause consumer confusion between a particular economic operator, its establishment, products or services and those of another economic agent. Under this head the visual appearance of a product or service and how it is presented to the public are of particular importance.

Acts of appropriation take place when an economic operator appropriates elements, qualities or characteristics that do not belong to, or refer to, it. These acts are listed in the IPC and include the display, sale of (or offering for sale) goods bearing a brand or trade name in order to take advantage of the credit or reputation of those brands or trade names.

Discrediting acts are actions that aim to discredit the activity of other competing economic operators. Usually within the category of discrediting acts one finds comparative advertising. In other words this is advertising that seeks to compare the products advertised with other unrelated products, imputing to the latter certain defects that they do not have or attributing to the advertiser's own products qualities that do not characterize those with which they are compared.

Deceptive acts seek to mislead consumers about the nature, quality, method of manufacture, characteristics or use of products and services in the course of commercial activity.

Under clause 3 of article 174 of the IPC, unfair competition also includes violation of trade secrets, consisting of the removal, use or disclosure of certain confidential information or data belonging to a competitor, without the consent of that competitor, in a manner contrary to honest commercial practice.

Unfair competition is punishable by a fine of one hundred and twelve minimum wages and two hundred and twenty-four minimum wages in the cases of a natural or legal person respectively. Fines for unfair competition shall be paid within fifteen days from the date of notification.

Pursuant to Article 190 of the IPC, the investigation of unfair competition is the responsibility of the General Inspectorate of the Ministry of Industry and Trade. In this regard, we note that Decree n.º 46/2009 of 19 August, establishing the National Inspectorate of Economic Activities ("INAE"), expressly derogated the powers of the General Inspectorate of the Ministry of Industry and Trade, such powers becoming the responsibility of INAE. Thus, the investigation of unfair competition is the responsibility of INAE, and investigations may be initiated by INAE itself or at the request of the Institute of Industrial Property, or interested parties.

Note also that in addition to the fines indicated above, unfair competition can also give rise to civil liability, provided that the relevant requirements in the Civil Code are fulfilled. Thus, economic operators who have their rights violated may also seek redress through the civil law.

Additionally, if any of the acts constituting unfair competition meet the standard for classification under the Criminal Code, economic operators may also avail themselves of the relevant criminal law measures in this regard.

In conclusion, it should be noted that the regulation of unfair competition rests within the intellectual property framework. The unfair competition regime is intended to contribute to regulating the operation of the market, protecting directly or indirectly, both the interests of economic operators and of consumers.

Economic operators harmed by an act of unfair competition should address a complaint to INAE, so that this body can investigate and apply the penalties established by law where applicable, without limiting the use of other means available to obtain compensation for damages.