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Thus, we proceed with an analysis of the foregoing subject matter.

1. Legal framework.

The encumbrances of health and personal accident insurance agreements, as well as those of life insurance agreements that guarantee exclusively: retirement benefits, supplementary retirement benefits, invalidity or survival benefits for employees, are accepted for tax purposes within certain limits, and provided that the following cumulative conditions are met:

- The benefits are attributed to all employees;
- The benefits are attributed according to **objective & identical criteria** for all employees;
- The insurance agreements are managed by and entered into with, resident insurers;
- Income from employment is not taken into consideration^{1,2}

With respect to the limits of acceptance for tax purposes, 10% of the total payroll is considered, or 20% if the employees are not entitled to social security benefits³. Note that whenever the total of the premiums and contributions exceeds the aforementioned limits (of 10% or 20% of the payroll, as the case may be), the remainder is not accepted as a cost⁴.

So, health insurance, personal accident and life insurance premiums, which fall within the aforementioned encumbrances limits and the terms outlined above, should be for all employees, according to objective & identical criteria and be managed by resident insurers⁵.

Analysing the CIRPC, and subject to other opinions, it does not appear that the legislator has defined that criteria or explained how it should be applied.

2. Interpretation of objective & identical criteria.

On the determination of the meaning of the tax rules and on the qualification of the facts to which they apply, the general rules and principles for the interpretation and application of the law are followed⁶. And possible omissions cannot be integrated in a similar way⁷.

¹ Article 32 of the IRPC Code, approved by Law 34/2007 of 31 December (the "CIRPC").

² ACIS, ob. cit. In cooperation with GTZ APSP Deloitte, The Legal Framework for Tax in Mozambique, No. 4, IRPC, II Edition, July 2010, page 39.

³ Article 32, in conjunction with clauses 2 and 3 of article 31 of the CIRPC.

⁴ ACIS, ob. cit., page 39.

⁵ Américo Brás Carlos and Aboobacar Changa, *Manual de Formação em Imposto sobre o Rendimento das Pessoas Colectivas – IRPC*, Maputo, April 2003, page 56.



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However, in the current situation, the only concern is to understand what the legislator meant by "objective & identical criteria", and not to create any new rule with respect to incidence or exemption.

For this purpose, we will turn to Comparative Law, namely the Portuguese Tax Code for Corporate Income (the "CIRC"), which was used as a reference by the legislator. In the CIRC, the legislator also did not clarify how these criteria should be interpreted. However, though the CIRC has not clarified the meaning/application of that criteria, the Portuguese Directorate-General for Taxation, in its turn, has produced an interesting Binding Information (*Informação Vinculativa*) in this respect. Below, we quote part of it, given its relevance for the analysis of the current question⁸:

"In a programme in which all employees are given the option to choose between different benefits, without any distinction (whether they are part of the respective workforce on the date of entry into force of the programme or are hired subsequently), within an established time limit, among those highlighted in article 40, n.º 2, the conditions stipulated in the CIRC, article 40, n.º 4, clauses a) and b), may be considered satisfied.

Thus, in this kind of programme, analysis of the fulfilment of the requirements provided in n.º 4 of the precept under consideration is made of all optional benefits, from among those provided in the CIRC, article 40, n.º 2 and only those, since if employees are given the option to choose other benefits, which are not contained therein, that situation may jeopardize the acceptance of the costs under consideration, for tax purposes.

*Tax deduction, under the CIRC, article 40, n.º 2, is not impaired in cases where employees who do not wish to be covered by any one of the benefits on offer, provided that they communicate such intention to the company in writing and provided that the other conditions stipulated by n.º 4 are met."*⁹

Without going into more detail than is strictly necessary about legislation from another jurisdiction, we consider it important to refer here to the contents of clauses *a)* and *b)* of n.º4 of article 40 of the aforementioned CIRC, which at that time was worded as follows:

⁶ Law 15/2002 of 26 June, article 5, paragraph 1, which defines the principles of the organization of the tax system of the Republic of Mozambique, defines the guarantees and obligations of the taxpayer and the tax administration, and revokes Law 3/87 of 19 January and Law 8/88 of 21 December ("L15/2002"), in conjunction with the provisions of Law 2/2006 of 22 March, article 10, paragraph 1, which defines the general principles and standards for the Mozambican legal tax system and applicable to all national and local taxes ("L2/2006").

⁷ L15/2002, articles 5 and 6, in conjunction with the provisions of L2/2006, article 10, paragraph 5.

⁸ Procedure 2957/2008, approved by order of the Director General, dated 2008.10.22. It is available (in Portuguese) at the following Internet address: www.taxfile.pt.

⁹ Article 40 of the CIRC (Portuguese legislation), dealt at that time with the subject-matter of social benefits. The subject is currently dealt with in article 43. In our CIRPC, these issues are addressed in articles 31 (Social benefits), 32 (Health insurance, personal accident and life insurance and pension funds) and subsequent paragraphs.



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- a) The benefits must be applicable to all permanent employees of the company or as part of a collective bargaining agreement applicable to the professional group to which the employees belong;
- b) The benefits must be applied according to objective & identical criteria to all employees even where these do not belong to the same professional group, except in cases where differentiation is in accordance with a collective bargaining agreement.

While we are aware that the aforementioned is from a different jurisdiction, and therefore only has persuasive authority for us, it is nevertheless useful for understanding the possible meaning of "objective & identical criteria".

Thus, in our opinion and without prejudice to other views, it seems likely that the intention of the legislator was to guarantee that benefits granted to employees are based on criteria that are not discretionary, subjective or arbitrary, or, that do not favour one or more specific categories of employees in clear detriment to others, *for example*, attributing benefits exclusively to employees performing functions or holding positions at senior levels.

Objective & identical criteria would, *for example*, be the granting of benefits, using clearly defined requirements that would allow any employee without distinction to potentially be eligible, provided that such requirements are met. Let us consider a scenario in which the company grants benefits to all employees who have completed 5 years of service (seniority). In this situation, all employees would be eligible, irrespective of their educational qualifications, experience, or the positions they hold in the company, it merely being necessary that they complete the minimum period of time stipulated. So, in these circumstances all employees would have the same possibility to become eligible. This is not the case when discretionary (or less objective) criteria are used and where it is immediately clear that part or the majority of the employees will never be able to satisfy such eligibility criteria, or it cannot be objectively expected that they will satisfy them in future, despite any efforts they may make.

We believe this is the "*ratio legis*" that the legislator intended to give when referring to that criteria, and one can further understand that this is the case, in the context of the principles laid down in the Labour Law, where each employee should be guaranteed the possibility to enjoy the same rights and benefits as the others.

3. Conclusion and recommendation.

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The legislator did not define the meaning of objective & identical criteria.

In our view, it seems likely that the legislator, when making reference to that criteria, wanted to avoid discretionary situations that would favour specific categories or professions to the detriment of others or that would limit in any way access of a part of the company's staff to certain benefits. Whenever such discretionary limitation occurs, the legislator has stipulated that those costs would not be accepted for tax purposes.

The interpretation herein is obviously based on our understanding of the issue submitted to us, so it must be considered only in this context.

Should ACIS or any of its members require a document with **binding** force, it can, in accordance with the provisions of article 20 of L15/2002, in conjunction with the provisions of article 101 of L2/2006, request a Binding Information statement from the Mozambican Tax Authority.

4. Legislation consulted and bibliography.

We have consulted the following legislation for this analysis:

- Law 15/2002 of 26 June – which establishes the principles of the organization of the Tax System in force in the Republic of Mozambique, defines the guarantees and obligations of the taxpayer and the tax administration, and revokes Law 3/87 of 19 January and Law 8/88 of 21 December;
- Law 2/2006 of 22 March – which lays down the general principles and standards for the Mozambican legal tax system and applicable to all national and local taxes;
- Law 34/2007 of 31 December – which approves the Corporate Income Tax Code.

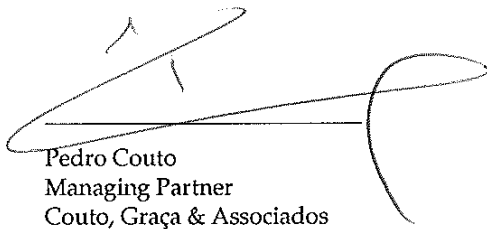
We also consulted the following:

- ACIS, in cooperation with GTZ APSP Deloitte, *The Legal Framework for Tax in Mozambique*, No. 4, IRPC, II Edition, July 2010;
- Carlos, Américo Brás and Changa, Aboobacar, *Manual de Formação em Imposto sobre o Rendimento das Pessoas Colectivas – IRPC*, Maputo, April 2003;

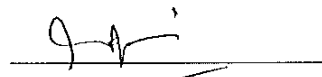


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- Portuguese Corporate Income Tax Code (*Código do Imposto sobre o Rendimento das Pessoas Colectivas – IRC*)
- General Directorate of Taxes of Portugal – Binding Information – Instruction Sheet. Procedure 2957/2008. (*Informação Vinculativa- Ficha Doutrinária. Processo nº 2957/2008*)



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