

Trends and Developments

Contributed by:

Rui Filipe Oliveira

MdME Lawyers see p.24

Introduction: General Overview of the Macau Tax System

Macau is a special administrative region of the People's Republic of China (the "Macau SAR"), created pursuant to Article 31 of the People's Republic of China's Constitution and enacted on 20 December 1999, following the handover of Macau's administration. Its fundamental law – defining its political, economic and legal system – is the Macau Basic Law, which includes several provisions on the Macau tax system. Pursuant to the principles of continuity and a high degree of autonomy set under the Macau Basic Law, the Macau SAR has kept its tax system fundamentally unchanged since the Portuguese administration. Its structural tax laws were approved in the final years of the 1970s and, despite legislative amendments, their fundamental architecture remains unchanged, regardless of being noticeably outdated.

As set forth under the Macau Basic Law, the Macau SAR adopts an independent tax system based on a low taxation policy; it has full autonomy to approve its tax laws and the state does not collect any taxes in Macau.

All taxes are subject to the principle of legality, which implies that all tax laws need to be approved by the Macau Legislative Assembly and that the Macau government is not allowed to produce laws to create or amend taxes, although the legislative process is dependent on a proposal to be submitted by the latter.

The key taxes provided under Macau law can be summarised as follows.

Direct taxes

- Industrial contribution tax, which is set as an annual fixed fee, the amount of which depends on the type of business operated in Macau and ranges from MOP150 to MOP80,000. For most businesses, the tax rate is MOP300.
- Professional tax, which is an income tax levied on the income from labour and other professional activities, at progressive rates ranging from 7% to 12% over the taxable income.
- Complementary income tax, which is levied on the profits deriving from commercial and industrial businesses, at progressive rates ranging from 3% to 12% over the taxable income.
- Urban property tax, which is an annual tax levied on the rental income or on the rental value of urban real estate property, at a standard tax rate of 6% for non-leased properties and 10% for leased properties.

Indirect taxes

- Tourism tax, which is levied on the typical services provided by hotels and similar establishments, health clubs, saunas, massage parlours and karaoke venues, at a standard rate of 5%.
- Excise duty, which is levied only on the importation or production of certain alcoholic drinks and tobacco. The rate is 10% for alcohol, while the tax on tobacco is set on the basis of a fixed fee per unit or kilogram, depending on the type of product.
- Motor vehicle import tax, which is levied on the first transfer to the consumer of new motor vehicles or on the importation for self-use of new motor vehicles, based on the

estimated market value of the vehicle. The progressive tax rate is based on the vehicle's estimated value, ranging from 50% to 90% for automobiles and from 35% to 45% for motorcycles.

- Road tax, which is an annual tax levied on motor vehicles and industrial machines that is based on progressive fixed fees that depend on the cylinder capacity for motorcycles and automobiles, and on the gross weight for transportation vehicles and industrial machines.
- Stamp duty, which applies to certain documents and to the transfer of real estate property as well as on the transfer, for no consideration, of certain movable property that is subject to registration in Macau. The tax rate is set as a fixed fee, a standard rate or a progressive rate, depending on the documents/transactions involved.

The Macau tax system on income is therefore essentially characterised by its schedular nature. The income derived from professional activities is taxed under professional tax, whereas income derived from commercial and industrial activity is taxed under complementary tax. The assessment of the taxable profit is determined differently for the two groups of taxpayers:

- Group A taxpayers' taxable profits are determined on the basis of their actual profits according to their accounts, prepared in accordance with the accounting principles applicable and eventually subject to corrections imposed under the Complementary Tax Law (CTL); and
- Group B taxpayers' taxable profits are determined on the basis of their presumed profits as determined by a Fixation Committee.

The low taxation policy, however, does not apply to the revenue to be obtained from concessions, which is, according to the Basic Law, subject

to a special regime. The financial needs of the Macau SAR largely depend on taxes collected from gaming revenues (in the pre-pandemic years, the gaming revenue generally exceeded 80% of the total ordinary income of the government) and, as such, the taxation of the gaming concessions is at a much higher rate, which is currently 35% over the gross gaming revenue.

Most taxes are collected on the basis of the taxpayer's obligation to self-assess and declare tax triggering events. This applies to practically all taxes, with the exception of urban property tax and industrial tax, which, in any event, require certain reporting statements by the taxpayers.

Recent amendments to the tax system

In recent years, the Macau SAR has increased the pace of the production of new tax agreements and amendments to its tax laws. Since 2011, the Macau SAR has entered into 15 tax information exchange agreements and in 2019 completed its eighth double taxation agreement. Several amendments were introduced to the stamp duty law in 2011, 2012, 2018 and 2020, and to the CTL in 2019; the offshore regime was cancelled; and a new law was approved to provide for a general legal regime on the exchange of tax information. With the exception of the most recent stamp duty law reform, which aims to modernise and improve stamp duty taxation, these changes are fundamentally driven by the aim of complying with international standards and obligations to limit tax erosion as well as to enact particular government policies, such as curbing real estate prices.

The annualisation of tax laws

Notwithstanding the crystallisation of the fundamental structure of Macau's tax laws, significant adjustments are annually made to the tax system through the government's annual budget law and other administrative decisions. Such laws and administrative acts have become an impor-

tant source of tax law and provide for relevant adjustments to the tax system. These adjustments are generally introduced as tax benefits and have been providing increasingly important tax relief, and include:

- a total exemption on industrial contribution tax;
- a total exemption on complementary tax up to MOP600,000, thus creating a de facto standard rate of 12% over all taxable income;
- a total exemption of professional tax up to MOP144,000 and a deduction of 30% to the tax due;
- a partial exemption on stamp duty for the purchase of a first property by residents; and
- an exemption on stamp duty on banking interests and commissions.

Although these benefits are formally valid for each fiscal year only, they have not only been continuously renewed, but their scope has been significantly expanded and other benefits added. For example, the industrial contribution tax has been waived since 2002 and since the current gaming concessions were granted in 2002, the Macau SAR has continuously exempted, on an annual basis, gaming concessionaires' income from gaming activities from complementary tax. The nature, scope and constancy of these benefits mould the tax system's characteristics and play an important role in the private sector's business choices and investments in Macau.

Tax authorities

Apart from excise duty and road tax, the competent authorities for which are the Economic and Technological Development Bureau and the Institute for Municipal Affairs respectively, all other taxes fall under the competence of the Macau Finance Bureau.

Recent Increase of Tax Controversies and Tax Litigation

The number of tax litigation cases has reduced in Macau, which can be explained not only by the jurisdiction's size but also by the low taxation policy and the tax surplus generated from gaming taxes. However, especially since 2014, a considerable increase in tax disputes has been observed, some of which have led to landmark court decisions that have crafted some of the recent changes to the tax laws. Although complete statistics are not available, the number of tax cases in the Administrative Court alone jumped by 1,000% from 2013 to 2014. An analysis of the most recent court decisions suggests that such a spike in tax disputes results from a more active role by the tax authorities in the audit and assessment of taxpayers' statements.

The most relevant recent tax controversies relate fundamentally to stamp duty, tourism tax, motor vehicle import tax and complementary income tax.

Stamp duty controversies

Recent disputes relating to stamp duty fundamentally concern whether certain transactions and documents were subject to stamp duty. Some of the most relevant decisions in recent years relate to the taxation of contracts for the grant of use of spaces in shopping centres. The tax authority has taken the initiative to tax the agreements executed between the promoters, operators or managers of shopping centres and retailers as lease agreements, which are subject to stamp duty at a rate of 5% over the rent payable for the duration of the agreement.

Especially for agreements relating to shopping malls located in so-called integrated resorts, the consideration payable by the retailers is, in many cases, astronomical, which implies a hefty tax burden. Such assessments, however, were subsequently annulled by the Court of

Second Instance (and later confirmed by the Court of Final Appeal) on the basis that grant of use agreements cannot be considered as lease agreements and, pursuant to the principle of legality, they should not be subject to taxation. These decisions inspired the most recent reform of the stamp duty law, which was amended to expressly include the taxation of contracts for the grant of use of spaces in shopping centres.

In other landmark disputes, the Macau Finance Bureau has decided to levy stamp duty on the adjudication of any assets in auction sales, irrespective of the transfer of such assets effectively taking place. According to the private auction regulations, the transfer of the title to the assets put up for auction would only occur after the execution of a sale and purchase agreement and after full discharge of the consideration due.

The Finance Bureau has decided that taxation would occur on adjudication, which would correspond to the decision by the auctioneer to award the assets to the highest bid, irrespective of the effective transfer of the property of such assets. The Court of Second Instance has also decided to annul the tax assessment and the decision was confirmed by the Court of Final Appeal. Similarly, the matter was addressed in the amendments to the stamp duty law, which now expressly state that the triggering event of the stamp duty payable for adjudication in private auctions (and other public sales) is the acceptance by the adjudicating entity of the highest bid, irrespective of the assets being effectively transferred.

Tourism tax controversies

Several of the recent disputes that were submitted to courts concerning tourism tax relate to its tax reach; in particular, to the definition of complementary hotel services for tax purposes. Tourism tax applies over the price of the specific services provided by hotels and similar establish-

ments (as defined in law), health clubs, saunas, massage parlours and karaoke venues. Hotel-specific or typical services are legally referred to as accommodation and “other complementary services”, with the exception of telecommunication and laundry services.

The expression “other complementary services” leaves broad room for interpretation and since 2015, the Macau Finance Bureau has taken a closer look at the tax statements submitted by taxpayers and has considered that certain ancillary services provided by hotels, their subsidiaries or other related companies should also be subject to tourism tax. These included, in some cases, transportation services, limousine services, bookings of flights and tickets for shows with other entities, and entertainment or amusement services provided in hotel facilities. With few exceptions, the courts have taken a particularly broad interpretation of the “complementary services” associated with the hotel business, hence upholding the tax authority’s assessments in these matters in most cases.

Complementary tax controversies

A number of disputes relating to complementary tax are mostly related to its assessment; in particular, to the corrections introduced by the tax authority to deductible costs or to taxable income. Some of the most notable controversies arise from the tax authority considering the variable remuneration payable by a retailer under a grant of use contract, which consisted of a (high) percentage of the profits resulting from its business not being tax deductible, due to the particular contractual arrangement being intended to evade complementary tax, despite there being no express anti-tax law evasion provisions in the Macau legal system. This position was upheld by the Court of Second Instance in October 2020.

Other relevant disputes relate to the scope and extension of the complementary tax exemption annually granted to gaming concessionaires. Certain entities have argued that their income deriving from certain contracts executed with gaming concessionaires should be exempted from complementary tax, as such income should be covered by the exemption provided to the gaming concessionaires. The tax authority has assessed the taxable profit of these entities and corrected the taxable profits to include such income, which quintupled their tax results in some cases. The courts have confirmed the tax exemption provided to the gaming concessionaires is purely subjective and does not exclude taxation over the income itself deriving from the gaming operations.

Recently, the Macau Finance Bureau has adopted a peculiar interpretation of an exceptional tax benefit introduced by the annual budget law to provide additional relief to businesses due to the economic impact of the COVID-19 pandemic. Such benefit consisted of a tax deduction of MOP300,000 to the tax amount payable after-tax computation in relation to the 2019 fiscal year. As a result of the operation of such tax benefit, the said tax authority has, in practical terms, cancelled a deduction to the taxable profits allowed under the CTL to avoid economic double taxation, which ultimately resulted in a tax aggravation to the taxpayers. The matter has been submitted to the courts, but no decisions have yet been issued.

Cross-border exchange of information and mutual assistance between tax authorities

In 2017, Macau approved Law 5/2017, which sets a general legal framework for the exchange of tax information with other regional and international tax jurisdictions. Such effort was complemented with the amendments to the CTL in 2019, which aimed to implement measures against tax base erosion and profit shifting

(BEPS), and by the execution of a significant number of tax information exchange treaties. Together, they form the legal framework for cross-border exchange of information and co-operation between tax authorities. This system provides for the:

- the exchange of information on request of a foreign tax authority;
- spontaneous exchange of information; and
- automatic exchange of information for certain entities, including foreign tax residents, multinationals based in Macau and other individuals and entities defined in international treaties.

As a result, in the course of 2019 and 2020, the use of cross-border information exchange and mutual assistance among tax authorities increased significantly, which had an impact on tax audits and exchange of information. Such impact is expected to translate in the short term into an increase of administrative and judicial litigation.

Taxpayers' Rights and Recourse: **Administrative and Judicial Appeals** *Taxpayer's fundamental rights and protections*

The taxpayer's interests are protected not only by the possibility of disputing the tax authorities' decisions, but also by a number of legal provisions and principles that limit the authorities' actions.

The rule of law

The principle of legality referred to above is transversal to the entire administrative and tax system. This principle carries strict implications for the tax system:

- it mandates that all taxes need to be formally approved by a Legislative Assembly law;

- that such law defines the essential elements of the tax, including the scope, the tax benefits and the recourse mechanisms available; and
- that the collection of all taxes needs to be authorised annually by the Legislative Assembly under the Government Budget Law (“no taxation without representation”).

Furthermore, any and all actions taken by the government authorities are generally subject to a legality principle: the administration in general, and the tax authorities in particular, can only act if authorised and within the limits prescribed by law.

The right to be informed

Taxpayers have the right to be notified of any decisions that may affect their rights and interests protected by law. On the other hand, the tax authorities have the duty to explain and to provide the reasons for their decisions to taxpayers. This combination is intended to allow the taxpayers to effectively be informed and understand any tax decisions concerning their rights and interests, and, ultimately, to dispute such decisions.

The right to take part in the tax assessment

The fundamental stage of any tax liquidation process is the assessment of the taxable income or tax value of the relevant transactions or assets subject to taxation. The taxpayers are generally granted the right to, directly or through representation, participate in the process of determination of the tax base. The particular manner that allows such participation varies from tax to tax. For some taxes, such as income taxes, such participation derives from the taxpayers’ initiative to submit the tax statements. For stamp duty and property tax, such participation is guaranteed through the appointment of a taxpayer’s representative to the valuation committees.

Furthermore, in all cases, the taxpayer is guaranteed the right to seek a review of the assessment made by the tax authority, through administrative and judicial means. The administrative review is made by specialised committees that, in theory, have the expertise to deal with the specific issues relating to the assessment.

Statutes of limitation

The assessment of any taxes is subject to statutes of limitation, which are generally five years. This means that the tax authority will not be able to initiate and collect any taxes after expiry of the statute of limitation. Recent changes to tax laws intend to effectively extend such statutes of limitation for certain transactions, such as in relation to stamp duty applicable to lease and grant of use agreements, in which case the statute of limitation period only commences after the agreements expire.

The obligation to pay any taxes assessed within the statute of limitation period is subject to a larger statute of limitation period of 20 years, as recently decided by the Court of Second Instance.

Tax litigation

The Macau legal system provides a general right for individuals and private corporations to seek a judicial review of all decisions taken by the administration that may affect them. Naturally, this includes the taxpayer’s right to dispute the tax authorities’ decisions relating to tax matters.

There is, however, no unified regime for tax disputes. The rules and procedures for taxpayers to contest and challenge the tax authorities’ decisions relating to tax matters are provided in the laws that set and regulate each tax. This makes the system quite complex and, in certain cases, inconsistent, creating a prolonged phase of administrative litigation and a de facto division in the judicial system, where both the Administra-

tive Court (which is a court of first instance) and the Court of Second Instance serve as courts of first instance, depending on the tax and type of decision involved.

In virtually all tax disputes, an administrative litigation phase mandatorily precedes the judicial review. The government administration is fundamentally organised under a hierarchical structure and, as a matter of principle, an administrative decision can only be judicially challenged after the administrative process becomes definitive; ie, once the decision can no longer be further reviewed within the administration's structure. This means that taxpayers are required to exhaust the administrative review procedures before the matter can finally be submitted to the courts. The administrative recourse path, however, is different depending on the type of decision taken by the tax authority.

Arbitration is not available for tax disputes under Macau law.

Due to the administration's duty to act strictly within the law, the tax authorities are not allowed to enter into any settlements or contractual arrangements regarding tax matters.

Enforcement of tax debts

The process for enforcement of tax debts is a source of many controversies under Macau law. The Fiscal Debts Enforcement Code (FDEC) is dated from 1951 and remains materially in force, being used as the legal regime applicable to the coercive collection of tax debts, but only to the extent that its legal provisions do not infringe the sovereignty of the People's Republic of China and are not contrary to the Macau Basic Law and other laws enacted by the competent Macau authorities.

Its application is therefore not easy to administer, not only because it is a completely obso-

lete and anachronous law, requiring a massive effort of adaptation and interpretation to the current times to ensure private entities can effectively exercise their opposition rights, but also because the process of determining which provisions are contrary to other Macau laws is not, in many cases, simple. The direction taken by the courts in this respect is not always clear, which makes the system precarious. For example, the Court of Second Instance has ruled that tax debts are subject to a higher ordinary statute of limitation (20 years) than common debts under the Civil Code (15 years), due to the provisions of the FDEC having a specific nature in relation to those of the Civil Code. Yet, in another ruling by the Court of Second Instance, the court has found that the reversion of tax debts against the directors of the company set forth under the FDEC does not apply due to being found contrary to general law, specifically the provisions of the Macau Commercial Code.

Tax debts can be enforced directly by the Macau Finance Bureau, which has the authority to directly order the seizure or apprehension of private property, monies and other rights or entitlements and proceed directly to their public sale. The taxpayer may oppose the enforcement based on limited grounds. Issues strictly relating to the tax assessment can only be disputed under the administrative and judicial recourse means referred to above. The law provides for two opposition mechanisms, one being the opposition by "simple application", in which the taxpayer does not have to appoint legal counsel, and the other the so-called opposition by "embargoes". Both need to be submitted within ten days from the service of notice of the enforcement proceedings and are decided by the Administrative Court.

The opposition by simple application is limited to certain straightforward grounds, such as the debt being paid or having fallen under statutes of

limitation. Embargoes allow the taxpayer to use all the grounds allowed under the opposition by simple application and more, including the illegality of the taxation based on the fact that the type of tax or its collection is not authorised by law, forgery of the documents that serve as title for the enforcement and to dispute the seizure of any assets, due to their title being the subject of controversy or simply not belonging to the taxpayer.

Penalties: Criminal and Administrative Penalties

The sanctions framework is also regulated separately for each type of tax, which typify singly the different types of infringements of tax laws.

Notwithstanding the disparity of laws regulating the matter, the key types of tax infringements relate to:

- non-compliance with the tax reporting obligations;
- failure to self-assess or withhold the relevant taxes;
- failure to pay the tax amounts due;
- inaccurate and delayed tax reporting; and
- failure to co-operate with the tax authority.

Subject to certain requirements, both corporations and individuals can be liable for the payment of fines and in certain tax laws, there is joint and several liability of certain individuals that participate in the offence. This includes the directors and other de facto administrators of corporations, as well as other representatives and auxiliaries.

In spite of several references to criminal liability, the only penalties applicable pursuant to tax laws are fines, with the exception of a crime of disobedience stipulated in the stamp duty law, which applies to those who may prevent tax authority officials from entering or remaining at the premises of the establishments, offices and other locations for the purposes of conducting audit inspections. The law also does not provide for the possibility of such fines being converted into imprisonment sentences if they are not paid, which strongly suggests that the penalties specifically provided under the tax laws are of an administrative nature only.

The fines applicable are usually set within certain fixed value ranges provided in the law, the specific amount depending on the seriousness of the offence. In other cases, the law provides that the fines may range between the amount of the tax and a multiple of such amount. In the case of stamp duty, for example, the range can go from one to ten times the amount of the tax due for certain infringements, including the failure to pay the tax due in a timely fashion.

Administrative penalties are applied by the relevant tax authority.

However, several criminal provisions provided under the Criminal Code may apply in the context of tax matters, such as document fraud. Any potential criminal infringement depends on prosecution by the Public Prosecutor and will be tried by the criminal courts under a due process.

Contributed by: Rui Filipe Oliveira, **MdME Lawyers**

MdME Lawyers is a full-service law firm based in Macau, with offices in Hong Kong and Lisbon and a strong reputation in the Asia-Pacific region for providing high-quality and innovative legal insight to its clients. The team of over 25 fee earners represents casino companies, owners and operators, gaming manufacturers and suppliers, sports betting companies, gaming promoters, private equity firms and investment banks, governments and regulators, in both the land-based and online sectors. The firm advises

es gaming clients across the broad spectrum of their legal needs, including licensing, compliance, employment, real estate, intellectual property, corporate M&A, anti-money laundering, financing, and tax and litigation. The need to deliver local knowledge with a global reach has led the firm to launch the Lex Mundi Gaming Solution, a network of law firms that combines the expertise of gaming lawyers across 25-plus jurisdictions around the world.

AUTHOR



Rui Filipe Oliveira is widely recognised as one of the leading business lawyers in Macau. Rui advises multinational and domestic corporations on a wide range of M&A transactions, including complex corporate and financial restructurings, private investments and joint ventures. In particular, he has substantial experience working with local conglomerates on a range of corporate, governance,

commercial, tax and regulatory matters. Rui uses his multidisciplinary expertise to provide clients with valuable insight into complex transactions, delivering commercial outcomes at board and shareholder levels. In addition to his corporate work, Rui has a significant track record in dispute resolution, having advised in the context of a number of high-profile shareholders disputes, land concession matters, patent and tax litigation.

MdME Lawyers

Avenida da Praia Grande 409
China Law Building 21/F
Macau

Tel: +853 2833 3332
Fax: +853 2833 3331
Email: mdme@mdme.com.mo
Web: www.mdme.com.mo/en/

M d M E
L a w y e r s