Brazil

International Estate Planning Guide

Individual Tax and Private Client Committee

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Updated 9/2012

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I. Wills and Disability Planning Documents

A. Will Formalities and Enforceability of Foreign Wills

The formalities for making a Will in Brazil in accordance with the Brazilian legislation will depend on the type of the Will (public, closed, or private). Each type has its own formal requirements, such as being executed in the presence of two witnesses (a private will requires three). The most common and reliable type is the public Will, which is made by a public deed before a public Notary. Wills can be written in Portuguese or any foreign language, as long as the witnesses and the testator understand its content. The formalities for making a Will in Brazil do not vary, regardless of nationality, residence and/or domicile of the testator.

A Will made in another jurisdiction is considered valid and will be enforced in Brazil, if a judicial decision granted by a foreign court related to the succession of a foreigner is presented in Brazil to be homologated (ratified) by a Brazilian Court. Under Brazilian law, the content of the Will must obey the *lex domicilii* (law of domicile) of the testator, and the formalities must obey the *lex locus regit actum* (law of the place of act). Nevertheless, in relation to the content of the Will, no matter in which country it was executed, the law of the domicile of the testator shall apply if it does not conflict with Brazil's sovereignty and/or Law.

Therefore, practical issues that can be considered relevant to foreigners do not result from dying in Brazil, but rather from being domiciled in Brazil. The domicile of the deceased is important because Brazilian legislation states that the succession follows the law of the country where a person was domiciled (exception is made to benefit the Brazilian spouse and children, as long as the law of domicile of the deceased is not more favorable to them than Brazilian law).

B. Will Substitutes (Revocable Trusts or Entities)

There are no will substitutes in Brazil, since Brazilian law does not have the concept of a trust.

In Brazil, a common way of anticipating the inheritance is the institution of usufruct. The usufruct according to Brazilian Legislation is a right "in rem" over the asset belonging to third parties, which allows the use for certain time without making changes to its content. The usufruct is normally established to benefit a relative or a friend, through an *inter vivos* act (a gift, for instance) or *causa mortis* (a Will, for example).

The usufruct can be established over one or more than one movable asset or real estate, in a whole patrimony, or in part of it, including the whole or part of the income.

Thus, the usufruct can be (i) universal, if it includes a whole patrimony, for instance, a lab, earnings and inheritance, (ii) partial, if it includes a fraction or a part of patrimony, or (iii) specific, if it includes a determined asset.

C. Powers of Attorney, Directives, and Similar Disability Documents

According to the Brazilian legislation, all persons with capacity have the ability to give a power of attorney by private instrument, which shall be valid provided that it contains the grantor's signature. However, the mandate ceases upon death or interdiction of one of the parties.

Thus, in case of the death of one of the parties, the authority from the power of attorney will cease. This event should start a probate proceeding regarding the deceased's assets, and an executor will be appointed to administer the property in accordance with the procedure discussed below.

When a person loses capacity, a judicial interdiction procedure must be filed and the rules of guardianship shall be applied. That is, a curator shall be selected to manage the assets of the person who lost capacity, and to render accounts to the judge.

II. Estate Administration

A. Overview of Administration Procedures

In Brazil there are two representatives involved with an estate, who are equally important: an executor and an administrator.

An executor is determined by the testator in a Will. The executor has the power to verify if testamentary provisions are being executed in accordance with the deceased's wishes, and the burden to defend the will and enforce the correct testamentary dispositions.

Alternatively, the administrator shall manage the assets of the estate, represent the estate, and inform the Judge about the identity of the heirs. The administrator also must locate the assets of the estate and must take all the necessary measures to finish the probate proceedings.[1]

The Brazilian legislation states the order of appointing an administrator, as follows (i) the surviving spouse under certain conditions; (ii) the heir who has possession of and is managing the estate; (iii) any heir, regardless of possession and management; (iv) the executor, if in charge of the estate administration; (v) the judicial administrator, if there is one; and (vi) a reliable third party.

If all heirs agree or it is stated in the Will, it is possible to select one administrator regardless of the order of the law, but if they disagree, the Judge shall decide the matter. It is possible to indicate in the Will that the executor and administrator shall be the same person.

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[1] In accordance with the Brazilian Procedural Civil Code, article 991, the administrator who represents the estate has the following duties:

I – to represent the estate as plaintiff or defendant in the Court of law or outside the Court of Law, observing, if it is a judicial administrator, the provisions set forth on article 12, § 1 of this law;

II – to administer and manage the estate, ensuring that all estate assets are treated with the same diligence as if they were his own;

III – providing for the Judge, personally or by an attorney with special powers, the first and the last statement of all assets of the estate;

IV – at any time present in Court, for consideration of the parties, the documents relating to the estate;

V – if there is a will, present its certificate in Court;

VI – to bring to the knowledge of the Judge the estate property received by the missing, resigning or excluded heir;

VII – to present the accountancy of its management acts and when leaving his duty or if the Judge determines him to do so;

VIII – request the declaration of insolvency of the estate.

Article 992 establishes that the administrator also has the following duties that must be performed after the Public Attorney and the interest parties are heard, and with the Judge's authorization:

I – to sell all estate assets;

II – to execute agreements (judicial or non-judicial);

III – to pay the estates debts;

IV – to incur in all necessary expenses with the maintenance and improvements of the estate assets.

B. Intestate Succession and Forced Heirship

If the deceased did not make a Will (intestate succession), the total amount of his/her assets will be distributed only among the necessary and legitimate heirs, in accordance with the legal rule established by the Brazilian Civil Code. Necessary heirs (also called legitimate heirs) include a deceased's descendants, ascendants, and in some cases the surviving spouse, depending on the property regime of assets established in the marriage. If there are no necessary and legitimate heirs, then the Municipality will receive the assets of the deceased person.

Regarding forced inheritance, under the Brazilian law, a decedent who has necessary heirs has their assets divided into two equal parts: (i) half of the assets are considered the "available property" (or the "available part"), and can be left by Will to anyone; and (ii) the other half of the assets is called the "legitimate part," and must be distributed among the necessary heirs. For such reason, normally the available part and the legitimate part are of equal amounts. There are exceptions, such as when an heir received donations of assets in anticipation of such legitimate part and then is forced to bring this amount/asset to the estate and unbalance the legitimate part of the estate. In such situations the legitimate part will then be recalculated.

It is important to point out that the available assets may be left by a Will to any person (necessary heir or not) or even to a legal entity to whom the deceased desires to give a specific asset or even a participation in his assets. It is in fact a faculty of the law. Nevertheless, if the deceased does not leave a will, the total amount of his assets will be distributed only between the necessary heirs, in accordance with the legal rule established by the Brazilian Civil Code.

Bearing this in mind, if we assume that the deceased left half of his assets, considered to be his available property, by a Will, then the other half of the assets are equivalent to the legitimate part, and will be distributed among the necessary heirs in different percentages, depending on some requirements.

According to the current Brazilian Civil Code, the percentage of the deceased's assets that the heirs will receive is affected by the following facts: (i) regime adopted in the marriage, if there is a surviving spouse; (ii) the number of children; (iii) if there are children, whether they are common to the deceased and the surviving spouse, or whether they are children only of the deceased; or (iv) whether the deceased left ascendants. All these issues must be completely understood to determine the share/participation of each one of the heirs in the succession of their deceased spouse. If the situation changes, for instance, instead of "surviving spouse with common children," the scenario is "surviving spouse and surviving ascendants of the deceased," the calculation will be substantially different.

In general, forced inheritance rules can be found in the Brazilian Civil Code, specifically, articles 1.829 through 1.850. Article 1.829 of the Civil Code provides that succession by law is granted in the following order:

- to the descendants, in conjunction with the surviving spouse, except if the latter was married to the deceased under full community property rules, or under obligatory separate property rules (art.1.640, sole paragraph); or if, under the quasi-community property rules, the deceased has not left private property;

- to the ascendants, in conjunction with the spouse;

- to the surviving spouse;

- to the collateral relatives.

The spouse inherits in conjunction with the descendants or, in the absence of descendants, with the ascendants, and always depending on the marital property rules of the marriage. There is also a variation in the "quantum" to be received by the spouse, depending on the quantity of heirs (ascendants or

descendants) with whom the spouse shares. For a better understanding of these rules, the following explanation provides an overview of the order of hereditary entitlement set forth by the current Civil Code.

If the spouse and descendants survive, the descendants succeed in conjunction with the surviving spouse, except if:

- the spouse and the deceased are married under full community property rules;

- the spouse and the deceased are married under the separate property regime (this regime is imposed by law in certain circumstances, as for example, between spouses above 70 years of age); or

- the spouse and the deceased are married under partial community property regime, and the deceased has not left private property.

If the spouse is an ascendant of the descendant heirs with whom he/she shares, he/she will receive the same share as the descendants, but this share cannot be less than a quarter of the inheritance.

If the spouse is not an ascendant of the descendant heirs with whom he/she shares, the limitation discussed above (requiring the surviving spouse receive at least one fourth of the inheritance) is not applicable, and the spouse always receives the same share as receiving the descendant heirs.

If the decedent is survived by a spouse and ascendants, but no descendants, the ascendants succeed in conjunction with the surviving spouse, irrespective of the marital property rules. The following rules apply in this case:

- in the class of ascendants, the closest excludes the most remote (ex: father excludes the grandfather);

- if there is equality in degree (ex. both living grandparents), the ascendants on the paternal line inherit half, the other half being allotted to those of the maternal line; and

- if the surviving ascendants are first degree ascendants (father or mother), the surviving spouse will inherit one third of the inheritance, if there is only one ascendant or if the degree is greater than the first degree (ex: grandmother or grandfather), the spouse will be entitled to half of the inheritance.

If the decedent is survived by a spouse, but no descendants or ascendants, the totality of the estate is granted to the surviving spouse, irrespective of the marital property rules.

If there are no descendants, no ascendants, and no surviving spouse, then there are no forced heirs. The deceased may then leave a Will, determining all assets to be distributed according to his/her wishes. If no Will is left, then the totality of the inheritance shall be allotted to the collateral line (brothers/sisters, uncles/aunts, cousins, nephews/nieces); in the absence of any of these, the State shall receive the totality of the inheritance (in such case the municipality receives the inheritance). This kind of inheritance is called an "estate in abeyance."

It is important to note that if the deceased is considered to have a common law marriage, the common law spouse must be considered a spouse in the sense that he/she is considered a forced heir.[2]

[2] Civil partners' rights are protected by law. It is important to note that, according to the Brazilian Legislation, if (i) the partners are a woman and a man, (ii) the partners intend to have a family, and (iii) the relationship is considered to be public and permanent, the partners are considered for all legal purposes as being married under the partial community property regime. Although there is not a specific law, some Brazilian Courts have already extended the same rights to homosexual relationships as to civil partnerships.

The participation in the Estate for a common law spouse is different from that of a spouse because the spouse will only participate depending on the marital regime chosen, and the common law spouse will participate on the property acquired during the relationship.

C. Marital Property

There are four potential regimes applying to spouses' property: (i) the universal property regime, (ii) the separate property regime, (iii) the partial property regime, and (iv) the final participation in the common assets.

Under the regime of "universal property," all assets of a husband and wife and their debts are treated as a single unit regardless of whether they were acquired before or during the marriage, with few exceptions. Thus, if a husband had an apartment before he married, under the universal property regime, after the marriage, it will belong to both the husband and wife.

Under the regime of conventional "separate property," the husband and wife enter into a pre-nuptial agreement which establishes in detail the ownership of present and future assets. Under this regime each of the spouses is free to encumber or transfer his/her assets.

Under the "partial property" regime, assets obtained by each partner prior to the marriage continue to be held separately, while all assets obtained subsequent to the marriage are treated as a single unit, with few exceptions (such as inherited property or property received as gifts).

Under the regime of "final participation in the common assets," each of the spouses has exclusivity over his/her assets during the marriage. At the end of the marriage each spouse shall receive half of the assets acquired during the matrimony. This is a very specific marital property regime, which is not commonly applied in Brazil.

It is important to note that if there is no pre-nuptial agreement between the intended spouses, or if the agreement is null or ineffective, the regime of partial property shall automatically apply between the spouses respecting their property (in other words, this is the legal regime).

In Brazil, electing a particular marital regime is relatively straightforward. Intended spouses may, when legally registering the marriage, opt for any of the regimes governed by the Brazilian Civil Code. If the couple elects the partial property regime, a public record of this election will suffice. If a couple opts for the universal property, separate property or final participation in the common assets regimes, a pre-nuptial agreement is required.

As mentioned above, the marital property regime is relevant to succession affairs. The marital property regime must be thoroughly analyzed if there is shared inheritance between the surviving spouse or common law spouse and the other legitimate or chosen heirs. Depending on each specific case, the assets will or will not also be transmitted to the surviving spouse, and for this sharing of possessions, it is essential to consider what kind of marital regime is in place.

D. Administration of Multi-Jurisdiction Estates

According to the Brazilian Civil Code Introduction Law, the succession follows the law of the country where the deceased was domiciled, applying the principle of "lex domicilii." However, there is an exception, namely that "the succession of assets of foreigners, situated in the Country, shall be governed by Brazilian Law, in benefit of Brazilian spouse or children, or whoever represents them, whenever the personal law of the deceased is not more favorable to them." Accordingly, if there is a Brazilian spouse or child, once the succession is initiated one needs to analyze which law will be more favorable, for this law shall prevail. Each specific case has to be considered under this principle.

Another precept set forth in the Brazilian Civil Code Introduction Law is that the capacity of the heir to succeed is governed by the law of his respective domicile. In addition, it is important to note that as to real property situated in Brazil, the Brazilian jurisdiction considers itself to be the only one competent to carry out the probate proceeding and partition of this property, regardless of the place of domicile of the deceased. In such case, the applicable law will remain the law of the decedent's domicile. Aside from real property assets, other assets located abroad can be probated and distributed outside the Brazilian jurisdiction.

Pursuant to Brazilian Legislation, the Brazilian courts are competent to judge the probate proceeding of assets located in Brazil, even if the deceased was foreigner and had resided abroad. This is an exclusive competence and shall not be affected by the existence of probate proceedings initiated abroad, due to the fact that this rule is a matter of public order. However, the Brazilian law interpretation is that the Brazilian Courts are not competent to adjudicate probate proceeding of assets located abroad, since the majority of countries do not agree to the regency of foreign law over assets situated in its territory. The nature of the asset matters insofar as it establishes the connection rule that will determine the competent court.

In Brazil, the Judges of each State are competent to judge the probate proceeding of assets located in the corresponding jurisdiction that is the *lex rei sitae* (the law where the property is situated), meaning that the *causa mortis* transmission shall occur according to this law. If the assets are located in different countries, the corresponding courts shall be competent to rule over the distributing of those assets, in accordance with the law of the domicile of the deceased at the time of the death.

E. Tenancies, Survivorship Accounts, and Payable on Death Accounts

Tenancies as they relate to succession are covered by the Brazilian Ordinary Law no. 8.245/1991, recently amended by Ordinary Law no. 12.112/2009, which provides:

> Art. 10. Dying the lessor, the lease is transmitted to the heirs.

This article indicates that the tenancy remains current, and is not extinguished on the event of death of the person who instituted it. The lease is governed in Brazil by contractual arrangements that usually determine its existence even after the lessor's or lessee's death. Therefore, if the lease agreement is current, even with the lessee's death, the transaction persists, binding the parties and being transmitted to the heirs.

However, the Tenancy Law (n. 8.245/91) provides, in its article 11:

> Art. 11. Dying the lessee, it will be subrogated in his/her rights and obligations:
>
> (i) in the leases with residential purpose, the surviving spouse or companion and, successively, the necessary heirs and people who lived on the economic dependence of the deceased, provided that they are residents in the building;
>
> (ii) in the leases with non-residential purpose, the estate and, if applicable, his successor in business.

Thus, with the lessee's death, there are two scenarios: (i) the lease for residential purposes, and (ii) the lease for non-residential purposes. In the first case, the duties and rights of the deceased tenant are assumed by the surviving spouse or common-law spouse, and sequentially, the necessary heirs and people who were economically dependent on the decedent. It is important to note that all must be residents in the real property. In the second case, involving leases whose purpose is not residential, the estate or the successor in business will replace the deceased lessee in his rights and obligations.

In relation to survivorship accounts, and payable on death accounts, as discussed above, the judicially appointed executor will be responsible for the administration of the estate's assets. This person has the duty to look after the rights, obligations and assets of the estate, including the property covered by the lease, and manage the assets during the probate proceeding.

III. Trusts, Foundations, and Other Planning Structures

A. Common Techniques

Within the Brazilian legislative framework, there are no institutions or entities specifically designed for estate planning. Accordingly, trusts and foundations, as existing under common law legislation, cannot be found. Bearing this in mind, Brazilian resident individuals (as defined below, in section IV.A) often make use of two common structures when planning estate succession: (i) offshore company structures, or (ii) foreign trusts.

1. Offshore Companies

Companies constituted abroad are commonly known as "offshore companies," simply meaning a company incorporated outside the Brazilian geographical boundaries. This term does not have any link with the type of taxation to which those companies are subject or with the jurisdiction in which they were established. The income accrued to the offshore company is available only after a deliberation of the administrator regarding the delivery of profits or income. Offshore companies may take the form of different types of entities, depending on their location, which can vary significantly in relation to local regulations.

2. Trusts

Trusts are typically a common law institution. Brazilian law does not provide for or recognize trusts, because Brazilian civil law does not distinguish between legal title and beneficial ownership. It is worth noting that Brazilian law provides for similar institutions, such as the usufruct and the chattel mortgage (*alienação fiduciária*), but not trusts.

Brazilian law recognizes trusts that are formed in accordance with foreign laws for foreign persons, provided the trust's elements of constitution do not interfere with Brazil's sovereignty, which is fundamental for determining validity. Hence, the trust will be probated according to the law of the country of origin, or according to the terms determined in its instrument of constitution.

It is important to note, it is not possible for a foreign trust to directly hold any assets in Brazil (such as equity participation in a Brazilian company or real estate). This is because trusts do not have a legal corporate identity in Brazilian law.

B. Fiduciary Duties (Trustees, Board Members, Directors, etc.)

Not applicable.

C. Treatment of Foreign Trusts and Foundations

As discussed above, the concept of a trust does not exist in the Brazilian legislation. Nevertheless, a foreign trust will be considered valid in Brazil, so long as its elements of constitution do not interfere in the country's sovereignty. Hence, the trust will be probated according to the law of the country of origin, or according to the terms determined in its instrument of constitution.

IV. Taxation

A. Domicile and Residency

Residency is a key concept for determining tax liability. Brazilian tax residents are taxed on a worldwide basis on income arising in or outside Brazil. Non-residents are taxed only on Brazilian-located assets and Brazilian-sourced income. Different rules apply to determine residency, depending on the taxpayer's nationality.

1. Brazilian Nationals

Residency of Brazilian nationals is based on domicile status. Brazilian nationals who live in Brazil are treated as tax residents. Brazilian nationals are no longer treated as tax residents if they (i) leave Brazil on a permanent basis, or (ii) have left Brazil on a temporary basis for a period of more than 12 months.

Brazilian nationals who are not residents in Brazil for tax purposes will become residents when they enter the country with the intention of returning to the country on a definitive basis. Note that this requirement is quite vague, and there is no clear legal or regulatory guidance in this respect. Nevertheless, some elements could serve as evidence that the non-resident Brazilian individual has returned to Brazil on a permanent and definitive basis, such as: (i) constant physical presence in the country, (ii) engagement in a local employment, (iii) family bonds, and (iv) accounts being maintained with Brazilian banks, among other elements.

2. Foreign Nationals

Foreign individuals who enter Brazil holding either a permanent or a temporary work visa issued upon an employment contract entered into with a Brazilian legal entity will become residents of Brazil for tax purposes as from the date of their arrival in the country. Foreign nationals who enter Brazil for any other reason, and hold another type of visa (for example, a business or tourism visa), are attributed tax residency status once their stay exceeds 183 days (consecutive or non-consecutive) within a 12-month period.

3. Termination of Tax Residency

Foreign and Brazilian nationals who are residents in Brazil for tax purposes will have their tax residency status terminated if they leave the country either:

(i) on a permanent and definitive basis and file a Definitive Departure Statement (which is a special type of Income Tax Return which notifies the Brazilian tax authorities of the departure, and computes the income taxes owed by him/her until that date); or

(ii) on a temporary basis and do not return for twelve consecutive months. In this case, although Brazilian tax authorities would likely demand the filing of a Definitive Departure Statement after the 12-month period in order to accept that the individual has lost its tax residency in Brazil thereafter, there would be grounds to contend that the mere expiration of this term is sufficient.

B. Gift, Estate, and Inheritance Taxes

Brazil has a federal taxation system. Accordingly, the federal Constitution grants the Brazilian States and the Federal District the authority to impose the Tax on Donations and on *Causa Mortis* Transfers (*Imposto sobre Transmissão Causa Mortis e Doação de quaisquer Bens ou Direitos*, or “ITCMD”). This tax is generally levied on the value of goods and rights conveyed by gift or inheritance.

The different Brazilian states levy different rates. Therefore, it is essential to consider in which State the individuals involved with the donation or inheritance are domiciled. Note that if the beneficiary of the donation or the inheritance is a Brazilian tax resident, ITCMD will usually apply.

The relevant Brazilian State determines the ITCMD rate, although it is legally capped at 8%. For example, in the State of São Paulo, ITCMD is levied at a rate of 4% over the total value of the deceased's assets at the time of death. Delay in starting the probate proceeding and in paying the tax will result in applicable fines and interest. Also, tax-free allowances and exemptions may be granted under the law of the particular Brazilian state.

As the tax is due on both donations and on inheritances, there are few planning strategies to reduce the frequency with which it applies, although some tax efficiency can be achieved by reducing the tax basis (for example, through reorganization procedures), which must be analyzed on a case by case basis. Pension plans may be useful for financial investments as they are mostly exempt from ITCMD. There are no other taxes on death or on lifetime gifts.

C. Taxes on Income and Capital

Since 1939, Brazilian resident nationals are taxed on a worldwide basis, on their income and gains arising both in Brazil and abroad. Taxable income is calculated on a cash basis. Accordingly, income is taxable in the month or year in which it is actually received by or made available to the individual taxpayer.

Amounts received abroad by Brazilian residents are classified in two groups for Individual Income Tax (*Imposto de Renda da Pessoa Física*, or "IRPF") purposes. The taxation will depend on their nature, which is classified as ordinary income or capital gain. "Ordinary income" is income derived from work or capital or both, and "capital gains" correspond to the positive difference between the sale price and the acquisition cost of assets owned by the taxpayer.

1. Ordinary Income

Ordinary income paid by local sources is generally subject to IRPF at progressive rates of 0%, 7.5%, 15%, 22.5% and 27.5%. Currently, these progressive rates are applied according to the following tax brackets.

Tax Base (R$)	**Rate (%)**	**Amount to be Deducted from Tax in order to Reach Progressiveness (R$)**
Up to 1.566,61	--	--
From 1.566,62 to 2.347,85	7.5	117,49
From 2.347,86 to 3.130,51	15	293,58
From 3.130,52 to 3.911,63	22.5	528,37
Over 3.911,63	27.5	723,95

If tax upon income attributed to a Brazilian tax resident is withheld at the source, such tax is treated as an advance payment of the IRPF due at the end of the year. Furthermore, this payment may be offset against the overall tax liability assessed on the individual's Annual Income Tax Return (*Declaração de Imposto de Renda da Pessoa Física*, or "DIRPF").

Earnings received from other resident individuals or from foreign sources are also taxed at the above referred progressive rates.[3] However, in this case, the resident individual will be responsible for paying the tax due, under a procedure commonly known as "*carnê-leão*." These assessments are carried out on a monthly basis, and the tax paid will be considered an advance payment of the income tax due at the end of calendar-year, under the resident individual's DIRPF.

Under the monthly *carnê-leão* method, as well as under the withholding assessment carried out by Brazil companies, certain specific amounts may be allowed as a deduction from the applicable tax base. For example, contributions paid to the public social security system, or alimony and child support payments under a court order or judicially validated settlement would be allowed.

After the calendar year has ended, resident individuals will generally be required to file an Annual Income Tax Return (DIRPF). This Annual Income Tax Return must be filed by the last business day of April in the year following the taxable year. Under the DIRPF, resident individuals will be allowed to take certain deductions (personal allowances), such as those referring to non-reimbursed medical, dental and hospital-related expenses, as well as to contributions paid to the public social security system (among a few others).

2. Capital Gains

a. Assets and Rights Held in Brazil

As a rule, any capital gains earned by resident individuals are subject to a 15% final income tax assessment. The capital gain will generally correspond to the positive difference between the sale price and the acquisition cost.[4] The resident individual will be responsible for paying the capital gains by the last business day of the month following the one in which the capital gain was earned.

b. Assets Held Abroad

Brazilian residents are also subject to income tax on capital gains arising from the sale of assets and rights located abroad. These gains are also taxed at a fixed 15% income tax. Nevertheless, specific rules have been set forth for the purpose of computing capital gains derived by resident individuals from the sale of assets or rights held abroad.[5]

Bearing in mind (i) the residency statutes described in section IV.A above, and (ii) the planning structures referred to in section III.a above, practitioners should review the main tax aspects of structures commonly adopted by Brazilian individuals for estate planning abroad.

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[3] However, it is important to note that, according to the Brazilian tax authorities, in certain circumstances, the income arising from fixed-income investments abroad will be taxed as gains, at a 15% flat rate.

[4] Nevertheless, the Brazilian tax authorities have taken the position that income arising from fixed income financial investments carried out abroad by resident individuals will be subject to taxation as capital gains, even if these investments generate periodic income, provided that they may be withdrawn or redeemed by the taxpayer.

[5] The rules for computing capital gains derived by resident individuals on the sale of assets held abroad include:

(i) for assets and rights acquired with income originally earned in *Reais*, capital gains will correspond to the positive difference (calculated in Brazilian currency) between the sale price of the respective asset in *Reais* (based on the American dollar of the date of the sale) and the acquisition cost in Reais (based on the American dollar of the date when the investment was acquired). Accordingly, any exchange variation in the period when the investment is held abroad will be included in the calculation of the capital gain;

(ii) for assets and rights acquired with income originally earned in foreign currency, capital gains will correspond to the positive difference (calculated in foreign currency) between the sale price of the investment in foreign currency and the acquisition cost in foreign currency (converted into *Reais* based on the foreign exchange rate on the date of the receipt of the proceeds); and

(iii) for assets and rights acquired with income originally earned both in *Reais* and in foreign currency, the sale price and the acquisition cost will be ratably determined according to the rules above.

c. Common Techniques – General Comments

In the case of indirect investment (i.e., investments in entities located abroad such as offshore companies or trusts), the taxation of income and gains is deferred to the time of availability of these amounts. In other words, income accrued by such entities that is not distributed to Brazilian residents is not subject to tax in Brazil until the time of its availability. Indirect investment, therefore, could be an attractive option in estate planning for Brazilian individuals who intend to maintain the resources invested abroad for a considerable period of time. However, for cases in which the repatriation of the resources occurs in a short period of time, the amounts spent on the indirect investment organization, which are more sophisticated than direct investments, may not be justifiable by a deferred taxation.

3. Offshore Companies – Tax Aspects

Income received by a Brazilian shareholder of an offshore company, such as profits and dividends, are subject to the income tax by the *carnê-leão* system, subject to the income tax graduated rates. It should be noted that the income taxation applies regardless of where the income was made available, if in Brazil or abroad, and regardless of the location of the paying source. On the other hand, current law provides as long as there are no profits distributed by an offshore company, an interest in an offshore company should not be taxed because the taxation is deferred to the time of availability.

In relation to the gains, as previously mentioned, if a Brazilian individual sells his shares in an offshore company, resulting in capital gain, the gain will be subject to income tax at a rate of 15% on the positive difference between the sale price and the acquisition cost.

4. Trusts – Tax Aspects

From the Brazilian perspective, the trust is a legal arrangement conceived by the Anglo-Saxon law, developed in common law countries which consists in the transfer of part of the assets originally detained by a settlor into a separate ownership, which is managed by a trustee in favor of third parties (beneficiaries). Thus, pursuant to foreign laws, the institution of trusts provides a means for the settlor to shift a portion of his estate so that this fraction comprises a separate estate, by way of a special allocation. This new estate, formed by assets and/or rights, will be managed by the trustee, a person other than the one who initially was the sole holder of the segregated estate.

In view of the above, a trust can be distinguished by the following parties:

(i) the settlor, who is the original owner of the assets and rights that form the allocated estate;

(ii) the trustee, an individual or legal entity to whom custody and ownership of the assets, interests and/or amounts that will form the estate will be attributed, and whose principal obligation shall be to manage such estate in observance of the rules established upon the settlement of the trust; and

(iii) the beneficiaries, the persons to be benefitted by the trust's estate and by the earnings received/accrued by it.

Note that the transfer of property to the trust by the settlor gives rise to an estate that is autonomous. Although it is true that the trustee is entrusted with the assets and rights, the assets are not included in the personal estate of the trustee and may not be reached by debts and other obligations of the trustee.

The proportion of the benefits to be paid to the beneficiaries is defined by the settlor in documents related to the trust, the deed and letter of wishes, which governs the distributions to be made to the beneficiaries. In some circumstances, the trustee may have certain discretion, based on a personal analysis of the context in which any particular beneficiary lives, including behavioral, criminal or even health contexts. As we have previously pointed out, the institute of trust is not contemplated by the Brazilian legal system, nor

does it provide for an identical legal structure able to produce the same legal effects. Despite this, a Brazilian resident is not forbidden from receiving the distributions made by a trust established abroad.

In this context, since we cannot identify an equivalent institution in Brazil, there are no specific rules that should be followed for regulatory, tax and succession matters, or even consolidated understandings from the authorities or precedents in this respect. Thus, although the trust is a fairly common planning structure abroad, there is some resistance to its implementation by Brazilian residents due to the uncertainty of the related matters.

Considering the absence of rules in respect to trusts, in determining the tax treatment applicable to each part of the trust, it is important to verify the legal nature given to the transfer of the assets from the settlor to the trustee and to the beneficiaries.

In this context, it is relevant to stress the difference between two types of trusts: (i) revocable trusts and (ii) irrevocable trusts. In general, the former may be altered or terminated any time by the settlor, while the latter cannot be changed or revoked once it is set up, and the assets and rights transferred upon its incorporation cannot be taken out of the trust by the settlor, leaving no room for post-settlement interferences.

In the context of an irrevocable trust, in the author's opinion, the transfer of goods to the trustee and the beneficiaries can be characterized as a donation, since the intention of such transfer is an indirect donation to the beneficiaries on a permanent basis. Such rationale does not apply to the revocable trust, since the transfer can be revoked at any time. The legal nature of the transfer in the revocable trust is a very controversial matter within the Brazilian legal system.

a. Transfer of Goods from the Settlor to the Trustee and the Beneficiaries

When settling an irrevocable trust, the individual transfers in a permanent basis the property of the goods to the trustee and the beneficiaries. In this case, there are arguments to sustain that the individual (as the Settlor) shall not submit potential income received by the trust to IRPF, since the individual does not own the assets after the transfer. The transfer of the assets to the trustee and the Beneficiaries of an irrevocable trust would be subject to ITCMD, since such transfer has the legal nature of a donation.

As we have seen on section IV.B above, ITCMD is generally levied on the value of goods and rights conveyed by donation (as a gift tax) or estate succession (as a death tax), at a rate to be determined by each Brazilian State. In this case, ITCMD is payable to the State of the donor's domicile in case of donation or conveyance of title to movable properties, instruments or credits. If these assets are originated from inheritance, ITCMD is payable to the State where the probate proceedings are being processed. The tax determined on the conveyance of real properties and attaching rights is payable to the State where these assets are located.

In respect to the revocable trust, notwithstanding different interpretations, it is possible to claim the same tax treatment applicable to the investments in an offshore company by a Brazilian individual would be applicable. In contrast, no income should be recognized at the moment of settlement of a revocable trust.

b. Tax Aspects on Income Available to the Beneficiary Individual

As a rule, income made available by an entity located abroad may be subject to IRPF in Brazil because Brazilian residents are liable to tax on their worldwide income. Accordingly, income derived from sources located abroad (such as a trust) must be taken into account upon calculating the taxable base for IRPF purposes. This income will be subject to IRPF at a rate determined generally in accordance with progressive rates established by the legislation.

In this sense, for IRPF purposes, any amount made available by the trust to the beneficiary individual may potentially qualify as a taxable amount, irrespective of the fact that the relevant value is effectively transferred to Brazil or not.

Payments realized by the trustee to the beneficiaries would be subject to income tax only in case they exceed the amount of the acquisition cost (tax basis). In this circumstance, the beneficiaries would have to collect the tax as capital gain under the "carnê-leão" procedure, as previously explained. Nevertheless, please note that there is a risk that Brazilian tax authorities take the interpretation that the reported payments must be integrally subject to IRPF, under "carnê-leão" procedure.

In respect to ITCMD, state tax authorities could take the interpretation that all payments made by the trustee to the beneficiaries have the nature of donations, and, thus, such payments would be subject to ITCMD. However, in our opinion, such interpretation should not prevail, since: (i) the beneficiaries have a registered right on the irrevocable trust and (ii) the payments made by the irrevocable trust to the beneficiaries have the nature of a donation made by the Settlor and not by the irrevocable trust. In addition, the beneficiaries have the right to oblige the trustee to comply with settler determinations, which are established at the moment of the trust settlement, which removes the characteristic of "liberality", typical in donations. On the other hand, in case of tax authorities considering that all payments made by the trustee are donations, such amounts would be exempt from IRPF.

It is important to stress that these conclusions are based on the legal opinion in respect to the nature of the payments made by the irrevocable trust to the beneficiaries, which, in the view of the authors, can be considered as donations. Notwithstanding, such matter has never been analyzed by Brazilian tax authorities or by judicial courts in Brazil.

Finally, regarding the revocable trust, the beneficiaries only recognize their income or the principal amount when they are effectively paid.

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