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Recent Developments in International Taxation
Brazil

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Recent highlights

During the past year, from August 2019 to July 2020, Brazil has mainly: dealt with tax developments regarding the Pension Reform; worked together with the Organisation for Economic Co-operation and Development (OECD) on a report regarding its Transfer Pricing rules; and amended or expanded its treaty network. Due to the outbreak of the Covid-19 pandemic, Brazil has also taken tax emergency measures in order to convey the economic crisis and tackle the public health needs due to the pandemic.

Domestic legal developments

Pension reform

One of the biggest legislative developments of 2019 for the tax and economic setting in Brazil was the approval of the Pension Reform[1] by the National Congress. The enactment of the new law sets changes for the retirement age for men and women, as well as increases for workers' pension contributions, and establishes a new mechanism for calculating social security benefits. The reform will be gradually introduced and there will be four phases to this transition. The Pension Reform was the most important item of the 2019 legislative agenda, and its approval had a rather important political and economic impact. For tax concerns, its enactment shifted the National Congress's attention to the following crucial topic of the agenda: the simplification and unification of Brazil's indirect taxation.

Law on Negotiation of Outstanding Tax Debt Settlement

In April 2020, a new regulation was enacted[2] allowing taxpayers and tax authorities to negotiate terms for the settlement of outstanding federal tax debts. The law represents an innovation to the Brazilian tax system because, before the law was passed, tax authorities had no right or power to negotiate tax debts, even though the debts were highly unlikely to be paid through normal means of collection. According to its wording, the amount due by the taxpayer may be paid in installments over a period of up to 84 to 100 months, and the respective interest, penalties and charges may be reduced by 50 per cent to 70 per cent of the total debt.

Covid-19 emergency measures

Due to the outbreak of the Covid-19 pandemic, Brazil implemented temporary tax measures to relieve the tax burden and tax duties during the critical period of quarantine (March to July 2020). Thus, since March 2020, Brazil provided for import duty and payment relief on public health related goods; tax debt payment relief; return deadline extensions for individual income tax, social security contributions and for taxpayers under the Simplified Regime (SIMPLES); reduced payroll contributions and Imposto sobre Operações Financeiras (IOF) rates; suspension of tax procedural terms; and deadline extensions for tax installments due in May, June and July 2020.

Brazilian tax agenda

The changes in the economic and political setting in Brazil, as well as the pandemic outbreak, led to a rather intense and disruptive tax agenda at the National Congress. There have been heated discussions about reintroducing the financial transactions tax, the so-called Contribuição Provisória sobre Movimentação Financeira (CPMF), as well as taxing dividends. For the time being, nothing has been done concretely. Moreover, two other topics of the tax agenda have been discussed lately, (1) the unification of Brazilian indirect taxes into a VAT regime – which, as a first step, has been presented only as the unification of two indirect federal taxes (PIS and COFINS) into a new contributions, the Contribuição sobre Bens e Serviços (CBS)-; and (2) the Bill of Law on Digital Services Tax[3] (Contribuição sobre Intervenção no Domínio Econômico (CIDE-Digital), as a unilateral measure for Brazil to tackle digital economy tax issues. Both tax matters will be further developed in the next few years, and they

[1] Constitutional Amendment no 103.

[2] Law no 13.988/2020.

[3] Bill no 2,358/2020.

represent key subjects in Brazilian tax and economic policies.

Transfer pricing rules: the OECD report

In December 2019, the report *Transfer Pricing in Brazil: Towards Convergence with the OECD Standard*, produced by the OECD jointly with the Federal Revenue of Brazil, was published. The report assessed the similarities and differences between Brazil's transfer pricing rules and the OECD Transfer Pricing Guidelines and identified two options for Brazil to converge with the OECD standard, while enhancing the positive attributes of its existing transfer pricing framework. Both options contemplate full adherence to the arm's length principle, which is at the core of the OECD standard, while seeking to preserve simplification, and maintain ease of compliance and effectiveness of the tax administration, as well as cross-border tax certainty.

The developments of this project and the report's conclusions are still uncertain to Brazilian legislation on transfer pricing because no concrete proposition to change the domestic rules has been presented to the National Congress. Nevertheless, it shall be noted that Brazil applied for OECD Membership in 2017, and the alignment of transfer pricing rules would represent an important step towards its acceptance as an OECD member.

Treaty network

Recent Brazilian international tax policy has developed towards expanding and amending its tax treaty network. As Brazil has chosen not to sign the Multilateral Instrument (MLI) agreement, the amendment protocols to double tax conventions (DTC) already in force between Brazil and some countries are being negotiated and signed in order to comply with the base erosion and profit shifting (BEPS) minimum standards.

Regarding new treaties, in the past year, Brazil has signed a DTC with Uruguay (June 2019), and pending DTCs with Singapore, Switzerland and the United Arab Emirates (March 2020) have been approved by the lower chamber of the National Congress (Câmara dos Deputados). Brazil also put into force a Tax Information Exchange Agreements (TIEAs) with the United Kingdom (May 2019) and ratified another TIEA with Jamaica (June 2019). Regarding Social Security Agreements (SSAs), Brazil is also expanding its network. Since last year, the SSA between Brazil and Switzerland entered into force (October 2019) and the SSA with India was signed (January 2020).

On the matter of tax treaty amendments, Brazil signed a protocol amending the DTC with Sweden (March 2019) and put into force a protocol to the DTC with Denmark (July 2019).

Case law highlights

'Substantial economic activity' of Dutch holding companies for the purpose of a privileged tax regime[4]

The Administrative Court of Tax Appeals (Conselho Administrativo de Recursos Fiscais or CARF) in December 2019 held that a Dutch holding company had no substantial economic activity to meet the requirements set on the anti-avoidance domestic rule which lists low tax jurisdictions and privileged tax regimes5. In order to evaluate what it means to have no economic substance, the Court focused on lack of employees and on the shared addressed with other group companies, even though the Dutch holding company had premises in the Netherlands and loan agreements with entities in other countries. As a result, Brazilian thin cap rules should apply to the case.

Fees for Technical Services under Brazil-France DTC[6]

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[4] Administrative Procedure 16561.720100/2017-97 (*Unilever Brasil Ltda*.), CARF.

[5] Normative Instruction RFB No 1037/2010.

[6] REsp 1.618.897 – RJ, STJ.

In May 2020, the Superior Court of Justice (STJ) rendered a decision on whether fees for technical services may be subject to withholding tax under the Brazil- France DTC. The STJ decided in favor of the taxpayer, holding that term profits for the purpose of applying a tax treaty should be considered as operational profits, including technical service fees, and not just actual profits. As such, Article 7 should apply in respect of technical service fees and, in the absence of a permanent establishment, are exempt from withholding tax.

Loss offset limitation in the case of reorganisation[7]

The STJ also decided, in June 2020, on whether a company may be exempted from the limitation on the offset of losses in the case of a reorganisation – spin-off or merger – that results in the extinction of the company. According to domestic law, tax losses can be carried forward indefinitely; however, only up to 30 per cent of the company's tax income in a tax period can be offset by losses. In this decision, the STJ held that because there is no specific law providing for an exemption from the 30 per cent limitation in cases of the extinction of a company by reorganisation, the tax benefit cannot be granted.

[7] REsp 1.805.925.