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# Brazil

## International Estate Planning Guide Individual Tax and Private Client Committee

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*Updated 8/2021*

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## I. Wills and Alternative 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, sealed, 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 generally can be written in Portuguese or any foreign language, as long as the witnesses and the testator understand its content. The exception is the public Will, which must be written in Portuguese given that it is a public instrument. 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 with respect to assets located in Brazil may be considered valid and will be enforced in Brazil after a probate procedure before a Brazilian Court, which has exclusive jurisdiction to judge succession regarding assets located in Brazil<sup>1</sup>.

According to Brazilian law, the content of the Will must obey the *lex domicilii* (law of domicile) of the testator (deceased) and the formalities must obey the *lex locus regit actum* (law of the place of act). In addition, the Brazilian legislation establishes that the succession follows the law of the country where the deceased was domiciled.

However, no matter in which country it was executed, the law of the domicile of the testator should only be applied if it does not conflict with Brazilian sovereignty, public order and/or good conduct. In addition, an exception is made to benefit the Brazilian spouse and children: in case of the law of domicile of the deceased is not more favorable to them than the Brazilian law, the Brazilian law will be applicable.

### B. Alternative Succession Planning

Succession planning can be based on other alternatives, in addition to Wills, whether by setting up trusts, other entities, or even by the anticipation of inheritance through donations or by means of life insurance policies, for example.

However, it is important to point out that 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<sup>2</sup>, so they must be established abroad. Please see section IV.C.4 below on this matter.

On the other hand, the anticipation of inheritance through donations follows strict rules of the Brazilian Civil Code. In fact, a very common form of donation for the purposes of succession planning is by the institution of usufruct, which is, according to Brazilian legislation, a right *in rem* over the asset belonging to third parties, which allows the use for certain time without making changes to its content.

### C. Advance Directives Documents

Other important planning documents are the Advance Directives, which are designed to express someone's wishes about medical care and treatments they would or would not like to undergo in case of disability.

In other words, these documents serve to express someone's desire for health treatments in the event of being ill, in an incurable or terminal condition, as well as to indicate a representative to take decisions in the event of their incapacity.

There is no law in Brazil that regulates such documents, but they are provided for in the Resolution of the Federal Council of Medicine (CFM) No. 1.995/2012, according to which physicians must respect such

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<sup>1</sup> A judicial decision granted by a foreign court may be homologated (ratified) in Brazil by the Superior Court of Justice, provided that the competence related to the succession and share of the assets located in Brazil is respected.

<sup>2</sup> It is important to mention that this scenario may change, given that a bill has already been presented at the Brazilian Congress (PL No. 4.758/2020). Please see section IV.C.4 below.

documents, unless they are contrary to the Code of Medical Ethics.

The Advance Directives can be made by a Public Deed or a Private Instrument.

## II. Estate Administration

### A. Overview of Probate Proceedings

In Brazil, the succession takes place at the moment of the person's death. However, to verify and share the inheritance, it is necessary to open a probate procedure before the Court or the Public Notary. In first scenario, the judge will appoint an administrator (*inventariante*) and, in the second, the heirs will do it. In both scenarios, the administrator is the one responsible for managing the inheritance during the procedure.

The administrator shall represent the estate, manage the assets of 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<sup>3</sup>.

Another important representative of the estate is the executor (*testamenteiro*), who is usually determined by the testator in the 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.

The Brazilian legislation establishes the order of appointing an administrator by the judge, as follows: (i) the surviving spouse under certain conditions; (ii) the heir who has possession of and is managing the estate, under certain conditions; (iii) any heir, regardless of possession and management; (iv) the minor heir, by his legal representative; (v) the executor, if in charge of the estate administration; (vi) the one who receives the inheritance or legacy rights; (vii) the judicial administrator, if there is one; and (viii) 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.

### 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 legal heirs, in accordance with the rules established by the Brazilian Civil Code. Such heirs include the deceased's (i) descendants; (ii) ascendants; (iii) surviving spouse, depending on the property regime of assets established in the marriage; and (iv) collateral relatives.

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<sup>3</sup> In accordance with the Brazilian Procedural Civil Code, the administrator has the following duties (article 618):

- 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 75, § 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.

In addition, the administrator has the following duties that must be performed with the Judge's authorization, in accordance with the Brazilian Procedural Civil Code (article 619):

- 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.

The heirs mentioned in items (i), (ii) and (iii) above are forced ones, which means that they cannot be excluded from the inheritance by means of testamentary provisions. The heir mentioned in item (iv) is legal, but not forced, that is, he will receive the inheritance if there is no Will, but may be excluded according to the freedom to bequeath.

Regarding forced heirship, under the Brazilian law, a deceased who has forced heirs has his 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 forced 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.

In short, the available assets may be left by a Will to any person (forced 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 legal heirs, in accordance with the rules established by the Brazilian Civil Code.

Besides, the percentage of the deceased's assets that the heirs will receive is affected by some facts, such as: (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; and (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 the deceased.

### 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 (such as property acquired by gift or inheritance subject to a clause of incommunicability and other provisions from article 1.668 of the Brazilian Civil Code). 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 prenuptial 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 after 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 prenuptial 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 an regime provided by the Brazilian Civil Code and enter into a prenuptial agreement, whereby they can determine the conditions that best suit them. In addition, if the couple elects the partial property regime, a public record of this election will be enough, but if the couple chooses any other regime, a prenuptial 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, the Brazilian Civil Code Introduction Law and the Brazilian Procedural Civil Code also provides that as to assets located in Brazil, the Brazilian jurisdiction considers itself to be the only one competent to carry out the probate proceeding and partition of such assets, regardless of the place of domicile of the deceased – however, in such case the applicable law will remain the law of the deceased's domicile (except if the Brazilian law is more beneficial to the spouse and children, as explained above).

In other words, the Brazilian Courts are exclusively 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 jurisdiction and shall not be affected by the existence of probate proceedings initiated abroad, since 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.

#### 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, which provides as follows:

"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 (No. 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 and investment funds

Investment vehicles incorporated abroad are commonly referred to as "offshore companies or offshore vehicles," simply meaning a type of company or fund 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.

Offshore companies or investment funds are important depending on the life and financial goals of the shareholder/quotaholder specially because thus far income accrued by those vehicles can be easily reinvested in general allowing for a tax deferral at the level of the shareholder/quotaholder. Offshore vehicles may also allow for a more professional management of the underlying assets and facilitate the bureaucracy of international succession.

##### 2. Trusts

Trusts are typically a common law institution. Brazilian law currently does not provide for or recognize trusts, even though it recognizes trusts that are formed in accordance with foreign laws, 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<sup>4</sup>.

It is important to note that 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).

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

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<sup>4</sup> It is important to mention that this scenario may change, given that a bill has already been presented at the Brazilian Congress (PL No. 4.758/2020). Please see section IV.C.4 below.

- (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.

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.

Regarding irrevocable trusts, in our 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.

Please see more details about trusts in section IV.C.4 below.

#### IV. Taxation

##### A. Residency

###### 1. Tax Residency Concept

Residency is a key concept for determining tax liability regarding income. 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.

An individual is considered a Brazilian tax resident when (i) resides in the Brazilian territory on a permanent basis; (ii) enters Brazil with a permanent visa; (iii) enters Brazil with a temporary visa issued upon an employment contract or (iv) enters Brazil for any other reason, and hold another type of visa (for example, a business or tourism visa) but completes 184 days of stay, consecutive or not, within a 12 months term.

In addition, 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. It is paramount that those requirements are reviewed in a case-by-case analysis.

Once the individual becomes tax resident in Brazil, he or she will be subject to local tax legislation. Broadly, this means the individual must (i) register with the Individual Taxpayer's Register (*Cadastro de Pessoas Físicas – CPF*), (ii) report all assets and rights (in Brazil and abroad) owned by filing a Tax Return and potentially a specific declaration to the Central Bank of Brazil and (iii) offer all income/gains earned in Brazil and abroad to taxation, in addition to other specific obligations.

Given this, it is important that the individual, when entering Brazil, be aware of the legislation and other elements that may establish tax residence. When one becomes a taxpayer in Brazil, all tax obligations must



be observed. Otherwise, he or she can be subject to penalties and interest upon the failure of paying taxes in Brazil.

## 2. 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 12 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.

It is highly recommended to carry out a review of all the assets owned before moving out of Brazil considering that several formalities must be complied with, which if not done correctly may result in regulatory and tax liabilities to the individual.

### B. Gift, Estate, and Inheritance Taxes

In accordance with the Brazilian Federal Constitution, ownership transfers arising out of succession/inheritance and donations of any assets or rights are generally subject to ITCMD (*imposto sobre transmissão causa mortis e doação*), a state jurisdiction tax. Therefore, each state of the Brazilian federation has specific ITCMD regulations.

Regarding real estate transmissions, ITCMD is due to the state where the property is situated. With respect to movable assets, securities and credits, the tax is due to the state in which the probate is processed, or the donor is domiciled.

On the other hand, when the donor is resident abroad, when the deceased (even if resident in Brazil) possessed property abroad, or even when the probate procedure was processed abroad, ITCMD is currently not due. This matter was recently addressed in a decision handed down by the Supreme Court<sup>5</sup>, which ruled unconstitutional the tax collection on inheritance and gifts/donations (ITCMD) received from abroad under such circumstances<sup>6</sup>.

ITCMD has a maximum rate of 8%, as established by the Federal Senate in 1992. Thus, although the rates vary (from 1% to 8%) according to each state legislation, they cannot exceed 8%.

### C. Taxes on Income and Capital

Brazilian law adopts a worldwide system of taxation, which means that income/gain assessed by Brazilian tax residents are usually subject to taxation in Brazil, even if this income or gains has been assessed abroad.

Amounts received abroad by Brazilian residents are classified in two groups for IRPF purposes, depending on their nature ("ordinary income" or "capital gain"). A case-by-case analysis is important to determine the legal nature of any cash flow received but as a rule income relates to 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.

Considering that the triggering event of IRPF is any form of economic or legal availability of income, the

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<sup>5</sup> Extraordinary Appeal No. 851.108

<sup>6</sup> The Supreme Court's decision established that the ITCMD cannot be charged under such circumstances unless a specific law is enacted, which means that it is not possible to anticipate if this position will not change in the future.

moment of recognition should be the time when the corresponding revenues are effectively made available to the Brazilian resident individual. Accordingly, the mere availability by the individual (and not by its controlled foreign vehicles) succeeded by reinvestment is enough to trigger the IRPF payment.

## 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.

<b>Tax Base (R\$)</b>	<b>Rate (%)</b>	<b>Amount to be Deducted from Tax in order to Reach Progressiveness (R\$)</b>
Up to 1,903.98	--	--
From 1,903.99 to 2,826.65	7.5	142.80
From 2,826.66 to 3,751.05	15	354.80
From 3,751.06 to 4,664.68	22.5	636.13
Over 4,664.68	27.5	869.36

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 Income Tax 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 but the taxpayer itself is responsible for paying the tax due, under a procedure commonly known as "*cartão-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 *cartão-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.

## 2. Capital Gains

### a. Assets and Rights Held in Brazil

As a rule, any capital gains earned by resident individuals are subject to a progressive rate from 15% to 22.5% of income tax. The capital gain will generally correspond to the positive difference between the sale price and the acquisition cost. 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 progressive rate from 15% to 22.5% 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<sup>7</sup>.

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.

### 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.

In addition, it is important to point out that Brazilian government had tried to change the tax rules applicable to offshore investments – mainly focusing on the mentioned tax deferral. Even though those changes were disregarded in every attempt, this is a matter that often requires a more detailed review, including an analysis of what the individual is envisaging to achieve with the offshore structure or what its financial and life objectives are.

### 3. Offshore Vehicles – Tax Aspects

As previously mentioned, in general offshore vehicles allow for a tax deferral until the moment the funds are actually made available to the Brazilian shareholder/quotaholder.

Profits distributed by offshore companies to the Brazilian shareholders are generally considered income and therefore are subject to the progressive rates ranging up to 27,5%. The redemption of shares can have a controversial tax treatment as if they should be considered income (subject to income tax at a 27,5% rate) or if they should be subject to a capital gain assessment (where only the gain assessed – and not the whole amount – would be taxed at a 15% to 22,5% rate).

The redemption of quotas of investment funds abroad are generally subject to capital gain assessment (instead of considered an income) but it is paramount that a case-by-case analysis is carried out to understand the specific features of the investment funds as the regulatory characteristics can differ substantially from jurisdiction to jurisdiction and from legal form to legal form (and sometimes Tax Authorities may treat those funds as ordinary companies – thus affecting the applicable tax treatment).

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<sup>7</sup> According to “IN SRF No 118” by the Federal Revenue of Brazil, 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 BRL, capital gains will correspond to the positive difference (calculated in Brazilian currency) between the sale price of the respective asset in BRL (based on the American dollar of the date of the sale) and the acquisition cost in BRL (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 BRL 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 BRL and in foreign currency, the sale price and the acquisition cost will be ratably determined according to the rules above.

#### 4. Trusts – Tax Aspects

As we have previously pointed out, the institute of trust is currently not contemplated by the Brazilian legal system, which generate a few uncertainties in respect to the tax treatment applicable to Brazilian settlors or Brazilian beneficiaries.

##### 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. For its irrevocable feature the transfer of assets by a Brazilian resident to a Trust is subject to ITCMD at a rate to be determined by each Brazilian State.

In respect to the revocable trust, notwithstanding different interpretations, it is possible to claim that no ITCMD is due in the moment of the transfer of assets.

##### b. Tax Aspects on Income Available to the Beneficiary Individual

Distributions made by trust to beneficiaries' resident in Brazil are a very controversial matter. This is mainly because tax authorities claim that distributions must be treated as general income assessed by said Brazilian beneficiary and thus impose Income Tax at progressive rates ranging up to 27.5%. On the other hand, this position should be legally questionable as the transaction is much more similar to a donation (which is precisely the reason why ITCMD is levied upon the transfer of assets to irrevocable trusts).

Given the legal complexity of the matter trust structures must be carefully reviewed in a case-by-case analysis specially because details and variations on corporate structures used to set up the Trust can have beneficial tax impacts on the correspondent tax aspects of the structure.