Rödl & Partner

Seizing opportunities

Newsletter Rödl & Partner Brazil

News on Tax and Business advisory in Brazil

Issue: Q1/2017 · www.roedl.de/brasilien · www.roedl.com/br

Content of this issue:

> Brazilian Capital Gains Tax Rate has been increased from 2017 onwards

Federal Law # 13,259/2016 modified the applicable individual tax rates on capital gains in Brazil. Since the rules for resident individuals are generally applied to non-residents, the tax rate increase is also applicable to non-residents. The taxation as of January 1st, 2017 shall be as follows:

- 15 % for the portion of capital gains that does not surpass BRL 5 million
- 17,5 % for the portion of capital gains that exceeds BRL 5 million and does not surpass BRL 10 million
- 20 % for the portion of capital gains that exceeds BRL 10 million and does not surpass BRL 30 million
- 22,5 % for the portion of capital gains that exceeds BRL 30 million.

In addition, Normative Instruction # 1,662/2016 established that whenever non-residents are unable to prove the acquisition cost of the assets in Brazil to calculate capital gains, the acquisition cost to be considered shall be equal to zero and thus, total amount of the transaction will be subject to the taxation as above. Additionally, the acquisition cost must be considered in Brazilian Reais, while before there was a discussion whether the acquisition cost should be considered in Reais or foreign currency.

> The definition of Service Outcome for determination of services exportation is defined by the Superior Court of Justice

Brazilian case law intensively discussed the concept of service outcome for the determination services exportation, as the Federal Law # 116/2003 concedes an exemption conditioned to the services exports that either is fully performed and concluded abroad, or performed in Brazil and whose outcome is verified abroad. Determining when a service is verified abroad was subject to greater discussion between Municipal tax authorities and taxpayers.

Initially the Municipality of São Paulo enacted the Normative Ruling #2/2016, understanding that the outcome of service and the place where the service was rendered would be the same. Therefore, ISS exemption would only take place when the conclusion of the service was physically verified abroad, raising legal uncertainty, especially due to the lack of clear definition of service outcome, which can be interpreted as either the conclusion of the service provision or the benefits originated from the service outcome.

After some discussions, the Superior Court of Justice published a decision in a Special Appeal granting the ISS exemption and determining that the Municipality should return the amounts of ISS paid due to the export of services, adopting the benefits originated from the service outcome approach. In the same sense, the Municipality of São Paulo enacted another Normative Ruling # 4/2016, reviewing its prior position to defend that whenever the service recipient, the object or the economic benefit of the service rendering is located abroad, the ISS exemption is recognized. While there are still discussions on the accurate definition of service outcome, the recognition of this concept by the Municipality of São Paulo and (or not) in the export of services is an important step to recognize the appropriate taxation in the export of services.

> Elimination of obligation to legalize documents

Brazil finally enacted the Decree that internalized the Hague Apostille Convention, which eliminates the need of legalizing foreign public documents, and thus, simplifies the international procedures for recognizing public documents abroad among the signatory countries, including Germany.

According to the new rules, documents will be submitted to apostille procedure and accepted in the other foreign country. A Hague Apostille will be attached in the documentation by the competent authority that issued the Apostille and the validity of the document will be recognized in all countries that are signatories of the Convention. The procedure will also be applicable to certificates, powers of attorney, notary certificates and student documentation. The foreign documents that were legalized before the enactment of the Apostille Convention will be accepted until February 14, 2017. After that, the Apostille will be mandatory.

> Brazilian Corporate Taxpayer registry should disclose the ultimate beneficiary

Brazilian IRS enacted Normative Instruction # 1,634/2016, which brought several modifications to the regulations of the Corporate Taxpayer Registry (CNPJ). With the new regulation, legal entities should disclose to Brazilian tax authorities the corporate structure of ownership to the ultimate beneficiaries, as well as the legal representatives of the owners. This measure aims to prevent money laundering, tax avoidance and corruption worldwide, aligned with the actions towards tax transparency of the OECD and G-20 initiatives.

The ultimate beneficiary for Brazilian purposes must be an individual that directly or indirectly holds control, ownership or exercise of significant influence over a company (which can be either holding more than 25% of the entity equity or exercising power to elect directors). The disclosure is mandatory for newly incorporated entities as of January 1st, 2017 that are: (i) Brazilian and foreign investment funds and their shareholders, that are registered at the Brazilian Securities Exchange Commission (CVM); (ii) Foreign companies that have assets in Brazil; (iii) Foreign financial institutions that carry out foreign exchange transactions with Brazilian banks; (iv) Silent Partnerships (Sociedade em conta de participação).

In addition, taxpayers that already have the corporate taxpayer number will also be required to disclose the information of the ultimate beneficiary up to December 31, 2018. All information reported must be submitted electronically. Finally, Normative Instruction # 1,684/2016 enacted on December 2016, extended the mandatory term to present the information from July 1st, 2017 onwards to all taxpayers.

> Accountants must disclose non-compliant acts to managers and public authorities from July 2017 onwards

As a part of international harmonization in accounting procedures, from July 2017 onwards, Brazilian accountants will have to disclose any known or suspected acts that are non-compliant with the legislation. The NOCLAR (non-compliant with legislation and regulation) rule was developed by the International Ethics Standards Board for Accountants (IESBA) to develop new standards for Code of Ethics for Professional Accountants (IESBA Code) with respect to NOCLAR acts on the IAASB's International Standards. Examples of NOCLAR mentioned in the international rules are: tax frauds; securities frauds; non-compliance with environmental or health regulations; among others.

In Brazil, the IESBA and IBRACON (Brazilian Institute of Independent Auditors) held a meeting in November 2016, in which they discussed the main implications of adopting NOCLAR rule on the Brazilian scenario. The adjustment of such rules into the Brazilian Accountant Ethic Code is being supervised by IBRACON and the voting before the Federal Council of Accountancy should take place in the following months.

With the new regulations, those who prepare financial statements will have to be more watchful with the information disclosed as well as keep close eye to any inconsistencies found during this process, increasing the accountant's responsibility. Regardless, the NOCLAR rule shields any professional that reports a NOCLAR situation from violating professional confidentiality.

There are still some details to be clarified regarding NOCLAR application in Brazil, for instance, which acts can be regarded as NOCLAR. Also, the general rule sets forth that NOCLAR is firstly reported to a superior manager, and if there is no solution, the accountant should disclose the NOCLAR to public authorities, which could be either the Federal Prosecution or the Brazilian Federal Police (still pending definition).

Currently, accountants already have to disclose irregular acts to the Council of Financial Activities Control (COAF), which is part of the Treasury Ministry, and to the Securities and Exchange Commission (CVM), depending on activity developed by the entity.

> Brazilian IRS amends lists of Low Tax Jurisdictions (LTR) and Privileged Tax Regimes (PTR)

Brazilian IRS has a list of the low-tax jurisdictions (LTJ or black-listed jurisdictions) and privileged tax regimes (PTR or gray-listed entities) in the Normative Instruction # 1,307/2010.

Such list is regularly updated, bringing countries and corporate types being included, excluded and suspended subject to adverse tax consequences, namely, potential higher withholding income tax rate, transfer pricing adjustments, thin capitalization rules, contamination for consolidation purposes at Brazilian Corporate Income Tax, and requirement of additional support documentation to ensure deductibility of expenses at the Brazilian level.

In September, the Normative Instruction #1,658/2016 amended the list to include Curacao, Saint Martin and Ireland to the LTJ list and **holding companies in Austria** to the PTR list and excluding the Dutch Antilles and St. Kitts and Nevis from the LTJ list. It also brought more guidance to the definition of holding company with so called "substantial economic activity" for the purposes of the therein identified PTR regimes.

Finally, in December the Normative Instruction 1,683/2016 was enacted, that clarified for Austria that only a holding company that does not exercise "substantial economic activity" would be regarded as PTR.

> International tax transparency: Enacting of CRS MCAA and Consultation on the implementation of the Country-by-Country Reporting in Brazil

In 2016, Brazil has adopted two significant measures that are in accordance with international cooperation to prevent tax avoidance and abusive tax planning. One of them is the signature of the Common Reporting Standard Multilateral Competent Authority Agreement (CRS MCAA) which allows disclosure and information exchange between the countries assuming that they comply with the MCAA Convention. Brazil enacted MCAA through the Federal Decree # 8,842/2016, with effects as of October 2016. This is an important step towards the automatic exchange of information in tax matters.

As a result, the approval of the CRS MCAA could allow the implementation of the new transfer pricing reporting standards developed under Action 13 of the BEPS Action Plan, namely the Country by Country Reporting (CbCR). This is a mechanism that enables tax administrations to have access to the enterprises' structure and operations, by exchanging the country-by-country reports automatically, with the safeguard of confidential information.

In order to implement the CbCR, in November 2016, Public Consultation #11/2016 was published stressing the importance of implementing CbCR to enable tax authorities to investigate abusive structures and also to avoid further non-compliance and incremental costs for the enterprises.

Normative Instruction # 1,681/2016 enacted in the end of 2016 establishes that CbCR will be required to be reported at the Corporate Income Tax Return (ECF) of calendar year 2016, which is filed in 2017. The disclosure of information shall be sent through the ECF Platform. The regulation also brought important definitions of the information to be disclosed at the CbCR, as well as settled penalties for late filing, omission or inaccuracies on the disclosure of information.

> Brazilian tax law advances on BEPS Project

Brazil is not an OECD member, and is not obliged to the OECD initiatives. Nevertheless, due to the important role that Brazil has in the international scenario, being an important business player in Latin America, the BEPS Project was on its agenda of important subjects, especially regarding the international cooperation to prevent tax avoidance and abusive tax planning.

Brazilian tax law system is very complex, to the extent that some of the BEPS Actions have difficult implementation. One of those is the adoption of Actions 8, 9 and 10 (Transfer Pricing rules), since Brazilian methodology is based on fixed margins and differ significantly from the OECD Standards.

Regardless of the efforts, Action 12 measures are still pending of approval, regarding the disclosure of aggressive tax planning. While in 2015 tax authorities tried to introduce a mandatory disclosure regime, it was rejected by the Brazilian congress.

It also brought discussions among tax specialists as some of the concepts introduced by the mandatory disclosure program were not clear and determined, bringing uncertainty to taxpayers.

On the other hand, there were advances on some Actions, as follows. Regarding Action 5, which deals with Harmful tax practices, new concepts were introduced in the Brazilian tax law bringing guidance on corporate structured that could be regarded as privileged from a tax standpoint. In September and December 2016 the Normative Instruction # 1,037/2010, which lists privileged tax regimes (PTR) and low tax jurisdictions (LTJ), was amended to address the concept of substantive economic activities of holding entities in PTR's.

> Modifications on foreign capital registry and declaration procedure takes place on January 2017

As of January 30, 2017 Brazilian Central Bank regulations (i.e. Resolution # 4,533 of November 24, 2016 and Ruling 3,814, of December 6, 2016) that establishes new procedures in connection to foreign capital registry and declaration in Brazil will become mandatory.

Such modifications aim to simplify the current procedures for the registry of operations that involve foreign capital and are applicable to the platform of Electronic Declaratory Registry and Foreign Direct Investment (RDE-IED).

In a nutshell, the modifications comprise that (i) the recipient of the investment is responsible for making the registry of the Foreign Direct Investment before Brazilian Central Bank; (ii) the RDE-IED shall be automatically created in foreign exchange operations; and (iii) the update of information regarding the participation of each investor based on the exchange variations and other corporate modifications will be through a declaration, being waived the need of updating the system to register capital pay up, capital redemption, profit distribution, payment of internet on net equity, among other transactions.

It is worth mentioning that such rules set a 30-day dead-line to the update of information related to the equity and share capital paid up in the recipient entity, counted from the modification of the share participation of the foreign investor, and also on a yearly basis, up to January 31 of each year regarding the December 31 of the previous year. The update of the information related to December 31, 2016 shall be updated up to January 31, 2017.

Finally, the Brazilian Central Bank reintroduced the obligation of declaring economic-financing information on a quarterly basis, for entities that receive foreign direct investment with assets or equity that amount equal or above BRL 250 million. Such should be reported on May 31, August 31, November 30 and February 28 of the following year. The newer Manual for Electronic Declaratory Registry (RDE-IED) should be published soon.

Newsletter Brazil

Q1/2017

Your contacts for further information:

Philipp Klose-Morero
Rödl & Partner Brazil
South America Coordination
São Paulo: + 55 (11) 5094 – 6060
Curitiba: + 55 (41) 3091 – 9855
E-Mail: philipp.klose-morero@roedl.pro

Michael Löb
Consulting Director – Rödl & Partner São Paulo
Tel: + 55 (11) 5094 – 6067
E-Mail: michael.loeb@roedl.pro

Karen Steuer
Consulting Manager – Rödl & Partner São Paulo
Tel.: + 55 (11) 5094 – 6073
E-Mail: karen.steuer@roedl.pro

Seizing opportunities

"Despite the political crisis in Brazil and more precisely because of it, the biggest economy in Latin America, due to its resilient economic fundamentals, continues to offer multiple possibilities for investors and entrepreneurs. Seize with us the unique business opportunities in Brazil."

Rödl & Partner

"Every hand grasped, every foot put on the shoulders of another Casteller is an opportunity for us to create a brand-new constellation of a human tower."

Castellers de Barcelona

"Each and every person counts" – to the Castellers and to us.

Human towers symbolise in a unique way the Rödl & Partner corporate culture. They personify our philosophy of solidarity, balance, courage and team spirit. They stand for the growth that is based on own resources, the growth which has made Rödl & Partner the company we are today. „Força, Equilibri, Valor i Seny" (strength, equilibrium, valour and common sense) is the Catalan motto of all Castellers, describing their fundamental values very accurately. It is to our liking and also reflects our mentality. Therefore Rödl & Partner embarked on a collaborative journey with the representatives of this long-standing tradition of human towers – Castellers de Barcelona – in May 2011. The association from Barcelona stands, among many other things, for this intangible cultural heritage.

Imprint: **Newsletter Brazil**
Issue Q1/2017

Publisher: **Rödl & Partner Brazil**
Audit – BPO – Business Advisory – Tax
Latin America Coordination
German Desk Transaction Competence Center

Responsible for the content: **Michael Löb** – michael.loeb@roedl.pro
Karen Steuer – karen.steuer@roedl.pro