

Kluwer International Tax Blog

Brazil and BEPS Action 12

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In line with BEPS Action 12, the Brazilian President enacted, on July 21, 2015, the Provisional Measure (“MP”) no. 685, creating the obligation for taxpayers to disclose aggressive tax plans. Even though this MP is enforceable immediately, the actual disclosure still depends on regulations to be issued in the near future. In addition, a MP is a temporary law that is submitted to the Brazilian Congress, who can, within 120 days, either (a) approve; (b) reject; (c) approve with changes; or (d) do nothing. If the Congress does not approve within 120 days, the MP expires and ceases its effects.

MP 685/2015 establishes that taxpayers are obliged to declare to Brazilian tax authorities, until the end of September of each year, the transactions performed in the previous calendar year that involve elimination, reduction or deferral of tax.

This declaration must be filed when (a) the performed transactions do not have significant reasons other than tax; (b) the adopted form is not usual for the intended deal, or when the contract contains clause that result in effects different from a typical contract; or (c) the specific transactions performed by the taxpayer are those included in the list to be enacted by Federal Revenue Secretariat (“RFB”). When this declaration contains facts or transactions not yet occurred, it will be treated as a request for a ruling (formal consultation).

RFB may either agree or disagree with the transactions practiced by the taxpayer and, when there is a disagreement, the taxpayer will be notified to pay (or request to pay in installments) the taxes due with arrears interest within 30 days. No penalty will apply provided that this 30-day period is complied with. This exemption of penalty does not apply when the taxpayer presents the declaration after RFB started a tax inspection.

The lack of declaration or the incomplete or incorrect declaration will characterize omission to hide a tax evasion and RFB will charge taxes due with penalty (150%) and interest.

There is no question that this declaration is in line with BEPS. Upon the enactment of the MP, the Government explained that the disclosure of tax planning strategies intends to increase legal security for businesses and avoid long and unnecessary disputes, and also to follow BEPS recommendation. The Government also points out that the existence of disclosure obligation stimulates a more conservative approach by taxpayers when dealing with tax plans.

However, the question to raise is whether it complies with the rest of Brazilian tax legislation or not. In this regard, some aspects must be taken into account.

1. General anti-avoidance rules (“GAAR”). Even though Brazilian tax authorities have been adopting substance and business purpose tests for more than 15 years, alleging that any tax driven transaction is a sham or abusive – and, thus, a tax evasion –, the fact is that there is no definition of “abuse” in Brazilian tax legislation.

Notwithstanding, there is a broad definition of “abuse of law” in the Brazilian Civil Code, whose Article 187 reads as follows: “It is also illicit when someone exercises a right in a way that clearly exceeds limits imposed by its economical or social objective, by good faith or good manner s.”

The absence of a GAAR is concerning indeed, not only because of disrespecting rule of law principle in our civil law system, but also taking into consideration that Brazilian tax authorities oftentimes take aggressive approach of disregarding economic justifications presented by taxpayers, even in transactions that involved analysis and approval by other governmental bodies, such as the Brazilian Securities and Exchange Commission (“CVM”), the Central Bank of Brazil (“BACEN”), the antitrust authorities (“CADE”), etc.

In other words, oftentimes, the approach is to reject any reduction of taxes when such reduction comes from a transaction that would not have been done if the tax inspector was in charge of the company’s management, which should probably be far beyond any business purpose test adopted by any other tax authority in the world. We would certainly need a GAAR law before implementing this disclosure obligation.

2. “Significant reasons other than taxes”. The use of expressions that are not defined in the law is another concern. What could be considered “significant” from one’s point of view may not be “significant” from another person’s view.

The use of expressions with broad meaning may permit that the tax authorities establish their understanding as the definition by means of regulations, in a clear threaten to the rule of law principle.

3. Use of Assumptions. The transaction that is not reported to the authorities – for example, because the taxpayer understood that was not the case of reporting due to existence of business purposes – will be deemed tax evasion if the tax inspector considers that the taxpayer should have disclosed it.

Exactly because the tax authorities have traditionally adopted an aggressive approach towards taxpayers, it is likely that a number of disputes will arise in relation to whether taxpayer should have or not reported a certain transaction.

4. Lack of Specific Dispute Resolution Mechanism. In case of disagreement with the disclosed transaction, the tax authorities will request the taxpayer to pay the amount of taxes due, with no clarity on whether it will be possible to dispute the tax authorities’ interpretation in the Administrative Tax Courts.

The concern, in this case, is that by needing to dispute directly in the Judicial courts, taxpayers will have to either deposit or post bank guarantees corresponding to the amount under dispute. Considering that a judicial dispute lasts, in average 8-10 years, the taxpayers would stay with such amount blocked in a deposit, or would have to bear the costs of a guarantee during all these years.

Even though no assurance can be given that the Congress will approve this MP and despite of the problems that this new legal provision may cause, this is an evidence that Brazilian tax authorities are committed with the implementation of BEPS in Brazil, in such a way that we should expect new “BEPS inspired” measures in the near future.

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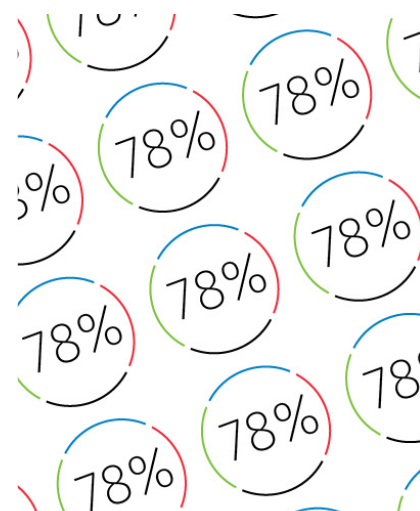
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