December 3rd, 2009

Recent developments in the Brazilian black list

Giancarlo Chamma Matarazzo

Table of Contents

1. Evolution of the concept of Tax Haven in Brazil

✓ The definition of ‘tax favorable jurisdiction’ was first introduced in the Brazilian legislation by **Law n. 9,430/96** in the context of transfer pricing regulations:

“Art. 24. The dispositions related to prices, costs and interest rates, set forth in articles 18 to 22, are applicable to the transactions carried out by individuals or companies domiciled in Brazil, with any individual or company, related or not, domiciled in a country that does not impose tax on income or which maximum income tax rate is inferior to 20%: (Original wording of Law 9,430/96)
(...)

§ 4o Are considered as tax favorable jurisdictions the countries or dependencies whose legislation does not allow access to information in relation to the shareholder composition or ownership of the investment, or that impose secrecy on the beneficial owners of income paid to non-residents. (Included by law 11,727, of 2008)”

✓ Upon the enactment of **Law 9,779/99**, the following was established:

“Art. 8° Except for the cases set forth in items V, VIII, IX, X and XI of article 1 of Law 9,481, of 1997, the income earned in any transaction in which the beneficiary is domiciled in a country that does not impose tax on income or which maximum income tax rate is inferior to 20%, to which refers article 24 of Law 9,430 of 1996, are subject to the assessment of withholding income tax at the rate of 25%”.

1. Evolution of the concept of Tax Haven in Brazil (cont.)

✓ **Normative Instruction 188/02** determined a list of tax havens containing 53 jurisdictions:

American Virgin Islands, Andorra, Anguilla, Antigua, Aruba, Netherlands Antilles, Bahamas Community, Bahrain, Barbados, Barbuda, Belize, Bermudas Islands, Campione D'Italia, Chipre, Costa Rica, Djibouti, Dominica, Gibraltar, Granada, Cayman Islands, Cook Islands, Hong Kong, Maldives, Madeira Island, Isle of Man, Channel Islands (Jersey, Guernsey, Sark and Alderney), Marshall Islands, Macao, Mauricio Islands, Montserrat Islands, American Samoa, Western Samoa, Turks Islands and Caicos, British Virgin Islands, Lebuan, Lebanon, Liberia, Liechtenstein, Luxembourg (with respect to holding companies set forth by Luxembourg Law of July 31, 1929) Malta, Monaco, Nauru, Niue Island, Panama, State of Saint Kitts and Nevis, Saint Vincent and Grenadines, San Marino, Santa Lucia, Seychelles, Singapore, Sultanate of Oman, Tonga, United Arab Emirates and Vanuatu.

✓ There has been a discussion on whether the list established by Normative Instruction 188/02 is exemplifying or exhaustive.

✓ There are arguments to sustain that the list is exemplifying, since the lawfulness principle must be observed. On the other hand, the public administration is obliged to comply with the normative rules established by the Federal Revenue (such as Normative Instruction 188/02).

✓ The Federal Revenue of Brazil ruled that the list is exhaustive (Tax Ruling n. 49/00 from the 7th Region and Tax Ruling n. 143/00 from the 8th Region).

1. Evolution of the concept of Tax Haven in Brazil (cont.)

✓On June, 2008, **Law n. 11,727/08** was published, establishing that a country which has **privileged tax regime** is defined as a country:

(i) that does not impose tax on income or which maximum income tax rate is inferior to 20%;
(ii) that grants a tax benefit to a nonresident individual or entity;
  (a) without substance requirements;
  (b) dependent upon the carrying out of non-substantial economic activities;
(iii) that does not impose tax on foreign income or when doing so at a rate of 20% or lower;
(iv) that impose restrictions on disclosure of information regarding the corporate organization or structure of the resident entity or the ownership of its shares or stocks or to their economic activities.

✓ Law n. 11,727/08 established that the concept of '**tax favorable jurisdiction**' also includes countries that that impose restrictions on disclosure of shareholder composition or ownership of the investment, or that impose secrecy on the beneficial owners of income paid to non-residents.

✓ Law n. 11,727/08 is effective since January 01, 2009.

✓ New and enlarged definition of tax haven, that may lead to a review of the existing list of tax havens.

✓ New concept of privileged tax regime: applies only for purposes of the transfer pricing legislation or whether also to the qualified transactions under article 8 or Law nr. 9.779/99 (25% of WHT)?

1. Evolution of the concept of Tax Haven in Brazil (cont.)

✓ **Law n. 11,727/08** included article 24-B in **Law 9,430/96,** as follows:

“Art. 24-B. The Executive Branch may reduce or reestablish the percentage referred to in article 24 and in items I and III of the sole paragraph of article 24-A, both from this law. (Included by Law 11,727/08)

Sole Paragraph . The use of the faculty set forth in this article may also be applied, in exceptional and restricted circumstances, to countries that are part of economic groups from which the Country participates (Included by Law 11,727/08)”

3. Delaware

- ✓ Delaware is currently not in the list of Normative Instruction 188/02.
- ✓ The list of Normative Instruction 188/02 is exhaustive.
- ✓ There is a risk that Delaware is included in the black list.
- ✓ Decision ruled that Delaware is a tax haven jurisdiction.

4. Future Perspectives

✓ Expectation of issuance of a new black list.

✓ Discussion regarding the applicability of the new concept for transfer pricing purposes only or also to apply higher rates of taxes.

✓Clarification on article 24 and 24-A.

✓ OECD Concept.

SÃO PAULO
R. Hungria, 1.100
São Paulo - SP
01455-000 Brasil
T (55-11) 3247-8400 / F 3247-8600

RIO DE JANEIRO
Av.Nilo Peçanha, 11
Rio de Janeiro - RJ
20020-100 Brasil
T (55-21) 2506-1600 / F 2506-1660

BRASÍLIA
SCS, Quadra 1, Bloco I
Brasília – DF
70304-900 Brasil
T (55-61) 3312-9400 / F 3312-9444

www.pinheironeto.com.br

pna@pinheironeto.com.br

Giancarlo Chamma Matarazzo
gmatarazzo@pn.com.br