



Low Tax Jurisdictions and Privileged Tax Regimes from a Brazilian perspective

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Facts

- ▶ The Brazilian tax legislation imposes, in certain cases, higher taxation on transactions carried out with residents located in “low tax jurisdictions”.
- ▶ As a general rule, the following situations give rise to a higher taxation (in case the beneficiary is resident or domiciled in a “low tax jurisdiction”):
 - Payments of income (import of goods, services, rights and interest - 25% WHT);
 - Capital gains (25% WHT);
 - Income and gains realized by foreign investors that invest in Brazil under the Resolution no. 2,689 are subject to a more beneficial tax treatment, not applicable to “low tax jurisdiction” investors.

Facts

- ▶ The more beneficial treatment granted by Resolution no. 2,689 (not applicable to “low tax jurisdiction” investors) includes:
 - (i) WHT at a rate of 10% in case of stock investment funds (fundo de investimento em ações), swap transactions, registered or non-registered in the stock market (bolsa), and in future market transactions performed outside the exchange market (bolsa);
 - (ii) 15% WHT, in all other cases, including fixed yield investments performed in the over-the-counter or stock markets;
 - (iii) Tax exemption on capital gains upon sale or exchange transactions.

Definition – Low Tax Jurisdiction

- ▶ Law no. 9,430/96, article 24 introduced the concept of low tax jurisdiction for transfer pricing purposes:
 - *“country that does not tax income or that taxes it at a rate lower than 20%”.*
- ▶ Law no. 10,451/02 amended Law no. 9,430/96 and added other elements:
 - *“countries whose domestic legislation does not allow access to information with respect shareholding composition of legal entities or on its ownership”.*
- ▶ Law no. 9,799/99, article 8, when defining “low tax jurisdiction” for taxation purposes makes reference to article 24 of Law no. 9,430/96.
- ▶ Law no. 10,833/03, article 47, when defining “low tax jurisdiction” for taxation on capital gains makes reference to article 24 of Law no. 9,430/96.
- ▶ Law no. 9,959/00, article 7 provides for the non application of a more favorable tax treatment granted by Resolution 2,689 in case the investor is located in a low tax jurisdiction.

Definition – Low Tax Jurisdiction

- ▶ In 2002, the Brazilian Internal Revenue Service (IRS) issued a Normative Instruction (IN/SRF 188/02) listing all jurisdictions deemed low tax jurisdictions (“black-listed countries”):
 - Andorra, Alderney (Channel Islands), American Samoa, American Virgin Islands, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bahrain, Barbados, Campione D’Italia, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Costa Rica, Cyprus, Djibouti, Dominica, Eastern Samoa, Gibraltar, Granada, Hong Kong, Isle of Man, Labuan, Lebanon, Liberia, Liechtenstein, Luxembourg (with respect to the 1929 Holdings), Macau, Madeira Island, Maldives, Malta, Marshall Islands, Mauritius Islands, Montserrat, Monaco, Nauru, Nevis, Netherlands Antilles, Niue, Oman, Panama, Saint Vincent and Grenadines, San Marino, Santa Lucia, Seychelles, Singapore, Tonga, Turks and Caicos Islands, United Arab Emirates, Vanuatu.

- ▶ Exhaustive or exemplificative list?
 - Tax Ruling no. 136/2002 - exhaustive

Definition – Privileged Tax Regime

- ▶ Recently, Law no. 11,727/2008 amended Law no. 9,430/96 adding a new article after Article 24 (Article 24-A), introducing the concept of “Privileged Tax Regimes” for transfer pricing purposes.
- ▶ Accordingly, if transactions are performed under privileged tax regimes, whether between related parties or not, transfer pricing rules should apply.
- ▶ A tax regime will be considered privileged if it satisfies any of the following:
 - Imposes no taxation on income, or a taxation at a rate lower than 20%;
 - Imposes no taxation, or a taxation at a rate lower than 20%, on income earned outside of its territory (territorial tax system);
 - Grants tax benefits to a nonresident individual or legal entity (i) without requiring the undertaking of substantial economic activity in the country or location, or (ii) conditioned to the non performance of substantial economic activity in the country or location;
 - Does not allow access to information with respect to capital composition, ownership of goods or rights or to economic operations undertaken.

Discussions

- ▶ When the Brazilian legislation mentions “taxation at a rate lower than 20%” it should be understood as nominal or effective rate ?
 - How we should qualify jurisdictions that have special tax regimes whose **effective** tax rate is lower than 20%?
 - e.g. The Netherlands, Belgium, Luxembourg, Austria, Switzerland
 - How we should qualify jurisdictions with taxation at a **nominal** tax rate lower than 20%?
 - e.g. Ireland, Slovak Republic, Hungary, Poland and Chile.
- ▶ Would it make sense that Tax Treaty Countries are deemed as “Privileged Tax Regimes” ?
 - e.g. Slovak Republic, Hungary and Chile.

Discussions

- ▶ In the past, the tax legislation adopted the low tax jurisdiction concept applicable to transfer pricing also to determine higher withholding tax rates on remittances.
- ▶ In this sense the main question raised is whether this recent change that has broadened the concept for transfer pricing purposes could be applied for withholding taxation on remittances in the future.
- ▶ In our opinion, the increased withholding tax rate (25%) only applies, as a general rule, to remittances or capital gains of low tax jurisdictions and therefore should not be automatically extended to cross border remittances to privileged tax regime jurisdictions.
- ▶ It is important to notice that historically, the blacklist enacted by tax authorities is used for both concepts: transfer pricing and to determine the withholding tax on remittances.
- ▶ However, considering that the new regulation does not expressly change the blacklist in effect but leaves room for tax authorities to scrutinize particular transactions, it is expected that a new regulation is enacted addressing how the blacklist should now be applied.
- ▶ No updated Blacklist has been published yet.