Transfer Pricing in Brazil – control of interests

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Agenda

- Transfer Pricing in Brazil – general aspects
- TP in Brazil – recent changes in law
- TP and interests – previous regime
- TP and interests – new regime
- New regime, new doubts.

Transfer Pricing in Brazil – general aspects

- Brazil is not an OECD member.
- Brazilian arm's length interpretation differs from the OECD guidelines: fixed margins and limited methods.
- TP applies to related parties, tax havens and "privileged tax regimes".

Transfer Pricing in Brazil – general aspects

- TP control has started in 1996, but several changes in law were introduced since then and many doubts are still unanswered by tax authorities.
- The main impact is that application of Brazilian TP rules may result in double taxation caused by the difference in parameters used by Brazil and OECD members.

TP in Brazil – recent changes in law

- Law 12,715 – September 17th , 2012
- Law 12,766 – December 27th, 2012
- Normative Instruction 1,312 of the Brazilian Revenue Authority – December 28th, 2012
- Normative Instruction 1,322 of the Brazilian Revenue Authority – January 18th, 2013.

TP in Brazil – recent changes in law

- Comparable Uncontrolled Price (PIC): concept of relevance to benchmark calculation, introduced that independent prices used for calculation must refer to the same calendar year or (if not possible) it must be adjusted by foreign exchange rate variation.
- New methods for commodities in importation and exportation.

TP in Brazil – recent changes in law

- Resale minus Profit Method (PRL). Unification of resale and production profit method, three different margins that varies on the type of product (40%, 30% or 20%), exclusion of import costs from the calculation.
- TP control of "back to back" transactions.
- New limits for export safe harbors.
- **Control of interests**.

TP and interests – previous regime

- General Safe Harbor: registration within Central Bank of Brazil.
- Due to Foreign Currency Controls in Brazil the registration was mandatory for virtually all contracts involving inbound loans.
- If it was not registered in Central Bank a fixed parameter: proportional Libor interest rate for 6 months plus 3% as spread.

TP and interests – previous regime

- According to Law 4,131, dated as of 1962, Central Bank could not allow the registration of an interest rate if it was different from the market rate at the jurisdiction of funds remittance.
- Although this provision was not linked with TP controls, maybe an easy solution could have been use the information registered by Central Bank to supply comparable benchmark.

TP and interests – new regime

- General Safe Harbor - not applicable for contracts celebrated since January 1st, 2013.
- Instead of a fixed spread (3%), the spread for TP comparison will be determined by the Ministry of Finance based on market averages.
- Besides proportional Libor rate for six months, the market interest rate applicable to Brazilian sovereign bonds in US dollars and in Reais issued with fixed interest rates will be used for transaction in fixed rates in these currencies

New regime, new doubts

- What are the parameters for interests in contracts celebrated before December 31st, 2012?
- Is TP new regime applicable to issuance of Notes or Bonds, that are not rigorously "contracts"?
- The new regime is effective, but Ministry of Finance has not issued the spread to be used in TP controls. How to deal with this lack of parameters?
- New TP regime may interfere in the Brazilian thin capitalization rule?

Many Thanks! Gracias! Obrigada!

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Additional Info

Tax Haven Jurisdictions:

- If it doesn't tax income or if the income tax rate is lower than 20%;

or

- If its law preserve the secrecy about enterprise's owners, partners and beneficial owners.
- Brazil Black listed jurisdictions are in Normative Instruction n# 1,037/10).

Tax Haven Jurisdictions:

Andorra, Anguilla, Antigua and Barbuda, Netherlands Antilles, Aruba, Ascension Island, Commonwealth of the Bahamas, Bahrain, **Barbados**, Belize, Bermuda, Brunei, Campione D'Italia, Channel Islands (Alderney, Guernsey, Jersey and Sark), Cayman Islands, **Cyprus**, **Singapore**, Cook Islands, Republic of Costa Rica, Djibouti, Dominica, **United Arab Emirates**, Gibraltar, Grenada, **Hong Kong**, Kiribati, Labuan, Lebanon, Liberia, Liechtenstein, Macau, Madeira Island, Maldives; Island of Man, Marshall Islands, Mauritius, Monaco, Montserrat Islands, Nauru, Niue Island, Norfolk Island, Panama, Pitcairn Island, French Polynesia, Queshm Island, American Samoa, Western Samoa, San Marino, St. Helena Island, St. Lucia; Federation St. Kitts and Nevis, Island of Saints Peter and Miguelão, Saint Vincent and the Grenadines, Seychelles, Solomon Islands, St. Kitts and Nevis, Swaziland, Sultanate of Oman, Tonga, Tristan da Cunha, Turks and Caicos, Vanuatu, Virgin Islands, British Virgin Islands.

Tax privileged regime

- It has no income taxation or its income tax rate is lower than 20% (twenty per cent);
- It provides tax advantages to non-resident individuals or legal entities (a) without requiring any substantial economic activity in the country or dependency; (b) or conditioned to the absence of substantial economic activity in the country or dependency;
- It has no taxation or its income tax rate is lower than 20% (twenty per cent) for the income earned outside its territory;
- It forbids access to information related to the corporate structure, ownership of assets or rights or economic transactions.

Tax privileged regime

- In Uruguay, the entity known as SAFI;
- In Denmark, the tax regime applicable to holding company without economic substance;
- In Netherlands, the tax regime applicable to holding company without economic substance;
- In Iceland, the tax regime for International Trading Company ("ITC");
- In Hungary, the tax regime for offshore KFT;
- In United States, the tax regime applicable to LLC, with no resident participants that are not subjected to income taxes in USA;
- In Malta, the tax regime applicable to International Trading Company (ITC) and International Holding Company (IHC)

(Normative Instruction n# 1,037/10)