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The US-Brazil tax information exchange agreement and its impact on tax fraud prosecution

In recent years, Brazil has established itself as a country remodelling and reconfiguring its position towards a global scenario that increases its political and economic power, but also demands increasing legal and administrative structures to deal with global issues. The recent entry into force of the US-Brazil Tax Information Exchange Agreement (TIEA) is one of the steps taken in that direction.

Brazil has been concluding Double Tax Conventions, which include international exchange of information clauses, since the late 1960s.¹ Overall, Brazil has concluded 30 Double Tax Conventions (DTCs)² and seven TIEAs.³ Moreover, Brazil signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters during a signing ceremony held at the G20 Summit in Cannes, France, in November 2011.⁴

The Brazilian Exchange of Information (EOI) legal framework contains principles and rules that make tax cooperation with other countries possible. Under the Brazilian Constitution, one may find a guiding principle of cooperation between nations for the purpose of humanity progress (Article 4^o, IX). Furthermore, more specifically, the Brazilian Tax Code provides rules regarding the international and domestic exchange of information. In its heading, Article 199 provides for the exchange of information between the federal government, states and municipalities in the interest of national tax administration. In 2001, the language of the article was amended to clarify that Brazil could also mutually exchange tax information with other countries through international treaties, agreements and conventions. To facilitate the enforcement of these international instruments, the National Tax Code also provides, in Article 98, that DTCs (as well as other treaties in tax matters) prevail over national legislation.

These recent changes form part of the implementation of the Brazilian commitment to the Global Forum on Transparency and Exchange of Information for Tax Purposes guidelines.⁵ As a member of this Forum since 2009, Brazil is engaged in implementing an international standard of transparency and exchange of information in tax matters.

The Global Forum report (*The Peer Review Report – Phase 1*) stresses that the Brazilian Internal Revenue Service (Secretaria da Receita Federal do Brasil – RFB) has significant information resources at its disposal, including ownership, identity, bank and accounting information both for domestic purposes and in response to a request from another jurisdiction by means of an international treaty.⁶ Also, the RFB has wide-ranging access powers to obtain information for international exchange of information purposes, and measures to coerce the production of such information. It may also summon individuals and legal entities, whether or not they are taxpayers, and other related parties, to produce books and documents for examination, and to provide any information required by the RFB in the exercise of its duties. In principle, there are no restrictions to the RFB's powers to interrogate individuals directly or seize documents. However, in the case of search and seizure of documents in private residences or professional premises, a court order is needed.

The Organisation for Economic Cooperation and Development (OECD) concluded, as a result of the Phase 1 Peer Review, that the legal and regulatory framework for availability and exchange of information is in place in Brazil.⁷ The report highlights that Brazilian tax authorities, empowered by civil, commercial, tax, regulatory and criminal (money laundering for example) laws, have many sources of information and also some enforcement

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mechanisms that compel taxpayers to provide information. Brazilian tax authorities also have a significant amount of ownership information at their disposal, which is kept up to date on a yearly basis. According to the OECD Phase 1 Peer Review, it is clear that Brazil has a complete database.⁸

Therefore, the Brazilian legislation and institutional framework supports the EOI policies allowing availability, access to reliable information and powers to obtain information under the aforementioned areas of law, where necessary. However, it is important to emphasise that international information exchange instruments must contain confidentiality provisions, which spell out specifically to whom the information can be disclosed and the purposes for which the information can be used. It must be noted that the joint application of the general domestic rules on confidentiality, together with the confidentiality provisions contained in Brazil's exchange of information agreements, would lead to the conclusion that information exchanged with foreign authorities may only be disclosed to persons or authorities, including courts and administrative bodies, concerned with the assessment, collection, prosecution or enforcement of the tax law in question or in criminal proceedings related to such taxes.

As regards bank confidentiality, the Brazilian Constitution does not expressly provide for it,⁹ but it protects the right to privacy. Thus, there are no restrictions on the access to bank records (financial statements and other information) where (1) access is required during the course of a tax procedure,¹⁰ and (2) such examination is considered indispensable under a valid EOI request. In particular, some bank information is already available to the RFB owing to specific obligations for financial institutions to provide such information on a regular basis.

By way of exception, the RFB needs first to summon the taxpayer to provide bank information. However, the taxpayer is not advised as to the reason why this information has been demanded. If the taxpayer does not provide the information within a given timeframe, the Brazilian tax authorities can request it directly from financial institutions. It is important to stress that bank secrecy cannot be the basis for declining a request to provide information; such a refusal, based on a domestic tax interest¹¹ requirement, is not consistent with the US and Brazil TIEA.

Turning to criminal law, the foundation of

the anti-money laundering (AML) framework in Brazil is Law N 9.613/98, which details the definition of money laundering crimes, preventive measures, the system for reporting suspicious activities and the procedures for international cooperation. The Brazilian Financial Intelligence Unit (COAF), an agency within the Ministry of Finance, is actively involved in international initiatives related to the prevention of money laundering and financing of terrorism. Since 2001, Complementary Law N 105/01 introduced new rules on bank secrecy and extended the access powers of the COAF to bank data. In 2013, Law N 10.701/03 provided the COAF with an even broader authority, allowing it to obtain information from third parties.

For over 40 years, Brazil and the United States have been negotiating a double taxation agreement not yet signed.

Nevertheless, in 2007, they signed a TIEA, exclusively concerning federal taxes.

Owing to the fact that, in contrast to what is required under US law, Brazilian legislation demands ratification by the Congress for all international agreements, this TIEA only entered into force this year, 2013. Although not dealing with the sensitive matter of double taxation, it has been seen as a step towards it.¹²

It is widely known that, since 2010, the Internal Revenue Service (IRS) has commenced a policy to enforce and control tax evasion by American citizens using the exchange of information between financial institutions and the government. The Foreign Account Tax Compliance Act (FATCA) provides that so-called foreign financial institutions (FFIs) and non-financial foreign entities (NFFEs) worldwide shall monitor and report to the US tax authorities information on financial transactions of 'US persons' (citizens, companies and US corporations) residing or acting outside the US. The measurement determines the application of a penalty to taxpayers who refuse to authorise such procedures. The penalty is to withhold 30 per cent of any payment to be made to the account holder or US investor, and a financial institution that does not comply or does not comply properly in reporting the information will also be subjected to withholding of 30 per cent on payments receivable from US sources.¹³ Canada, Denmark, Finland, France, Germany, Guernsey, Ireland, Isle of Man, Italy, Japan, Jersey, Mexico, the Netherlands, Norway, Spain and Switzerland¹⁴ have already signed bilateral agreements to implement



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FATCA regulation for financial institutions at a domestic level, with US revenue authority granting reciprocal treatment to these countries.¹⁵

The TIEA between Brazil and the US itself has no effect whatsoever on the implementation of FATCA, except that it facilitates the negotiation of a future FATCA Intergovernmental Agreement (IGA), but it can be seen as arising from FATCA provisions.

But the TIEA is expected to have paramount importance in another field, that of tax fraud investigation and prosecution. Zagaris stresses that both countries decided that such agreement would be a legal tool to prevent, investigate and prosecute tax crimes, since the US is one of the main sources for Brazilian tainted money.¹⁶

Unlike other mutual legal assistance treaties in criminal matters ratified by Brazil, in which the central authority is the Ministry of Justice, the US-Brazil TIEA prescribes that the Brazilian RFB will be the central authority for mutual legal assistance requests in connection with tax fraud offences. If one considers the amount of information this body already holds, it is easy to imagine that cooperation for these purposes will be expeditious and effective, increasing the number of criminal prosecutions for tax evasion in both countries.

In addition, it is important to bear in mind that Brazilian AML legislation was amended in 2012, in order to abolish the list of predicate crimes for the offence of money laundering, that is to say that tax fraud is, since then, an offence providing tainted funds for money laundering conducts. In Brazil, unlike other countries such as Switzerland, the failure to declare income alone is considered a criminal offence, leading to the obvious conclusion that the TIEA will have a twofold outcome, increasing prosecutions for both tax evasion and money laundering in Brazil.

Notes

1 OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Review: Brazil 2012: Phase I (2012), 7.

2 Argentina; Austria; Belgium; Canada; Chile; China; Czech Republic and Slovakia; Denmark; Ecuador; Finland; France; Germany (agreement not in force since 1 December 2006); Hungary; India; Israel; Italy; Japan; Korea; Luxembourg; Mexico; Netherlands; Norway; Peru; Philippines; Portugal; South Africa; Spain; Sweden; Ukraine. Further information is available at www.receita.fazenda.gov.br/principal/ingles/Acordo/DuplaTributDefault.htm.

3 The agreement between Brazil and the US (20 March 2006) was put to effect under Decree n 8.003, issued on 15 May 2013. However, agreements between Brazil and the UK (28 July 2012), Uruguay (24 October 2012), Bermuda (29 October 2012), Jersey (28 January 2013), Guernsey (6 February 2013) and the Cayman Islands (19 March 2013) are still pending ratification by the Brazilian Congress (available at <http://eoi-tax.org/jurisdictions/BR#agreements> accessed 15 May 2013).

4 OECD (2012), see n 1 above, 61.

5 *Ibid* 18.

6 *Ibid* 49.

7 *Ibid* 7.

8 *Ibid* 25.

9 Until 2001, bank confidentiality was protected under Art 38 of Law n 4.595/64.

10 This information covers investigations in both civil and criminal tax cases.

11 The absence of the domestic tax interest rule occurs when a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes.

12 Zagaris calls attention to the fact that in terms of enforcement cooperation, there is a historic wide range of subjects between the US and Brazil, such as a memorandum of understanding on securities enforcement and commodities futures cooperation, a customs cooperation agreement, a mutual assistance in criminal matters treaty, a framework agreement on cooperation in the peaceful uses of outer space, an extradition treaty, an air transport agreement, an agreement regarding defence cooperation, an antitrust enforcement cooperation agreement and a strong cooperation against drug trafficking. See Bruce Zagaris, 'Brazil-US TIEA Takes Effect and Presages Significant New Tax Enforcement Cooperation' *Tax Notes International* (24 June 2013), 1.

13 Further information is available at www.kpmg.com/br/pt/estudos_analises/artigosepublicacoes/paginas/release-fatca.aspx.

14 Further information is available at www.treasury.gov/press-center/press-releases/Pages/tg1759.aspx.

15 Cf US Treasury Department, Joint statement from the United States, France, Germany, Italy, Spain and the United Kingdom regarding an intergovernmental approach to improving international tax compliance and implementing FATCA, available at www.treasury.gov/press-center/press-releases/Documents/020712%20Treasury%20IRS%20FATCA%20Joint%20Statement.pdf.

16 Bruce Zagaris, see n 12 above, 2.