

Brazil Modifies the Tax Haven Minimum Taxation Threshold Qualification Criterion

Brazilian tax law typically attributes more burdensome taxation on certain transactions involving tax havens, and each set of rules applying more burdensome taxation on tax havens adopts different tax haven “concepts”.

One of these concepts was recently modified by Ministry of Finance Ordinance No. 488 of November 28, 2014, under the authority granted to the Executive Branch by Article 24-B of Law No. 9.430 of December 27, 1996.

According to article 24 of Law 9,430, countries that do not impose income tax or where the maximum income tax rate is lower than 20% are considered “Favored Tax Jurisdictions.” Paragraph 4 of Article 24 also includes as Favored Tax Jurisdictions countries that do not allow access to confidential information regarding company ownership.

Article 24-A of Law No. 9.430 describes the “Privileged Tax Regime” (regime fiscal privilegiado) as having one or more of the following characteristics: (i) does not tax or taxes income at a rate lower than 20%; (ii) grants fiscal advantage to non-resident individuals or legal entities without requiring substantial economic activity or conditioned upon the non-exercise of substantial economic activity; (iii) does not tax or taxes earnings outside the Brazilian territory at a rate lower than 20%; and (iv) does not allow access to confidential information regarding company ownership.

Ministry of Finance Ordinance No. 488 reduces from 20% to 17% the above-mentioned minimum taxation threshold for jurisdictions and regimes aligned to the international standards of fiscal transparency, as defined by the Brazilian Internal Revenue Service.

Historically, tax havens have been identified as listed in Brazilian Federal Tax Authority Normative Rulings. The list currently in effect is that of Normative Ruling No. 1.037, of June 4, 2010.

A new list is expected to be issued in the near future, not only as a result of Ordinance No. 488 but also to regulate the new concept of tax haven introduced by Law No. 12.973, of May 13, 2014 (the sub-taxation regime, defined as taxing foreign entity profits at a rate less than 20%)¹.

The Brazilian Federal Revenue has consistently accepted these lists as binding (i.e., only those jurisdictions and regimes listed are deemed tax havens for tax authority purposes).

In our view, jurisdictions and regimes that have been wrongfully listed, or have become non-tax havens due to changes in their own domestic laws or under the Brazilian concept of tax haven, should be disregarded; i.e., accepted as non-tax haven jurisdictions regardless of whether listed or not. This would avoid necessarily awaiting new list issuance each and every time for tax haven status determination purposes.

Ordinance No. 488, however, conditions the application of the 17% minimum taxation to new regulation to be issued by the Federal tax authorities on the conditions for jurisdictions and regimes to be considered “aligned to the international standards of fiscal transparency.” Thus, application of the new restricted tax haven concept will not be immediate.

¹ Article 84, III.

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The new minimum taxation threshold (17%) will mostly impact on the application of transfer pricing and thin capitalization rules, which are affected both by the Privileged Tax Regime and Favored Tax Jurisdictions concepts, as well as the application of the increased withholding income tax of 25% (instead of the ordinary 15% rate) on income² and gains³ earned by non-residents in Brazil.

The favored tax treatment ("Special Tax Regime") attributed to qualified investors (investors in the Brazilian financial and capital markets, according to National Monetary Council Resolution No. 2.689, of January 26, 2000 – "2.689 Investors") will not be affected, as the applicable tax haven concept is based on Law No. 9.959, of January 27, 2000 (Article 7), and not on Law No. 9.430, to which Ordinance No. 488 refers.

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²Article 8 of Law 9.779, of January 19, 1999.

³Article 47 of Law 10.833, of December 29, 2003.