

**Recent Precedent Could Assist Overseas Assets Regularization**

An Appeals Council of the National Financial System (Conselho de Recursos do Sistema Financeiro Nacional - CRSFN) decision dated December 2014 could assist regularization of assets held abroad by Brazilian residents. This isolated but innovative precedent allows for the late submission of the Declaration of Brazilian Assets Abroad (Declaração de Capitais Brasileiros no Exterior - DCBE) via hardcopy. The consequences of this decision are positive within the administrative law and possibly also within the criminal realm.

According to Central Bank of Brazil (Banco Central do Brasil - BC) rules, the DCBE must be submitted electronically through the BC website, via quarterly and annual statements, depending on the aggregate amount of the assets held abroad. Late statement submission subjects the asset holder to a fine of R\$25,000.00 or 1% of the declared value, whichever is less (the fine is reduced by 90% for late submission of up to 30 days and by 50% for late submission between 31 and sixty days). Contrastingly, non-DCBE submission results in a much higher BC-imposed fine: R\$125,000.00 or 5% of the value that should have been declared, whichever is less.

Although late DCBE filing is accepted, the BC only allows for filing from 2007 onwards, preventing the filing of earlier declarations through its website. This is not problematic under the applicable five-year administrative law statute of limitations. Should the assets held abroad include deposits, however, non-declaration is considered criminal and the 12-year statute of limitations under criminal law applies.

Thus the significance of the recent CRSFN precedent, under which DCBEs for years 2004-2006 may be submitted through hardcopies, overruling a previous BC decision that considered hardcopy statements to be “not submitted.” Also, the previous R\$375,000.00 fine amount was reduced to R\$75,000.00. More important than the financial impact, however, is the possible repercussion of the decision within the criminal sphere. According to Article 22, sole paragraph, of Law No. 7,492 of June 16, 1986, it is a crime for a Brazilian resident holding deposits abroad to not declare them to the relevant federal authority.

The concept of “not declare” must be sought in administrative regulation. In light of Article 8, items i and iii, respectively, of Brazilian National Monetary Council Resolution No. 3,854, of May 27, 2010, which clearly distinguishes between late declaration and non-declaration, a careful reading of the recent CRSFN precedent leads one to the conclusion that the abovementioned crime will not be committed when the declarations can still be submitted to – albeit out of time – and are effectively filed with the BC. In other words, once the declarations are filed the assets are deemed to be correctly declared, which excludes the crime of maintaining undeclared deposits abroad.

The same precedent addresses another matter perhaps someday beneficial to the declarant who files more than one statement in arrears: the possibility of considering the various untimely filings as a single “continuous infringement” (Article 71 of the Brazilian Criminal Code). The consequence would be the imposition of one single fine of up to R\$41,666.67 (corresponding to R\$25,000.00 plus two thirds) to the set of declarations rather than the per declaration-fine of R\$25,000.00 or 1% of the declared value, whichever is less. Ruling in favor of the application of the continuous offense concept was dissenting opinion within the CRSFN, but the argument may yet be upheld in future decisions.

As a last note, full regularization of assets held abroad by Brazilian residents would require proper declaration to the Brazilian Federal Revenue (Internal Revenue Service equivalent), with due payment of all taxes owing.

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