

The Brazilian Federal Government Increases the Income Tax Rate on Capital Gains

Provisional Measure No. 692/2015 increases the income tax rate on capital gains earned by individuals and certain companies¹ from 15% to 15%-30%.

As from January 1st, 2016, when the new rules will become applicable, capital gains earned on the sale or disposition of any assets or rights located in Brazil or abroad will be subject to income tax at the following progressive rates:

- 15% on the portion of the gain not exceeding R\$ 1,000,000.00
- 20% on the portion of the gain above R\$ 1,000,000.00 up to R\$ 5,000,000.00
- 25% on the portion of the gain above R\$ 5,000,000.00 up to R\$ 20,000,000.00
- 30% on the portion of the gain above R\$ 20,000,000.00²

The new rules shall also be applicable to capital gains earned in Brazil by (i) non-Brazilian-resident individuals and (ii) non-Brazilian-resident companies, on sales or dispositions of noncurrent assets.

In our view the new rules shall not apply to capital gains from foreign “portfolio” investments in the Brazilian financial or capital markets made in accordance with Brazilian Monetary Council (CMN) rules³ and which do not originate from tax haven jurisdictions. These investments benefit from a special and specific tax regime.

Under such regime and provided certain legal conditions are met, income tax applies at a maximum rate of 15% and certain earnings and capital gains are not subject to income tax. The special tax regime does not apply to investments originating from tax haven jurisdictions (as defined by Brazilian legislation), which are subject to the same taxation rules applicable to Brazilian residents, thus including those introduced by Provisional Measure No. 692/2015.

In order not to lose its effectiveness, Provisional Measure No. 692/2015 must be converted into law by the Brazilian Congress within 60 days from the date of its publication, which time period is extendable for an additional 60 days. In any case, according with the Brazilian Federal Constitution, as this Provisional Measure calls for income tax increase, it can only become effective as from January 1st, 2016 and provided it is converted into law by the last day of this year 2015.

It is recommended those non-Brazilian-residents intending to sell/dispose or already negotiating the sale/disposal of any assets or rights in Brazil consider concluding these transactions within this year so as to benefit from the tax rate currently in force.

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¹ These are companies earning gains from the sale or disposition of noncurrent assets and not subject to the real, presumed/estimated or arbitrated profits system of corporate taxation.

² Future transactions will be taken into account for the purpose of determining the applicable rate in the case of the sale or disposition of assets in parts. Provisional Measure No. 692/2015 is not clear in this respect and it is anticipated that disputes shall arise concerning the same.

³ Especially CMN Resolution No. 4,373/14, which revoked and replaced CMN Resolution No. 2,689/00.