V BRICS LEGAL FORUM CONFERENCE
August 24, 2018

Brazil and Mutual Agreement Procedures

Enrique Lewandowski
Brazilian Tax System - General Guidelines

• Taxation guidelines established by the Federal Constitution:
  – General principles of taxation
  – Authority to impost taxes
  – Limitations on the power to lay and collect taxes
  – Distribution of tax revenues

• Sources of Tax Law:
  – Constitution
  – Complementary Laws
  – Ordinary Laws / Provisional Measure
  – International Treaties
  – Acts of Legislative and Executive Branch
  – Customs, Case Law, Treatises
Existing Bilateral Double Taxation Treaties

- **33 DTT in force** – Germany denounced its treaty on 2005 and Paraguay, Switzerland and Singapore treaties have to be ratified by Congress
- **Russia** – signed on Nov/2004 and ratified on May/2017
- **India** – signed on Apr/1988 and ratified on Apr./1992
- **China** – signed on Aug/1991 and ratified on Nov/1992
- **South Africa** – signed on Nov/2003 and ratified on Oct/2006
A Word on Double Taxation Treaties

- Treaties are hierarchically equivalent to ordinary laws
  - Article 98 of National Tax Code – A treaty will prevail over internal law if conflicting in any way.
    - The treaty will override domestic law, limiting (partially or completely) its effectiveness.
  - *lex posterior derogat prior* x *lex specialis derogat generalis*
    - Superior Court of Justice - Treaties are specialty laws (REsp 1.161.467/RS, Dje 01.06.2012)
- Treaty abuse
  - Article 116, sole parag. – general anti-avoidance rule interpreted broadly by Secretaria da Receita Federal do Brasil ("RFB")
- REsp 1.325.709/RJ – Tax treaty prevails over internal legislation – Currently pending analysis by the Supreme Court
  - Supreme Court decision on Consumer Protection Code – international treaty prevails
Brazil, BRICS and BEPS

- Brazil does not adopt a specific Model Tax Treaty – uses both UN and OECD standards
- All DTT Brazil agreed with BRICS provide for Mutual Agreement Procedure (“MAP”)
- None of them have a provision for compulsory arbitration if the dispute has not been resolved in a given period
- Brazil is not an OECD member, but has been actively participating on the Base Erosion and Profit Shifting Action Plan (“BEPS Initiative”)
- Brazil did not sign the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“MLI”).
  - According to the Brazilian Tax Administration, this innovative procedure could generate lengthy discussions in the Brazil’s National Congress, thereby delaying the approval of the MLI for years, a result which would be undesirable. It rather amend its tax treaties through bilateral negotiations.
- Brazil did commit to implementing the minimal standards under Action 14
RFB in November 2016 published a Normative Instruction (IN RFB 1,669/16), which provides guidance on the requirements and criteria for taxpayers to invoke MAP under a relevant tax treaty.

Key Points:
- Non-contentious nature
- Unilateral phase x bilateral phase
- Transfer pricing matters can be the subject of a MAP, including APA
- BRIRS will inform treaty partner whenever MAP is initiated
- In the event of reaching a solution, albeit partial, the RFB will issue order of implementation giving validity to the solution found, preceded by
  - agreement of the applicant and of the related people domiciled abroad involved in the solution; and
  - proof of express and irrevocable waiver appeals or of administrative appeals and lawsuits that have the same object of the MAP and waives any claim of law upon such matter.
Normative Instruction no. 1,669/16 - Controversies

- No specific time frame
- No provision stating that the enforcement of the tax liability is suspended
- If agreeable solution is not reached, RFB will issue a formal decision to which there will be no request for reconsideration or appeal.
- Waiver of any legal claim and forfeit administrative appeals and lawsuits on the matter
  - Conflicts with domestic dispute resolution mechanism and Brazilian tax treaties stipulate that a MAP is available “irrespective of the remedies provided by the domestic law.”
- MAP is not available if:
  - already submitted to the administrative tax litigation or Judiciary and a decision/judgment
  - involves a taxpayer other than the applicant, even if belonging to the same economic group.
  - statute of limitation has been reached (5 years)
BRICS MAP Recommendations

- MAP procedure should suspend the enforceability of tax liability under discussion
- The formal response issued regarding MAP by Revenue authority should be uniform in every jurisdiction
- If unfavorable response is rendered, taxpayers must be able to access domestic dispute resolution procedures, which must include an administrative appeal prior to submitting a claim before the Judiciary
- It should be established that it is unnecessary to present a bond/collateral to challenge the liability
- MAP should have no proceeding fees or no burden to pay prevailing party’s legal fees.
Thank You!

Enrique Lewandowski

enrique@allaw.com.br
T +55 (11) 5180-5260
allaw.com.br