

V BRICS LEGAL FORUM CONFERENCE
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Brazil and Mutual Agreement Procedures

Enrique Lewandowski



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- Taxation guidelines established by the Federal Constitution:
 - General principles of taxation
 - Authority to impose 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 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 e and waives any claim of law upon such matter



- 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)



- 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.



Amaral
Lewandowski
advogados

Thank You!

Enrique Lewandowski

enrique@allaw.com.br

T +55 (11) 5180-5260

allaw.com.br