Recent Changes in Tax Disputes Resolution System in Brazil

The new Brazilian Finance Minister and his economy team on 12 January 2023, announced some measures to address the 2023 budget deficit. The new provisions have a focus on changes in tax regulations, mostly related to PIS and Cofins, but it also comprises important changes in the tax disputes resolution system.

CARF's tiebreaker rule

The most significant change relates to the regulation of the 2nd Level Federal Administrative Tax Court (CARF). This court is composed by panels of 8 tax experts, 4 tax officials indicated by the government and 4 taxpayers' representatives indicated by class associations. Until 2020, if there was a tie in the trial votes, the vote of the chairman of the panel, who is always a tax official, would prevail over the other votes. This tiebreaker rule was called the "casting vote". The law n. 13.988/20, revoked the "casting vote" rule and created a new tiebreaker rule, based on the *in dubio pro taxpayer* principle, by which the tax infraction charge against the taxpayer would be dismissed in case of a tie.

The new Provisional Measure n. 1.160/23, issued on 12 January, revoked the tiebreaker rule provided in law n. 13.988/20 and reestablished the "casting vote" rule for the trials of the 2nd Level Federal Administrative Tax Court.

Although this change has immediate effects, as it was brought by a provisional measure, the Congress must approve it in 120 days. It is uncertain whether the federal government will succeed to pass in the Congress the "casting vote" rule as is.

Due to this uncertain scenario and the potential consequences for the cases scheduled for trial in the following weeks, the Brazilian BAR Association (OAB) is challenging the new rule before the Supreme Court and has filed a motion for the Court to suspend the trials until the Congress analyzes the new provision.

Recently, on 14 February, confirming the rumors that the government was considering stepping back on the new proposal, the BAR association, tax officials and the Finance Minister had a hearing with the Justice Dias Toffoli and reached an agreement to propose a middle ground rule to provide that, in case of a tie in the trials, the chairman vote would still prevail, but the penalties and interests related to the tax infraction would be canceled if the taxpayer pays the due amount in 90 days. It is not yet clear when this middle ground rule will be applicable, nor by which means it will be issued.

New settlement programs

Besides the change in the CARF's tiebreaking rule, the finance minister Fernando Hadadd also announced two new settlement programs for cases under dispute in the administrative courts, one for individuals, micro and small enterprises and one for companies under audit proceedings. The benefits of the settlement programs can be summarized as follows:

Modality	Debt rate	Reductions	Cash Payment
Cases under dispute in federal administrative courts with the offsetting the tax losses and negative tax base	Irrecoverable or hard to recover tax debts. (debts under dispute for more than 10 years are automatically classified as irrecoverable)	Up to 100% of interests and penalties limited to 65% of the total debt.	Minimum of 30% up to 9 installments
	High or medium chances of recovery tax debts.	Not aplicable	Minimum of 48% up to 9 installments
Cases under dispute in federal administrative courts without the offsetting the tax losses and negative tax base	All tax debts.	Up to 100% of interests and penalties limited to 65% of the total debt, upon the debt rate.	Initial payment of 4% of the total debts included in the settlement program. The net due amount in up to 8 installments upon the debt rate.
Individuals, micro and small enterprises	Federal tax debt up to 60 minimum wages	Up to 50% of the total debt regardless the debt rate	Initial payment of 4% of the total debts included in the settlement program. The net due amount in up to eight installments.
Companies under federal tax audit proceedings started before 12 January	All federal tax debts	100% of the penalties	Companies must declare and pay 100% of the tax debts up to 30 April

New transfer pricing regulations - settlement alternative

Finally, it is also worth mentioning an important provision in the Provisional Measure n. 1.152/22, which changed the Brazilian Transfer Pricing regulations and changed the dynamics of the audit process for transfer pricing by creating the possibility of a settlement in the auditing proceeding.

The article 37 of the provisional measure stablishes that, in case tax authorities disagree with the taxpayer's position, they can authorize the taxpayer to proceed with the proposed adjustments without the standard 75% penalty, as long as the taxpayer: (i) doesn't confront a normative act or biding ruling issued by tax authorities; (ii) has been cooperative with tax authorities, inclusive in the audit proceeding; (iii) has demonstrated reasonable efforts to comply with TP regulations; (iv) has adopted sound, reasonable and justifiable criteria to calculate the tax basis.

Although this provision and all new TP regulation are already in force if the taxpayer opts to adopt it this year, the provisional measure must be analyzed and approved by the Congress.

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