

## TAX NEWSLETTER

## NEW REGULATIONS CONCERNING "TAX HAVENS"

Brazilian Federal Revenue Service (RFB) issues long-expected regulations addressing the different concepts of "tax haven" applicable for different Brazilian tax purposes. Among other important provisions, the new regulations clarify how Limited Liability Companies incorporated in the United States of America (including those incorporated in Delaware) should be regarded.

Law No. 11,727, effective since January 1<sup>st</sup>, 2009, modified the statutory definitions of "tax haven jurisdictions" for different Brazilian tax purposes, as follows:

CONCEPT	DEFINITION	EXAMPLE OF APPLICATION
"Nil or Low Tax Jurisdiction"	Country or location: (a) that does not tax income; or (b) that taxes income at a maximum rate lower than 20%.	Withholding Income Tax (WHT) on capital gains earned by non-Brazilian parties on the sale or other form of disposition carried out in a Brazilian stock exchange environment (including over-the-counter market) of equity interests held in a Brazilian company pursuant to the rules of CMN Resolution No. 2,689/00 <sup>1</sup> .
"Tax Favorable Jurisdiction"	Country or location: (a) that does not tax income; (b) that taxes income at a maximum rate lower than 20%; or (c) the laws of which do not allow access to shareholding composition, ownership of investments, or identity of the beneficial owner of earnings attributed to non-residents.	WHT on capital gains earned by non-Brazilian investors on the sale or other form of disposition of equity interests held in Brazilian companies according to the rules of Law No. 4,131/62;  Remittance of income in general to beneficiaries domiciled outside Brazil, including interest on loans, royalties, and others;  Particular types of remittances made from Brazil (application together with "Privileged Tax Regime"); and  Thin capitalization rules (application together with "Privileged Tax Regime").

<sup>1</sup>The application of the concept of "Nil or Low Tax Jurisdiction" to this situation was recently confirmed by the Brazilian Federal Revenue Service (RFB) in Article 73 of Normative Ruling ("*Instrução Normativa*") No. 1,022/10.

<p>"Privileged Tax Regime"</p>	<p>Country or location:</p> <p>(a) that does not tax income;</p> <p>(b) that taxes income at a maximum rate lower than 20%;</p> <p>(c) that grants a tax advantage to a non-resident individual or legal entity (i) without requiring substantial economic activity in the respective country or location or (ii) conditioned to the absence of substantial economic activity in the respective country or location;</p> <p>(d) that does not tax income earned out of the respective country or location;</p> <p>(e) that taxes income earned out of the respective country or location at a maximum rate lower than 20%; or</p> <p>(f) that does not allow access to information related to the shareholding composition, ownership of goods or rights, or economic transactions that are carried out.</p>	<p>Transactions subject to transfer pricing rules;</p> <p>Particular types of remittances made from Brazil (application together with "Tax Favorable Jurisdiction"); and</p> <p>Thin capitalization rules (application together with "Tax Favorable Jurisdiction").</p>
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Before Law No. 11,727, the RFB issued a list of the countries and locations defined as "tax haven jurisdictions" for Brazilian tax purposes (without specification of each particular purpose) by means of Normative Ruling No. 188, of August 6<sup>th</sup>, 2002. At the time, the RFB issued a non-binding ruling adopting the position that this list of "tax haven jurisdictions" was exhaustive, meaning that only the listed countries and locations should be deemed to be "tax haven jurisdictions" (technique called, in the international literature, as "black-listing").

After Law No. 11,727, there was some speculation as to whether the RFB would attempt to adopt the same definition of "tax haven jurisdiction" for all Brazilian tax purposes, without taking into consideration the different concepts of "Nil or Low Tax Jurisdiction", "Tax Favorable Jurisdiction", and "Privileged Tax Regime".

This matter was clarified by the RFB by means of the issuance of Normative Ruling No. 1,037, of June 4<sup>th</sup>, 2010, which was published in the Brazilian Official Gazette on June 7<sup>th</sup>, 2010, and revoked Normative Ruling No. 188/02. The main aspects of this new Normative Ruling are the following.

- (1) The concept of "Nil or Low Tax Jurisdiction" is not separately addressed in Normative Ruling No. 1,037/10. Before Law No. 11,727, the concepts of "Nil or Low Tax Jurisdiction" and "Tax Favorable Jurisdictions" already co-existed. In the past, the RFB treated both concepts together by providing a single list of countries and locations deemed to be "tax havens" for Brazilian tax purposes in Normative Ruling No. 188/02. If a similar reasoning were to be adopted with respect to Normative Ruling No. 1,037/10, this could lead to the position that the concept of "Nil or Low Tax Jurisdictions" would encompass the same countries and locations that are listed as "Tax Favorable Jurisdictions", addressed in the following item.
- (2) In Article 1, the concept of "Tax Favorable Jurisdiction" is reproduced (with a slight difference regarding disclosure), followed by a list of countries and locations defined under such concept. This list includes the countries and locations below (names followed by

comments on the countries and locations which were included in the list in comparison with the previous list contained in Normative Ruling No. 188/02):

- American Samoa
- Andorra
- Anguilla
- Antigua and Barbuda
- Aruba
- Ascension Island (new)
- Bahamas
- Bahrain
- Barbados
- Belize
- Bermuda
- British Virgin Islands
- Brunei (new)
- Campione D'Italia
- Cayman Islands
- Channel Islands (Jersey, Guernsey, Alderney and Sark)
- Cook Islands
- Costa Rica
- Cyprus
- Djibouti
- Dominica
- French Polynesia (new)
- Gibraltar
- Grenada
- Hong Kong
- Isle of Man
- Kiribati (new)
- Lebanon
- Lebuan
- Liberia
- Liechtenstein
- Macau
- Madeira Islands
- Maldives
- Marshall Islands
- Mauritius
- Monaco
- Montserrat
- Nauru
- Netherland Antilles
- Niue
- Norfolk Island (new)
- Oman
- Panama
- Pitcairn Island (new)
- Queshm Island (new)
- Saint Helena Island (new)
- Saint Kitts and Nevis
- Saint Lucia
- Saint Pierre and Miquelon (new)
- Saint Vincent and The Grenadines
- San Marino
- Seychelles
- Singapore
- Solomon Islands (new)
- Swaziland (new)
- Switzerland (new)
- Tonga
- Tristan da Cunha (new)
- Turks and Caicos Islands
- United Arab Emirates
- U.S. Virgin Islands
- Vanuatu
- Western Samoa.

(3) In Article 2, the concept of "**Privileged Tax Regime**" is mentioned, and a list of regimes which qualify under this concept is provided, as follows:

COUNTRY OR LOCATION	TYPE OF REGIME
Luxembourg <sup>1</sup>	Regime applicable to legal entities incorporated in the form of a "holding company" <sup>2</sup> . Previously, Luxembourg was listed by Normative Ruling No. 188/02 only with respect to holding companies governed by Law dated July 31st, 1929.
Uruguay	Regime applicable to legal entities incorporated in the form of a " <i>Sociedade Financeira de Inversão (Safi)</i> " until December 31 <sup>st</sup> , 2010.
Denmark <sup>1</sup>	Regime applicable to legal entities incorporated in the form of a "holding company" <sup>2</sup> .
The Netherlands <sup>1</sup>	Regime applicable to legal entities incorporated in the form of a "holding company" <sup>2</sup> .
Iceland	Regime applicable to legal entities incorporated in the form of an " <i>International Trading Company (ITC)</i> ".
Hungary <sup>1</sup>	Regime applicable to legal entities incorporated in the form of an " <i>offshore KFT</i> ".
United States of America	Regime applicable to legal entities incorporated in the form of a " <i>state Limited Liability Company (LLC)</i> " that is owned by non-residents and that is not subject to federal income tax.
Spain <sup>1</sup>	Regime applicable to legal entities incorporated in the form of an " <i>Entidad de Tenencia de Valores Extranjeros (ETVEs)</i> ".
Malta	Regime applicable to legal entities in the form of an " <i>International Trading Company (ITC)</i> " and of an " <i>International Holding Company (IHC)</i> ". Previously, Malta was listed by Normative Ruling No. 188/02 without restriction to any kind of company.

<sup>1</sup>Double tax treaties between Brazil and each of Luxembourg, Denmark, the Netherlands, Hungary, and Spain are currently in force. The application of "Privileged Tax Regime" provisions in the case of transactions covered by double tax treaties must be carefully analyzed.

<sup>2</sup>No further detail was provided as to which companies should be treated as "holding companies" in Luxembourg, Denmark, and the Netherlands for this purpose.

This newsletter aims at commenting on the main changes recently occurred on the Tax Legislation. For further enlightenments, our professionals are at your disposal.

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