

Brazil adopts top-up tax for multinational companies (BEPS Pillar II)

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Authors

Paulo Cezar Aragão

Hermano A. C. Notaroberto
Barbosa

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Pillar 2 rules aim to establish a global minimum tax of 15 per cent for international multinational groups, by means of an interlocking and coordinated system of domestic rules that are based on models issued by the Inclusive Framework on BEPS of the OECD. It is expected that, once implemented into the domestic law of each jurisdiction, the rules will operate together to ensure that multinational groups are subject to a minimum level of tax on their excess profits in every jurisdiction where they operate.

In general terms, Pillar 2 considers two means of achieving this goal. On the one hand, it allows countries to tax parent companies of multinational groups on the amount of the profits obtained by its controlled foreign subsidiaries in case the corporate income tax applicable to such foreign entities in their countries of domicile is object of an effective rate that is lower than the envisaged minimum of 15 per cent. These rules are called income inclusion rules (IIR). On the other hand, Pillar 2 also considers protective measures which should be adopted by the countries, namely those in which entities of such multinational groups are based, in order to ensure that the new minimum tax on the portion of the profits that otherwise would be taxed below 15 per cent is due in the country of domicile of each company. This second model of rule is called qualified domestic minimum top-up tax (QDMTT).

During recent years, Pillar 2 rules started to be implemented in many jurisdictions, including countries within the EU, even if relevant – not to say key – international players, such as the US and China, have been reluctant to adopt them.

Brazilian new top-up tax for multinational groups

The QDMTT rule was recently adopted in Brazil in late 2024 and is expected to directly impact large multinational groups operating in Brazil. It was introduced by Federal Law 15,079 of 27 December 2014, originally billed as Provisional Measure 1.262, of October of that same year, and its regulations by Instruction 2.228/24 (RFB IN 2228).

In sum, according to the Brazilian new QDMTT, as of January 2025, local entities that fall within the concept of a multinational enterprise group ('constituent entities') will be subject to a top-up tax on profits arising in Brazil whenever their effective tax rate is below a minimum limit of 15 per cent. The earnings of entities within the multinational group that are located outside Brazil do not fall within the scope of that new rule.

From a technical standpoint, the new tax was imposed as an increase to the already existing tax on net profits (*contribuição social sobre o lucro líquido*

(CSLL)), which is one of the two federal taxes composing the Brazilian corporate income tax (the other being the *imposto de renda da pessoa jurídica* (IRPJ)). For budgetary purposes, while a portion of the funds collected by the Federal Treasury as IRPJ is shared with states and municipalities, the full amount obtained as CSLL is held exclusively by the federal government.

The new top-up tax is imposed on Brazilian constituent entities of a multinational group that have a total annual revenue exceeding €750m. Its rules are applicable to any entity whose earnings, assets or liabilities are reflected in the group's consolidated financial statements, regardless of the tax regime adopted by that entity in Brazil. These are basically the 'actual profit' regime (*lucro real*), in which the tax basis of corporate income tax corresponds essentially to the company's accounting profits, and the alternative 'deemed profit' regime (*lucro presumido*), which is eligible to certain mid-sized entities. In the latter, the basis of corporate income tax is a deemed percentage of the company's gross operational revenues with an effective corporate tax rate that may be lower than 15 per cent.

The new tax may also be applicable, for example, to companies that benefit from (a) special regimes for tax depreciation of amortisation of goods and rights that differ from ordinary ratios adopted for accounting purposes (eg, companies benefitting from tax deductibility of goodwill booked in a business combination); or (b) some of the several different tax incentives regimes that exist in Brazil. Two of these tax incentives, referring to companies based in the North and Northeast regions of the country (the SUDAM and SUDENE regimes), are expected to have top-up tax impacts mitigated. Even so, increased costs are expected, as the company would need to collect the new tax before claiming its recovery as a 'qualified refundable tax credits to be compensated in future with other tax debts or reimbursed for up to four years. For other types of tax incentives, including investment subsidies, it is still unclear if any of them might fall within the scope of the new mechanism, which is intended to neutralise the effects of local tax benefits in the global income taxation of a multinational group.

The concept of an 'effective tax rate' paid by a constituent entity corresponds to the 'adjusted covered taxes' paid by that entity divided by their net 'GloBE income or loss', where:

- 'adjusted covered taxes' correspond to the total amount of income taxes included in the individual financial statements of all the entities of the group that are set up in Brazil, following certain adjustments that are set by the new legislation; and
- 'net GloBE income or loss' corresponds to the amount in the difference between the GloBE income of all constituent entities and the GloBE loss of all constituent entities. The GloBE income or loss of each constituent entity is an amount to be evidenced on the relevant entity's financial statements, adjusted in accordance with the new law and its regulations.

The new top-up tax shall be calculated according to a formula in which its amount corresponds to the 'CSLL top-up percentage' multiplied by the amount of the 'excess profit' obtained from the constituent entity, where:

- the CSLL top-up percentage is the positive difference between the minimum rate of 15 per cent and the effective rate, as outlined above; and

- excess profit is the difference between company's net GloBE income or loss and the amount of substance-based income exclusion. The law sets the exclusion at percentage rates applicable to certain payroll costs and the tangible assets of the Brazilian constituent entity.

In some cases, an adjustment will be added to the CSLL top-up, in an amount stipulated or treated as an adjustment for a given fiscal year.

The CSLL top-up is payable by each constituent entity that obtained 'excess profits'. The amount payable is calculated by multiplying the 'excess profit' obtained by the constituent entity by the positive difference between 15 per cent and the constituent entity's effective tax rate.

The multinational group can opt to allocate the CSLL top-up to a single constituent entity, in which case the other constituent entities will be jointly and severally liable for payment of the CSLL top-up tax. If no election is made, the costs can be borne proportionally by each of the local entities of the multinational group.

If constituent entities fail to file the information required to calculate the CSLL top-up, or file late, a fine of 0.2 per cent of total revenue for the relevant tax year will apply for each, per calendar month or fraction thereof, limited to ten per cent and BRL 5m. In addition, a fine of five per cent (subject to a minimum of BRL 20,000 and a limit of BRL 5m) can be imposed on the amounts that are omitted, incorrect or imprecise.

There is still uncertainty about the interpretation and application of the Brazilian new top-up tax rules in relation to specific matters. However, as an exception to the Brazilian tradition of intense administrative and judicial litigation in the relations between the tax authorities and taxpayers, it is expected that controversies related to the new top-up tax should not be challenged by taxpayers before judicial authorities. Under the BEPs Pillar 2 rules, amounts controverted or deposited in the course of administrative or judicial proceedings cannot be considered by the subsidiary's foreign parent company as settled when assessing its own profits pursuant to its own CFC and IIR rules. Thus, tax disputes in the country of domicile of the local constituent entity (ie, Brazil) might lead to double taxation for the multinational group in case the matter is finally ruled unfavourably to the taxpayer.

Brazilian parent companies investing overseas

The new legislation also determines that, during the first semester of 2025, Brazil should complete its implementation of Pillar 2 rules, by reviewing its currently existing controlled foreign corporation (CFC) tax rules to achieve the results equivalent to an income inclusion rule (IIR). CFC rules are those according to which profits obtained by entities domiciled abroad that are directly or indirectly controlled by a parent company domiciled in a certain country are deemed for tax purposes as if they had been distributed to the parent company, even if no effective distribution had occurred, and taxed by corporate income tax in the country of that parent company.

This envisaged new step would be a way round current rules for large multinational groups whose parent companies are based in Brazil and would then be entitled to tax profits of their foreign subsidiaries at a minimum effective rate of 15 per cent in case each of such entities was not subject to a

QMDTT (top-up tax).

Nonetheless, this review of the current legislation may not be relevant in practice as, for many years, Brazil already has a CFC rule that is broadly applicable to any controlled foreign corporation, irrespective of its country of domicile or nature of its income (active or passive), and Brazilian corporate income tax rate, which is generally of 34 per cent, is much higher than the minimum threshold considered by OECD. According to Brazilian CFC rules, profits obtained from entities domiciled abroad that are directly or indirectly controlled by a Brazilian company are deemed, for tax purposes, as if they had been distributed to the Brazilian parent company, even if no effective distribution had occurred, and are taxed by Brazilian corporate income tax.

Final comments

One could say that the new tax would not increase taxation of multinational groups because, being a defence measure, the amount of higher taxes to be collected in Brazil would avoid an increased taxation in the country of domicile of the parent controlling entity. In other words, the same amount of tax would be collected anyway by the group, with the new local rules causing a portion of such funds to be collected for the benefit of the Brazilian State. This is true for multinational groups that are headquartered in countries that have adopted the Pillar 2 rules, such as most of those of the EU. However, this will not be true for those that have not implemented the new rules.

In addition, the Brazilian new rules on taxation of profits of local subsidiaries of multinational groups for implementation of the Pillar 2 of the BEPS Project are quite complex. In practice, they will require these entities to prepare substantially a third different annual financial statement, in addition to ordinary corporate accounting and to the general assessment of profits that is made specifically for local tax purposes (corporate income tax).

In practice, an increase of local costs to be incurred by such subsidiaries of large multinational groups are expected to come as a result of the new top-up tax and the complexities of the compliance with its assessment and collection. As a result of that, we recommend that international executives and counsels dealing with Brazilian subsidiaries of large multinational groups, and, of course, the local teams of such companies, be aware and prepared for the new costs and requirements resulting from the new tax legislation.

This article was written by our partners Paulo Cezar Aragão and Hermano Barbosa. The publication was featured on the International Bar Association (IBA) portal on 05/05/2025, [click here to check it out](#).

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Paulo Cezar Aragão



Hermano A. C. Notaroberto Barbosa