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New Regulations Impose Unlawful Eligibility Requirements for RET-Developments

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Recently, the Federal Revenue Service of Brazil (RFB – Receita Federal do Brasil) issued RFB Instruction 2.179/2024 (RFB IN 2.179/2024), which replaces RFB IN 1.435/2013. The new rules introduce changes to the eligibility requirements for the "Special Tax Regime for Real Estate Developments", known as "RET-Developments" (Regime Especial de Tributação da Incorporação Imobiliária).

RFB IN 2.179/2024 makes eligibility for RET-Developments conditional on various requirements, some of which were found in the 2013 rules. Others, however, go beyond the requirements established in Law 10.931/2004, which establishes the simplified tax system:

- The real estate developer must not owe any debts to the federal agencies and entities stipulated in the Instruction;
- None of the real estate developer's executives or its majority shareholder may have been found guilty in an action for administrative improbity; and
- No criminal or administrative penalties for conduct or activities harmful to the environment may have been imposed against the real estate developer's executives or its majority shareholder.

These provisions contradict article 2 of Law 10.931/2004. It establishes only two requirements for eligibility for RET-Developments: (i) a formal option for the system by the real estate developer, and (ii) segregation of the development (the land and all improvements) from the rest of the developer's assets and liabilities.

Not only do the illegal requirements created by RFB IN 2.179/2024 make it more difficult for real estate developers to benefit from RET-Developments, they are entirely inconsistent with the purpose of segregating a particular real estate development from the rest of the developer's assets and liabilities, precisely to prevent commingling of assets and liabilities. In other words, when a development's assets and liabilities are segregated, the developer's good standing (or lack of it) is completely irrelevant to the segregated development and to RET-Developments, since the obligations and liabilities of the developer and of the development are independent of each other, as provided for in article 31-A of Law 4.591/1964.

Although they may seem reasonable at first glance, the requirements under RFB IN 2.179/2024 lack any basis in the governing legislation and consequently overreach the RFB's powers to establish regulations for the application of RET-Developments.

RFB IN 2.179/2024 also establishes a new procedure for joining RET-Developments. Starting in January 2025, the developer will have to file its option for the system and then await the RFB's decision to approve the option. If the option is approved, the RFB's decision will also give the development a federal tax identification number (CNPJ). Only then will the development be enrolled in RET-Developments.

This is a significant change. Currently (and until the end of 2024), the real estate developer obtains the development's CNPJ number, and after filing the option for RET-Developments (which is subsequently confirmed by the RFB), the development automatically becomes subject to the special taxation system.

If there are delays in approving the option for RET-Developments, the changes will generate uncertainty for real estate developers, since in general the development project will have been launched, with advance sales of units in the project already underway.

Real estate developers should be aware of the changes to eligibility requirements made by RFB IN 2.179/2024 and the new procedure for opting for the RET-Developments special taxation system. Developers affected by the unlawful requirements under the new rules can consider judicial remedies to protect their right to the benefits of RET-Developments.

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