

New guidance on taxation of non-residents

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In July 2024, Brazil's Federal Revenue Service (RFB – *Receita Federal do Brasil*) issued rulings in three important cases dealing with the taxation of investments held by non-residents (NRI – Non-Resident Investor) in Brazilian investment funds and listed companies.

The rulings are binding on the RFB in similar cases, but neither taxpayers nor the Administrative Tax Appeals Council (CARF – *Conselho Administrativo de Recursos Fiscais*) are required to follow the rulings.

Classification of earnings from investment funds under treaties to avoid double taxation (Cosit Ruling 199/2024). In a request for a tax ruling regarding earnings of a Spanish investor, the RFB concluded that for the purposes of the treaty to avoid double taxation, the income obtained by the NRI on redemption or amortization of shares in a multimarket investment fund should be treated as “capital gain” or “other income”, which is subject to withholding tax (IRRF – *Imposto de Renda Retida na Fonte*) in Brazil. The RFB rejected the taxpayer’s argument that the provision under the treaty dealing with “business profits” applied and that the income was therefore not taxable in Brazil.

Sale of shares in real estate fund off the stock exchange (Cosit Ruling 202/2024). According to the RFB, a sale of shares in a real estate fund (FII – *Fundo de Investimento Imobiliário*) by the NRI made off the stock exchange is subject to withholding tax at a fixed rate of 15%, and the progressive rates applicable to capital gains (which can reach 22.5%) do not apply. Sales of FII shares on the stock exchange are tax exempt, as long as the NRI does not reside in a tax haven and the investment is duly registered with the Central Bank of Brazil.

Sale of shares in a “restricted efforts” offering (Cosit Ruling 228/2024). The RFB took the position that the exemption from tax applicable to capital gains realized by NRIs on shares traded on the stock exchange did not apply to sales of shares in a listed company (which were originally held through ADRs, on the facts of the case submitted to the RFB) in a follow-on offering with restricted sale efforts. Unlike offerings made to the public in general, with broad disclosure of information, “restricted efforts” offerings are directed to a limited number of professional investors.

In the RFB’s view, there are significant differences between sales of shares under restricted efforts offerings and sales made directly on the stock exchange, such as the limited public disclosure of the offering, the fact that the sales may not be concluded immediately, and the fact that the offering is open exclusively to professional investors.

The RFB’s position on this issue is controversial and the ruling may affect its interpretation in other cases where the taxation of transactions involving

shares in listed companies is open to debate, such as initial public offerings and follow-on offerings without restricted efforts. One positive aspect of the ruling is that the RFB held that the acquisition cost of the shares should be based on the amount of the symbolic currency exchange contract made when the ADRs were converted and the NRI acquired the underlying shares.

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