The future of the Brazilian transfer pricing rules

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Introduction

Brazil has been actively participating in the OECD tax work since joining the Global Forum on Transparency and Exchange of Information for Tax Purposes in 2010 and since 2013 as a member of the G20/OECD BEPS Project, which had a substantial focus on transfer pricing. In 2017, Brazil also expressed interest in initiating the process to join the OECD.

Brazil operates a transfer pricing regime that has remained relatively unchanged since it was enacted in 1996

- The fixed margins approach (core of the 1996 regime) was designed in a different economic reality and is no longer sufficient to cope with the dynamic of business models and economic activity
Brazilian transfer pricing rules – legal framework

- Law 9430/96 (altered by Law no. 12.715/2012)

Establishes the foundation for transfer pricing concept and methods.

- Normative Instruction (IN) No. 1312/12

Regulates and clarifies the application of Law 9430/96.

- Normative Instruction (IN) No. 1037/2010

Lists tax havens and privileges tax regimes.
Brazilian transfer pricing rules – legal framework

- Law 9430/96 (altered by Law no. 12.715/2012)

Transfer Pricing rules applies to exportation and importation of assets, goods, services and rights to foreign related parties or companies resident in tax havens.

“Art. 18. The costs, expenses and charges related to assets, goods, services and rights, present in importation or acquisition documents, in operations made with related party, can only be deducted in the determination of the actual profit up to the value that does not exceed the price determined by one of the following methods:” (free translation)
Brazilian transfer pricing rules — legal framework

• Brazilian Transfer Pricing rules do not have a best method or most appropriate method rule. Taxpayers are allowed to choose between the methods explicit in the law. However, taxpayers are required to apply the same method, which they elect, for each product or type of transaction consistently throughout the respective fiscal year.

• Transfer Pricing rules do not apply for royalties and technical, scientific, administrative or similar assistance fees that involve transfer of technology. The previous remain subject to previously established deductibility limits.
Brazilian transfer pricing rules – methods

- **Import transactions**
  1. Comparable independent price method (PIC)/ "price under quotation on import" for commodities
  2. Resale price less profit method (PRL)
  3. Resale price less profit method (CPL)

- **Export transactions**
  1. Export sales price method (PVEx)
  2. Wholesale price in the country of destination less profit method (PVA)
  3. Retail price in the country of destination less profit method (PVV)
  4. Acquisition or production cost plus taxes and profit (CAP)
Position of Brazil on OECD instruments

On the Commentary to Article 9 in the 2017 edition of the OECD MTC, stating that:

“As regards paragraph 1 of the Commentary on Article 9, Brazil reserves its right to provide for an approach in its domestic legislation that makes use of fixed margins derived from industry practices in line with the arm’s length principle. In consequence, it reserves the right not to adhere to the application of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations where the guidelines contradict this approach.”
Update on the Transfer Pricing in Brazil project

Background

- The OECD and the RFB jointly launched the project in February 2018 to review and identify similarities/differences between the Brazilian transfer pricing rules and the OECD standard.
- The differences identified have been further analysed to understand their impact and implication for Brazil.

  i. The differences found can give rise to double taxation for taxpayers, which impacts Brazil as a choice of investment by MNE groups
  
  ii. They also create opportunities for Base Erosion and Profit Shifting, resulting in significant tax revenue loss for Brazil.

  iii. They also produce positive outcomes like tax certainty and simplicity, but in many cases this is just a perception, mostly the complexities outweigh the intend simplicity
Update on the Transfer Pricing in Brazil project

- Several options were considered on how to move towards the convergence
  - Partial alignment
  - Dual system

- On 1 December 2019 the finding of the project generated a Joint Report

- The Joint Report identified two options for Brazil to align with the OECD standard while allowing the positive attributes of the Brazilian system to be enhanced

- Both options fully adhere to the arm’s length principle

- The incorporation of targets and carefully designed safe harbours is going to be considered.
Steps taken towards convergence

- Following the publication of the Joint Report, the work now is focusing on implementation activities organized into 4 workstreams:
  1. Policy design
  2. Legislative drafting
  3. Simplification/ special measures
  4. Tax administration/capacity building

- The implementation of the new system has started in April 2020
Design of safe harbors

- The RFB has launched a survey to corporates and technical groups to seek public input on the development of safe harbours as well as other simplification measures and measures that can contribute to enhanced tax certainty. Deadline for submission is on the 30th of October 2020.
  - Safe harbours could come into play when issues may arise when performing a comparability analysis and also where tax certainty can be achieved.

- The implementation of APAs is also being considered.
Design of safe harbors – cont.

The OECD Guidelines recognize the benefits of well-designed safe harbours (Section E 01, Chapter IV).

In this respect the OECD Guidelines explains that:

“(…) design of safe harbours requires careful attention to concerns about the degree of approximation to arm’s length prices that would be permitted in determining transfer prices under safe harbour rules for eligible taxpayers, the potential for creating inappropriate tax planning opportunities including non-taxation of income, equitable treatment of similarly situated taxpayers, and the potential for double taxation resulting from the possible incomparability of the safe harbours with the arm’s length principle or with the practices of other countries.”

For unique or complex transactions, the OECD framework offers mechanism like APAs.
Next steps expected by the RFB and OECD

- Extend deadline to submit the safe harbour survey by **30 October 2020**
- Based on needs of taxpayers and the quality of input collected, efforts will be dedicated to designing safe harbours in appropriate circumstances
- Similarly, framework APAs will be considered based on demand and quality of input
- The input may also serve to inform other considerations, such as the access to comparable data for the full-fledged transfer pricing analysis and the use of foreign comparables where local comparables are not available (potentially subject to comparability adjustments)
Tax and Digitalization project and the Brazil project

- The solution proposed by the OECD under Pillar 1 largely retains the current OECD transfer pricing rules but creates an exception
  - It complements them with formula-based solutions in areas where tensions are high (Amount A)
  - Amount B expected to be consistent with the ALP

- Brazil alignment with the OECD standard is consistent with the work to address tax challenges of digitalization. It would be very difficult for Brazil to implement the solution under Pillar 1 in the absence of alignment
Questions

Now I would like to hear from you, any questions?
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Thank You

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