Transfer Pricing Country Summary

Brazil

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1. Introduction

In many aspects, Brazilian TP legislation differentiates from OECD guidelines. The arm's length principle is not explicitly mentioned in Brazilian legislation. Although the OECD Model Convention influenced Brazilian transfer pricing legislation, Brazil still does not follow the OECD standards. Brazilian law allows for a method that uses set margins established from industry norms, but the country does not employ formulary apportionment.

2. Laws & Regulations

a) References to OECD/EU/Local Rules

Brazil has a specific transfer pricing regime governed by Law 9,430/96, Articles 18 to 24 and 28. They differ in several aspects from the OECD guidelines on transfer pricing. The Law 12,715/12 and the Normative Instruction no. 1,312/12 issued by the Brazilian Federal Revenue provides specific rules on applying transfer pricing methods and related rules. Also, Brazil introduced a particular method for commodities (considered the sixth method) on exports and imports and a benchmarking methodology for finance transactions.

The Internal Revenue Service has recently released Normative Ruling 1870/19, which modifies the Transfer Price requirements. It was released on 29 January 2019, and it provided significant insights into the systematic use of transfer prices in Brazil. The majority of the revisions aim to clarify key components of the standard, provide more information to taxpayers about using certain procedures, and make necessary adjustments to particular pricing parameter calculation methods.

The form of establishing the parameter price in PECEX (Método do Preço sob Cotaço na Importaço (PIC) and Método do Preço sob Cotaço na Exportaço), modifying the concept of commodity for the purposes of determining the transfer price, is one of the changes.

b) Definition of Related Party

Associate enterprise and related party terms are regulated in Article 2 of the Normative Instruction 1.312/12. The legislation broadly defines related parties involving concepts of direct and indirect control utilising voting power, business control criteria, and domicile and residence in a tax haven or low-tax jurisdiction. The rules also include transactions with (i) related or non-related companies based in low-tax jurisdictions and privileged tax regimes, (ii) joint ventures and similar arrangements, and (iii) exclusive distributors and interposed parties.

The following are considered to be related to the Brazilian party:

- It's head offices when domiciled abroad;
- Its branch or subsidiary domiciled abroad;
- The individual or legal entity, residing or domiciled abroad, whose corporate participation in the capital characterises it as a controlling or affiliated company;
- The legal entity domiciled abroad which is characterised as a controlling or affiliated company;

- The legal entity domiciled abroad when it and the company domiciled in Brazil are under corporate control or common administration or when at least 10% of the capital of each one belongs to the same individual or legal entity;
- The individual or legal entity, resident or domiciled abroad, that jointly with the legal entity domiciled in Brazil, shared in the capital of a third legal entity, owning combined participation that characterises them as a controlling or affiliated company;
- The individual or legal entity, resident or domiciled abroad, which is its associate under the legal form of a consortium or a condominium, as defined in Brazilian law, in any enterprise;
- The individual resident abroad who is a relative, a spouse or companion of any of his directors or of his partner or controlling share-holder, by direct or indirect participation;
- The individual or legal entity, resident or domiciled abroad, who enjoys exclusive rights, as its agent, distributor or concessionaire, for buying or selling goods, services or rights; and
- The individual or legal entity, resident or domiciled abroad, for which the legal entity domiciled in Brazil, enjoys exclusive rights, as its agent, distributor or concessionaire, for buying or selling goods, services or rights.

c) Nature of Transfer Pricing Documentation

Taxpayers must submit the Tax-Accounting Bookkeeping (ECF), which replaced the Corporate Income Tax Return of Legal Entities ("DIPJ") in 2015. It contains transfer pricing information on the operations of the Brazilian legal entity. The ECF must be filed by the end of July of the subsequent year and is an obligation imposed on legal entities established in Brazil. The ECF is part of the Brazilian SPED (Public System of Digital Bookkeeping), a platform for a massive integration, standardisation and sharing of tax and accounting data of federal, state and municipal public treasuries and regulatory agencies.

There is no threshold for the ECF. The taxpayer shall mention in the ECF all the operations that influence the composition of the calculation basis and the amount due from Corporate Income Tax (IRPJ) and Social Contribution on Net Income (CSLL). Thus, taxpayers must disclose in their corporate income tax return information regarding their inter-company transactions and, in the case transfer pricing rules are applicable, their accurate information.

By the end of 2016, Brazil implemented the Country-by-Country Report ("CbCR") in connection with BEPS Action 13. Although it does not seem that the CbCR will be used primarily by Brazilian tax authorities for transfer pricing scrutiny purposes, it may serve as an additional tool in tax audits. The CbCR in Brazil is required for entities that, as the ultimate parent company of a multinational group, are residents of Brazil for tax purposes and that have total consolidated group revenue of the fiscal year before the year of the CbCR of an amount greater than R$ 2.26 billion if the controller is domiciled in Brazil or €750 million (or the equivalent in local currency) if the controller is domiciled abroad. The CbCR is to be filed along with the taxpayer's ECF for the related year and its submission to the tax authorities in the file named "Block W".

The CbCR in Brazil became effective from 31 December 2016 and applies for fiscal years beginning or after 1 January 2016. There are penalties for non-filing / filing late. The OECD's XML Schema standardised electronic format has been adopted for this.

A Brazilian entity that is not the parent of a multinational group will be obliged to deliver the CbCR of the group if:

- The parent company of the group is not obliged to deliver the CbCR in its jurisdiction;
- The jurisdiction of the parent company has a DTT with Brazil but did not agree with Brazil about the final deadline for delivery of the CbCR; or
- There is a systematic failure of the parent company's jurisdiction that the Federal Revenue notified of Brazil to the Brazilian resident entity.

d) Tax Havens & Blacklists

Brazilian law distinguish tax heaven from countries with privileged tax regimes. Tax heaven means jurisdictions whose rate is lower than 20% or whose laws do not allow access to information relating to the shareholding of legal entities within a jurisdiction that provide the aforementioned advantages.

The current "black-listed jurisdictions" are expressly mentioned in SRF Normative Instruction nº 188, of August 9, 2002, and include the following countries: (i) Andorra; (ii) Anguilla; (iii) Antigua and Barbuda; (iv) Netherlands Antilles; (v) Aruba; (vi) The Bahamas; (vii) Bahrein; (viii) Barbados. (ix) Belize; (x) Bermuda; (xi) Campione d`Italia; (xii) Channel Islands (Alderney, Guernsey, Jersey and Sark); (xiii) Cayman Islands; (xiv) Cyprus; (xv) Singapore; (xvi) Cook Islands; (xvii) Costa Rica; (xviii) Djibouti. (xix) Dominica; (xx) United Arab Emirates; (xxi) Gibraltar; (xxii) Granada; (xxiii) Hong Kong; (xxiv) Labuan; (xxv) Lebanon; (xxvi) Liberia; (xxvii) Liechtenstein; (xxviii) Luxembourg (concerning holding companies governed by local Law dated July 31. 1929); (xxix) Macau; (xxx) Madeira Island; (xxxi) Maldives; (xxxii) Malta; (xxxiii) Isle of Man; (xxxiv) Marshall Islands; (xxxv) Mauritius; (xxxvi) Monaco; (xxxvii) Monteserrat; (xxxviii) Nauru; (xxxix) Niue Island. (xl) Oman; (xli) Panama; (xlii) St. Kitts and Nevis; (xliii) American Samoa; (xliv) Eastern Samoa; (xlv) San Marino; (xlvi) Saint Vincent and the Grenadines. (xlvii) St. Lucia; (xlviii) Seychelles; (xlix) Tonga; (l) Turks and Caicos Islands. (li) Vanuatu; (lii) U.S. Virgin Islands; (liii) British Virgin Islands.

e) Advance Pricing Agreement (APA)

There is no legal regime for obtaining APAs but, by utilising a consultation process governed by Law 9,430/96, it may be possible to request a change in the fixed profit margin. This procedure has not been adopted in practice since (i) it is very difficult for a company to prove the profit margin of a given sector and (ii) it is subject to Federal Revenue's discretionary powers (up to date, no change of margin has been granted by Tax Authorities).

f) Audit Practice

Transfer pricing may be reviewed as part of a comprehensive tax audit or through a specific transfer pricing audit. In recent years, tax authorities have considerably increased the number of audits, mainly in strategic sectors (e.g. pharmaceuticals, electronic, auto-parts, etc.).

3. Transfer Pricing Documentation

a) Level of Documentation

Documentation necessary to support corporate income tax return are incoming invoices, accounting information, agreements, commercial invoices, export registers, import registers. There is no exemption for documentation obligation; any related party transaction must be documented. There is no limited transfer pricing documentation or threshold for documentation.

There are no specific documentation requirements in addition to the disclosure of transactions in the ECF explained before but, when (and if) requested, a taxpayer must provide the tax authorities with information on the method applied, the documentation used to support the price and the respective calculation records. If a taxpayer does not provide the tax authorities with this information or provide insufficient or inappropriate information, it may be subject to the determination of prices by the tax authorities based on documents available, applying one of the methods prescribed by Law 9,430/96.

About the Country-by-Country (CbC) Reporting, Normative Instruction No. 1681/16 introduced rules to incorporate the minimum standards recommended by the Base Erosion and Profit Shifting (BEPS) project Action 13. The rules are applicable as of 1 January 2016.

b) Industry Analysis

By identifying value drivers for the relevant industry, a first indication of the level of profitability common in the industry is being given.

c) Company Analysis

A description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices.

A detailed description of the business and business strategy pursued by the local entity, including an indication of whether the local entity has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year and an explanation of those aspects of such transactions affecting the local entity.

d) Functional Analysis

In conducting a functional analysis, an assessment is made of the significant activities and responsibilities that are performed by the related parties relevant to the Intercompany Transactions under review, the tangible and intangible assets that are employed and the risks that are borne in undertaking the business activities. Such an assessment is consistent with the recommendations that have been made in the OECD Guidelines in paragraph 1.51.

e) Choice of Transfer Pricing Method

The methods included in Brazil's transfer pricing legislation are similar to the OECD Guidelines traditional methods with an important peculiarity: the application of statutory, fixed gross profit margins. The taxpayer may choose any of the methods described below, as long as applicable to the case in question. Also, the taxpayer may apply the transfer pricing method that results in the lowest taxable income. In short, the taxpayers can make use of;

- In case of the Import Transactions: (i) the Comparable Uncontrolled Prices Method (PIC), (ii) the Production Cost Plus Profit Method (CPL), (iii) the Resale Price less Profit Method (PRL)
- In case of the Export Transactions: (i) Export Sales Price Method (PVEX) (ii) Wholesale Price in the Country of Destination Less Profit Method (PVA) (iii) Retail Price in the Country of Destination Less Profit Method (PVV), (iv) Acquisition or Production Cost Plus Taxes and Profit Method (CAP)
- In case of the transactions involving commodities quoted on stock or futures exchanges or internationally recognised magazines: (i) PCI and (ii) PECEX.

Moreover, in cross-border loans and debt instruments, the base interest rate for transfer pricing purposes are:

- For loans/debt instruments denominated in US Dollars with pre-fixed rates: the rate for Brazilian sovereign bonds issued in the international market in US Dollars;
- For loans/debt instruments denominated in Reais with pre-fixed rates: the rate for Brazilian sovereign bonds issued in the international market in Reais; and
- For other loans/debt instruments: the six-month LIBOR rate.

Brazilian borrowers are allowed to deduct a spread of up to 3.5% in addition to the base rate; Brazilian lenders must add a spread of at least 2.5% to the base rate in calculating taxable income.

f) Economic Analysis – Benchmark Study

The methods PIC and PVEx use a third party comparable for products, services, or rights identical or similar, calculated in the Brazilian market or other countries, in purchase and sale operations, under similar payment terms.

According to certain criteria outlined in the rules, the Commodities methods (PCI and PECEX) use commodities' market value quoted on stock or future exchanges or internationally recognised magazines.

For financial transactions, the used methods are the Brazilian sovereign bonds issued in US Dollars, Reais and six-month Libor as benchmarking, according to specific terms and conditions outlined in the rules, as mentioned above.

g) Inter-company (IC) Legal Agreement

Although an Inter-company legal agreement formalises the business and financial relationship between group entities, the legal agreements have a lower ranking since the OECD 2017 Guidelines made the "conduct of parties" the prevailing concept.

h) Financial Statements

Not applicable.

i) Production Process for TP Relevant Returns, Documents, Forms and Financials

In the chart below, the existence of the filing requirements with the details of which format is used, the latest filing date, notification requirement and its deadline, thresholds to be applied in case it exists, and the required languages are demonstrated. These information can be seen respectively for CIT, master file, local file, CbCR, local forms, annual accounts and segmented P&L documentations.

	Prepare or File?	Format	Deadline	Notification Deadline*	Threshold* (Yes/No)	Local Language (Yes/No)*(If "No", it can be filed in English)
Corporate Income Tax	File	Electronic (EFD-ICMS-IPI)	Last working day ofJuly for previous FY	N/A	BRL 240,000	Yes (Portuguese)
Master File	N/A	N/A	N/A	N/A	N/A	N/A
Local File	N/A	N/A	N/A	N/A	N/A	N/A
CbCR	File	Electronic (EFD-ICMS-IPI)	Last working day of July for the previous FY	Last working day of July for the previous FY	BRL 2,260,000,000 if the ultimate parent company is resident in	No

					Brazil; Otherwise, EUR 750,000,000 or more	
Local form X						
Local form Y						
Annual Accounts	N/A	N/A	N/A	N/A	N/A	N/A
Segmented P&L	N/A	N/A	N/A	N/A	N/A	N/A
* Brazil has signed the MCAA agreement on 21 October 2016 for the filing of CBCR, and it gained effect on 1 January 2017.						
* There is no specific transfer pricing rules and regulations for SME's.						

Documentation (ECF) must be available to tax authorities by the end of July of each year (when the income tax assessment from the previous year must be concluded and paid).

The information regarding transfer pricing submitted to the tax authorities with the corporate income tax return shall be submitted up to the last business day of July every year. Please note that transfer pricing documentation must be filed in the ECF as mentioned before, and detailed information on calculations and supporting documentation should be available to tax authorities, upon request, in case of tax inspection.

During a tax audit, the IRS sets a deadline for providing documentation. It usually ranges from 5 to 30 days, depending on the circumstances, and the taxpayer has the right to request an extension if required and fair. Also, the limitation of 5 years for Audits applied after the end of the financial year (exception is made, e.g. for fraudulent transactions).

According to the Brazilian transfer pricing legislation, if the average sales price of goods, services or rights to related parties abroad is not lower than 90% of the average sales price of these same goods, services or rights to Brazilian non-related entities, the taxpayer is dismissed from the duty to comply with the Brazilian transfer pricing rules on export transactions. The legislation includes other two types of safe-harbours for export transactions involving related parties, the first one for companies with export revenues equal to or below 5% of the total turnover on a given calendar year and the second one for companies that present minimum profitability on export transactions equivalent to 10% of the corresponding export revenues, the revenues derived from export transactions to related parties does not exceed 20% of the total revenue derived from export transactions. However, these safe-harbours do not imply definitive acceptance.

j) Mandatory Language

According to the tax legislation, all accounting and fiscal documentation shall be presented in Portuguese (documents in other languages shall be translated). With respect to CbCR, taxpayers are allowed to choose one of the three following languages to fill the free text fields: Portuguese, Spanish or English.

k) Notification Requirement

If the ultimate parent entity is resident in Brazil for tax purposes, a Brazilian tax resident subsidiary that is part of that multinational group is dismissed from the CbC report file if the multinational group's total consolidated revenue in the fiscal year before the fiscal year of the report is less than BRL 2,260,000,000 (EUR 750,000,000). In this case, the notice of whether or not a CbC report is required should take place on the same day as the CbC report submission. It is the last working day of July as ordinary.

l) Record Keeping

Documentation to support the transfer pricing methods must be kept for a period of 5 years after the end of the financial year for which the documentation was prepared as it is the period during which the tax authorities ordinarily are allowed to make assessments.

m) Penalties and Interest Charges

Although the transfer pricing legislation establishes no specific penalties, should the taxpayer not provide the tax authorities with the proper information, it may be subject to the arbitration of prices by tax authorities based on available documents and information, applying one of the methods established in Law 9,430/96. In this case, should be arbitration result in any adjustments on the company's income tax basis and, as a consequence, in a tax deficiency, such amount is generally subject to interest penalties based on the Selic rate (varying from 10% to 15% per year) and fines (varying from 20% to 75%).

Penalties in the current tax law:

- Untimely filing: R$ 1.500,00 (approximately US$ 450) for each month or fraction of delay;
- Omitted, incomplete or inaccurate information: 3% of the amount not informed correctly;
- General penalty: may vary from 75% to 150% in case of evasion, fraud or collusion.