

BRAZIL

TRANSFER PRICING IN BRAZIL

During 2012, the Brazilian Government introduced some important changes in the transfer pricing rules – possibly the most relevant changes since the Law was enacted in 1996. Brazil is not a member of the OECD, and does not follow its rules. Brazilian transfer pricing rules are unique, with fixed formulas and profits, and do not consider any economic, risk or functional analysis.

One of the changes relates to the resale price minus profit method (RPM). Under the previous legislation, transfer pricing was based on the average resale price of the goods applied by the importer in transactions with independent parties, minus unconditional discounts, taxes, brokerage fees and a profit margin of: (1) 60% of the resale price of the final product, minus the deductions mentioned above and less costs aggregated in Brazil by the importer, in the case of imported goods used in the production process or (2) 20% of the resale price of the imported goods, in general.

The margin described in item 1 above has been changed to 40%, 30% or 20%, depending on the economic activity of the company. The 40% margin will apply to pharmaceutical and pharmaceutical manufacture, tobacco products, sales of dental/medical/hospital equipment, oil and gas extraction, and the manufacture of petroleum derivative products. The 30% margin will apply to chemical products, glass and glass products, cellulose, paper and paper products, and metallurgy. The 20% margin will apply to other activities. This change will have a great impact on transfer pricing calculations for companies, in that the former 60% margin, in most cases, was resulting in transfer pricing adjustments.

The Government has also created a new method to calculate transfer pricing, known as “Price on Quote”, to be used for import and export transactions. This method will apply to the import or export of commodities (such as cotton, soy, oil, etc.) subject to quotation on internationally accepted commodities and future exchanges. The imported or exported price will be compared to the prices on quote. The legislation has listed some of the accepted commodities and future exchanges, such as the Chicago Mercantile Exchange (CME), New York Mercantile Exchange (NYMEX), London Metal Exchange (LME), Tokyo Commodity Exchange (TOCOM), Multi Commodity Exchange (MCX), and the China Beijing International Mining Exchange (CBMX). If no prices are available on commodities and future exchanges, a comparison could be made with information obtained from independent data provided by well known international research institutions such as Platts, Argus, The Metal Bulletin and others.

Interest paid or credited to related parties in relation to intercompany loans will only be considered deductible for income tax purposes if the amount does not exceed the amount calculated based on LIBOR, for deposits in US dollars for a term of 6 months, plus a spread of 3% per year.

The new legislation also clarifies that back-to-back transactions are subject to transfer pricing rules. These transactions relate to the purchase and sale of products that are not physically in Brazil – the product is purchased from a foreign country and sold to a third country without the transit of goods in Brazil. In this case, two calculations (one for purchase and another for sale) are necessary.

The safe harbour rules have also been changed. Companies with profit before tax from export revenue of at least 5% of the total export revenues, on a triennial average, were within the safe harbour and it was not necessary to provide the calculation. However, from 2013 onwards, this percentage is changed to 10% and the safe harbour is only applicable if the net export revenue for related parties represents up to 20% of the total net export revenues. With this new regulation, some companies will certainly be out of the safe harbour.

These are undoubtedly the most relevant changes in transfer pricing legislation since 1996, and the Government is trying to develop the rules and clarify some aspects for companies. It is an important step, but the rules are still not aligned with the OECD transfer pricing guidelines adopted by most jurisdictions. Transfer pricing experts still need to keep a special chapter in their global transfer pricing guidelines for transactions with Brazil.

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