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LEGAL MEMORANDA

BRAZIL

The following is a review of recent Brazilian legislative, administrative and judicial rulings.

I. LEGISLATIVE AND ADMINISTRATIVE RULINGS

National Constituent Assembly

On November 22, 1985, the Brazilian Congress approved an amendment submitted by Congressman Valmor Giavarina, which provides that members of the Chamber of Deputies and of the Federal Senate meet in a free and sovereign National Constituent Assembly on February 1, 1987. The Chief Justice of the Federal Supreme Court shall convene the Constituent Assembly and preside over the election of its Chairman. The new Brazilian Constitution will be enacted in two discussion and voting sessions by an absolute majority of the members of the National Constituent Assembly (DOU-I, November 28, 1985).

Tax Reform

The Chamber of Deputies and the Federal Senate enacted Constitutional Amendment No. 27 on November 28, 1985, introducing changes in articles 21, 23, 25 and 26 of the Federal Constitution. The main tax changes are the following: (a) the division of the federal Tax on Transportation and Communication Services, as provided for in article 21, item VII into two new taxes: the tax on communication services and the tax on transportation services, both excluding those services in the municipal sphere; and (b) the states were granted authority to institute a Tax on the Ownership of Automotive Vehicles, replacing the Sole Highway Tax. However, the states are prohibited from levying any other taxes or charges on the use of vehicles (DOU-I, December 2, 1985).

Double Taxation Treaty between Brazil and Luxembourg

The Minister of Finance issued Ordinance No. 510/85 which amended the wording of item I of Ordinance No. 413/80. The latter ordinance established the methods for applying the Double Taxation Treaty. The Treaty was signed by the Federative Republic of Brazil and the Grand-Duchy of Luxembourg and enacted in Brazil by Decree 85.051/80. The new ordinance establishes the following changes: (a) a reduction to fifteen percent of the rate of income tax payable on dividends and profits earned by a company that holds at least ten percent of the capital of the company that pays the dividends; (b) an increase to twenty-five percent of the rate income tax payable on all other dividends; (c) an increase to fifteen percent of the rate of income tax for interest paid to a resident of one contracting state by another contracting state; (d) a reduction to ten percent of the interest rate on long-term loans by banking establishments in connection with the sale of capital goods or the study, installation or supply of industrial or scientific complexes and of public works (DOU-I, December 12, 1985).

Double-Taxation Treaty Between Sweden and Brazil

An Agreement was executed in Brasilia on December 18, 1985 to extend the Double-Taxation Treaty of April 25, 1975 for another ten years. This agreement, between the Government of the Federative Republic of Brazil and the Government of the Kingdom of Sweden, became effective as of January 1, 1986 (DOU-I, January 3, 1986).

Double-Taxation Treaty between Canada and Brazil

The President of the Republic signed Decree No. 92.318 of January 23, 1986, regulating the effectiveness in Brasilia of the Double-Taxation Treaty. This treaty was entered into between the Government of the Federative Republic of Brazil and the Government of Canada on June 4, 1985 (DOU-I, January 24, 1986).

Taxation of the Stock Market

The Central Bank of Brazil issued Circular Letter No. 1.335/86 to clarify the procedures established in Resolution No. 1.076/85, which provided for taxation of the stock market. The Circular Let-

ter determines that the tax authorities will consider a transaction financially liquidated in the futures market upon payment of the initial deposit of the margin by the purchaser and, in the options market, upon payment of the amount necessary to purchase the shares. The circular confirms that the collection and payment of the tax are the exclusive responsibility of the securities brokerage companies (DOU-I, January 10, 1986).

Sole Tax on Minerals

The President of the Republic signed Decree No. 92.295 of January 14, 1986, approving the Regulation for the Sole Tax on Minerals. This Decree is effective as of January 15, 1986. Accordingly, the Sole Tax on Minerals will be levied only once on the extraction, treatment, circulation, distribution, exportation, and consumption of Brazilian mineral substances, as specified in the list attached to the regulations (DOU-I, January 15, 1986).

Centralized Payment of Withholding Tax

The Secretary of Federal Revenue issued Normative Instruction No. 85/85, establishing that companies may centralize the payment of their withholding income tax in the head office of the company or in the unit that records the tax generating facts. The companies may do this if the centralizing unit (a) centralizes the accounting entries for the tax generated facts, the filing of the respective documentation, and the preparation and submission of the annual Withholding Tax Return; (b) submits a Statement of Centralized Payment of Withholding Tax, specifying which branches or agencies will be included in the centralized payment to the Economic/Fiscal Information Sector of the Federal Revenue Office having jurisdiction over the unit; and (c) centralizes the payment of the tax under a given code in only one unit (DOU-I, January 14, 1986).

Changes in Prepayment of Income Tax by Individuals

The Secretary of Federal Revenue issued Normative Instruction No. 12/86 amending the wording of item 3 of SRF Normative Instruction No. 131/85. According to the new wording, individual taxpayers may deduct twenty percent from their gross income derived from (a) leases or subleases of personal assets or real prop-

erty to other individuals, and (b) capital that was not taxed at source (DOU-I, January 14, 1986).

Intervention in Financial Institutions

The President of the Republic signed Decree No. 92.061 of December 5, 1985, regulating article 31 of Law No. 6.024/74 which deals with official intervention, and extra-judicial liquidation of financial institutions. According to the decree the liquidator of a financial institution who is authorized by the Central Bank of Brazil and Article 31 of Law No. 6.024/74 may (a) transfer to other financial institutions the assets, rights and obligations of the company or the institution that is being liquidated; (b) transfer or assign assets and rights to third parties and provide for other financial institutions to assume obligations of the institution in liquidation; and (c) organize and reorganize a company for general or partial continuance of the business or activities of the institution being liquidated, after its assets, rights, and obligations have been wholly or partially transferred to such company. The Central Bank of Brazil shall select and approve the financial institution to which such assets, rights, and obligations are to be transferred and shall also approve the organization and, if necessary, authorize the operation of a company organized for such purposes. These procedures will not affect the progress of the extra-judicial proceedings nor of the investigations to determine the liability of the officers and members of the Boards of the institution undergoing liquidation (DOU-I, December 6, 1985).

Central Bank Resolutions

At a meeting held on December 4, 1985, the National Monetary Council passed several decisions which were issued as resolutions of the Central Bank of Brazil and published in DOU-I, on December 6, 1985:

(a) Resolution No. 1.063/85, eliminated the tax on Financial Transactions (10F) imposed on credit transactions in connection with the implementation of projects that are of interest to the government, and that enjoy priority in terms of the national economic development. In order for these projects to be entitled to the reduced tax rate, they must be carried out by the National Economic and Social Development Bank (BNDES) and by Banco de Brasil together with companies in which these entities have an equity in-

terest (represented by advances on account of future capital increases in such companies).

(b) Resolution No. 1.064/85, provided that asset transactions of commercial, investment, and development banks shall be carried out at freely determined interest rates. Asset transactions subject to monetary correction must have established interest rates, while post-established interest rates are limited to an amount equal to the variation of the Readjustable National Treasury Bonds (ORTNs) over the period.

(c) Resolution No. 1.065/85, approved regulations for the assessment of penalties on financial institutions, their officers, advisory and other council members, audit committee members, managers and other persons that infringe the provisions of Laws Nos. 4.595/64, 4.728/65 and 4.829/65, as well as other applicable legal rules and regulations. This resolution is effective as of March 3, 1986.

(d) Resolution No. 1.066/85 permits investment banks to invest 100 percent of shareholders' equity in fixed assets or in the permanent interest in the capital of other countries.

Further Central Bank Resolutions

The following Resolutions of the Central Bank of Brazil were published in DOU-I of December 27, 1985:

(a) Resolution No. 1.075/85 authorized the issuance of Readjustable National Treasury Bonds as book bonds for minimum terms of six months;

(b) Resolution No. 1.076/85 established that a tax will be levied on purchases of stock options and purchases on the futures market;

(c) Resolution No. 1.077/85 defined as a short-term financial transaction any purchase and subsequent transfer or redemption of bills or securities in a period of less than sixteen days. The Resolution established a ten percent rate of withholding tax due on such transactions. It also established a fifty-five percent rate of withholding tax on capital gains made on purchases and subsequent assignments or liquidations of bills, bonds, or fixed-term investments within a sixty day period, and a forty-five percent tax rate transactions taking place beyond a sixty day period.

Central Bank Circulars

The following Circulars of the Central Bank of Brazil were published in DOU-I, of January 17, 1986:

(a) Circular No. 988/86, approving supplementary rules for the tax treatment of lending foreign funds by commercial, investment, and development banks according to Central Bank Resolution No. 63/67;

(b) Circular No. 991/86, reducing to zero the percentage applicable to the balance of time deposits of commercial, investment, and development banks as of December 31, 1985 for purposes of compulsory deposit.

Import Program of 1986

The Foreign Trade Department (CACEX) issued Communiqué No. 148/85 containing the rules for import programs. Accordingly, any party interested in importing in 1986 must submit an Import Program with the respective attachments and other information by January of 1986 (DOU-I, December 4, 1985).

National Consumer Defense Council

The Minister of Debureaucratization issued Ordinance No. 57/85. The Ordinance approved the Internal Regulations of the National Consumer Defense Council (CNDC) created by Decree No. 91.469/85 to assist the President of the Republic in establishing and conducting the National Consumer Defense Policy. The CNDC has various functions. It shall conduct studies of consumer rights and propose ways the state may properly safeguard rights; study and implement forms of technical and financial support for consumer defense organization; and study and implement special support programs for underprivileged consumers. The CNDC will also propose action to prevent consumer fraud; encourage action to educate and inform consumers; coordinate the activities of the various consumer defense organizations in the various ministries in order to make their policies uniform; propose the consolidation of entities that act in the area of consumer defense; and propose the consolidation of consumer relations regulations (DOU-I, December 11, 1985).

Brazilian Informatics Companies

The President of the Republic signed a decree which approved the regulation of article 21 of Law No. 7.232/84 dealing with the income tax deduction for the subscription of new shares in Brazilian informatics companies. In fiscal years 1986 (base period 1985) to 1995 (base period 1994), companies may reduce their income tax liability up to one percent for direct cash investment in new shares of Brazilian informatics companies. The decree does not extend to investments in situations where both companies have the same controlling shareholder or partner, one of the companies is the sole distributor of one or more of the other's products, or one of the companies is the exclusive representative of the other (DOU-I, December 20, 1985).

Tax Incentives for Brazilian Informatics Companies

The President of the Republic approved the regulations for the tax incentives dealing with the national informatics policy. According to the Regulations, the incentives shall be granted (i) for research and development in several areas of informatics; (ii) for the training and development of human resources; (iii) for the production of informatic goods and services; (iv) for the development of software; and (v) for the segment of micro-electronics. These incentives will be available to Brazilian companies with programs approved by the National Informatics and Automation Council (CONIN). The regulations also include different tax incentives (DOU-I, December 23, 1985).

New Code of Civil Procedure

The Minister of Justice submitted to the President of the Republic a draft bill of Amendment to the Code of Civil Procedure for the basic purpose of expediting proceedings to ensure greater effectiveness in the administration of justice in Brazil. The Ministry of Justice will accept suggestions from the community, after which the bill shall be prepared in final wording for submission to Congress (DOU-I, December 17, 1985).

Penal Offenses

The President of the Republic sanctioned Law No. 7.453 of

December 20, 1985 which includes among penal offenses the performance of acts resulting from prejudice as to race, color, sex, or marital status (DOU-I, December 23, 1985).

Purchase of Maritime Land by Foreigners

Foreigners were previously not allowed to purchase maritime land or land located in the frontier strip. Maritime land is owned by the Navy and consists of a border along all tidal waters which begins at the average water mark and extends inland for thirty-three meters. The frontier strip is a zone 150 kilometers wide along the Brazilian border. Article 89 of Law No. 7.450 of December 23, 1985 (Economic Package) amends article 205 of Decree-law No. 9.760 of September 5, 1946. This amendment permits the Minister of Finance to authorize foreigners to purchase frontier strip or maritime land provided that the land is an autonomous unit in a condominium, located in an urban zone, and that the area sold to foreigners does not exceed one-third of the total area (DOU-I, December 24, 1985).

Industrial Model: Patents

The President of the National Institute of Industrial Property (INPI) issued Normative Act No. 78/85. This act establishes the conditions and specifications necessary to satisfy the basic documents for an application for an industrial model or design patent.

Manaus Free Zone: Minimum National Content

The Superintendent of the Free Zone of Manaus (SUFRAMA) and the Secretary of the Industrial Development Council (CDI) issued Ordinance No. 1/86. This decree establishes criteria to determine and amend the minimum indices of national content for products manufactured in the Free Zone of Manaus. These indices will be proposed after studies are made by a permanent Work Group of SUFRAMA and CDI. The indices will then be established at progressive rates for each industrial product by the Superintendent of the Manaus Free Zone and the Executive Secretary of the Industrial Development Council (DOU-I, January 14, 1986).

Foreign Participation in Insurance Companies

The National Council on Private Insurance (CNSP) issued Resolution No. 3/86 to restrict the direct and indirect participation of foreign capital in insurance companies, capitalization companies, private pension funds, and insurance brokerage companies. The participation will be limited to fifty percent of the total capital of these companies and to one-third of their voting capital. Agreements existing before the date of effectiveness of the resolution are not affected by this resolution (DOU-I, January 16, 1986).

Foreign Movie Production

The National Cinema Council issued CONCINE Resolution No. 122/85, establishing the conditions for foreign movie production in Brazil. The Technical Support Division of CONCINE will examine and accept projects for foreign movie production in Brazil that comply with the applicable legal provisions and with the determinations of the resolution. Movie production is understood as the recording or reproduction of moving images by any means, on film, tape, video-disks, or other forms of reproduction in any vehicle or system, regardless of the gauge, length, or duration of the final product. These provisions do not apply to movie productions of a strictly journalistic nature authorized by the President of CONCINE (DOU-I, January 10, 1986).

Foreign Air Transportation

In Decree No. 92.319 of January 23, 1986, the President of the Republic determined that foreign air transport companies must obtain the prior authorization of the Federal Government of Brazil to operate in Brazil. The decree applies to bilateral agreements and those in which there is a unilateral interest in obtaining such authorization. According to the decree, authorization will also be required for the establishment of agencies, branches, offices or any other premises by foreign air transport companies that do not have the lines to the Brazilian territory (DOU-I, January 24, 1986).

Abuse of Economic Power

The President of the Republic signed Decree No. 92.323 of January 23, 1986, approving the Regulations for Law No. 4.137/62,

which deals with the suppression of abuses of economic power. The structuring, authority, and operation of the Administrative Council for Economic Defense (CADE) shall be issued by the Minister of Justice by delegation and established in Internal Regulations. According to the regulations, abuses of economic power shall be suppressed in all the forms, provided that these abuses individually or simultaneously cause the following situations: (a) domination of markets; (b) elimination of competition; and (c) arbitrary increase of profits (DOU-I, January 24, 1986).

Financial Crimes

Seeking to encourage ample debate on the matter, the DOU-I of January 24, 1986 published the text and the justification for the bill of law on financial institutions and financial crimes.

II. JUDICIAL AND ADMINISTRATIVE DECISIONS

Recovery of the Tax on Financial Transactions

In the case of exchange transactions for imports of goods and services, the tax generating fact is the liquidation of the exchange contract. The tax on financial transactions (IOF) is due upon the liquidation of the exchange contract and the tax is only refundable if one of the requisites of undue payment occurred, as provided in article 165 of the National Tax Code (Decision No. 202.00.473 of the second chamber of the second Taxpayers Council).

Suits for Losses and Damages

It is not feasible to file a suit for losses and damages based on a contractual default without first filing a request for termination of the relevant contract (Decision of the Federal Supreme Court on Special Appeal No. 107.670-4, Reporting Judge Cordeiro Guerra, published in DJU of December 10, 1985).

Average Exchange Rate on the last day of January 1986: Cr Dollars 12.125 = U.S. Dollars 1.00.

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