Brazil

Follow this and additional works at: http://repository.law.miami.edu/umialr

Part of the Comparative and Foreign Law Commons, and the International Law Commons

Recommended Citation
Brazil, 14 U. Miami Inter-Am. L. Rev. 137 (1982)
Available at: http://repository.law.miami.edu/umialr/vol14/iss1/12

This Legal Memorandum is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.
LEGAL MEMORANDUM

The first part of this memorandum is a brief summary of legal rulings and decisions recently enacted by the Brazilian government. The second part analyzes a recent development in the Brazilian law concerning the withholding tax on foreign loans.

I. LEGISLATIVE AND ADMINISTRATIVE RULINGS

Administrative Rules on Imports Revised and Consolidated

The Foreign Trade Department of Banco do Brasil S.A. (CACEX) has established new administrative rules for imports. These are set forth in Communiqué No. 7 of March 4, 1982, which consolidates the rules already in effect and revokes Communiqué No. 79 of January 22, 1979 and subsequent amendments (DOU-I, March 4, 1982).

Gains on Certain Futures Market Transactions Exempted from Income Tax

The President of Brazil has signed Decree-Law No. 1929 of March 8, 1982 granting income tax exemption until 1984 for gains realized by individual residents of Brazil through the liquidation of futures contracts entered into on domestic commodities exchanges. The exemption applies only to: (a) commodities exchange transactions that meet the conditions established by the Ministry of Finance; and (b) transactions involving commodities that are included in a list to be issued by the Ministry of Finance (DOU-I, March 9, 1982).

Modification of Rules on Imports under Drawback Scheme

The wording of item 2 and sub-item 2.1 of Normative Ruling No. 30/72 of the Secretary of the Federal Revenue, which establishes the rules for refund—in the form of a tax credit—of the amount of taxes paid on imports under the drawback scheme, has been modified by Normative Ruling No. 10/82. In order to qualify for the tax credit, the interested company should submit the following documents: (a) the fourth copy of the import statement for the product used in the exported goods, and the second copy of the
DARF form showing payment of the corresponding duties; (b) production plan showing the relationship between the imported inputs and the units of products exported; (c) proof that the goods produced were exported. The representative of the local revenue authority will then (a) investigate, either before or after issuing the certificate of tax credit, to check the documentation submitted; (b) note on the fourth copy of the import statement the fact that a certificate of tax credit has been issued and immediately return that statement to the company (DOU-1, March 11, 1982).

**Suspension of IPI Tax on Exported Products**

The Secretary of the Federal Revenue, in Normative Ruling No. 11/82 has explained that the suspension of the Tax on Manufactured Products (IPI) is still in force as regards goods shipped from the factory to commercial companies that engage in exporting, including the trading companies referred to in Decree-Law No. 1.248/72. The industrial establishment shipping the products is assured the right to maintain and utilize the tax credit it receives on raw materials, intermediate inputs and packing materials used in the manufacture of the exported goods (DOU-1, March 17, 1982).

**Set-Off Clause Illegal in Foreign Loans**

The Minister of Finance approved a Normative Ruling to the effect that the inclusion in a foreign credit agreement of a clause giving the creditor the right to "set-off" an unpaid obligation of a defaulting Brazilian debtor by blocking deposits or seizing other assets which the debtor may possess outside Brazil, is illegal. The main reason given is that such a practice has the effect of circumventing the requirement of Law No. 4.131 of September 3, 1962 (The Foreign Capital Law), that remittances or transfers abroad of sums owed for interest, repayments, commissions or other amounts related to foreign loans be authorized and registered beforehand with the Central Bank of Brazil. Furthermore, the procedure permitted under such a clause constitutes a compensation of private debts, which is specifically prohibited by Decree-Law No. 9.025 of February 27, 1946 (DOU-1, March 17, 1982).

**Amnesty on Federal Tax Debts in Arrears — Extension of Deadlines**

We wish to remind our readers that Decree-Law No. 1,893 of
December 16, 1981 granted partial amnesty on federal tax debts that were due and payable on or before December 31, 1979, whether or not those debts have been formally enrolled as receivables of the federal government, and whether or not legal action was brought. The deadlines for payment under these favorable conditions were recently extended by three months, under Decree-Law No. 1,931 of March 19, 1982, published in DOU-I March 22, 1982. The following are the revised terms to be observed:

a. waiver of the penalty and the default interest if payment is made by June 30, 1982;

b. reduction of the penalty and the default interest by fifty percent if payment is made by September 30, 1982; and

c. reduction of the penalty and default interest by twenty-five percent if payment is made by November 30, 1982.

When the amount in arrears refers only to the penalty, the debt may be paid by the deadlines indicated above and the amount will be reduced by seventy-five, fifty, or twenty-five percent depending on the date of payment.

In the case of administrative or judicial proceedings in which case was deposited as guarantee, the interested party may request that the deposit be converted into a receipt of the federal government up to the amount of the debt. The balance will be refunded. If the deposit was made in Readjustable National Treasury Bonds (ORTNs), then payment will have to be made before restitution of the bonds can be requested.

As stated above, the amnesty applies to tax debts payable on or before December 31, 1979, whether the debt is still in the administrative phase or whether it has already been taken to court (through ordinary action to annul the debt, writ of mandamus, or tax collection action).

_Treaty of Montevideo is Ratified by Brazil_

The President of Brazil has signed Decree No. 87,054 of March 23, 1982 promulgating the 1980 Treaty of Montevideo. This treaty established the Latin-American Integration Association (LAIA) which replaces the Latin American Free Trade Association (LAFTA) (DOU-I, March 24, 1982).

_Simplified Procedure for Obtaining Export Tax Credit on Sales of_
Goods Used in Brazilian Offshore Oil and Gas Production

Export sales from Brazil entitle the exporter to a tax credit. Normally, to export any goods an export license is required. By Ordinance No. 24/82, the Minister of Finance has stated that sales of products intended exclusively for use in the production of crude petroleum and natural gas in the Campos Basin and on the Brazilian continental shelf will be considered as exports, will not require an export license, and will entitle the exporter to the normal tax credit. It is sufficient that the beneficiary of the tax credit submit, to the Foreign Trade Department of Banco do Brasil S.A. (CACEX), documentary evidence of the purchase and shipment of the goods (DOU-1, January 26, 1982).

Limit on 1982 Imports of Informatics Equipment

The Economic Development Council (CDE) has established a limit of US$ 200 million on 1982 imports of informatics equipment, parts and components. The new limit covers both imports under recently approved projects and those which will be submitted to the Special Secretary for Informatics (SEI) during the current year. Excluded from the import ceiling are items to be used in producing equipment for export, supplementary items such as discs and tapes, parts, components, and accessories. Imports of the latter will be controlled by the SEI and their value may not under any circumstances exceed sixty percent of the limit established by the CDE (DOU-1, January 29, 1982).

Ceiling on Imports Through Manaus Free Zone

Decree No. 86.890 of February 1, 1982 places a ceiling of US$ 500 million, f.o.b. value, on the imports of goods through the Free Zone of Manaus, other than petroleum or wheat. As an incentive under approved export programs however, the Manaus Free Zone Authority (SUFRAMA) may exclude from this overall limit the following: (a) the f.o.b. value of components intended for manufacture of products to be exported; and (b) the equivalent of thirty percent of the net balance of the entry of foreign exchange resulting from a comparison between exports and imports intended for use in the manufacture of exported products (DOU-1, February 3, 1982).
Requirement for Public Disclosure of Details on Share Purchases

The Securities Commission (CVM) has issued Ruling No. 20/82 requiring that information pertaining to the acquisition of voting shares in a publicly-held company be published in the press. Under the new regulations, any individual or legal entity who comes to hold five percent or more of the voting stock in a publicly-held company must disclose (a) name and identification data; (b) purposes of the purchase and the quantity involved; (c) number of voting shares and/or rights to subscription of voting shares acquired; and (d) existence of any contracts or agreements covering the exercise of the right to vote, the purchase and sale of shares or preference in purchasing same, even if such agreements have not been filed at the head office of the company. The CVM will rule on requests to waive the requirement for disclosure, taking into consideration the degree of concentration of the holdings of shares in the company (DOU-I, February 8, 1982).

Control of Travelers’ Imported Personal Property

Procedures for recording the imported items being carried abroad by travelers departing from Brazil have been established in the Regional Secretary of the Revenue’s Service Order No. 2/82. To facilitate Customs clearance when the returning traveler brings them back to Brazil, objects of personal, domestic and professional use are to be listed on a form entitled “Register of Exit of Foreign Items.” The form is to be submitted to the Customs authorities at the point of embarkation (DOU-I, February 11, 1982).

Holding Companies Must Make Advance Payments of Estimated Income Tax

Seeking to resolve doubts raised by holding companies, the Coordinator of the Tax System has confirmed, in Normative Ruling No. 3/82, that such companies must indeed make monthly installment payments on the income tax they estimate will be owed during the year, despite the fact that they do not have “net earnings from sales and services.” All companies are obliged to follow this procedure if a) they do not close their balance sheets during the month of December and, if b) the amount of their latest annual income tax payment is equal to or greater than the limit fixed annually in tax legislation as generating the requirement to prepay estimated tax. Acceptance of the reasoning that the absence of net
earnings from sales and services would free a company from the obligation to prepay estimated tax, would defeat the purpose of the law which sought to reach companies that, because they close their balance sheets in a month other than December, had not been obliged to make monthly tax payments (DOU-l, February 15, 1982).

Central Bank Facilitates On-Lending by Development Banks

The Central Bank of Brazil, in Circular No. 680/82, has released development banks from the requirement to formally consult the Central Bank before contracting for foreign funds and on-lending them under Resolution No. 63/67. Only those transactions which do not fit within the limits established in Resolution 63 regulations need be submitted in advance to the Central Bank’s Department of Banking Organization and Authorizations (DOU-l, February 16, 1982).

Approval Needed to Import Process Control Systems or Components

Under Normative Act No. 1/82 issued by the Secretary for Informatics and the Executive Secretary of the Industrial Development Council, applications for licenses to import complete instruments, assemblies, sub-assemblies and parts intended for use in manufacturing or mounting process control systems are subject to the specific approval of the Special Secretariat for Informatics (DOU-l, February 18, 1982).

Public Agencies to Give Priority to Payments on Foreign Currency Obligations

The President of the Republic has signed Decree-Law No. 1928 of February 19, 1982 which makes it mandatory that debts resulting from obligations contracted in foreign currency, whether or not they were guaranteed by the Federal Treasury directly or through an official bank, shall be given absolute priority in the disbursement plans of the government agencies, entities of the indirect administration, their subsidiaries, and government foundations that assumed those obligations. Officials who, by act or omission contribute to the failure to observe such priority will be held responsible, jointly and severally, for any delay in payment (DOU-l, February 19, 1982).
Company-Provided Employee Transportation Considered as Business Expense

The Coordinator of the Tax System, in Normative Ruling No. 4/82, has determined that a company's expenses for transporting employees from home to work and back, whether the service is provided by the company itself or contracted out, may be considered as a business expense for income tax purposes (DOU-I, February 25, 1982).

II. FOREIGN LOANS - WITHHOLDING TAX - DOUBLE TAXATION TREATIES

Interest, fees, expenses and other charges on foreign loans are subject to the withholding of income tax at source, normally at the rate of twenty-five percent. If the foreign creditor is resident and domiciled in a country with which Brazil has signed a Double Taxation Treaty, the rate of tax is reduced to fifteen percent in the case of Sweden, Norway, Portugal, France, Belgium, Finland, Denmark, Austria, West Germany, Spain, Italy and Luxembourg and to twelve and one-half percent in the case of Japan.

This special tax treatment has to date been readily accepted by the Brazilian Federal Revenue authorities and by the Brazilian Courts. Recently, however, a decision was rendered by the Federal Supreme Court (Supremo Tribunal Federal - STF) on August 6, 1981 upholding a decision of the Federal Court of Appeals (Tribunal Federal de Recursos - TRF) of April 14, 1980, interpreting the matter in a different manner. An article we published with our comments on the subject appeared in the "Gazeta Mercantil", edition of November 11, 1981 under the title *E preciso aplicar os tratados para evitar bitributação.*

In the case at hand, a borrower established in Rio de Janeiro received a foreign loan from a Japanese bank (The Sanwa Bank Limited), and the respective loan agreement expressly established that the withholding tax would be for the account of the Brazilian borrower, which is normal practice in such loans. According to the Double Taxation Treaty signed between Brazil and Japan, the borrower should withhold and pay income tax on the interest, at the rate of twelve and one-half percent (and not twenty-five percent), as the creditor of the loan was a financial institution established in Japan. The borrower probably did not known that the Treaty provided for reduced taxation and paid the tax at the normal rate of
twenty-five percent on remitting the interest to Japan. He later noticed the mistake and filed a judicial petition for the reimbursement of part of the tax paid on the interest remitted to the Japanese bank. The petition was based on the provisions of the Double Taxation Treaty and was intended to recover the excess tax from the Brazilian Government. But the court decided the case against the borrower. The summary of the decision handed down by the 3rd Panel of the TFR, as upheld by the STF, reads: “If it was established that the Tax on the interest would be paid by the borrower in Brazil so that the creditor would receive the amount abroad without any deduction, it is not admissible to apply the Brazil-Japan Convention to avoid double taxation.”

If we extend this interpretation to the other cases in which Brazilian borrowers assume liability for withholding tax in transactions contracted with foreign banks established in countries with which Brazil has double taxation treaties, the financial cost borne by the borrowers of foreign loans will be considerably increased.

In addition, if we also apply this interpretation to the financing of imports, in which the tax liability always falls on the Brazilian importer, we will be imposing an unfair penalty on Brazilian companies by increasing the financial cost of financed imports from countries with which Brazil has a double taxation treaty. We can thus see that the court decision in question may end up by affecting the current policy of the Brazilian Government, which seeks to attract foreign capital to Brazil and encourages the contracting of foreign loans and foreign financing for imports.

The Federal Revenue authorities have now also adopted a position in the matter. Normative Ruling No. 092 of December 4, 1981 corrects the distortion and reiterates the former interpretation in the sense that the reduced tax rate of the double taxation treaties should be applied to all foreign loans regardless of whether the liability for the withholding tax is borne by the payment source (the Brazilian borrower).

Pinheiro Neto & Cia. - Advogados
São Paulo, Brazil