Brazilian Federal Tax Authorities issue Normative Instruction dealing with withholding tax on transactions between Brazilian residents and nonresidents

Brazilian Federal Tax Authorities (RFB) published Normative Instruction 1,455 (NI 1,455) on 7 March 2014, dealing with withholding tax (WHT) on different types of income resulting from cross-border payments made to nonresidents.

Although NI 1,455 supersedes previous regulations on the subject (Normative Instruction 252/2002 - NI 252), it does not introduce significant changes to the prior rules.

This Alert covers the most significant changes made by NI 1,455.

Transactions subject to WHT under NI 1,455

NI 1,455 does not cover all types of transactions subject to withholding tax. It primarily applies to transactions with payments for services and intangibles, certain financial transactions and capital gains taxation of non-residents.

Some of the payments included in NI 1,455 are:

- International transport and commissions paid by exporters
- Marketing expenditures to promote Brazilian business and tourism
- Hedging
- Leasing
- Placement of listed companies shares and credit securities abroad
- Management of industrial property rights
- Interest payments on export contracts and related commissions
- Interest on net equity
Foreign warehousing and goods handling payment
Professional athlete transfer of rights and services related to conformity assessment of goods for export

The most relevant changes brought by NI 1,455 were:

**Capital gains**

According to NI 1,455, capital gains realized by a non-Brazilian resident on the sale, transfer or disposal of qualifying Brazilian assets or rights is subject to 15% WHT (25%, if the gain is accrued by a black-listed jurisdiction (i.e., tax haven)). Further, it also confirmed that Double Tax Treaty (DTT) provisions should be respected to determine whether Brazil has the right to tax capital gains.

Historically, the capital gain realized by nonresidents was calculated based on the investment made in the Brazilian shares in non-Brazilian currency (e.g., USD or Euros). Although not very clear yet, NI 1,455 reinforces that the capital gain realized by a non-Brazilian resident on the sale of shares should be determined in reference to the historical investment made in Brazilian currency, instead of applying the amount of the investment made in foreign currency. Confusion exists, however, on how to calculate the capital gain because NI 1,455 indicates that the central bank’s foreign investment certificate can be used as reference to determine the cost basis in the shares in the absence of reliable supporting documentation. Such certificate also establishes the basis in the shares in both Brazilian and non-Brazilian currency.

**Extension of the definition of technical services**

NI 1,455 confirmed the 15% WHT applies to technical services (25% to black-listed jurisdictions) and also provided a revised definition of technical services: “which execution relies on specialized technical knowledge or involving administrative assistance or consulting services performed by independent professionals or companies, or relying on automated means with clear technological content.” This definition is broader than NI 252 because it explicitly includes “consulting services,” “companies” and “automated means with clear technological content.”

In this context, the Brazilian Federal Revenue Attorney General’s Office recently issued an opinion establishing that services paid to residents of jurisdictions that executed DTTs with Brazil should fall within the scope of Article 7 of the DTT, under which Brazil has no right to tax. The prior statement does not apply if a DTT executed by Brazil contains a provision stating that the tax treatment of technical services, technical assistance and administrative services (the latter when applicable in the DTT) will be that provided under Article 12 (Royalty). Whether and to what extent the broadened definition of technical services as provided in NI 1,455 will affect the application of this opinion is a question that will require further attention.

**Export financing**

Although the interest and commission payments to nonresidents for export financing may be subject to a 0% WHT rate, the commercial bank in charge of carrying out the payment abroad should verify the “tax conformity,” as well as the legality and economic purpose of the transaction. If the export financing fails to comply with these requirements, a 25% WHT rate will apply.

At this point, it is unclear as to how to interpret “tax conformity.” Apparently, the goal of the RFB is to avoid the treatment of funds brought into Brazil as export financing but whose cash proceeds are not used to finance export transactions per se.

**Other transactions required to meet tax conformity**

The tax conformity requirement also applies to other transactions subject to NI 1,455: (i) commissions paid by exporters; (ii) marketing expenditures to promote Brazilian business & tourism; (iii) hedging; and (iv) interest payments on discount of export contracts and related commissions.

Unless RFB outlines the practical application of this requirement, controversy is expected.

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**Endnote**

1. See EY Global Tax Alert, *Brazil’s Federal Revenue Attorney General’s Office issues formal opinion on remuneration of services rendered by foreign companies*, issued 25 February 2014 for further discussion on this opinion.
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