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Overview of corporate tax work over last year

Types of corporate tax work, significant deals and themes

The second wave of the global sanitary crisis and delays on vaccination have kept Brazilian executives in a conservative position, and opinions on the recovery of our domestic market show that bets on the return of revenues and profitability to the pre-pandemic level are already reaching the year of 2023. Notwithstanding this, some macroeconomic indicators, such as low interest rates, good financing conditions, and business and digital transformation that intensively hit all segments of the economy, helped the Brazilian capital market to maintain the 2019 number of announced transactions. Despite the chaos, 1,200 deals took place during 2020 and the beginning of 2021, 95 of them in February alone.

Transactions continued to target distressed assets, but investments in innovation, start-ups, fintech, healthcare, infrastructure, and logistics have started to steal the spotlight. Technology, mining, and agribusiness continued to be the golden boys. In the last 12 months, the market witnessed a strong warming up in acquisitions of rural, commercial and residential real estates and a significant reallocation of funds from fixed to variable income investments.

Good for some and not so lucky for others, social isolation combined with a decrease in demand and consumption led to the unfortunate total or partial paralysation of 13 automobile companies in the country. Life also became difficult for those working in sectors related to entertainment, food services, footwear, leather goods, urban public and passenger transportation.

From a juridical perspective, the Brazilian Supreme Court ("**STF**") took the delay and, during the pandemic, judged an incredible number of cases, considerably reducing its collection of pending judgments to around 25,000 cases, the smallest balance in the last 25 years. Taxwise, important decisions ruling matters related to ICMS (State Value-Added Tax), ISS (Service Tax), ITCMD (Inheritance and Gift Tax), IPI (Excise Tax) and ITBI (Property Transfer Tax), although not always favourable to the taxpayers, somehow increased certainty and gave more guidance in many controversial issues, bringing more juridical safety for investors in certain sectors.

Among these important decisions, two of them caused a lot of noise in the field of corporate reorganisation and succession planning.

In Brazil, the onerous transfer of real estate is subject to ITBI, a Municipal tax levied at various rates according to the city where the asset is located (in the City of São Paulo, the applicable rate is 3%). Pursuant to our Federal Constitution (item I of paragraph 2 of article 156), ITBI shall not be imposed when real estate is incorporated to the equity of a legal entity in realisation of capital, nor when this asset is transferred through a merger, spin-off,

or extinction of a company, except if, in such cases, the acquirer develops as a preponderant activity the leasing or purchase and sale of immovable properties (real estate activity).

Following a broad interpretation of the wording of article 56, Brazilian doctrine on the matter always understood that the transfer of real estate: (i) in contribution to the "equity" (not "capital") of a legal entity is not taxable; and (ii) either by way of capital/equity contribution or within a corporate reorganisation context is taxable when the company receiving the property has "real estate activities" as its main core business. The STF, however, when deciding Extraordinary Appeal No. 796,376 (Theme 796), in general repercussion, understood that ITBI immunity: (i) "does not reach the value of the assets that exceed the limit of the capital stock to be paid in"; and (ii) applies to real estate contributed to the capital of companies even if such legal entities have real estate activity as their principal business.

In practical terms, the STF:

- denied tax immunity to the part of the value of the real estate being contributed to the equity of a company that exceeds the amount destined to its capital stock (this is the case when the value of the contribution in kind is partially attributed to the capital – "contribution of assets in realisation of capital" – and partially to a share premium reserve – "contribution of assets into equity");
- was silent as to the cases involving real estate with a market value that exceeds the amount being contributed to the capital stock (income tax law allows such contribution in kind to be carried out following the same amount of real estate informed in the individual's income tax return, but ITBI law determines that the ITBI taxable basis shall nevertheless correspond to the market value of the relevant asset, regardless of the amount used in the capital increase). The levy of ITBI on differences arising from it (market value *versus* income tax return value) remains, then, still unclear; and
- accepted to apply the tax immunity to contributions made to the capital of a legal entity even when the acquirer (the company receiving the property) is a real estate company. Former understandings were always in the sense that real estate companies would never benefit from the non-levy of ITBI, regardless of how the property was transferred (i.e., by way of capital or equity contribution, merger, spin-off, etc.). Despite the good news coming from the STF's new understanding, taxpayers should bear in mind that, unfortunately, this issue remains controversial at lower court level. On the one hand, the most recent decisions issued by the São Paulo and Ceará States followed the STF's position and accepted the contribution in kind (with real estates) to the capital of a company to be carried out without ITBI, but some others have not followed the STF's position on the grounds that this topic ("real estate preponderant activity") was not part of the original Extraordinary Appeal No. 796,376's request and, therefore, this issue has been regarded as merely incidental. In lower courts, this issue is still uncertain.

Another subject appreciated by the STF relates to ITCMD, a State tax levied at various rates according to the State where the donated asset or heritage is deemed to be located (in the State of São Paulo, the applicable rate is 4%). Pursuant to our Federal Constitution (item III of paragraph 1 of article 155), the levy of ITCMD depends on further regulation to be established by way of a complementary law whenever the asset (movable or immovable) is transferred: (i) through donation and the doner is resident or has domicile abroad; and/or (ii) in succession and the deceased was resident or had domiciled outside Brazil or the relevant inventory was processed abroad. For years, State legislation imposed the charge of such tax without said proper regulation. The STF finally settled this controversy by prohibiting the collection of the tax without the enactment of the complementary law (Extraordinary Appeal No. 851.108 (Theme 825), decided in general repercussion).

Notwithstanding this decision, the STF modulated its effects to guarantee that the benefits coming from this leading case will only reach donations occurred and inheritances received as from the date of publication of this STF judgment, except for lawsuits pending conclusion until this moment. In practical terms, no retroaction of effects will take place to reach events that occurred before April 20, 2021 (date of publication) that are not covered by a judicial discussion. This modulation excludes from the list of beneficiaries those who discuss the levy of the tax in administrative proceedings. In addition, to be valid for modulation purposes, the relevant lawsuit must discuss: (1) to which State the taxpayer must pay ITCMD; and (2) the validity of ITCMD collection. For those who have already paid the tax, no refund will be available.

Amounts involving estate and inheritance planning that may be potentially impacted by such decision are extremely relevant (as there are many wealthy Brazilians living abroad or maintaining their fortune in foreign structures – e.g., funds, foundations, trusts, investment vehicles) and therefore, since the STF's decision, a lot of pressure is being put on lawmakers to draft and vote on the complementary law. Pressure has increased further due to the recent filing of 24 Direct Unconstitutionality Actions by the Attorney General's Office against State laws that impose taxation on donations and inheritances from abroad. On March 17, 2021, Bill No. 37/2021 was presented by the Federal deputy Hildo Rocha, aiming to regulate the subject.

Key developments affecting corporate tax law and practice

Purely domestic changes

Unlike previous years, the last 12 months were not marked by relevant legislative changes, in neither the legal nor the tax sphere. As mentioned, novelties remained on the account of the STF, which intensively worked on important judgments during the pandemic. In the domestic scenario, the STF appreciated leading cases involving some of the Brazilian sales taxes, such as ICMS (State tax levied on the import and sale of goods) and PIS and COFINS (Federal social contributions levied on the import of goods and services, as well as on revenues).

In relation to ICMS, the Court, for instance, decided to deny the charge of the tax on the transfer of goods from one establishment to another of the same taxpayer located in different States under the allegation that, in such situation, no taxable event takes place as there is no transfer of ownership or the performance of an act of mercenary. Such decision corrects a huge distortion caused by repeated attempts by the State tax authorities to reach situations in which there was no real economic circulation of goods.

Following other good news, the STF also corrected a misinterpretation given by the Federal tax authorities in relation to PIS and COFINS. After 20 years of dispute, on March 15, 2017, the STF, in Extraordinary Appeal (RE) No. 574,706 (with recognised general repercussions and *erga omnes* effects), decided that ICMS that is: (i) levied on domestic sales of goods; and (ii) included in the sale prices of the company, must be excluded from the relevant revenues for the purpose of calculating PIS and COFINS (which are due over companies' gross revenues). According to the STF: (a) ICMS that is part of the sales price is not a revenue of the company, but rather an amount that is received by the company to be passed forward to the government; therefore, it cannot be interpreted as "revenue" for PIS and COFINS purposes; and (b) the amount of ICMS to be excluded from PIS and COFINS bases corresponds to ICMS due on sales (which are mentioned in the relevant company's invoices) and not to ICMS actually paid by the company (i.e., ICMS due (output), net of ICMS credits/inputs).

Despite the STF's decision, the Federal tax authority (COSIT) clarified that ICMS eligible for tax exclusion relates to ICMS actually paid. If they followed COSIT's understanding, several companies would have no ICMS amount to exclude, as many of them suffer from ICMS credit accumulation. Huge disputes began, then, to discuss the amount to be excluded, and uncertainties caused significant losses to the companies.

On May 13, 2021, the plenary session of the STF determined that ICMS to be excluded from the PIS and COFINS taxable bases is the tax highlighted in the invoices (and not ICMS actually paid by the taxpayer). In addition, the Court modulated the effects of the decision to ensure its retroaction (i.e., a tax refund for the five years prior to the filing of the lawsuit) only to those who filed a lawsuit before March 15, 2017 (the date of the STF's judgment that recognised the right to exclude ICMS from the PIS and COFINS bases). According to calculations of the Attorney General's Office of the National Treasury, this modulation saved the government from losses with retroaction effects of more than BRL 250 billion (USD 47 billion). Even with the modulation, the market celebrated the outcome of this judgment.

Changes resulting from/inspired by international developments

Brazil's request to join the Organisation for Economic Co-operation and Development ("**OECD**"), made in 2017, is still awaiting the acceptance of the 37 member countries in order for the formal accession process to start. Brazil's entry into the OECD has been built since 1996 and, since then, many actions, including adherence to various OECD instruments, have been taken. Notwithstanding this, Brazil has been severely criticised, as the country: (i) has not been efficient in adopting actions to fight corruption; (ii) has not implemented (or even started to implement) any concrete tax reform; and (iii) failed to control the pandemic and to put in place a minimally effective vaccination campaign.

In addition to the above, the OECD still requires other measures to be taken such as the meeting of the goals of the Paris Agreement on Climate Change and the liberalisation of the economy. None of these goals have been successfully pursued by the Brazilian government with concrete results.

Competition is another topic that must be put on the table. In addition to Brazil, five other countries (Argentina, Bulgaria, Croatia, Peru, and Romania) are also candidates, and this makes Brazil's acceptance even harder.

Taxwise, in February 2021, new treaties to avoid double taxation executed by Brazil entered into force, such as those with Singapore, Switzerland and the United Arab Emirates.

Besides this, no further significant developments were realised. As a matter of example, Brazilian transfer pricing rules remain isolated from the rest of the world and no further progress has been made in making Brazilian rules compatible with OECD guidelines.

In relation to BEPS Action #1 (Digital), several Bills have been proposed to implement a Digital Service Tax in Brazil. This taxation has been greatly criticised as Brazil does not need another tax to make digital services even more expensive. To cut a long story short, except for cases of technology imported by individuals, all other situations involving digital services are highly taxed in Brazil. Unfortunately, Brazilian lawmakers do not agree and during the pandemic, several different Bills were presented.

In a nutshell, most of the Bills propose taxation on gross revenues, at rates varying from 1% to 5%. Among the taxable events, we may mention online advertising, exploitation of digital platforms (used to allow direct selling of goods or services between end-users), transfer of data, streaming or download of digital content, and online games. Bill No.

241/2020, for instance, proposed a general 3% rate and an increased 10% rate for revenues related to electronic betting.

COVID-19

Brazil finished the year of 2020 and started 2021 as the epicentre of the pandemic in the world, with a surprising, rising number of contamination cases and deaths. Up to May 2021, more than 435,000 deaths were officially reported, and infection records exceeded 15 million people. Among the possible reasons for this worsening of the situation, specialists point to local authorities' failures to contain people agglomeration and President Bolsonaro's resistance to implementing an effective national vaccination campaign. Political fights between the President and governors of the State and the City of São Paulo also did not help to stem the crisis.

Controversies surrounding lockdowns *versus* the urgent need to recover the domestic economy still divide opinions and social isolation measures, when taken, are quickly suspended, always justified by an alleged and sudden improvement in the health crisis. Shutdowns and the reopening of the market seem to be being used as an instrument to compose opposing opinions, within a purely political game.

Financially, we note that public budgets to pursue pandemic control are unfortunately being underestimated. Very recently, the Ministry of Economy admitted to having not allocated enough funds in 2021's budget to tackle the virus or offer greater emergency plans to people, as the government was not expecting the pandemic to get worse. The last not-so-successful lockdown in April was followed by an even greater increase in cases of contamination, which was not the plan of the Federal government.

However, despite COVID's numbers, the economic impact caused by the second wave has been surprisingly positive and economists have begun to estimate a minimum 3% growth for the year. The positive market reaction seems to be a result of a more moderate shutdown in 2021, showing the economy's desire to recover despite the price to be paid. Delays in vaccination and a possible low efficacy of vaccines against new strains of the virus mean that risks of a third wave cannot be ruled out and predictions for the second semester may be subject to further review.

Tax climate in Brazil

The past 12 months started with concerns related to COVID-19, including a shyly optimistic scenario coming from the promised vaccines as well as slight pessimism from a suffering economy, with many States and some industry and service sectors completely broken. Notwithstanding the crisis, the Brazilian capital market gradually warmed up, investments in digitalisation and business transformation were substantial, and important judgments carried out by the STF signalled that, despite all the pressure, decisions would still be issued based on legal (and not financial or political) grounds.

Regarding corporate reorganisation and doing business with tax savings, the market continues to wait for the appreciation by the STF of Extraordinary Appeal No. 2,446. This case discusses the legitimacy of tax planning, the freedom of taxpayers to conduct their business in a less costly manner from a tax perspective, and the lack of regulation to give grounds to tax authorities to disregard acts and restructuring carried out based on the sole or main purpose of saving taxes. Up to now, five (out of 11) votes reflect that taxpayers are allowed to seek, through legitimate means, tax reductions whenever their acts are practised before the occurrence of the relevant taxable event. Taxpayers are then waiting for one more vote to bring down tax authorities' attempts to forcibly apply the substance over form principle in Brazil.

While this important leading case awaits a conclusion, taxpayers celebrate some isolated victories such as the judgment by the STF of the Declaratory Action of Constitutionality No. 66/DF. In this case, the STF recognised the compatibility of article 129 of Law No. 11,196/2005 with the Federal Constitution. In practical terms, the STF accepted intellectual services (including those of a scientific, artistic, or cultural nature and those of a very personal nature) to be rendered through legal entities. For years, tax and labour authorities disregarded such entities' legal personalities, aiming at collecting more taxes and social security contributions at the level of their individuals' partners. Taxpayers can now enjoy better legal certainty as, according to the STF, such disregard is only possible in cases of deviation of purpose or patrimonial confusion.

Developments affecting attractiveness of Brazil for holding companies

Brazil lost its attractiveness for holding companies since the country decided, back in 1995, to migrate from a territorial to a worldwide taxation basis and began to tax profits earned by controlled and affiliate companies located overseas with limited treaty protection (alien profits are commonly taxed in Brazil on an accrual basis, notwithstanding article 7 of an existing treaty that could, in theory, prevent taxation on still non-distributed profits). Brazilian controlled foreign company rules apply regardless of the nature of the income (active or passive) and the location of the foreign subsidiary (tax haven or not).

Unlike other jurisdictions, Brazil offers no special tax regime for holding companies nor any participation exemption rules and imposes thin cap rules at a 2:1 debt-to-equity ratio (0.3:1 ratio if the beneficiary of the interest is in a tax haven jurisdiction or is subject to a listed privileged tax regime).

In addition, rumours indicate that: (i) distribution of dividends will soon be taxed again in Brazil, at rates ranging from 15% to 25%; and (ii) Brazil's intent to become an OECD member will give cause to the start of more renegotiations of tax treaties, which, as a consequence, may result in: (a) the suppression of current treaty benefits (by eliminating exemption on dividends received and matching credits rights); and/or (b) the increment of requirements for parties residing in a member state to claim for treaty advantages (e.g., inclusion of treaty shopping provisions, anti-abuse rules or limitation on benefits clauses).

Industry sector focus

As mentioned, many industry and service sectors have been severely affected by the COVID-19 crisis, such as the automotive industry, entertainment, passenger transportation, and food services. Focus during the pandemic continued, then, to be pointed to the traditional mining and agribusiness sectors, as well as infrastructure and healthcare. Heavy investments were also noted in technology and logistics, due to the business, supply chain and digital transformation that reached the entire market, including not only tech companies but also companies belonging to the industry sector, such as automobile companies.

This digitalisation process enabled new ways of hiring employees and collaborators (home office, telework, virtual and international assignments) and brought lots of new issues, doubts, and controversies to the table (international labour agreements, expatriation, remittances of salaries and fees abroad, foreign exchange control, immigration, visas, etc.). Transformation of the supply chain and new roles (e.g., logistics companies becoming buy-and-sell companies and marketplaces becoming pure intermediaries) now played by companies belonging to the e-commerce environment (digital platforms, marketplaces, payments online, logistics and trading companies) also sparked lots of tax discussions.

In the digital field, one important topic finally appreciated by the STF between the end of 2020 and the beginning of 2021 relates to the licensing of software, a critical controversy that for decades was the biggest obstacle for the import and development of technology in the country.

Disputes involving software derive from the complexity of the Brazilian tax system, which provides for several different taxes (IRRF, ISS, ICMS, CIDE, PIS, COFINS, IOF) that are collected by different tax authorities (Federal, State and Municipal) and that may altogether be potentially charged, for instance, on remittances abroad for the use of software. Either in the international or domestic arena, one of the most controversial issues comes from uncertainties as to the legal nature of transactions involving the right to use computer programs. In contrast to the juridical qualification commonly given in other jurisdictions (where the license of software is, in general, characterised as a provision of a service), in Brazil, doubts have been kept for years as to whether such a transaction should be regarded as a rendering of a service, the purchase of a product or the licensing of a right. Different tax outcomes arise from each possibility and double or triple taxation has always been treated as an unbearable risk for taxpayers.

After years suffering from changes in State and Municipal legislation and updates in Federal, State and Municipal tax authorities' understandings (all aiming at strengthening tax collections), in February 2021, the STF judged two Direct Unconstitutionality Actions (ADI 5,659 and ADI 1,945) and gave some more comfort to the market by clarifying that the licensing of software shall not be qualified as a sale of a product and shall thus not be subject to ICMS.

Such important leading case followed a trend of the STF, which has, in its recent judgments, consistently decided on the levy of ISS (to the detriment of ICMS) on so-called "complex contracts" (agreements that involve the simultaneous provision of services and supply of goods).[1] In the Brazilian tax system, ISS and ICMS should not be imposed together over a single taxable event, but for the past few years double taxation has been applied to software licences.

According to the Court, elements of "complex contracts" (or "mixed operations") must be seen as integral parts of a single contractual arrangement, formed by a preponderant nucleus ("**core service**"). As a result, no segregation of each element of the contract can take place to enable the levy of ISS on the portion of services, ICMS on the supply of goods and the non-collection of any tax on the portion of non-listed services or licences of rights. In case the "core service" is expressly provided for in the list attached to Complementary Law No. 116/2003 (ISS Federal legislation), the complex contract shall be subject, on an exclusive basis, to ISS, even if it provides for the supply of any goods or products. If no service is listed, the operation may be subject to ICMS if the circulation of goods is present.

Although this STF decision does not solve other problems related to the taxation on software licences (e.g., controversies surrounding software as a service, royalties for distribution rights, etc.), it was received by the market with a lot of optimism not only for tech companies but for all those dependent on technology.

The year ahead

Isolated tax Bills (out of the context of the long-awaited tax reform) remain on the agenda of the National Congress. Among those most likely to be approved in the short and medium term, we may mention:

- Bill No. 250/2020 (ITCMD): this Bill proposes the amendment of the São Paulo State legislation governing ITCMD to raise its rate from 4% to 8% and to prioritise the

collected funds for the health sector. Among other Bills being analysed, there is Bill No. 1,315/2019 that proposes, also in the State of São Paulo, progressive rates ranging from 3% to 8%. Funds collected shall be destined for public education. Notwithstanding such Bills, the rumour is that the São Paulo State government plans to increase the ITCMD rate to 20%; and

- Bill No. 4,242/2019 (withholding tax on dividends): this Bill proposes the reintroduction of the dividends tax on dividends distributed to legal entities or individuals, residents, or non-residents, out of profits ascertained as of January 2020. This specific Bill proposes a rate of 1%, but rumours indicate that the government plans to tax at higher rates (from 15% to 25%). The capitalisation of profits, generated as of 1996, is permitted, without taxation, and shareholders may benefit from the increment of their acquisition cost, for tax purposes, provided that: (i) no capital reduction has occurred in the five years prior to the capitalisation; and (ii) no capital reduction or liquidation of the company occurs within the subsequent five years.

In relation to tax reform, no significant changes have occurred in the last 12 months. Three distinct initiatives (from the Senate, the House of Representatives and the Federal government) continue to be in the making, all of them aiming at simplifying the Brazilian tax system by instituting new taxes and extinguishing others. No reduction of tax burdens is expected, and the desired tax simplification may take longer to be accomplished as long-term transition periods (from 10 to 15 years) for the whole implementation process are provided in all proposals.

For the short-term future, the National Congress will work hard on the approval of the existing proposals as the government intends to make a lot of progress on tax reform until the end of 2021. How this legislative work will take place is still unclear as, apparently, the Senate will focus its efforts on unifying the Bills (PECs 45 and 110) proposed by the Senate and the House of Representatives, while the House of Representatives will focus on the approval of the Bill presented by the Federal government (which targets the creation of the CBS, i.e., the unification of PIS and COFINS). These parallel works seem to be conflicting as PECs 45 and 110 also consider modifying PIS and COFINS legislation.

While we sit and watch the Congress come together, taxpayers may continue to analyse the countless cases judged in the past months by the STF. It seems that this Court has finally felt the strong international pressure and, at least in the case of the exclusion of ICMS from the PIS and COFINS calculation bases, has chosen to decide this leading case based on purely legal arguments, despite the possibility that the final result could cause losses to the public coffers. Despite the financial crisis caused by the pandemic, good and balanced decisions issued by the STF in recent times have calmed spirits and slowed taxpayers' heartbeats. For the year ahead, then, the word is "hope".

* * *

Endnote

1. During the pandemic, the STF decided for the levy of ISS (and from the removal of ICMS collection) on: (i) software licences (provided in item 1.05 of the ISS list); (ii) franchise agreements (provided in item 17.08); and (iii) manipulated medicines (provided in item 4.07 of the ISS list as "pharmaceutical services").

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