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Taxation and Customs

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The role of BRICS in the forming of a New Legal Order

*Topic 5. Current trends in the development of
case law on cross-border taxation in Brazil:*

Cross-border services and royalties

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Why this issue?

Digital Economy & BEPS: Still Unsolved!

- Art. 9 x Arts. 5&7 x Art. 12: New Digital PE? New withholding taxes under Art. 12?
- Definition of intangibles remains elusive: residual income embedded in **Royalties**
- Residence/source debate, global formulary apportionment (GFA) vs. Arm's Length Principle (ALP), EU State Aid...
- ***Brazilian Experience: Still Hot! Solution or Problem?***

Background & Context

Cross-Border Services in Brazil (pre-2000)

- Pre-1990s: closed economy (forex barriers, non-deductibility, high withholding taxation, excise tax)
- 1990s: forex/trade barriers relaxed, deductibility of fees
- Private letter rulings confirm application of Arts. 5&7 (e.g. *Processo de Consulta 369/98 SRRF 7th Region*), inconsistent interpretation across multiple regions and national SRF/RFB Offices

Cross-Border Services in Brazil (2000-2014)

- Tax barrier to service/IP trade: treaty override Art. 5&7 vs. 21 *saga* begins with AD COSIT 01/2000
- Other taxes (CIDE, Pis/Cofins/ISS): Effectively UK DPT?...
- German denounces and terminates Brazil Treaty in 2005

COPESUL Case of 2012: Effects post-BEPS

Superior Court of Justice (STJ)

- STJ RE 1.161.467-RS (May 17, 2012)
- Prevalence of Brazil-Canada Treaty (Art. 98 of National Tax Code CTN)
- Dismisses erroneous Art. 23 (other income) argumentation
- Not *erga omnes* – leading case but no generally binding precedent was set
- Federal Tax Attorney-General (PGFN) acquiesced STJ ruling, RFB did not

The *Finnish threat* builds upon COPESUL

- New post-COPESUL strategy was devised by RFB and launched in conjunction with PGFN: Normative Opinion PGFN CAT 2.363/13, Technical Note RFB-COSIT 23/2013, Interpretative-Declaratory Act RFB 5/2014
- **Extended coverage of Royalties definition under Art. 12**
- **Extended coverage of Independent Personal Services under Art. 14**

Brazil-COPESUL Case of 2012: Effects post-BEPS

Extended Coverage of Art. 12

- Unique language, not following OECD/UN
- Services may or may not be accessory to intangible transfers under Art. 12: ***language of Protocols can be determinative***

Extended Coverage of Art. 14

- Unique language, not following OECD/UN
- Explicit reference to companies, partnerships, firms: ***nature of activity is objectively deemed personal***, irrespective of whether rendered by an individual, group of individuals, unincorporated firm, or corporate entity

Brazil-COPESUL Case of 2012: Effects post-BEPS

Interpretation of treaty (VCLT Arts. 31/32) cannot be derived from UN/OECD Model/Commentary given differences in Protocol language and differences in context. **Brazilian policy is ostensive** (including its overriding barrier to service trade) and hence *bona fide* interpretation **should be extensive** when Treaty or Protocol language permits. **Exception: treaties negotiated from 2000 through 2013.**

Brazil-COPESUL Case of 2012: Effects post-BEPS

Extended Coverage of Arts. 12 or 14: Existing Treaties

- Treaties that do not extend the coverage of Art. 12: Austria, Finland, France, Japan and Sweden
- Extension of Art. 12 expressly covered in several treaties/protocols (e.g., Argentina, Canada, Chile, China, Czech Republic, Denmark, Ecuador, Hungary, India, Italy, Luxembourg, the Netherlands, Norway, Peru, the Philippines, Portugal, South Korea and Spain)
- Extension of Art. 14 to legal entities is expressly covered in relatively few treaties/protocols (e.g., Mexico, Italy) yet can be construed under domestic law if treaty language differs from OECD/UN Models

Brazil-COPESUL Case of 2012: Effects post-BEPS

Extended Coverage of Arts. 12 or 14 post-BEPS: a true prospect, for better or worse!..

- UN work... **alternative methods** considered under BEPS Action 1 (WHT, Digital PE, DPT)...
- *Will Brazilian policy spill-over? Effects of the prospective expansion of Brazil's limited treaty network... tbd!..*

International Tax Treaty Law in BRICS Countries: Brazil



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