



International Tax

Brazil Tax Alert

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Tax authorities revise view on tax treatment of payments for technical services/assistance

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The Brazilian tax authorities issued guidance on 20 June 2014 (Interpretative Act No. 5/2014 (ADI RFB 5/2014)) in which they revise their position on the withholding tax treatment of payments made abroad for technical services and technical assistance in cases where a tax treaty is applicable. The new guidance is aligned with an opinion released by the National Treasury Attorney's Office (PFGN) in February 2014, in which the PFGN re-examined the long-standing view of the tax authorities on this issue (for prior coverage, see the alert [dated 27 February 2014](#)).

Based on guidance issued in 2000 (Declaratory Act-ADN COSIT 1/2000), the tax authorities took the position that payments made for technical services rendered without an accompanying transfer of technology should be deemed to be "other income" rather than business profits under a tax treaty if the recipient entity does not carry on business in the other contracting state through a permanent establishment. Treatment as "other income" resulted in the taxation of the income at source, ignoring treaty benefits.

The new guidance clarifies that the tax treatment of payments made by a Brazilian person to a nonresident entity or individual for the provision of technical services or technical assistance, regardless of whether there is an accompanying transfer of technology must be determined in accordance with an applicable tax treaty, as follows:

- 1) Where a treaty provides that a payment for technical services and technical assistance should be treated as royalties and the treaty allocates taxing rights to Brazil, the payment should be subject to withholding tax under the royalties article regardless of whether there is an accompanying transfer of technology;
- 2) Where item 1) does not apply and the technical services or technical assistance are related to the technical skills of a person or group of persons, and the treaty allocates taxing rights to Brazil, the payment should be taxed in accordance with the independent personal services article; and
- 3) In all other cases, the payment should be subject to the treatment in the business profits article.

ADI RFB 5/2014 also revokes the guidance issued in 2000.

Comments

Read in conjunction with the opinion of the PGFN and the repeal of ADN 1/2000, the new guidance represents a landmark change in the Brazilian tax authorities' position on the applicability of tax treaties in relation to outbound payments for technical services and technical assistance. Because the new guidance has an "interpretative" nature, it can be applied on a retroactive basis and, therefore taxpayers should reassess their specific fact patterns, taking into account the nature of services and the countries involved, to correctly apply treaty benefits prospectively and retroactively.

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