

Brazil changes position on application of tax treaties to some outbound payments for technical services

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The General Office of the National Treasury's Attorney (*Procuradoria-Geral da Fazenda Nacional – PGFN*) recently changed its position on the application of tax treaties for the avoidance of double taxation on outbound payments for the rendering of technical services without transfer of technology.

In the past, the PGFN and the Federal Revenue Office (*Receita Federal do Brasil – RFB*) published Normative Opinion 776/2011 and Declaratory Act 1/2000 providing, in a nutshell, that tax treaties signed by Brazil do not prevent the levy of withholding tax on these types of outbound payments. Accordingly, the amounts paid for the rendering of technical services without the transfer of technology would not fall within the concept of "business profits", as stated in article 7 of tax treaties signed by Brazil, since these amounts are defined as "revenue" of the foreign beneficiary under Brazilian domestic law. As a result, those payments would fall within the scope of the "other income" article, which in the case of tax treaties signed by Brazil generally diverges from the OECD Model by allowing taxation at source.

Normative Opinion 2,363/2013, recently made available by the PGFN, revisited the issue and established that, for the purposes of applying tax treaties, the definition of business profit of foreign enterprises should comprise the payments made by Brazilian sources for the rendering of technical services without transfer of technology. Thus, as a general rule, PGFN has recognised that article 7 of tax treaties signed by Brazil prevents the levy of withholding taxes on such payments, unless attributable to a permanent establishment situated in Brazil.

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