



International Tax

Brazil Tax Alert

27 July 2015

Tax planning disclosure requirement introduced – BEPS Action 12

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The Brazilian government published rules (Provisional Measure (PM) 685) on 22 July 2015 that include the introduction of a new requirement for taxpayers to disclose transactions that are carried out to reduce, eliminate or defer taxes.

PM 685 is the first response of the Brazilian government to any of the action items under the OECD's base erosion and profit shifting (BEPS) initiative. Action 12 (Mandatory disclosure rules) will require taxpayers to disclose potentially aggressive or abusive tax planning arrangements. The OECD issued a discussion draft on action 12 on 31 March 2015 in which it made recommendations regarding the design of mandatory disclosure rules, taking into account the administrative costs for tax authorities and businesses.

The new disclosure requirement under PM 685 will be triggered if any of the following situations apply for a Brazilian taxpayer in the previous calendar year:

- The legal acts carried out by the Brazilian taxpayer do not have a justifiable business or economic purpose other than to generate tax savings;
- The structure adopted by the Brazilian taxpayer to carry out the legal acts is "unusual," uses an indirect contractual transaction or departs in its nature from a typical contract; or
- The transactions carried out by the Brazilian taxpayer are specifically listed in regulations to be issued by the Brazilian tax authorities.

Where disclosure is required, it must be made by 30 September of the following year.

PM 685/2015 also provides that the disclosure of events or legal acts that have not yet taken place will be deemed to constitute a request for a formal private letter ruling, which the tax authorities have discretion to grant or deny.

Once a disclosure is made, the Brazilian tax authorities will examine the information and will be able to disregard transactions that are not carried out for valid business purposes. If a transaction is disregarded, the authorities will notify the taxpayer that the tax due (include late payment interest, but without any penalties) must be paid within 30 days. (Transactions that under tax audit at the time the disclosure is made will be outside the scope of this procedure.)

PM 685/2015 also will allow a transaction to be disregarded where the disclosure contains errors, omissions, false or fraudulent information, or is presented by an entity that is not responsible for any tax liabilities arising from the transaction.

Failure to comply with the disclosure requirement will be considered a deliberate omission with the intent to engage in tax evasion or fraud, and the taxpayer will be subject to an enhanced penalty of 150% (instead of the ordinary 75% penalty) of the tax not paid.

The Brazilian tax authorities will be issuing guidance on the procedural aspects of the disclosure (i.e. form, terms and conditions).

Comments

As mentioned above, PM 685 is the first step taken by the Brazilian government in response to the BEPS initiative. As worded, the measure seems to be broad in scope and as such is likely both to increase uncertainty and to prompt an adverse a reaction from the private sector. The probable consequence is that the Brazilian Congress will be unwilling to approve the PM in its current form.

Although PM 685/2015 is effective as from 22 July 2015, the House of Representatives and Senate still must vote on the PM, and this must take place within four months from the date the PM was published. A PM will remain in force for two months and will expire automatically if it is not extended for an additional two-month period or if the House and Senate do not vote on the PM within the four-month period. The Brazilian Congress may approve, amend or reject the terms of PM 685/2015.

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