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Brazilian National Report

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## Background

As certain governments around the world struggle with fiscal deficits, their attention has turned to international tax evasion (illegal) and the perceived shortcomings of the international tax system from the point of view of tax avoidance (legal). In other regions we have seen unsettled economies combined with civil unrest. Families are seeking safer, more stable jurisdictions not just for themselves but for future generations as they look for long term security and are increasingly looking overseas for a solution.

How do our immigration, legal and tax systems cope with the realities and complexities of 21st century aging family life and the demand for economic security/stability? What are the particular challenges for practitioners in assisting these families? How does increasing governmental exchange of information and compliance requirements affect strategies for investment, tax planning and personal security. How does the global citizen manage a world of overlapping, often conflicting regulation?

### 1. PRELIMINARY MATTERS

Prior to dealing with the legal problems thrown up by the case studies, could you please deal with the following questions with reference, where relevant, to any recent case law or general practice. If you need to clarify the answer to a question, please do so. If a question is not an issue in your country, please provide an explanation as to why it is not.

#### 1.1 Immigration and Nationality [for Immigration Commission only]

### 1.2 Cross-border succession

1.2.1 Is testamentary freedom a right recognised by national law or public policy?

(B) No. The testamentary freedom is relative due to the fact that only 50% of the estate is free from the forced heirship rule.

1.2.2 Can those entitled to the reserved portion (heirship entitlement), during the life of the donor, waive their rights to a reserved share?

(B) No. Only upon the demise, but there is the right of substitution for the heirs of the individual with rights on reserved portions.

1.2.3 Can an individual resident in your country elect the law applicable to his/her succession? If relevant/applicable, please consider your answer in the context of Brussels IV (Regulation (EU) 650/2012) and/or the 1989 Hague Convention on the Law Applicable to the Estates of Deceased Persons.

(B) No

### 1.3 Personal taxation and compliance

- 1.3.1 Please provide a brief summary on the current rules as to liability to tax (e.g. residence, nationality, domicile (if applicable)).

Tax residency/domicile

Liability to Brazilian taxation on individuals is primarily based on residency test. The general common rule of 184 days is applicable in Brazil. Legislation on the subject includes: article 12 of Federal Law n ° 9.718, dated November 27, 1998; article 2 of Normative Ruling SRF n ° 208, dated September 27, 2002, modified by Normative Ruling RFB n ° 1.008, dated February 9, 2010.

The normative body abovementioned establishes the following:

*For fiscal purposes, the following will be considered resident:*

*I - permanent residency in Brazil;*

*II - expatriates working for Brazilian Governmental branches and departments abroad;*

*III - foreign citizens entering Brazil:*

*a) under a permanent residency visa, on the date of the arrival;*

*b) under a temporary residency visa, when:*

*1. under an employment agreement, on the date of the arrival;*

*2. under the completion of 184 days of stay, consecutive or not, within the period of 12 months;*

*3. on the date a permanent visa or employment visa is issued if prior to the completion of 184 days of stay, consecutive or not, within the period of 12 months;*

*IV - Brazilian citizen that acquired the non resident status and returns to Brazil with the intent to resume residency, on the date of arrival;*

*V - Brazilian residents that leave the Country without delivering/filling the proper information of exit of the jurisdiction - Declaration of Definitive Departure, that has to be reported within 12 months of the actual departure.*

- 1.3.2 Have there been any changes introduced in the last 24 months to the definition of who is a "taxpayer" e.g. "resident", "habitually resident" or "domiciled" in your country?

(B) No

- 1.3.3 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for residents?

(A) Yes

If yes, please briefly set out the key provisions.

Brazilian tax authorities, specially Federal Revenue Service, is already

considered one of the most effective tax authorities in the World. There are already many controls in place - i.e. reporting obligations, etc...

However, since last November 2013, the President enacted a Provisional Measure (MP 627/2013) that has the force of law but has to be confirmed by the Legislative until May 2014.

This piece of law will introduce significant amendments to our tax law with regards to Brazilian investments outside Brazil.

With regards to individuals investing in foreign companies, Brazilians used to enjoy a very interesting tax deferral.

Taxation of profits and dividends distributed by companies located abroad where only imposed upon distribution.

However, MP 627/2013, under article 89, determined the end of such deferral, starting on 01/01/2015.

Once the measure enters in force, even if the profits and dividends are not distributed, they will be taxed.

There is still some doubt about the reports that will be demanded from the tax payers - monthly or yearly. This will be cleared during this year, after the Provisional Measure becomes a Federal Law and the Federal Revenue Service rules its internal procedures.

1.3.4 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for non-residents with assets located in your country?

(B) No

If yes, please briefly set out the key provisions.

1.3.5 Has your country undertaken (or proposed the introduction of) any legislative steps in the last 24 months to promote transparency in tax reporting obligations and to combat international tax evasion in the context of private wealth?

(A) Yes

If yes, please briefly set out the key measures.

During 2005 Brazil observed one of the largest corruption scandals when the embezzlement of public funds to purchase political support came to light. This scandal, known as Mensalão, involved the purchase

of congressional votes by the ruling political party in Brazil. 38 defendants were charged, among whom included the President's Chief of Staff, José Dirceu. The long list of charges during the lengthy trial included: money laundering, embezzlement, corruption, conspiracy and the misuse of public funds. During the trial, several of the defendants had money laundering charges dropped due to the fact that the Brazilian anti-money laundering (AML) law at the time required actual knowledge of the origin of the funds.

In July of 2012, Brazilian President Dilma Rousseff signed an amendment, enacting the country's Anti-Money Laundering Law. This new law known as "12.683/2012" changed the manner in which the country previously addressed this type of economic and financial crime.

The new law defines money laundering as the concealment of proceeds of any crime or misdemeanor, no matter how large or small. The new law also excludes the requirement that actual knowledge of the origin of the illicit fund must exist.

The new law broadens the list of individuals and legal persons obligated to report suspicious activities ("obligated persons"). It includes individuals and legal person who: (i) promote, serve as intermediary or negotiate athletes' transfer rights, artists or fairs, exhibitions or similar events; and (ii) commercialize goods of high value from rural or animal origin or that facilitate such commerce.

One of the most controversial aspects of the new law is that it requires individuals and legal entities that provide advisory, consulting, accounting, auditing or assistance of any kind, even on a sporadic basis, to report suspicious activities in connection with the following operations: (a) sale and purchase of real estate, including commercial or industrial establishment or equity participation of any kind; (b) management of funds, securities or other assets; (c) opening or management of bank accounts, savings accounts, investments or securities; (d) incorporation, exploration or management of any kind of company, foundation, trust or similar structure; (e) financial, corporate or real estate transactions; and (f) sale or acquisition of rights on contracts related to professional sports or artistic activities.

This provision has raised several questions about professional secrecy. Depending on the interpretation given to this new feature of the law by the courts, attorneys might even be obligated to report suspicious activities. Entities obligated to report are also required to identify their clients and maintain and update their clients' records.

1.3.6 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for holding

structures with assets or “beneficiaries” located in your country?

(B) Yes, see item 1.3.3 above.

#### 1.4 **Mental capacity of adults**

1.4.1 What system is in place in your country to deal with an individual who has lost capacity?

Incapacity of an adult individual must be declared by the Court. The Court Procedure is established in articles 1.177 to 1.186 of the Brazilian Civil Procedure Code. The translation of the procedure’s name could be - Civil Interdiction.

The Interdiction can be started by a parent, spouse, relative or the public attorney and has to present to the Court the reasons of the claim. The defendant will be summoned to present defense and present itself before the Judge. The Judge will appoint an expert to examine the defendant and to determine if the individual is incapable and to what extent.

Based on the expert opinion the Judge may declare the individual incapable and appoint a curator. The sentence will be registered before the Civil Registry and published in the Official Gazette.

Same procedure is applicable to terminate the Interdiction.

1.4.2 Does your country provide for Powers of Representation/Lasting Powers of Attorney/Mandats de protection future in relation to an incapacitated adult’s personal welfare and/or property and affairs?

(C) Both personal welfare and property and affairs - The Curator appointed by the Court has the powers to represent and defend the assets and rights of the incapacitated.

1.4.3 Will your country recognize and enforce a form of Power of Representation or Attorney intended to have effect after the onset of mental incapacity valid in the state in which it is prepared?

No

1.4.4 Are there proposals for legislative change in the field of mental capacity?

(B) No

1.4.5 Is your country a party to the Hague Convention XXXV for the International Protection of Adults of 13 January 2000?

(B) No

1.4.6 Is your country a party to the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol 2006?

(A) Yes

## QUESTIONS FOR CASE STUDIES

### 2. CASE STUDY A: ROBERTA AND PAUL

Roberta and Paul married in the Netherlands in 2008. Roberta is Brazilian and Paul is Dutch. Roberta, an IT specialist, was offered a job with Pear Inc in Silicon Valley and she and Paul moved to California (USA) in 2011. The family grows with twin boys and life is good.

Roberta's mother, Gloria, who is in her 70s, wants to live with Roberta (her only child) and Paul so that she can spend more time with her grandchildren. Interested in moving to your country, Roberta and Paul come to see you for advice.

#### 2.1 Immigration law [for Immigration Commission only]

Now settled into the hustle and bustle of life in your capital city, Roberta and Paul (who are very happy together and, incidentally, exceptionally wealthy), having purchased rental properties in Brazil and invested wisely in stocks and bonds, they are looking to buy a US\$ 20 million Penthouse Duplex in the hipster district of your capital city. They believe it is time to consider tax and estate planning opportunities and come to see you.

During the meeting you are also told that:

- Roberta is likely to inherit family assets - principally artwork - from Gloria. The family want to ensure that upon Gloria's death, the family assets will not be considered a "matrimonial asset" and that the assets, to the extent possible, can pass to the grandchildren (**the Inheritance**).
- Paul's father has been diagnosed with a degenerative medical condition, which may lead to a loss of mental capacity. Paul has been told that the condition is likely to be hereditary.

#### 2.2 Real estate planning

What structuring and/or tax planning opportunities should Paul and Roberta consider with respect to the purchase of the Penthouse Duplex (i.e. to mitigate taxation in your country)?

With regard to the Penthouse Duplex, there is very little that could be done. Taxation of urban property in São Paulo (namely IPTU), has a variable tax rate and is calculated based on the market value. The basis rate is 1% and according to the following table may be increased or decreased:

Market Value	Desconto/Acréscimo
up to R\$ 81.762,00	-0,2%
above R\$ 81.762,00 up to R\$ 163.525,00	0,0%
above R\$ 163.525,00 up to R\$ 327.050,00	+0,2%
above R\$ 327.050,00 up to R\$ 654.100,00	+0,4%
above R\$ 654.100,00	+0,6%

So, in the case of the duplex the IPTU tax rate would be 1,6% on an yearly basis.

There is no planning around that IPTU tax.

There is also the real estate transfer tax (ITBI) that is due upon the purchase and transfer. In São Paulo, the ITBI tax rate is 2% and is calculated on the real transfer/purchase price with a minimum value calculated as market value by the Municipality. So, if the purchase price is lower than the market value according to the Municipality, the higher value will be applicable.

Upon the sale of the real estate, if there is any capital gain, income tax may be due at the rate of 15%. However, calculation of the capital gain is actually performed with the use of a software supplied by the Federal Revenue Service and uses several different components in the calculation. For instance, lapse time of the original transfer, if any improvements were incorporated to the real estate, any damages, etc..

Also, it is important to inform that if the outcome of the sale is used to purchase another real estate within 180 days, the capital gain is tax exempt.

If the real estate is purchased under a corporate vehicle, the capital gain deriving from the sale of the property would result in a minimum taxation of 34%. And no exemption upon the use of the outcome to purchase a new property.

With regard to the rental property, it is quite the opposite. Rental income taxation is lower if executed under a corporate structure, using a real estate holding company and registering the accounting and tax obligations under the presumed profit system. Under such system the taxation of rental is:

Pis: 0,65%

Cofins: 3%

CSLL: 2,88%

IRPJ (income tax): presumed profit of 32% of income - tax rate 15% + additional 10% = 8%

**Total taxation - 14,53%.**



If the rent is received on the individual level, instead of paying 14,53% of taxes, the **individual will be liable to 27,5% IRPJ income tax** over the gross income generated by the rent.

## 2.3 Succession law and mental capacity

### 2.3.1 What would you advise with respect to the Inheritance?

With regard to the inheritance of the assets of Glória: Inheritance Assets do not communicate to the spouse, unless they are married under total community regime. Therefore, Gloria's will would be observed either way due to Brazilian Law. My suggestion with regard to the Artwork is to donate the assets to the grandchildren and the usufruct to Roberta. The donation could foresee a specific event to unite the property and usufruct in the hands of the grandchildren (i.e. specific age, marriage, university graduation, demise of Roberta, etc...)

With regard to the couple's assets, considering the forced heirship rules in place, I would recommend a straightforward will where Paul leaves his reserved portion to Roberta and vice-versa.

### 2.3.2 What steps can Paul take to ensure that Roberta has full authority to take decisions on his behalf and deal with their assets in the event that Paul loses his mental capacity?

Paul could grant Roberta several different and specific Powers of Attorney to represent him. Some of these documents would need to be renewed on an yearly basis. These documents are effective and in force immediately, since Brazilian law does not allow the limitation that such documents are to become effective upon the mental incapacity of the grantor.

Joint bank accounts are also recommended.

Another solution would be to incorporate a family holding so that the management of the assets could be executed by both individually.

### 2.3.3 More generally, with a shared wish to keep matters "simple", what estate and succession planning opportunities should Roberta and Paul consider?

Simplicity always works better. In this regard I would recommend joint bank accounts and a crossed will (as explained above).

## 3. QUESTIONS FOR CASE STUDY B

### 3.1 Case Study B: Bruce and Megan

Bruce, who has been given your contact details from an AIJA member, comes to see you for advice. Bruce gives you his background:

- 30 years old;
- Australian resident, national (and, if relevant to your country) “domiciled in a state of Australia”;
- Single;
- Commodities trader;
- Family wealth from mining opals;
- Bruce has an Aus\$15 M portfolio in Switzerland;
- Bruce also has shares in family mining company in Australia.

Bruce is looking to move to your country for 3-5 years.

## 3.2 Pre-arrival planning

### 3.2.1 What pre-arrival tax planning opportunities would you advise?

Individuals that relocate to Brazil become liable to Brazilian Taxation for their global assets and income.

This year, probably next May, a new tax law (MP-267/2013) will become effective and in force changing the scenario for Brazilian residents holding foreign investment. Previously, Brazilian residents were allowed to defer income tax deriving from profits and capital gain obtained abroad under a corporate structure.

Therefore, it was customary to advise Brazilian residents to incorporate a structure in a low tax jurisdiction to hold investments abroad, due to the fact that the profits obtained by such structure would only be taxed upon distribution to Brazil.

Now, this new piece of legislation will change this scenario, but the specifics such as the final tax rates are not clear and remain to be ruled by the congress and the Federal Revenue Services.

The general understanding, so far, is that profits and capital gain will be taxed automatically at the rate of 27,5%, even if the profit is not distributed to Brazil.

Therefore, for the time being, we are recommending all clients to wait until such legislation is finally passed and implemented.

But if the client could not wait, the advice would be to hold the foreign assets directly on the individual level, since capital gain is taxed at 15% and dividends originated abroad are taxed at 27,5%.

Any advice to minimize the tax burden should be held until such legislation is completely defined. By the time of the Congress we'll be able to present further details.

It is important to note that Brazil and Australia do not have an anti double taxation treaty.

### 3.2.2 What are Bruce's tax, residence or other reporting obligations upon becoming resident in your country?

Once Bruce becomes a tax resident (which in his case coincides with the granting of the visa), he is required to present his yearly Federal Revenue Service tax returns.

Depending on the source and form of payment of income received, he will also need to file a monthly tax return and pay taxes on a monthly basis (carnê-leão). The taxes paid monthly will be deducted from the yearly income tax return. Payments received from abroad, such as dividends shall be included in his monthly tax return.

Also, Bruce will be required to file an yearly declaration of foreign assets to the Brazilian Central Bank.

When you next meet Bruce 3 years later, life is looking good. He has met fellow Australian Kylie and they are expecting their first child (Jason). Bruce is looking to start his own commodities business and wants to know whether he can invest part of his foreign income or gains in the target company.

Bruce also tells you that his grandfather died in 2011 and that he (together with his 3 cousins) is a beneficiary of a trust structure with a bank account in a sun kissed jurisdiction. The bank account has not been reported in his tax return and he now wonders whether it should have been.

## 3.3 Lifetime matters

### 3.3.1 With respect to the commodities business, how would you advise Bruce in relation to:

- (a) the most tax efficient way to make the inward investment?

The most tax efficient way for Bruce to set up a company in Brazil is to incorporate a local Limited Liability Company and choose one of the taxation systems available that will fit within his cash flow and estimated margin of profit. The investment in the local LLC should be made in his own name as shareholder and the capital brought from abroad under his name and invested in the company locally. By doing so, the dividends distributed by the local business will be tax exempt.

- (b) any planning and structuring opportunities (including the use of double tax treaties) that Bruce should consider in order to minimise any tax leakage?

There is no tax treaty between Brazil and Australia.

- (c) eventually exiting the business. In particular, are there any structuring or other opportunities that Bruce should consider either at the inception of the business or in the run-up to an exit?

No. As explained in item (a) above, return of the capital gain to a Brazilian resident or the country of origin is tax exempt, and payment of dividends to Brazilian shareholders is also tax exempt. After distributing the dividends BRuce is allowed to remit the proceeds abroad in order to invest in other foreign businesses or financial assets.

3.3.2 As to the unreported bank account:

- (a) what would you advise Bruce?

Currently in Brazil, the concept of Trust is non existent. Therefore, the concept of beneficiary does not correspond to any type of ownership or possession. Thus, there is a legal void and there is no case law in this respect.

However, the Brazilian Tax Authority might consider Bruce as owner if he is entitled to demand distribution and/or has a claim against the Trust.

Therefore, if that is the case, besides the tax liability of 27,5%, Bruce would be liable to penalties reaching 150% of the taxes due as well as criminal liability for the maintenance of undisclosed assets abroad.

Disclosure of the assets held in trust abroad has to be executed as soon as Bruce has the knowledge of the entitlement of the trust assets.

- (b) what are the Trustee's reporting obligations in your country?

Brazil is a civil law country that did not include the Trust concept in its legal system. Also, Brazil is not a signatory to the Hague Convention for the Recognition of Trusts. Therefore, Tax Authorities do not recognize Trusts nor demand any reporting obligations.

Tragically, some years later still resident - and wealthy - in your country, Bruce dies without making a Will.

### 3.4 Succession law

3.4.1 Do Kylie and Jason have a financial claim against Bruce's estate?

Yes. Kylie would be entitled to 50% of the couple's assets (common assets) as his surviving spouse and ½ of the non common assets. His son Jason would be entitled

the other 50% of the common assets of the couple and  $\frac{1}{2}$  of the non common assets. Although in this case the percentages are equal, it would vary if there were more children or no children with respect to the non common assets.

3.4.2 What inheritance or estate tax (if any) is to be paid and by whom? What steps could Bruce and Kylie have taken in order to mitigate/reduce this tax charge?

Succession Tax is considered low in Brazil. The maximum rate is established by the Federal Constitution at 8%, but each State is able to establish its own rates. São Paulo and Rio de Janeiro States levy the succession tax at a 4% rate.

Given the fact that the tax rate is considered low, almost a succession tax haven, any measures to reduce such tax are a waste of time and money.

There are some tax planning for real estate located in States with higher Succession Tax rates. For instance, if they own some real estate in Bahia State, the tax rate would be 8%. However, if they incorporate a company in São Paulo that owned the real estate, the succession would encompass the quotas of the company in São Paulo (4%) and not the real estate in Bahia (8%), resulting in a 4% tax savings.