Transfer Pricing Alert

Brasilien erwägt Anpassungen an OECD

Im Jahr 2017 verlautbarte Basilien, dass es grundsätzlich daran interessiert ist, der OECD beizutreten. In Kooperation mit der brasilianischen Finanzverwaltung hat die OECD nun eine Studie betreffend der im Falle eines Beitritts zur OECD nötigen Anpassungen am brasilianischen Steuerrecht, insbesondere im Bereich der Verrechnungspreise, erstellt. Aus Sicht von Steuerpflichtigen mit verbundenen Gesellschaften in Brasilien ist dieser Schritt sehr zu begrüßen, da hierdurch das derzeit bestehende System, welches in der Vergangenheit häufig zur Doppelbesteuerung geführt hat, an international übliche Standards angepasst werden würde.

The OECD on December 18, 2019, released the study "Transfer Pricing in Brazil: Towards Convergence with the OECD Standard," a detailed report that marks the conclusion of a joint project with the Brazilian Federal Revenue (RFB) launched in February 2018 to examine the similarities and divergences between the Brazilian and OECD transfer pricing approaches.

Background

In 2017, Brazil submitted a letter of intent to join the OECD, which triggered the initiation of several actions to assess the country's tax regime and propose amendments, including an in-depth analysis of the Brazilian transfer pricing legal and administrative framework.

The conclusions of this project, which assessed the Brazilian transfer pricing rules' strengths and weaknesses, as well as the limitations imposed on local taxpayers for access to value added functions, and the possibility of alignment with the OECD transfer pricing guidelines, were presented at a joint meeting of the OECD and RFB in July 2019. The report discloses in detail the methodology, analysis, and conclusions presented at the joint meeting.

The OECD segmented the project into three stages:

a. Preliminary analysis:

- Evaluation of Brazil's transfer pricing legal and administrative framework;
- Analysis of Brazil's and the OECD's transfer pricing backgrounds; and
- Definition of methodology, including the analysis parameters.

b. Assessment of strengths and weakness of Brazil's transfer pricing rules and administrative practices:

- Absence of the arm´s length principle from Brazilian transfer pricing rules;
- Applicability of local transfer pricing methods and documentation obligations;
- Positive and negative outcomes of Brazil's simplistic approach;
- Considerations on transactions not properly addressed by Brazilian rules; and
- Consequences for local taxpayers of not being fully integrated into multinational groups value chains.

c. Options for alignment:

- Possibilities to achieve full alignment with the OECD transfer pricing standard; and
- Explanation of the impracticality of a dual system in which both Brazil and OECD approaches would coexist.

The assessment of strengths and weakness comprised the core of the analysis. The concepts and objectives of the OECD guidance on transfer pricing were compared to the Brazilian transfer pricing framework. The gaps or issues identified were assessed according to the main policy objectives of transfer pricing legislation -- securing the appropriate tax base in each jurisdiction and avoiding double taxation -- and to the general tax policy objectives, compliance and tax certainty.

The assessment identified several issues resulting from gaps and divergences between the Brazilian and OECD transfer pricing frameworks, revealing weaknesses in the Brazilian rules that result in base erosion profit shifting (BEPS) and double taxation. The report acknowledges the strengths of the Brazilian transfer pricing system, especially in terms of ease of compliance and ease of administration by the tax authority, but concluded that the Brazilian rules do not secure the appropriate tax base in each jurisdiction.

The OECD's in-depth analysis addressed the simplicity of Brazil's transfer pricing rules and the concerns they give rise to. Even though the current system provides a practical and predictable approach, from fixed margins, the ability of taxpayers to choose the transfer pricing method, and the availability of safe harbors rules, it represents a trade-off between simplicity and accuracy that could create inappropriate outcomes, resulting in a loss of revenue for Brazil and double taxation and tax uncertainty for taxpayers in the cross-border context.

The report's principal findings, summarized in "Transfer Pricing in Brazil: Towards Convergence with the OECD Standard – Highlights," are as follows:

- Many of the gaps and divergences identified between the Brazilian transfer pricing regime and the OECD guidance increase the risk of double taxation;

- Many of those gaps create BEPS risks, leading to the loss of tax revenue;
- The existing system favors some categories of taxpayers to the detriment of others and provides tax planning opportunities;
- Tax administration and tax compliance aspects of the Brazilian system are generally conducive to ease of tax administration and tax compliance;
- Tax certainty is generally provided, but only from a domestic perspective; significant tax uncertainty is observed from an international perspective; and
- Further tax uncertainty, even domestically, results from the absence of special considerations or very limited guidance for issues related to specific types of transactions.

Given the project's conclusions and the Brazilian tax structure, any alignment with the OECD transfer pricing standard must consider a modern, simple, and efficient system. Nonetheless, the study group indicated that a complete alignment with the OECD transfer pricing guidelines must be achieved, and this conclusion was accepted by RFB.

Two alternatives for alignment were presented:

- Full and immediate alignment: All taxpayers would be simultaneously subjected to new Brazilian transfer pricing rules that reflect the OECD standard, including the arm's length principle and the guidance for its application contained in the OECD transfer pricing guidelines, on a specific date; or

- Full and gradual alignment: Same outcome as the immediate alignment option, but introduced in a structured and staged process, allowing a gradual implementation of the new provisions over a longer period of time.

- A partial alignment, which would entail adoption of the OECD guidelines only in certain areas, or for specific transaction or taxpayers, was also evaluated during the project. However, partial alignment would mean that significant gaps would remain in the system, with negative effects on tax certainty, the compliance burden, and the risks of persisting double taxation and loss of tax revenue, and could have negative consequences for revenue collection, allowing tax planning based on the regime that is most favorable from a tax perspective.

  Even though a dual system (as other countries have enacted) is not under discussion, some nationalization of the OECD guidelines is expected. In Brazil, considering the history of simplistic, straightforward approaches, this process should take the form of safe harbor regimes. Such nationalization will be part of a draft legislation discussion, for which no agenda or schedule has been set.

  Given that convergence has been agreed to by the OECD and RFB, and the Brazilian government has reaffirmed its intention to become an OECD member, a full alignment of the transfer pricing rules is just a matter of time. The next steps were set at the report presentation and involve:

  a. The release of a blueprint and roadmap for convergence, to be developed in 2020;
  b. Conclusion of the policy design of the system, including an impact assessment from the RFB on local tax collection;
  c. Developing draft legislation;
  d. Establishing a plan for capacity building for the tax administration; and
  e. Development of safe harbor regimes.

  These next steps will involve a dialogue with taxpayers, including the engagement of associations and technical working groups focusing on specific areas, and will include a public consultation regarding the proposal.