

MEMORANDUM TO CLIENTS

TAX

September 16, 2016

NORMATIVE INSTRUCTION AMENDS RULES REGARDING TAX HAVENS AND FAVORABLE TAX JURISDICTIONS

The Brazilian Federal Official Gazette published on September 14, 2016, Normative Instruction RFB No. 1,658/2016 ("NI"), which was issued by the Brazilian Internal Revenue Service ("RFB"). The NI amends NI RFB No. 1,037/2010, which regulates favorable tax jurisdictions and privileged tax regimes. These jurisdictions are subject to a less favorable tax treatment.

The NI maintains most of the rules stipulated by the NI No. 1,037/2010, but amends the list of countries and jurisdictions in such tax regimes, as follows:

- i. Curacao, St. Martin and Ireland were included in the list of jurisdictions that do not tax income or tax it at a rate lower than 20%, or where local legislation does not allow access to information related to shareholding composition of companies, or their ownership (tax favorable jurisdictions – "TFJ"). The NI excludes Netherlands Antilles and the islands of St. Kitts and Nevis from the list.
- ii. Inclusion on the list of privileged tax regimes ("PTRs") of the regime applicable to entities incorporated as holding companies regardless of local substantial economic activity, pursuant to the laws of the Republic of Austria.

Please note that the definition of TFJ and PTR are established in legislation in force, but current legislation does not make reference to the list established by the RFB or categorizes these jurisdictions.

In this regard, RFB, throughout the past years, has issued lists that should be used as guidance for determining which countries, jurisdictions and tax regimes are included in these legal definitions. Therefore, in our view, the amendments introduced by the NI updates tax authorities' perspective on which countries, jurisdictions and tax regimes are included in the definition of TFJ and PTR.

The purpose of this memorandum is to inform our clients about important changes and developments in the area of law. We remain at the reader's disposal for any additional information that may be desired regarding the subject matter herein.

The reproduction or dissemination, in whole or in part, of the contents of this memorandum without the prior written consent of Mattos Filho is prohibited.

In addition, the NI stipulates standards for identifying the PTRs applicable to entities incorporated as holding companies in Denmark and the Netherlands and which do not exercise a substantial economic activity. Pursuant to the NI, an entity exercises a substantial economic activity when it has an operational capacity that is sufficient to secure its core business in its local jurisdiction. The exercise of a substantial economic activity by an entity can be demonstrated by:

- a) A reasonable number of qualified employees;
- b) A facility that adequately exercises management and decision making activities regarding: (i) development of actions with the purpose of generating income from its own assets; or (ii) management of equity interests with the purpose of generating income from the distribution of profits and capital gains.

Although the NI only stipulates certain guidelines on the concept of substantial economic activities for PTR identification purposes, it assists taxpayers which, before its enactment, were frequently subject to a high level of subjective interpretation.

The NI is effective as from August 1, 2016. Considering that the provisions in the IN are merely guidelines, we believe its immediate enforcement is appropriate, except if any provisions exceed the limits of the applicable legal rules.

With respect to potential issues concerning the retroactivity of the rules in the NI, we believe that the retroactive application of any of its rules which result in a less favorable tax treatment should be challenged based on the principle of non-retroactivity of tax laws that worsen the situation of tax payers (articles 100 and 146 of the National Tax Code and article 2, section XIII, of Law No. 9,784/1999).

Lawyers in the tax practice

The purpose of this memorandum is to inform our clients about important changes and developments in the area of law. We remain at the reader's disposal for any additional information that may be desired regarding the subject matter herein.

The reproduction or dissemination, in whole or in part, of the contents of this memorandum without the prior written consent of Mattos Filho is prohibited.

SÃO PAULO

Al. Joaquim Eugênio de Lima 447
01403-001 São Paulo SP Brasil
T +55 11 3147 7600

RIO DE JANEIRO

Praia do Flamengo 200 11º andar
22210-901 Rio de Janeiro RJ Brasil
T +55 21 3231 8200

BRASÍLIA

SHS Qd. 06 Cj A, Bloco C - Sala 1901
70322-915 Brasília DF Brasil
T +55 61 3218 6000

NEW YORK

712 Fifth Avenue 26th Floor
New York NY 10019 USA
T + 1 646 695 1100