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Bill No. 5387/2019: Foreign Capitals and Exchange Law

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In Brazilian history foreign capitals and exchange transactions have been subject to strict controls and regulations, mainly to protect Brazilian currency and reserves. Several laws and rules issued by the Central Bank of Brazil over the years have been dealing with foreign capital registration, restrictions to the entry and exit of funds, obligations to denominate and pay in Brazilian currency, foreign trade control regulations, among others.

In more recent years, economic globalization and worldwide foreign capital movements have allowed the increase of Brazilian foreign currency reserves and a more stable balance of payments in Brazil, which created the basis for the development of monetary policies with more flexible foreign capital and exchange transaction controls.

In this scenario, in October 2019, the Government presented Bill No. 5387/2019 with the purpose of modernizing, simplifying, and bringing more efficiency to the Brazilian exchange market. As stated by the Government, the law is aligned with international standards and grounded in the inclusion of Brazilian economy in the international market, the free movement of capitals, and the performance of exchange transactions in a simple, more transparent and less bureaucratic manner.

It is the intention of the authorities to **(i)** modernize the legislation in order to avoid legal uncertainty that could be caused by old rules that did not contemplate recent technological innovations and modern needs of the Brazilian economy; **(ii)** make the Brazilian legislation compatible with the global economy, facilitating foreign trade and flow of resources and investments; and **(iii)** encourage both foreign investments in Brazil and Brazilian investments abroad.

One of the general goals of the Brazilian authorities is to strengthen the process of convertibility of the Brazilian currency and Bill No. 5387 provides for mechanisms to allow the use of the Brazilian currency abroad and in Brazil by international players as a first step towards convertibility. The Government recognizes, however, that this is a gradual process, depending upon several other aspects, such as the confidence in Brazilian economy and Brazil's worldwide commercial and financial presence.

In general, Bill No. 5387/2019 consolidates the matter in one single law and proposes the revocation of several laws, decrees and decree-laws issued in different periods of Brazilian history (some of which in the first half of the 20th century). Especially, Bill No. 5387/2019 proposes the revocation of substantially all provisions (except for tax-related provisions) of Law No. 4131/62, which addresses foreign capitals and exchange controls.

The Bill provides for a one-year period for the law to enter into force, which should be a reasonable period for the Central Bank of Brazil to issue proper regulations to govern the procedures and details on foreign capitals and exchange transactions and to adapt public bodies and supervised entities to the new standards.

Bill No. 5387/2019 is a concise law with only 27 articles, organized in six chapters: **(i)** Initial Provisions; **(ii)** Exchange Market; **(iii)** Brazilian Capitals Abroad and Foreign Capitals in Brazil; **(iv)** Information to Compile Macroeconomic Statistics by the Central Bank of Brazil; **(v)** General Provisions; and **(vi)** Final Provisions.

Chapter I deals with the scope of the law and the concept of residence for the purposes of the law without innovations.

Chapter II presents general rules about exchange transactions, exchange rates, players in the exchange market, and competences of the Central Bank of Brazil as regards the exchange market.

Additionally, it provides that banks can both accept payment orders from abroad and make payment orders to abroad denominated in Reais, using accounts in Reais locally held by foreign entities – subject to regulation and financial supervision in their origin country. For this purpose, banks must obtain information about the foreign entity to fully understand their activity, reputation and quality of the supervision they are subject to, as well as to evaluate their money laundering and terrorism financing internal controls. This rule is intended to increase the convertibility of the Brazilian currency. Of course, the proposed solution has to be regulated in detail to allow the effectiveness of this measure.

Chapter III establishes that foreign capitals will have legal treatment equal to that of national capitals and establishes general principles and rules, leaving room to the regulations to be issued by the Central Bank of Brazil to rule on supervision, remittances and information.

Chapter IV sets forth that the Central Bank of Brazil is allowed to demand information from Brazilian residents that are necessary to compile official macroeconomic statistics. The individual information presented will be subject to confidentiality and will not allow the identification of their holder, consistent with data protection rules.

Chapter V, among other provisions, states that the private offsetting of credits and values between residents and non-residents continues to be forbidden; however, the Central Bank of Brazil may state cases, in which the forbidden offsetting is not configured. This provision was part of Decree-Law No. 9602/1946 and aims at avoiding mere accounting write-offs involving foreign and Brazilian parties without the proper closing of exchange transactions and payment of applicable taxes. The so-called simultaneous exchange transactions are the mechanism to formalize the offsetting, in which the parties do not actually have to send or receive funds, but the Brazilian party has to close symbolic exchange transactions.

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The update of the cases in which the transactions can be denominated in foreign currency is also provided for in Chapter V, which includes a broad item covering situations to be regulated by the National Monetary Council when the denomination in foreign currency may reduce the exchange risk or increase the efficiency of the transaction. Subject to future regulations, this may be a solution to certain markets that operate based on foreign currency and have always had to deal with a possible annulment of the prices denominated or calculated in foreign currency. It is worth mentioning that Bill No. 5387/2019 establishes that the denomination in foreign currency in cases not provided for by law is null and void.

Chapter V also establishes that small-value exchange transactions (up to USD 1,000) can be performed in a sporadic and non-professional manner between individuals. Moreover, persons are allowed to carry up to USD 10,000 in cash to enter and exit Brazil. In other cases, the general rule that exchange transactions must be carried out by local authorized financial entities continues to exist.

At last, Chapter VI restates the penalties provided for in Law No. 13506/2018 to be issued by the Central Bank of Brazil in case of breach against the law and regulations and approves new wordings to existing laws and the above-mentioned revocations. Among the new wordings, the removal of restrictions to use funds held abroad by Brazilian exporters is a positive measure.

As a whole, Bill No. 5387/2019 represents an important and long-demanded update in the Brazilian foreign capitals and exchange rules. If approved (and subject to the regulations to be issued), the new law will simplify foreign trade and foreign investment procedures and will bring about more legal certainty and improvements to the Brazilian exchange market.

Provisional Measure Nº 905/2019 Main Amendments to Labor and Social Security Legislation

The Federal Official Journal published on November 11, 2019, Provisional Measure No. 905/2019 ("PM 905") enacted by the Federal Government addressing many issues concerning labor and social security, and the impact these will have on the day-to-day operations of Brazilian companies especially concerning payroll tax exemption.

We would particularly draw attention to the creation of a new category for employment agreements, the so-called Green and Yellow Contract; also to the amendments set out in the Brazilian Consolidation of Labor Laws ("CLT") and Law No. 10.101/2000 (Profit Sharing Law).

The Green and Yellow Contract establishes a new type of employment contract aimed at encouraging young people to enter the job market, allowing companies to have up to 20% (twenty per cent) of their workforce composed of individuals between the ages of 18 and 29, subject to specific rules.

Provisional Measure 905 states that only first-time employees receiving up to 1.5 (one and a half) minimum wages with an employment contract not exceeding 24 months, may be hired under this new mode of employment.

In return, there will be payroll tax exemption regarding contributions to the FGTS (Employee Redundancy Fund) and INSS (National Social Security Institute). With regard to the FGTS, PM 905 establishes a monthly rate of 2% (two per cent) and termination penalty of only 20% (twenty per cent) over the balance of deposits. As regards the INSS, the measure provides for the exemption of payment, by the companies, of the employer social security contribution (the current rate is 20%), of the *salário-educação*, a contribution to fund education (the standard rate is 2.5%) and contributions to Incra[1] and System S[2] entities (combined rates usually reach 3.3%).

Several other issues are addressed in the Green and Yellow Contract, which will give rise to heated discussion and debates regarding its application which, according to MP 905, will only start as of 1 January 2020.

[1] **National Institute of Agrarian Reform.**

[2] **The System S consists of organizations and institutions that seek to improve and promote the well-being, professional training and health of their employees.**

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In respect of the conventional employment relations, the main points are: the removal of the social contribution of 10% (ten per cent), that employers must pay today in addition to the termination penalty corresponding to 40% of the FGTS balance, for unjustified dismissals; the authorization for electronic storage of labor documents; and an express definition stating that meals offered by the employer are not of a salary nature, be the meals *in natura* or in the form of meal tickets, meal vouchers and cards.

What we observe, therefore, is an essential improvement in the dynamics of corporate and people management, showing that employers may grant certain benefits to their employees without running the risk of being impacted by questions or notifications about the nature of such payments.

Still aiming at promoting greater legal security for the employer, PM 905 regulates in detail the procedure and the limits for the payment of premiums, setting requirements so that these benefits will not amount to salary payment and will not be part of the calculation base of social security contributions, such as a) payment to employees, exclusively; b) payment as a result of an outstanding performance, evaluated by discretionary means, provided that an ordinary performance had been defined previously; c) a limit of four payments per calendar year, with no more than one payment per quarter; and d) the obligation to record the rules on the payment of premiums, keeping them on file for a period of 6 (six) years as from the date of the respective payment.

This regulation is intended to clear up the doubts arising from Law 13,467/2017 (Labor Reform) regarding payment of premiums allowing them to be used as a true incentive tool by employers.

Likewise, the rules governing the negotiation and payment of the Profit Sharing ("PLR") have also changed. They exclude the need for a trade union representative of a specific category to take part in the negotiation by means of an equal representation commission (composed of employee and employer representatives). In addition, the understanding of the deadline for the signing of the plan has become more flexible and it accepts a document as valid when it is signed at least ninety (90) days before the single or final installment of the PLR.

It is worth mentioning that PM 905 substantially modifies the inspection procedures and enforcement of labor penalties as well as the rules for updating labor debts as a result of a Court order.

Concerning the inspection procedures, PM 905 establishes that there should be a double visit by the labor inspector in some instances, such as irregularities due to the promulgation of new laws or when it is the first inspection in the establishments opened for less than 180 days, before the execution of a violation notification. If the second visit is not observed under the cases mentioned in PM 905, then the notification will be considered void.

The measure is also innovative as it establishes caps for the imposition of administrative penalties both regarding those resulting from variable situations (which may range from R$ 1,000.00 to R$ 100,000.00) and the penalties applied per capita (which may vary between R$ 1,000.00 and R$ 10,000.00). Furthermore, it ensures that penalties will be halved for sole proprietorships, small businesses, companies with up to 20 employees and domestic employers.

A discount between 30% to 50% is granted, depending on the type of company notified, if the right to appeal is waived and if the company pays the penalty levied by the notification.

Regarding the criteria for the correction and updating of labor-related debts arising from a Court order, PM 905 also substantially alters the rules now in force, stating that debts must be corrected by the IPCA-E[3] plus interest on arrears equivalent to those applied to savings accounts, renouncing the percentage of 1% per month currently adopted.

Therefore, what we see is a profound change in specific parameters and concepts to promote a more significant incentive to employment and the increase of earnings by employees, without burdening the payroll, as well as allowing greater security and possibilities for employers wishing to hire new employees and promote the recognition of their current employees.

With the exception of special rules, such as those related to the Green and Yellow Contract, which will only take effect as from January 2020, the remaining points of PM 905 will take effect at the moment of its publication and promises to change employment relationships, demanding immediate updating and review of labor routines by the companies.

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[3] **Extended National Consumer Price Index.**

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Great Opportunities for Young Immigrants in Brazil: Perspectives From to the Migration Law

The relevance of the workforce from the young generation has been always a highly important factor to be considered in the worldwide economies. In some countries the concern with the population ageing represents a fact to be weighted and monitored, after all in a short period of time the overall characteristics of a population may completely change.

Regarding Brazil, according to the Brazilian Institute of Geography and Statistics (IBGE), the situation is no different, there was an ageing from the Brazilian population from 2012 to 2018 and this fact may be noticed by the younger age groups, as well as by the increase of the senior age group.

In conjunction with this perspective, it is important to evaluate the job opportunities for young immigrants in Brazil under the Migration Law (in force since November, 2017).

In this way, it is important to emphasize some visa categories designed to young immigrants as indicated below:

- Trainee Visa (Normative Resolution 19/2017): This visa category can be destined for an international professional for working purposes with no employment bond in Brazil. Once in Brazil, the immigrant should receive professional training in the subsidiary, branch or headquarter from the same economic group of the company at the home country.

The professional training considers all the activities performed at the Brazilian company in order to develop the professional skills and acquire technical expertise.

One of the most important requirements to apply for this category of visa at the Ministry of Justice is to proof a link between the two companies (subsidiary, branch or Brazilian headquarter with the company abroad) to be done through official documents, usually corporate or even intended to the study of the economic group as accounting files.

Furthermore, another important requirement is the proof of employment bond between the immigrant and the company abroad from the same economic group of the subsidiary, branch or Brazilian headquarter (sponsor for the visa application), as well as the salary which needs to be kept abroad while the immigrant resides in Brazil.

The application for the visa may be requested under the previous residence (with consular phase) or local residence (applied once the immigrant is in Brazil).

The validity period for this type of residence authorization is up to 02 (two) years with no extension option. In case of the immigrant intends to stay longer in Brazil, another type of visa will be required.

This type of residence may be extended to the legal dependents of the immigrant through a specific process called Familiar Reunion, to be requested through the Brazilian Consulate abroad or at the Federal Police in Brazil.

To the visa holder of this modality, the following Brazilian documents may be locally issued: Foreigner citizen ID Card (CRNM), Taxpayer number (CPF) and Drivers license (CNH).

- Professional exchange visas (Normative Resolution 26/2018): This category of temporary visa may be granted for professional internship or professional exchange purposes.

It is considered a professional exchange the experience of international socio-labor learning in a working environment, in order to develop the initial or the continued academic education, and also aiming the exchange of knowledge and cultural as well as professional experience.

In this context, the application for the visa may follow two different options: (i) professional internship program; (ii) temporary job in Brazil during vacations.

The professional exchange program covers the immigrants registered in a graduation or post-graduation course or even have a respective certificate issued in less than a year. This application requires presenting a formal agreement term between the immigrant and the employer with support from the Brazilian entity of exchange (when applicable) and all the conditions of the exchange program.

The validity period for this type of residence authorization is up to 01 (one) year with no extension option. In the case the immigrant intends to stay longer in Brazil, another type of visa will be required.

Regarding the temporary job in Brazil during vacations, the immigrant shall proof the registration in a graduation or post-graduation course in an institution abroad, so the working is in the vacations period. Additionally, the course abroad need to have at least 360 (three hundred and sixty) hours.

The validity period for this type of residence authorization will be up to 90 (ninety) days with no extension option. In the case the immigrant intends to stay longer in Brazil, another type of visa will be required.

Regardless professional internship program or temporary job in Brazil during vacations it is a mandatory requirement presenting the working fixed-term contract (full-time or part-time). For the professional internship it is accepted the payment of a scholarship allowance.

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The application for the visa may be requested under the previous residence (with consular phase) or local residence (applied once the immigrant is in Brazil).

This type of residence may be extended to legal dependents of the immigrant through a specific process called Familiar Reunion, to be requested at the Brazilian Consulate abroad or at the Federal Police in Brazil.

To the visa holder the following Brazilian documents may be locally issued: Foreigner citizen ID Card (CRNM), Taxpayer number (CPF), Work Booklet (CTPS) and Driver's license (CNH).

It is worth highlighting that, although the Normative Resolution 26/2018 allows the internship, the legal treatment for the immigrant is completely different from the one for local interns (Internship Brazilian Law – Law 11788/2008). However, to be covered by the Brazilian Law of Internship, the immigrant must be regularly registered in an education institution based in Brazil.

- Student visa/Internship (Interministerial Ordinance 7/2018): According to the law, this temporary visa is destined to study purposes.

The temporary student/internship visa may be granted to immigrant who intends to come to Brazil to perform the following activities: regular course; internship; study exchange program; or exchange for scientific research.

The temporary visa for study/internship has the validity period up to 01 (one) year and it is possible to request annual renewal for this residence visa until the end of course.

In the case of the immigrant decides to change the course or even the educational institution, it is mandatory to report it to the Federal Police in order to updating the records.

Moreover, in accordance with the Interministerial Ordinance, for the purpose of study will be allowed to perform working activities and to receive the respective compensation since there is compatibility between the activities and the workload of the internship, course or exchange program. Although is possible to receive salary in Brazil, the remuneration from a local hiring with an employment bond requires another type of visa – work visa based on the Normative Resolution 02.

In the aftermath of the presented article, it is noticeable the concern with the young immigrant in Brazil, once the legal system presents several options and possibilities for career development inside de country as well as contribute to the economy and business development.

* Author of the publication ***So geht´s Ihr Visum in Brasilien***

Wichtige Aspekte des Gesetzes der Wirtschaftlichen Freiheit - Gesetz Nr. 13.874/19

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Am 20. September 2019 ist das Gesetz der Wirtschaftlichen Freiheit – Gesetz Nr. 13.874, das die Erklärung der wirtschaftlichen Freiheitsrechte eingeführt und mehrere Bestimmungen des brasilianischen Rechtssystems geändert oder aufgehoben hat, durch Umwandlung der Vorläufigen Maßnahme Nr. 881 vom 30. April 2019, in Kraft getreten. Das Gesetz verfügt über den Schutz der Unternehmensfreiheit und der freien Marktwirtschaft und über die Funktion des Staates als normative Instanz und Aufsichtsbehörde. Es beabsichtigt, der Geschäftstätigkeit in Brasilien größere Rechtssicherheit zu verleihen und führt zu diesem Zweck Änderungen in mehreren Rechtsbereichen, unter anderem auf den Gebieten des Gesellschafts-, Zivil-, Vertrags- und Steuerrechts ein. Eine der großen Neuigkeiten des Gesetzes ist die Erlaubnis eines einzigen Gesellschafters in einer brasilianischen Gesellschaft mit beschränkter Haftung, der „Sociedade Limitada“, kurz „Limitada“ oder „Ltda.“. In der Begründung der Vorläufigen Maßnahme 881/19 wurde die Absicht erklärt, die Praxis der Einbeziehung eines zweiten Gesellschafters mit einer geringen Beteiligung, nur um die gesetzliche Anforderung zu erfüllen, zu beenden. Damit wurde die Ein-Personen-GmbH, eine seit Jahrzehnten in anderen Ländern konsolidierte Rechtsform, in Form der „Ein-Personen-Ltda.“ („Sociedade Limitada Unipessoal“) in das brasilianische Rechtssystem eingeführt. Übrigens wurde in Brasilien vor einigen Jahren bereits die „EIRELI“ – Individuelles Unternehmen mit beschränkter Haftung, die ebenfalls von einer einzigen Person, die das gesamte Gesellschaftskapital besitzt, gegründet wird und den Regeln der „Limitada“ unterliegt, eingeführt. Die EIRELI sieht jedoch die Einzahlung eines Mindestkapitals von 100 Mindestlöhnen bei der Gründung vor und außerdem darf ihr Inhaber nicht mehr als eine EIRELI gründen. Mit der Einführung der Ein-Personen-Ltda. wird die EIRELI wahrscheinlich außer Gebrauch geraten, da die Ein-Personen-Ltda. weder ein Mindestkapital noch eine Frist für die Kapitaleinzahlung vorsieht und es demselben Gesellschafter gestattet ist, eine unbegrenzte Anzahl von Gesellschaften zu gründen. Des Weiteren enthält das neue Gesetz wichtige Bestimmungen hinsichtlich der Durchgriffshaftung und sieht ebenfalls den umgekehrten Haftungsdurchgriff vor. Es begrüßt die Vermögensunabhängigkeit der juristischen Personen als rechtmäßiges Mittel der Risikozuordnung und -begrenzung und hebt die Unterscheidung zwischen der juristischen Person und ihren Gesellschaftern, Mitgliedern, Gründern und Geschäftsführern hervor. Vor dem Inkrafttreten des neuen Gesetzes sah das Zivilgesetzbuch bereits vor, dass im Falle des Missbrauchs der Rechtspersönlichkeit durch Geschäftsführer oder Gesellschafter,

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gekennzeichnet durch Zweckentfremdung oder Vermögensverwechslung, die Durchgriffshaftung eintritt, so dass diese letzteren für die Verbindlichkeiten der Gesellschaft haften. Es gab jedoch keine klare gesetzliche Definition von Zweckentfremdung und Vermögensverwechslung, vielmehr wurden solche Begriffe im Laufe der Zeit von der Rechtslehre und der Rechtsprechung definiert. Dennoch führte das Fehlen einer gesetzlichen Definition nicht selten dazu, dass Gesellschafter und Geschäftsführer, die keine Verbindung zu der missbräuchlichen Handlung hatten, dafür haftbar gemacht wurden. Der neu eingeführte Wortlaut des Zivilgesetzbuches legt fest, dass die Durchgriffshaftung aufgrund des Missbrauchs der Rechtspersönlichkeit nur das Privatvermögen der Geschäftsführer und der Gesellschafter, die direkt oder indirekt von dem Missbrauch profitiert haben, beeinträchtigen kann. Weiterhin wurden die Begriffe der Zweckentfremdung und der Vermögensverwechslung definiert, was eine erhöhte Rechtssicherheit mit sich bringt und eine einheitliche Behandlung durch die Gerichte ermöglicht. Es wurde auch festgelegt, dass die bloße Existenz einer Wirtschaftsgruppe nicht die Durchgriffshaftung erlaubt. Diese Bestimmungen erstrecken sich allerdings nicht automatisch auf spezifische Verbindlichkeiten, wie zum Beispiel solche auf arbeitsrechtlicher und verbraucherschutzrechtlicher Ebene. Das neue Gesetz hat weiterhin wichtige Änderungen in Bezug auf die Auslegung von Geschäftsverträgen eingeführt, bei denen den Vereinbarungen der Parteien nunmehr Vorrang eingeräumt werden soll (*pacta sunt servanda*). Dabei wurden objektive Kriterien eingeführt, welche die Ausübung der vertraglichen Autonomie stärken dürften. Nach dem Gesetz muss bei der Auslegung des Vertrages der Sinn berücksichtigt werden: **(i)** den das Verhalten der Parteien nach Abschluss des Geschäfts bestätigt; **(ii)** der den Marktbräuchen, -gepflogenheiten und -praktiken bezüglich der Art des Geschäfts entspricht; **(iii)** der Treu und Glauben entspricht; **(iv)** der für die Partei, die die Bestimmung nicht entworfen hat, vorteilhafter ist, wenn diese Partei identifiziert werden kann; und **(v)** der dem entspricht, was die angemessene Verhandlung der Parteien hinsichtlich des in Frage kommenden Themas wäre. Demzufolge gewinnt das Thema der Vertragsverwaltung für Unternehmen an Bedeutung, zumal die wiederholte und andauernde Nichteinhaltung einer Vertragsbestimmung die Unwirksamkeit dieser Bestimmung zur Folge haben kann. Darüber hinaus hat das Gesetz den Parteien Freiheit erteilt, um Regeln für die Auslegung, die Behebung von Lücken und die Integration der Rechtsgeschäfte zu vereinbaren, die von den gesetzlich vorgesehenen abweichen. Das Prinzip der sozialen Funktion des Vertrages, ein offenes Prinzip, das der Auslegung der Gerichte unterliegt, wurde von dem Gesetz beibehalten. Das daraus hervorgehende Risiko wurde jedoch dadurch reduziert, dass das Prinzip der geringsten Einwirkung eingeführt und die Vertragsüberprüfung als außergewöhnliche Maßnahme festgelegt wurde. Zudem wurde die Gleichheitsvermutung in zivil- und handelsrechtlichen Verträgen geschaffen und festgelegt, dass die von den Parteien vereinbarte Risikoverteilung beobach-

tet und eingehalten werden muss. Auf steuerrechtlicher Ebene hat das Gesetz einen Ausschuss geschaffen, der Richtlinien der Bundessteuerverwaltung herausgeben wird. Der Ausschuss setzt sich aus Mitgliedern des Verwaltungsrats für Steuerbeschwerden (CARF), des Sondersekretariats der Bundessteuerbehörde des Wirtschaftsministeriums (RFB/ME) und der Generalstaatsanwaltschaft der Bundesfinanzverwaltung (PGFN) zusammen. Solche Richtlinien sind von den erwähnten Stellen sowohl in ihrer Verwaltungstätigkeit als auch in ihrer normativen Tätigkeit, sowie in ihren Entscheidungen zu beachten. Darüber hinaus wurde die Liste der Fälle, bei denen die Generalstaatsanwaltschaft der Bundesfinanzverwaltung davon befreit ist, Einreden und Berufungen einzulegen, sowie dazu befugt ist, eingelegte Berufungen zurückzunehmen, erheblich erweitert.

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Judicial performance bond and its recent regulation by the Superior Labor Court

The payments made in the Labor Courts used to be a matter of concern to the companies, given the very short term to make the deposit and, in several occasions, the high amounts involved either to file appeal or to secure the execution and present defense *("embargos"),* or, yet, to fulfill the provisory enforcement of the sentence.

With the advent of Law No. 13,467/2017, from November 11th, 2017, commonly known as the "Labor Reform", the Brazilian Consolidation of Labor Laws ("CLT") now counts with express provision about the possibility to use a judicial performance bond instead of having to make a judicial deposit to secure the execution and/or to pay the appeal fees (articles 882 and 889, § 11 of the CLT).

Such innovation can be deemed as a huge and important improvement for the companies' financial management. Firstly, because the use of the judicial performance bond in the labor claims that are in the execution stage avoids the disbursement of funds to secure the provisory execution or to discuss the executed amount by filing defense *("embargos"),* which, in the past, was only admitted with a judicial deposit.

Secondly, because the judicial performance bond can now replace the payment of the appeal fees to the Higher Labor Courts. It is worth mentioning that, before these new legal provisions, for the employer to appeal to the Higher Labor Courts, it had to make a deposit in a judicial account linked to the case.

As of November/2019, in order to appeal to the Regional Labor Court, the maximum amount of the judicial deposit is *nine thousand, eight hundred and twenty-eight Brazilian Reais and fifty-one cents* (BRL 9,828.51) and, in order to appeal to the Superior Labor Court, the maximum amount of the judicial deposit is *nineteen thousand, six hundred and fifty-seven Brazilian Reais and two cents* (BRL 19,657.02).

Therefore, the possibility to replace the judicial deposit by a judicial performance bond, not only to file appeal but also to present defense in the execution *("embargos"),* was implemented by Law No. 13,467/2017 as a new alternative to ensure that the employee is secured to receive, in advance and in part, the amount of the condemnation in case the Higher Labor Courts do not reverse the decision. As a consequence, this new option considerably enhances the companies' savings as it neither compromises its equity nor impacts its cashflow.

Nevertheless, even with the innovation brought by the Labor Reform, some Labor Courts were still reluctant to accept the judicial performance bond in the labor claims, which created legal uncertainty, as it fully depended on the interpretation of the Regional Labor Court where the lawsuit was ongoing as to whether or not the judicial performance bond would be admitted.

One of the major discussions referred to the term of the insurance policy. Some Regional Labor Courts understood that the insurance policy that had a limited validity term was insufficient to secure the execution. As a result, the appeals and the execution defenses *("embargos")* were not acknowledged due to the lack of guarantee.

On the other hand, there were decisions that accepted the judicial performance bond with limited validity term under the argument that it could not be an obstacle provided that it had the possibility of renewal.

So, in order to settle the controversies about the issue, the Superior Labor Court, the Superior Council of the Labor Court and the Controller General of Labor Justice released, on October 16th, 2019, the Set Act "TST.CSJT.CGJT No. 1/2019", which ruled the requirements and criteria for the use and admissibility of the judicial performance bond policies.

Such Act, in summary, was issued in order to settle the debate about the subject, outlining what must be accomplished by the companies and, also, by the insurers, so that the judicial insurance bond can be accepted by the Labor Courts.

The main requirements are the following:

(i) To refer to the number of the labor claim, to the value of the insurance premium and to the insurer's up-to-date address;

(ii) To have a minimum term of *three* (3) years with automatic renewal, as a general rule;

(iii) The secured value must be equal to the original amount of the debt under execution with the charges and legal accruals, including attorney's fees and technical assistant's and judicial expert's fees, duly updated by the legal indexes applicable to the labor debts at the occasion, plus, at least, *thirty per cent* (30%);

(iv) In the event of guarantee of execution, the insurance will only be accepted if its presentation happens before the payment of the judicial deposit, the attachment of funds or other judicial constriction remedy;

(v) With respect to appeals, the insurance will only be accepted if it is presented before the appeal judicial fees are deposited, otherwise the use of the judicial insurance bond in replacement is forbidden.

Within this context, it is important to highlight that it is indispensable that all the requirements and criteria for the use of the judicial performance bond are met, under pain of the non-recognition of the execution defense *("embargos"),* with the consequent order to attach assets of the company, as well as the declaration of desertion in the event of use of the judicial insurance bond to replace the appeal deposit already made.

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This is because the judicial performance bond for the labor execution and to replace the appeal deposit aims at ensuring the payment of the debts recognized in the decisions pronounced by the Labor Courts, and, in the latter, it is even regarded as an essential prerequisite for the admissibility of the appeal.

The Set Act "TST.CSJT.CGJT No. 1/2019" entered into force in the date of its publication, this is, October 16th, 2019, covering all the judicial insurance bonds presented as of the effective date of Law No. 13,467/2017 ("Labor Reform"). Thus, the policies already issued may possibly need to be adjusted, while the judge leading the case will define a period for the insurance regularization, as set forth by article 12 of the Act.

Conclusion

The goal of the Set Act "TST.CSJT.CGJT No. 1/2019" was to harmonize the procedures about the reception of judicial performance bond policies to secure the labor execution and to replace the appeal deposits. The harmonization brought by such Act sought to give more effectiveness to the judicial decisions and its enforcement and, at the same time, to legitimate one of the new commands of the Labor Reform, leading to a scenario of legal certainty, in particular, to the parties in litigation.

In addition, on one hand, this is an advantage to the entrepreneur, which can focus its investments in the development of its core business rather than having idle funds in the Labor Courts and, on the other hand, it is expected that such investments can stimulate the creation of new jobs and enhance the country's economy.

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Countdown für das Inkrafttreten des Datenschutzgesetzes: Was Unternehmen für die Anpassung an das neue Gesetz tun müssen

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Als ich dabei war, mir über das Thema für diesen Beitrag Gedanken zu machen, habe ich eine alarmierende Meldung über das Ergebnis einer Umfrage eines angesehenen Instituts (Serasa Experian) bezüglich der Maßnahmen gelesen, die von den Unternehmen ergriffen werden, um den Anforderungen des Allgemeinen Datenschutzgesetzes (LGPD) gerecht zu werden: Die Umfrage ist ein Jahr vor Inkrafttreten des neuen Gesetzes erfolgt. Zum Zeitpunkt der Umfrage waren 85% der brasilianischen Unternehmen noch nicht auf den Schutz der Rechte und die Erfüllung der Pflichten in Bezug auf die Verarbeitung personenbezogener Daten vorbereitet. Dieser Prozentsatz mag sich vor allem im Bereich großer und mittlerer Unternehmen verbessert haben, es bleibt jedoch der Eindruck, dass in diesem Bereich bisher sehr wenig getan wurde.

Uns sind die Schwierigkeiten von Unternehmen bei der Führung ihrer Geschäfte inmitten der jahrelangen großen Wirtschaftskrise, die Brasilien durchgemacht und deren Auswirkungen noch überall zu spüren sind, natürlich bewusst. Trotz angespannter Budgets und Zweifeln, ob das Wachstum zurückkehrt, steht fest, dass alle Unternehmen zur Einhaltung dieser gesetzlichen Vorschriften verpflichtet sind und irgendwann Probleme auftauchen werden, wenn man nicht darauf vorbereitet ist, die Vorschriften umzusetzen.

Ich möchte an dieser Stelle lediglich den Vorbehalt machen: in Brasilien gibt es, wie in allen anderen Bereichen, die besondere Komponente der Unvorhersehbarkeit. Es ist nämlich noch nicht sicher, ob das Allgeneine Datenschutzgesetz (LGPD) tatsächlich, wie im bereits verabschiedeten derzeitigen Text vorgesehen, im August 2020 in Kraft tritt. Im Kongress wird ein Gesetzesprojekt in einem Gesetzgebungsverfahren diskutiert, das vorsieht, das Inkrafttreten des LGPD um weitere zwei Jahre zu verschieben. Die Begründung des Abgeordneten, der diesen Gesetzentwurf eingebracht hat, lautet, dass das Gesetz bereits in zehn Monaten in Kraft treten soll, derzeit aber nur ein kleiner Teil der brasilianischen Unternehmen mit dem Prozess der Anpassung an das neue juristische Szenario begonnen hat.

Es ist derzeit nicht abzuschätzen, ob das betreffende Gesetz verabschiedet, abgelehnt oder noch modifiziert wird. Fakt ist jedoch, dass das ursprüngliche Datum des Inkrafttretens, d.h. August 2020, momentan noch gilt.

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Da das Allgemeine Datenschutzgesetz bereits im August 2018 verabschiedet wurde, ist die Begründung nicht ganz nachvollziehbar, dass ein Großteil der Unternehmen mehr als 14 Monate später nicht mit dem Anpassungsprozess begonnen hat. Durch die Verlängerung der Frist würde die Frage im Ergebnis „vor sich hergeschoben", früher oder später müssen alle Unternehmen diese jedoch umzusetzen.

Vor diesem Hintergrund habe ich mich entschlossen, einige Tipps zu geben, was Unternehmen zu tun beginnen können und müssen, um ohne große Überraschungen die gesetzlichen Vorschriften erfüllen zu können.

Zunächst ist darauf hinzuweisen, dass die Anpassung an das LGPD direkt mit dem bekannten Dreieck Governance-Risiko-Compliance (GRC) verbunden ist und genauso wie bei jeder anderen Maßnahme bezüglich GRC die Unterstützung der obersten Geschäftsleitung notwendig ist, um das Engagement aller bei den anzunehmenden Initiativen zu garantieren. Außerdem müssen die für die Leitung des Projekts verantwortlichen Personen definiert und Rolle und Pflichten jedes einzelnen, sowie die betreffenden Fristen festgelegt werden.

Den Betroffenen muss durch Präsentationen und Material über den Zweck des Projekts Grundvorstellungen zum Datenschutz, dessen Bedeutung und gesetzliche Anforderungen nahegebracht werden.

Ist das Projekt erst einmal intern genehmigt und sind die involvierten Personen untereinander auf ein ähnliches Level an Kenntnissen gebracht, muss ein Mapping der Daten erstellt werden, wobei es sich hierbei um die vielleicht wichtigste Etappe handelt, weil damit definiert werden kann, welche Maßnahmen für den Datenschutz, Garantie der Rechte der Inhaber und Vorbeugung von Vorfällen zu treffen sind. Voraussetzung dafür ist die profunde Kenntnis der behandelten Daten und deren Fluss im Unternehmen (um welche Daten geht ist, von wem werden sie genutzt, für welche Zwecke, wer hat Zugang, wie lange werden sie aufbewahrt, mit wem werden sie geteilt, wie lange sie werden sie vorgehalten, wie werden sie vernichtet, etc).

Ausgehend vom Mapping können die bestehenden Risiken und die notwendigen Maßnahmen für deren Reduzierung identifiziert werden. Dann kann ein Aktionsplan festgelegt werden, der verschiedene Maßnahmen wie die Implementierung und/oder die Anpassung der Mechanismen der Kontrolle und Sicherheit, die Ausarbeitung und/oder Aktualisierung von Politik (wie bspw. Politik der Geheimhaltung, Informationssicherheit, Zurückbehaltung von Daten, Nutzung von Websites), die Durchsicht von Verträgen, die Verarbeitung und/oder Speicherung von Daten, die Schaffung von Verfahren, für die Bearbeitung von Anfragen der Dateninhaber, die Ausarbeitung eines Plans für Reaktionen auf Vorfälle etc.

Nach der Definition und Implementierung der einschlägigen administrativen und technischen Maßnahmen müssen alle Mitarbeiter in Bezug auf ihre Pflichten im Rahmen der Datenverarbeitung sowie die zu ergreifende Maßnahmen bei Fragen und/oder Vorfällen geschult werden.

Die Unternehmen, die die Verarbeitung personenbezogener Daten kontrollieren, müssen eine für die Verarbeitung der Daten verantwortliche Person benennen, die Ansprechpartner für Reklamationen und Mitteilungen der Inhaber der Daten, Empfänger von Mitteilungen nationaler Datenschutzbehörden und für die Orientierung von Mitarbeitern und andere Funktionen zuständig ist. Die nationale Behörde kann weitere Aufgaben des Datenschutzbeauftragten definieren und Unternehmen von der Verpflichtung der Benennung eines Datenschutzbeauftragten befreien, vorläufig lautet die Empfehlung jedoch, eine Person zu definieren, die imstande ist, diese Funktion zu übernehmen. Wer dies sein soll, kann gleich zu Beginn des Projekts oder im Rahmen der Implementierung des Projekts entschieden werden.

Wichtig ist, dass alle Maßnahmen im Rahmen des Datenschutzprogrammes dokumentiert werden, da es möglich ist, dass diese Unterlagen angefordert werden. Außerdem dient diese Dokumentation der Darlegung der tatsächlichen Implementierung solcher Maßnahmen.

Nach der Durchführung der vorgenannten Etappen sind die Unternehmen imstande, wenn nicht alle, so doch den größten Teil der gesetzlichen Anforderungen zu erfüllen. Das Datenschutzprogramm muss kontinuierlich beobachtet werden, um sicherzustellen, dass bei neuen Projekten bzw. Änderungen der verarbeiteten Daten die notwendigen Anpassungen vorgenommen werden.

Je nach Risiko für die Dateninhaber können verschiedene andere Aktionen notwendig sein (bspw. Erstellen von Berichten über die Auswirkungen für den Datenschutz, Abschluss von Versicherungen gegen Datenleaks, Schaffung globaler Unternehmensnormen oder anderen Formen des Datenschutzes für Fälle der internationalen Übertragung von Daten, Überprüfung von Gesetzen und Regelungen anderer Länder, Implementierung von Mechanismen für die Anonymisierung von Daten, etc).

Das Wichtigste ist, dass die Unternehmen mit ihren Projekten beginnen und die notwendigen Erhebungen durchführen, um das Universum der von ihnen bearbeiteten Daten zu erfassen, da dies die Definition erlaubt, welche Maßnahmen ergriffen werden. Je organisierter die Informationen sind, desto einfacher ist der Weg für die Einhaltung des Gesetzes.

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Natürlich stellen diese Bemerkungen nur einen kurzen Anriss auf der Grundlage einiger anerkannter Praktiken zu dem Thema dar und erheben nicht den Anspruch, das Thema erschöpfend zu behandeln. Klar ist, dass jedes Unternehmen gemäß seinen eigenen Charakteristiken, Größe und Art des Geschäfts ein Datenschutzprogramm haben muss. Eine Standardformel für alle gibt es dafür leider nicht.

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New Technologies and the Brazilian Regulatory Sandbox

There is no doubt about the constant transformation of the business environment that, with the advancement of technology and consumer relations, has been increasingly rapid and dynamic. Startups and *Fintechs* have progressively gained ground, although they still face some barriers to entering and establishing themselves in the market.

In order to foster digital entrepreneurship and the development of products and services with a technological innovation character in the national market, the Ministry of Economy released, in June of this year, a statement informing the intention of implementing a Regulatory Sandbox model ("Sandbox") in Brazil's financial, insurance and capital markets areas.

Inspired by British pioneering initiatives and by the experience of Hong Kong, Singapore, Malaysia and Australia, the project was launched jointly by the Special Treasury Office of the Ministry of Economy, the Brazilian Central Bank (*BACEN*), the Securities and Exchange Commission (*CVM*) and the Superintendence of Private Insurance (*SUSEP*), seeking to promote the development of innovative products and services on those areas.

In this sense, the CVM published, in August, a public notice submitting to the public hearing a draft of the normative ruling (Instruction) that shall regulate the creation and operation of an experimental regulatory environment, the so-called Sandbox. Also, in September, SUSEP published a set of drafts of normative rulings providing for the conditions to the authorization and operation of insurance companies under SUSEP's innovation project.

The model, firstly implemented by the British government – the country that carried out the first test cycle between June and July 2016 – establishes the creation of an environment, under the supervision of the relevant regulatory bodies, that allows the testing of products, services and business models mandatorily linked to innovative technologies, without initially incurring into all the consequences and being exempt from following the existing regulatory framework.

The idea is to guarantee a temporary authorization to the Sandbox participants to test their business without the need to meet certain regulatory requirements, reducing bureaucracy and – often – high costs, by setting prior limits, conditions and safeguards aimed at investors' protection and the proper functioning of the securities market, being certain that the participant companies will be subject to continuous monitoring by the regulatory bodies in a controlled environment throughout the testing period.

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Aligned with the innovative nature of the initiative, the foundations of eligibility criteria are set in innovation, making room for the development of Startups, *Fintechs* and entrepreneurs in general, promoting the inclusion of these companies in the market, encouraging competition and reducing regulatory uncertainty in the implementation of innovations.

Considering that the logic of Startups is precisely to bring solutions to everyday problems and challenges, with low costs and innovation, the Sandbox will be a great opportunity for these companies to test their products or services, to monitor the reaction of the market and to assess the feasibility of their business. Even more so, when statistics show that several promising initiatives end up barred in bureaucracy and high costs.

We understand that the main challenge of the government is the need for alignment between the different regulatory bodies, since several activities are subject to the regulation of plural entities. Accordingly, success will depend on a coordinated and joint action or the public agents, while on the companies' perspective it will be the preparation of the proper structure to maintain their activities after the testing period.

The public hearing period established by the CVM public notice ended – after an extension – on October 12, 2019, and the opinions and suggestions on the draft of the Instruction providing for the rules for the creation and functioning of this new regulatory environment is now under CVM analysis. The conclusion of CVM's analysis about the suggestions and the final wording of the Instruction shall be released by the CVM soon, with the consequent publication of the normative rule governing the matter. The measure is expected to have the same success in Brazil as it has had in other countries, and it is certain that, in this regard, Brazil is aligned with the international scenario.

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The negotiation of tax debits between taxpayers and Tax Administration: A welcomed step toward a cooperative paradigm

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In Brazil, until very recently, initiatives aimed to bring taxpayers and Tax Administration closer following a relation based on a cooperative rather than an adversary paradigm were very scarce and ineffective. In the opposite direction of the European Union and the United States where cooperation seems to guide many successful programs like cooperative tax compliance initiatives, in Brazil, the longstanding tradition was the mutual lack of trust between Tax Authorities and taxpayers.

One of the main reasons for such a strong reliance on adversity rather than cooperation may be the wrong assumption that 'cooperation' in Brazil could seem like an open door to bribe opportunities or corruption schemes.

However, it seems that this scenario is changing. Among many recent public initiatives aimed to soften the abovementioned adversary paradigm, the Brazilian Federal Government enacted the Provisional Measure n. 899/2019 providing for the regulation of the procedure of tax negotiation between taxpayers and Tax Administration.

The Brazilian 'National Tax Code', dated from the mid-1960's, already allowed the transaction of tax debts between taxpayers and Tax Authorities since its enactment (see article 156, III). Notwithstanding, the article 171 from the same Code made tax negotiation possible upon the enactment of a special law, whereby the conditions, limitations and public authorities in charge to negotiate should be specified. Until the enactment of Provisional Measure n. 899/2019, no legal statute had regulated tax negotiation so far.

The recently enacted Provisional Measure n. 899/2019 provides that the Federal Union in the Brazilian Federation can negotiate tax debits with taxpayers. Starting or accepting to negotiate is a discretionary act and should be justified in public interest purposes. All sorts of federal tax debts can be negotiated, including self-assessed taxes declared by taxpayers in tax returns, taxes assessed *ex officio* that are under discussion by administrative courts, also those taxes that are already being charged in executive proceedings.

The underlying approach adopted by the Federal Government through the enactment of the Provisional Measure n. 899/2019 consists of providing for rigid and narrow boundaries within which Brazilian Internal Revenue Service and Tax Attorneys have the competence to negotiate with taxpayers. In the end, the

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abovementioned Provisional Measure only allows negotiations if a maximum time of 84 months is observed and 50% of the tax debt is preserved (*i.e.*, discounts cannot exceed 50% of the tax debt). Moreover, discounts can be given only on interests and certain penalties due (*i.e.*, all penalties that do not have a criminal grounding) by the taxpayers; taxes cannot be granted any reduction.

Reading the Provisional Measure n. 899/2019, any practitioner that has already dealt with the several tax amnesties programs enacted since the early 2000s may find many converging highlights. The prohibition to grant discounts on the tax itself (only on interests due and certain penalties), the effects of the negotiation on debits (renouncement to any claim judicially before courts and the lack of novation of the debits) are some of the features that could be normally seem in basically all tax amnesties programs enacted during the past few decades.

Tax negotiation also looks like, seems like and smells like tax amnesty programs, but it is not. It is a hybrid legal creation, that combines features arising from past tax amnesty programs, the possibility to defer the payment of tax debts and to pay in installments and specially a discretionary power conferred to Brazilian IRS and Tax Attorneys altogether with the strong support to a new cooperative approach, that both Brazilian taxpayers and Tax Administration are not so used to deal with.

Furthermore, penalties based on criminal charges (like 'fraud' and 'tax evasion') cannot be granted any discount and certain debts arising from small-sized businesses cannot be negotiated. The case law of Federal Administrative Court of Appeal and Judicial Courts reveals that tax planning in Brazil, although based on entirely licit structures and instruments of tax avoidance, is commonly deemed by Tax Authorities as 'fraud' or 'sham conduct'. In this context, tax negotiation in Brazil may not comprehend tax debts of a high amount (normally arising from *ex officio* tax assessments related to tax avoidance schemes) and a low amount (from a small-sized business).

Those circumstances give rise to several questions related to the effectiveness of tax negotiation (since the major tax debts will be excluded from its scope) and to the justice regarding the discrimination against a small-sized business that cannot make use of negotiation whereas medium and major private agents can.

There are also conditions that may be complied with in order to allow tax negotiation. The most controversial one is the prohibition to make 'abusive use' of tax negotiation with the purpose to achieve a better competitive position in the relevant market.

Therefore, abuse is qualified in connection to a special purpose: a competitive advantage. What is a competitive advantage in this context? Which public agency or court has the competence to determine if the use of tax negotiation conferred to the taxpayer a competitive advantage? Is any competitive advantage to be considered? Or the use of tax negotiation must confer to the taxpayer a

substantial competitive advantage? Does the use of all tax amnesties combined with the choice to negotiate tax debits can be deemed as abusive? Choosing to opt-in a faculty provided by law can somehow reveal an abusive behavior?

The above questions evidence how controversial can that requirement be. In the absence of any specific guidance on this issue, there remains a great legal uncertainty related to compliance with legal requirements related to tax negotiation.

Finally, there is a special category of tax negotiation that gives rise to special concerns. It is the tax negotiation related to controversial legal issues in case law only takes place where there is no prevailing case law favorable either to Tax Administration or to taxpayers. Difficulties arise in the determination of the criteria that should be used in order to define what is prevailing case law in those circumstances. The lack of any specific guidance on this issue gives rise to legal uncertainty, undermining the attractiveness and effectiveness of tax negotiation.

The Treasury shall indicate which controversial legal issues are eligible for such a category of tax negotiation. Taxpayers cannot actually negotiate; they can only adhere to the pre-established conditions (again, it seems like past tax amnesty programs, although it is not).

In brief, we understand that the recently launched initiative of tax negotiation is very welcomed above all because it is a step toward a cooperative paradigm, which is by far more appropriate to increase compliance with tax rules and to promote a better business environment. However, Provisional Measure n. 899/2019 gives rise to several fundamental concerns, analyzed in this short article, that can undermine its main purposes. We hope that most of the issues pointed out in this article are addressed by Congressmen at the time the Provision Measure is converted into a Federal Law.

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ICMS PEP - Special Installment Program

Decree No. 64.564/2019, published on November 6th, in the Official Journal of the State of São Paulo, institutes a new Special Installment Program (PEP) for the State VAT in order to allow taxpayers from São Paulo to regulate debts related to such tax.

Through ICMS Convention No. 152/2019, the National Finance Policy Council (CONFAZ) authorized the State of São Paulo to institute the Special Installment Program (PEP) related to ICMS (State VAT), so that the taxpayer may reduce fines and other penalties arising from triggering events occurred until May 31st 2019, constituted or not in Active Debt.

The taxpayers who adhere to the program will be benefited by a 75% reduction on fines and a 60% reduction on interests when carrying out payment in one lump sum. With regards to payments in installments up to 60 months, the discount will be of 50% on the fine amount and 40% on the interests. As for the installments, the minimum amount per portion must be of BRL 500,00 (five hundred reais), with financial increases of 0.64% per month for liquidation in up to 12 installments; 0.80% per month for liquidation between 13 and 30 installments; and 1% per month for liquidation between 31 and 60 installments, that is, the consolidated debt may be paid in installments with the conditions:

I. In a single installment, with a reduction of up to 75% (seventy-five per cent) of punitive and late payment fines and up to 60% (sixty per cent) of other legal additions;

II. In up to 60 (sixty) equal and successive monthly installments, with a reduction of up to 50% (fifty percent) of punitive fines and moratoriums and 40% (forty percent) of other legal additions. In this case, monthly interest of up to:

a. 0.64% (sixty-four hundredths percent) for settlement in up to twelve (12) installments;

b. 0.80% (eighty hundredths per cent) for settlement of 13 (thirteen) to 30 (thirty) installments;

c. 1.00% (one percent) for settlement of 31 (thirty one) to 60 (sixty) installments.

The term to adhere to the program is from November 7th to December 15th 2019. The taxpayer must access the electronic website (www.pepdoicms.sp.gov.br) and log in with the same password utilized on the Electronic Tax Office (PFE) and select the tax debts to include in the program.

The installment payment foreseen in the Decree will be deemed effectively executed with the payment of the first installment within the established period.

Additionally, it is worth mentioning that the taxpayer may lose the benefit of installment payment in the hypotheses of:

I. failure to comply with any of the requirements set forth in the Agreement;

II. late payment of more than 3 (three) installments, successively or not;

III. the inclusion of any debt previously included in the installment payment program foreseen in ICMS Agreement 51/07, of April 18th, 2007, ICMS Agreement 108/12, of September 28th, 2012, ICMS Agreement 117/15, of December 17th, October 2015 and ICMS Convention 54/17 of May 9th, 2017, which is in regular progress on June 30th, 2019;

IV. non-compliance with other conditions to be established in State Legislation.

The breach of the installment payment under the terms of the decree will imply the immediate cancellation of the planned discounts, fully re-incorporating the reduced amounts into the tax debt and making the debt immediately due, with the legal additions foreseen in the legislation.

The program is a great opportunity for taxpayers to settle their debts before the Tax Authorities, that is, by adhering to the program and maintaining the renegotiation payments on time, companies may regain their regularity with the State Tax Authorities, restoring their capacities of participating in public bids and access to installments, for instance.

São Paulo State government's expectation is to raise in total the average of BRL 3.1 billion with this program, from which approximately BRL 650 million by the end of 2019. For the adhesions carried out between 7th and 15th of November, the maturity of the first installment or single installment will be on November 25th. As for the adhesions carried out from the 16th to the last day of the month, the due date will be on December 10th, and the adhesions between December 1st and December 15th will expire on December 20th. The remaining installments shall be paid in subsequent months, with maturity date depending on the date of adhesion of the taxpayer.

The program contains specific rules for particular cases, such as taxpayers who have debts related to infraction notices and fines that have not yet been registered in the Active Debt. For debts required by tax assessment not yet registered as active debt, additional and cumulative reductions in the amount of the fine corresponding to 70% are foreseen if the adhesion occurs within 15 days from notification, 60% if it occurs within the period of 16 to 30 days from issuance of Infraction Notice of and 25% in other cases.

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The taxpayer who is not regular before the Tax Authorities, such as the taxpayer who has suspended registration or has failed to submit the ICMS Information and State Ancillary Obligation (GIA) for three months, will only be subject to the benefit of PEP through the payment of a single installment.

For companies from other States that have made sales to non-contributors located in São Paulo, PEP will also be granted or approved through a single installment payment.

The referred Decree does not apply to the tax debts corresponding to the additional 2% (two per cent) in the ICMS rate, foreseen in Article 56-C of ICMS Regulation, which constitutes the revenue of the State Fund for Combating and Eradicating Poverty (FECO –EP), instituted by Law No. 16.006 of November 24th, 2015.

In case of tax debts arising from tax substitutions, the installment payments are allowed within up to six months, with financial additions of 0.64% per month, with the same discounts.

If there is a tax debt that passible to be settled under the terms of Decree No. 64.564 that is not available for selection, the taxpayer may request to the State Attorney General's Office until the 13th of December 2019, its availability in the program ICMS PEP. The aforementioned application will be remitted to the Department of Finance and Planning, which must, within ninety (90) days, include the debt in the PEP or justify its non-inclusion.

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Recent Discussions in Brazilian Superior Court of Justice Regarding Short-Term Real Estate Leases

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Last October, the Brazilian Superior Court of Justice initiated a new judgment on the matter of property rental. Even though Brazilian Courts widely debate the issue, what is in focus in this opportunity is the possibility -- or impossibility -- of property owners in residential condominiums to use digital platforms, such as the giant Airbnb or Booking, to offer the temporary rent of their properties.

In Brazil, the signing of short-term real estate lease contracts of all or a portion of the property is nothing new. However, this judgment concerns the enhancement of short or very short-term rent through virtual platforms, inserted in the so-called sharing economy, as in other intermediation systems, like Booking and HomeAway.

In this scenario, the Brazilian Superior Court of Justice discusses the limitation of the property rights as established in the Brazilian Federal Constitution, and also the application of two important statutes: **(i)** Law No. 8.245/1991 (Real Estate Rental Law); and **(ii)** Law No. 11.771/2008 (National Tourism Policy).

The discussion, until then unprecedented in the Superior Court, involves, on the one hand, the owner of a property that uses an online platform to rent it for the season, and on the other hand, the condominium where the property is located and which intends to prohibit this sort of rental.

The Justice-Rapporteur of the case, Luis Felipe Salomão, at the beginning of the trial, emphasized the importance of the Superior Court in the definition of case law in matters that affect the evolution of society, explaining that the solution of the controversy posed herein necessarily involves the analysis of any commercial destination conferred to the properties.

Concerning Law No. 11.771/2008, which establishes rules on the National Tourism Policy, Justice Salomão pointed out that the accommodation contract differs from the real state lease agreement, since the first one has as its main purpose a multiple rendering of services, in addition to accommodation, i.e., it is inherent to it the rendering of services such as concierge, security, and cleaning of the accommodations. Therefore, given the specificity of the hosting contract, the activity of short-term rental carried out by owners of real estate located in residential condominiums cannot be considered commercial. Therefore, the applicability of Law No. 11.771/2008 to these contracts is ruled out, not being subject to prohibition by condominium rules.

In other words, according to the Justice-Rapporteur, short term real estate

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leases contracts (including the ones contracted using digital platforms) have the legal nature of lease agreements, thus being regulated by the terms of Law No. 8.245/1991.

After overcoming the issue related to the nature of the agreement - whether of accommodation or lease - the debates in the Superior Court continued for the limits of the ownership restriction in parallel to the rights of the other members of the residential condominium, in which case the Justice-Rapporteur mentioned the consolidated case law of the Court which establishes that restrictions related to the prohibition of pets and defaulting condominium members to use areas of common use are illegal.

In such cases, which guided subsequent decisions, the consolidated understanding is that the analysis of restrictive rules issued by the condominiums must observe criteria of reasonableness and legitimacy of the measure given the right of ownership established in the Brazilian Federal Constitution. Having made these considerations, the understanding of the Justice is that there is no specific law in Brazil that restricts the use of digital platforms for the offer of properties by temporary lease.

Finally, it has been concluded that it is not possible to limit the leasing activities by the residential condominium because the rents via Airbnb and other similar platforms would not be included in the concept of accommodation, but instead of short-term residential lease. Also, they could not be classified as a commercial activity subject to prohibition by the condominium.

The trial session of this critical case has not been concluded yet since some Justices are still to vote. The conclusion of this trial is eagerly awaited since it will be determined whether the condominium may prohibit the owners from making temporary rentals through apps or not, which may impact several digital platforms.

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