

# LATAM Country Update – Tax and Transfer Pricing related developments

# Members

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Victor Caligiuri  
Transfer Pricing Associates  
[V.Caligiuri@tpa-global.com](mailto:V.Caligiuri@tpa-global.com)



Hector Zapata  
Transfer Pricing Associates  
[H.Zapata@tpa-global.com](mailto:H.Zapata@tpa-global.com)



Belisa Severini  
Transfer Pricing Associates  
Argentina  
[b.severini@tpa-global.com](mailto:b.severini@tpa-global.com)

# Brazil

# Brazil Tax Developments

## ❖ Tax reform – Direct and Indirect taxation

### ○ Simplification

Companies spent around 1.500 hours in a year to pay taxes

### ○ Increase of legal certainty

Due to high litigation 51% of the gross domestic product is comprised with tax controversy

### ○ Tax Fairness

Elimination of preferential regimes and increase of exempt income

# Brazil Tax Developments

## ❖ Income Tax reform

- **Interest on Equity Capital:** will no longer be deductible as of 2022
- **Dividends:** will be taxed by WHT at a rate of 20%, and if the beneficiary is in a tax haven the rate will be 30%.
- **Disguised Profit Distribution:** will also include loans or payment of expenses in favor of a partner
- **Offshore:** at the closing of the balance sheet the profit of the offshore is considered distributed to the individual, who will have to pay taxation on unrealized gains.
- **IRPJ:** in 2022 the rate will be 12.5% and in 2023 10%, but the additional 10% will be maintained
- **Effective Profit regime :** those whose revenue from royalties, rents, purchase and sale (except for real estate development), image rights exceed 50% will be obliged to follow this regime
- **Capital reduction:** only by the market value

# Brazil Tax Developments

## ❖ Income Tax reform

- **Capital reduction:** only by the market value
- **Capitalization of a legal entity abroad:** only by the market value; funds and trusts are included
- **Goodwill:** the deduction will be prohibited in the acquisition of corporate interest that occurs after December 31, 2021
- **Indirect Capital Gain:** the indirect sale of assets in Brazil will be taxed if the value of the asset corresponds to 50% or more of the market value of the legal entity, or if the market value of the participation in the assets in Brazil is higher than US\$ 100 million
- **Closed Fund:** taxation by quotas in November; the accumulated income (stock) will be taxed in May 2022, with the possibility of reducing the rate to 10% if paid in January 2022

# Brazil Tax Developments

## ❖ Income Tax reform

- **Financial Investment:** single tax rate of 15%; mortgage bonds will no longer be exempt
- **Property Investment Fund will no longer be exempt:** income and gain on the sale of shares will be taxed at 15%.
- **Share investment fund qualified as an investment entity:** funds from sale or redemption in other funds will be considered distributed
- **Share investment fund not qualified as an investment entity:** will be taxed as a legal entity; income accrued until 01.01.2022 will be taxed at 15% (reduced rate to 10% if paid in January 2022)
- **Stock Exchange:** the calculation will become quarterly; the rate for all operations will be 15%; possibility of compensation of several operations in the stock market environment (including day-trade and investment funds traded on the Stock Exchange); if it is impossible to prove the cost, the lowest quotation value of the asset in the last 60 months will be adopted
- **IRPF:** adjustment of the table (exempt until R\$ 2.500,00, 27,5% above R\$ 5.300,00); simplified discount only for those who earn taxable income up to R\$ 40.000,00
- **Real Estate:** possibility of updating to market value upon payment of IR at a 4% rate

# Brazil Tax Developments

- ❖ Income Tax reform

- Adjustment of the personal income tax table
  - The biggest update of the income tax exemption range for workers since the Real Plan. More than 16 million wage earners will be exempt. The reform benefits more than 30 million taxpayers with tax reductions.

Atual		Nova		
Contribuintes	Faixas	Faixas	Contribuintes	Alíqt.
10,7 mi	Até R\$ 1.903,98	Até R\$ 2.500	16,3 mi	0%
6,8 mi	R\$ 1.903,99 - R\$ 2.826,65	R\$ 2.500,01 - R\$ 3.200	2,8 mi	7,5%
3,7 mi	R\$ 2.826,66 - R\$ 3.751,05	R\$ 3.200,01 - R\$ 4.250	3,6 mi	15,0%
2,3 mi	R\$ 3.751,06 - R\$ 4.664,68	R\$ 4.250,01 - R\$ 5.300	2,2 mi	22,5%
6,9 mi	Acima de R\$ 4.664,68	Acima de R\$ 5.300,01	6,3 mi	27,5%



# Brazil Tax Developments

## ❖ Income Tax reform

### ○ Taxation of distributed Profits and Dividends

Currently Brazil is one of the few countries that exempt (from CIT and WTH) Dividends and similar profit distributions derived by resident companies and paid by resident companies out of after-tax profits.

- Avoidance of hybrid mismatch;
- Market value of Dividends in kind;

### ○ Change in taxation on investment

Currently, closed investment funds allow to indefinitely postpone paying income tax. With the reform, these funds will pay tax annually. The regime for investment funds is proposed to be amended aligned with taxation of dividends to prevent double taxation.

# Brazil Tax Developments

## ❖ Income Tax reform

- Fair market value adjustment of immovable property

The reform will give the opportunity of revaluating the property paying 4% of capital gain instead of 15 (person) 22.5% (legal entities)

- Family Immovable property holding

The reform seeks to extinguish the beneficial regime in which immovable property holdings are taxed at a lower rate in comparison to the natural person

- Indirect share transfer

The reform seeks to extinguish the actual beneficial indirect share transfer.

# Brazil Tax Developments

## ❖ Indirect Tax reform

### ○ Extinguishment of PIS/COFINS

Corporate taxpayers are subject to the PIS and COFINS non-cumulative contribution, which is imposed based on their gross revenue. There are currently 5 different PIS COFINS in Brazil

### ○ Creation of CBS

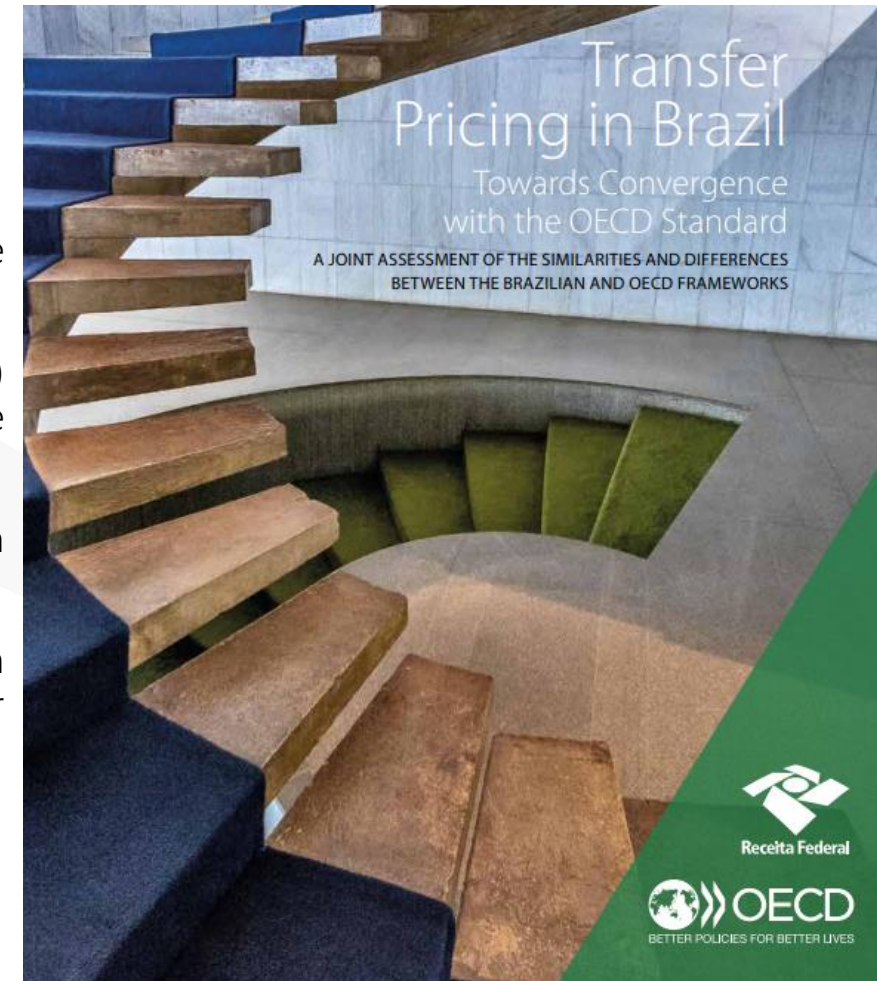
The reform seeks to unifies all PIS and COFINS into one contribution called “Contribution on Revenue arising from Operations with Goods and Services”(“CBS”)

# Brazil Transfer Pricing Developments

## ❖ Arm's Length Adoption

### Alignment between Brazilian rules and OECD transfer pricing guidelines.

- **October 2016**, Brazil signed the Multilateral Competent Authority Agreement on the Automatic Exchange of Country-by-Country (CbC) Reports;
- **February 2018**, the OECD and the Brazilian Federal Revenue Department (RFB) launched a joint project to examine the similarities and divergences between the Brazilian and OECD transfer pricing approaches.
- **July 2019** a joint statement was issued to present the outcomes of their 15-month work programme
- **30 July 2020**, the OECD and RFB launched a survey seeking for public collaboration in the development of safe harbours and other simplification measures on transfer pricing matters



# Brazil TP Approach

## ❖ Issues resulting from gaps and divergence

- Simplification, at what cost?
- Double (non) taxation arising from:
  - Mismatch of taxable base
  - Limitation of deduction
  - Absence of net methods and profit split

### 1. OECD Council Recommendation on the Determination of Transfer Pricing between Associated Enterprises and future BEPS Recommendations

Brazil has yet to adhere to the relevant OECD legal instruments

### 2. Statement and application of the arm's length principle

- Absence of restatement of the arm's length principle in the domestic law
- Scope of application of transfer pricing rules

### 3. Transfer pricing methods

- Freedom of selection of the transfer pricing method
- Use of "other methods" not permitted
- Absence of transactional net margin method
- Absence of profit split method

### 4. Comparability issues

- Absence of notion of accurate delineation of the actual transaction
- Use of fixed margins, which lead to non-arm's length outcomes
- Absence of a complete comparability analysis / process of performing a comparability analysis
- Strict use of comparables
- Strict application of the item-per-item approach and not permitting combining transactions
- Limited comparability adjustments



Source: TRANSFER PRICING IN BRAZIL: TOWARDS CONVERGENCE WITH THE OECD STANDARD

# Andean Community (CAN)

# Andean Community (CAN)

## ❖ Introduction

- CAN has the objective to promote the development of the members through integration and economic and social cooperation.
  - Created in 1969 and formed by Bolivia, Colombia, Ecuador and Peru. Venezuela was part of the Community until 2006.
  - Colombia is member of the OECD.
  - 11<sup>th</sup> economy of the world and 111 MM inhabitants.
  - Areas: Free Trade Agreement, Migration, Intellectual Property, Transportation, Taxation, etc
- ## ❖ Double taxation convention (Decision 578)
- Signed in 1971. Updated in 2004. Source taxation.
  - Article 7 = Article 9 OECD Model = Associated enterprises



# Andean Community: Double taxation convention





## ❖ Taxation of income: Chapters

CAN DTC	
Article 3: Tax Jurisdictions	Article 10.- Interests
Article 4.- Income from immovable property	Article 11.- Dividends and participations
Article 5: Income from the right to exploit natural resources	Article 12.- Capital gains
Article 6: Business profits	Article 13.- Income from the provision of personal services
<i>Article 7: Associated or related companies</i>	Article 14.- Business profits for the provision of services, technical services, technical assistance and consulting
Article 8: Transport companies	Article 15.- Pensions
Article 9: Royalties	Article 16.- Income from public entertainment activities



# Andean Community: Action 13

## ❖ BEPS Action 13

Country	LF	MF	CbCr	Other TP forms	Inclusive Framework
Bolivia 	Local TP Report			X	
Colombia 	X	X	X	X	X
Ecuador 	Local TP Report			X	
Peru 	X	X	X	X	X

# Andean Community: TP developments

## ❖ Bolivia

- In 2014, Tax Administration published guidelines to establish the subjects obliged to file the TP Report and the Informative TP Form.
- In 2017, first time that Bolivian Tax Administration makes reference to the OECD. The list of non-cooperative territories was published.
- In 2021, the deadlines were extended: 31-Aug-21 (Companies with FY31-Mar-21) and 31-May-21 (Companies with FY31-Dic-20).
- No TP cases developed by Bolivian Tax Administration
- No additional changes regarding the implementation of BEPS Action 13 in the national legislation.

# Andean Community: TP developments

## ❖ Colombia

- In June 2021 Colombia joined the International Compliance Assurance Programme (ICAP) for multinational entities with effect from September 2021.
- In July 2021, Colombian Tax Administration promulgated a resolution setting out the technical filing requirements for the FY2020. The local file must be submitted using form 1729 (version 8) and the master file, using form 5231 (version 2).
- In August 2021, Colombian Tax Administration published a resolution setting out CbCr and CbCr notification procedures and technical filing requirements for FY2020.
- Income Tax Law, Art. 260-4: Significant differences in comparability must take into account aspects such as the characteristics of the operations, functions, assets and risks, contractual terms, economic or market circumstances and business strategies. These differences can be eliminated by making sufficiently reliable adjustments for comparison.
- Colombian Case Law (Vidrio Andino vs DIAN, 2018) also supports the fact that exceptional and extraordinary circumstances can be considered as comparability adjustments and should not necessarily be regarded as “unpredictable”.

# Andean Community: TP developments

## ❖ Ecuador

- TP rules exist since 2005. Expressly recognizes the OECD guidelines as a technical reference.
- Other signs that show that Ecuador is trying to adhere to the OECD guidelines:
  - In 2018, local Government established the creation of a Commission in charge to coordinate and establish the steps to follow for the accession process of Ecuador as a member of the OECD.
  - In 2018, Ecuadorian Tax Administration signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.
  - In 2019, Ecuador committed to implement the Automatic Exchange of Financial Account Information.
- In 2020, new TP rules regarding exports of bananas. Ecuadorian Tax Administration publishes on its website the monthly comparable prices.

# Andean Community: TP developments

## ❖ Peru

- In December 2020, Peruvian Tax Administration announced that Peru met the required OECD information security and confidentiality standards for automatic exchange purposes. As a consequence, the deadline for submitting CbCr for fiscal years 2017, 2018 and 2019 was on January 2021.
- Government request in tax matters includes two proposals related to TP:
  - Greater emphasis on the use of discounted cash flows to calculate the market value in transfer of shares, even between unrelated third parties
  - Review and modify TP rules, especially modifications to the so-called "sixth method" to be able to resolve imperfections related to information required by the Peruvian Tax Administration that taxpayers do not have available at the moment.

# Argentina

# Argentina TP developments

## ❖ BEPS Action 13

### • Country by Country Report (CbCR):

- MNE Groups with consolidated annual revenues equal or greater than EUR 750 million in the year prior to the submission; and
- 2 Notifications for all the entities resident in Argentina that are members of MNE Groups, even though the MNE Group is not obligated to file the CbCR, reporting:
  - Which is the Ultimate Parent Entity,
  - If the MNE Group is subject to the CbC Report;
  - In which jurisdiction the CbC Report was submitted, etc.

### • Master File

- The thresholds for the submission of the Master File were recently modified, which must be now submitted when the following circumstances are jointly verified:
  1. The total consolidated annual revenues of the group exceeds AR\$ 4,000 million (approx. USD 38 million / EUR 33 million) in the year prior to the submission; and
  2. The transactions carried out by the local entity with related parties from abroad exceed, as a whole in the fiscal period, AR\$ 3,000,000 (approx. USD 28,500) or individually of AR\$ 300,000 (approx. USD 2,800).

# Argentina TP developments

## ❖ BEPS Action 13 – cont.

- Possibility to ratify the Master File previously submitted if there are no changes in the reporting period in relation to the information that was consigned in the last Master File submitted.
- **Local File and TP Form 2668**
  - Transactions that exceed, as a whole in the fiscal period, AR\$ 3,000,000 (approx. USD 28,500) or individually of AR\$ 300,000 (approx. USD 2,800) carried out by the local entity with:
    - related parties from abroad, or
    - entities domiciled, constituted or located in:
      - non-cooperating jurisdictions (according to list of jurisdictions included in Art. 24 of the Regulatory Decree of the Income Tax Law; e.g. Paraguay, Bolivia, Nicaragua, Honduras, etc.), or
      - jurisdictions with low or no taxation (i.e. Corporate Income Tax Rate below 15%),
- **Transactions of imports and/or exports of tangible goods with third parties**
  - **TP Form 2668:** Imports and/or exports of tangible goods carried out by the local entity with third parties that exceed, as a whole in the fiscal period, AR\$ 10,000,000 (approx. USD 95,000).
  - **TP Form 2672 :** If the taxpayer only performs imports and/or exports with third parties and the amount of those transactions is less than AR\$ 60 millions (approx. USD 570.000), the taxpayer can opt for the new Simplified Regime.



# Argentina TP developments

## ❖ New "Simplified Regime" – TP Form 2672

- Certain companies that have the obligation to submit the Local File and/or the TP Form 2668 will be able to choose the new "Simplified Regime", replacing the fulfillment of both obligations through said new regime,
  - if they qualify according to the conditions listed in General Resolution 5010/2021 (AFIP).
- Among said conditions to be able to opt for this Simplified Regime are:
  1. The companies should be small or medium-sized companies according to their total annual billing (approx. AR\$ 2,600 million / USD 25 million) plus meet certain requirements; or
  2. The total of their international transactions with related parties should not exceed 2.50% of their total billing plus meet certain requirements.
- Some of these additional requirements are the following:
  - not present recurring negative results;
  - not having undergone a business restructuring process in the last 3 years;
  - not having carried out significant operations with related parties and/or entities located in non-cooperating jurisdictions or jurisdictions with low or no taxation that involve:
    - ✓ royalties, license rights or research and development agreements, or
    - ✓ acquisition or provision of services (only for companies under situation 1.);
  - not having the quality of giver or borrower of loans with related parties abroad (only for companies under situation 1.);
  - not carried out import and/or export operations with the intervention of an international intermediary (only for companies under situation 2.) .

# Argentina TP developments

## ❖ New "Simplified Regime" – TP Form 2672 – cont.

- Excluded from the Simplified Regime:
  - Companies that are part of Multinational Groups that must submit the Country by Country Report, regardless of the jurisdiction where they have to comply with such obligation, (i.e. MNE Groups with consolidated annual revenues equal or greater than EUR 750 million); and/or
  - Companies that must submit the Master File or the ratification note, (i.e. MNE Groups with total consolidated annual revenues greater than AR\$ 4,000 million (approx. USD 38 million / EUR 33 million) .
- It is important to note that, even though the companies can opt for the Simplified Regime, they have to:
  - ✓ Complete the TP Form 2672 with details of the transactions performed; and
  - ✓ Declare that the transactions are arm's length.
- In addition, the local tax authority can require the Local File to the companies that opt for the Simplified Regime.

# Argentina TP developments

- ❖ **Recommendations and suggestions published by AFIP on May 2021 for the taxpayers to consider in their TP analysis for the fiscal years that were affected by the COVID-19 pandemic**
  - These guidelines are in addition to the extension of the deadlines for the submission of the TP Local File and TP Forms for 3 months exceptionally for the fiscal years ended between 31 December 2020 and 31 December 2021, both inclusive,
    - i.e. if the closing fiscal date is 31/12/2021, the deadline will be in September 2022.
  - This longer term for submission is granted by the local tax authority (i.e. AFIP) due to the difficulty that it is understood that the comparability analysis will take in this particular period.
  - In this regard, Afip establishes a series of recommendations and suggestions that it hopes will be included in the TP analysis.
  - These guidelines basically refer to:
    - ✓ the description of functions, assets and risks of the local company and the multinational Group,
    - ✓ the potential adjustments that it would be necessary to make to the financial information of the local company, and
    - ✓ the analysis of the comparables.

# Argentina TP developments

- ❖ Recommendations and suggestions published by AFIP for the FYs that were affected by the COVID-19 pandemic – cont.
- Local companies must prepare the necessary documentation, such as:
  - Documentation about how and to what extent the local company has been affected by the pandemic;
  - Identification of the differences between the economic effects of the pandemic and the new risks assumed because of it and those corresponding to its normal operations;
  - Identification of the extraordinary results of the local entity linked to the economic situation generated by the COVID-19 pandemic, carrying out an in-depth analysis of the adverse factors that could have affected its results, identifying information such as:
    - ✓ variations in sales volumes compared to sales generated in previous years;
    - ✓ change in the use of installed capacity;
    - ✓ incremental or exceptional costs borne;
    - ✓ comparison of internal budgeted or forecast data related to sales, costs and profitability, against actual results;
  - Identification of publicly available information regarding the effect of COVID-19 on the specific business and industry;

# Argentina TP developments

- ❖ Recommendations and suggestions published by AFIP for the FYs that were affected by the COVID-19 pandemic – cont.
  - Identification of the extent to which local government assistance has been received and, if so, quantify the effect and identify the type of assistance and its accounting treatment;
  - Carefully analysis and justification of the business reason for any changes in the risks assumed by the local company before and after COVID-19 (e.g. allocation of losses to low-risk distributors);
  - Carefully analysis and justification of the logic behind:
    - ✓ any change in the structure, distribution of risks and responsibilities, and
    - ✓ modifications in the agreements between the local company and its related parties.

# Argentina TP developments

## ❖ Recommendations and suggestions published by AFIP for the FYs that were affected by the COVID-19 pandemic – cont.

- For the comparability analysis, Afip states that:
  - To use financial information of the comparables from the same fiscal period of the tested party,
    - ✓ i.e. financial information of FY 2020 both for the tested party and the comparables;
    - ✓ multi-year analyzes will not be acceptable;
  - To use local or regional comparables;
  - Comparables with operating losses will not be accepted, except for their adequate justification and reliable demonstration that:
    - ✓ such losses are a characteristic of the business, due to circumstances of market, industry or other comparability criterion, and
    - ✓ the conditions that lead to the loss are not the consequence of factors that affect comparability;
  - Analysis of whether comparable companies have received government assistance and, if so, determine the terms and conditions of such assistance and its impact;
  - Analyze the circumstances that comparables are going through,
    - ✓ determining similarities and differences with respect to the circumstances of the tested party,
    - ✓ thus being able to justify any adjustment made;
  - Analyze whether the selected comparables assume the same risks as the local taxpayer.

# Argentina TP developments

- ❖ **Recommendations and suggestions published by AFIP for the FYs that were affected by the COVID-19 pandemic – cont.**
  - In addition, when the situation created by COVID-19 has an impact on:
    - the TP policies, and/or
    - the value chain of the Multinational Group,
      - such impact must be identified and justified in the Master File.
  - Thus, there are practically 4 parts to consider:
    - 1) Robust function analysis for the local entity;
    - 2) Local figures of the local entity (i.e. local financial information and detailed information about the effects of the pandemic);
    - 3) Solid benchmarking analysis and the detailed analysis of the selected comparables (i.e. by checking their Annual Reports); and
    - 4) Description of the pandemic effect on the TP Policies and/or on the value chain of the Multinational Group in the Master File.

# Questions & Answers



# *Thank You*

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H.J.E. Wenckebachweg 210 . 1096 AS Amsterdam . The Netherlands . +31 (0)20 462 3530 . [tpa-global.com](http://tpa-global.com)

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