Tax Controversy
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Contributing editor
Richard Jeens
Slaughter and May

Lexology Getting The Deal Through is delighted to publish the eighth edition of Tax Controversy, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Ecuador and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Richard Jeens of Slaughter and May, for his continued assistance with this volume.
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Brazil

Luciana Rosanova Galhardo, Felipe Cerrutti Balsimelli and Pedro Augusto A Asseis
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OVERVIEW

Legislation

1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The Brazilian tax system is grounded on a civil law basis. There are tax provisions under the Federal Constitution and the national tax code, plus supplementary and ordinary laws. As a Federative Republic, not only the federal administration but also states and municipalities have their own tax system, with local taxes and local rules.

To regulate such general provisions, each federative entity may issue its own decrees, ordinances, normative rulings, normative opinions and private letter rulings.

Tax treaties are also considered as part of the normative tax system in Brazil, and when they are internally approved they acquire the legal status of supplementary law. Nonetheless, treaties are not self-enforceable in Brazil. They must be approved by the Brazilian Congress after being executed abroad.

In parallel with this set of rules, courts may also issue certain standards on tax matters. Except for a few types of decisions, case law is not issued with binding effect, but provides general guidance on matters that are not expressly addressed by tax rules.

Specifically, when it comes to tax disputes, there are certain rules governing both administrative tax proceedings and judicial litigation. On the federal level of review, the most relevant rules are the following: Law No. 9,784/99; Decree No. 70,235/72; Decree No. 7,574/11; and the Civil Litigation Code.

Relevant authority

2 What is the relevant tax authority and how is it organised?

Collection and payment of federal taxes in Brazil are managed by the Receita Federal (the Brazilian IRS), an administrative structure within the Ministry of Economy. This structure also comprises the administrative level of review, when any infraction notices are assessed. The Brazilian IRS has internal divisions for addressing specific topics, such as collection and assistance, taxing and litigation, auditing and inspection, customs, and international relations.

States and municipalities also have similar structures for collecting taxes.

Once the tax is considered definitively due and payable (ie, if no claims are presented against the charge, or if the taxpayer challenges it but at the end of the administrative level of review the debt is maintained), the National Treasury Office is the competent authority for enrolling the tax debt in the Federal Debt Roster and filing the appropriate enforcement action.

ENFORCEMENT

Compliance with tax laws

3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

As a general rule, for most taxes in Brazil the taxpayer submits a tax return and submits the amount considered due. The tax authorities have a five-year term in which to claim any possible outstanding amounts. This is the statute of limitations for tax authorities analysing taxpayers' returns and assessing possible debts or penalties.

This term may be counted either from the triggering event (if the taxpayer has paid any amounts to the tax administration and there is no simulation, fraud or abuse) or from the first day of the calendar year subsequent to that in which the tax was due (if no taxes have been collected or the tax authorities claim that the taxpayer has acted fraudulently).

In principle, the audit proceedings may involve any past facts that might have affected the collection and payment of taxes over the previous five-year term, there being no particular rules in that respect.

Types of taxpayer

4 Are different types of taxpayers subject to different reporting requirements? Can they be subjected to different types of review?

Yes. Individual and corporate taxes are quite different, each of them subject to specific rules. Although all taxes are managed, audited and assessed by the same authority, taxes paid by individuals and by legal entities differ from each other and are analysed by different divisions of the Brazilian IRS.

Requesting information

5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer’s employees? If so, are there any restrictions?

The tax authorities may request any information that may affect the ascertainment and collection of taxes. In most cases, the request for information is put in writing and the taxpayer has to send this information, also in writing, to the tax authorities. Interviews and requests for meetings with tax authorities are not common, although in certain very particular and specific cases – especially involving large taxpayers – this procedure has been adopted by the Brazilian IRS.
Available agency action

6 | What actions may the agencies take if the taxpayer does not provide the required information?

If the taxpayer fails to attend to requests for documents and information, the tax authorities may impose additional penalties over the assessment and a presumed tax basis for the charges.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

Brazilian legislation expressly provides for tax confidentiality regarding any information disclosed to tax authorities.

Limitation period for reviews

8 | What limitation period applies to the review of tax returns?

As a general rule, Brazilian tax legislation provides for a five-year statute of limitations. The controversial aspect is when this term starts, that is, whether from the triggering event or from the subsequent calendar year.

Alternative dispute resolution

9 | Describe any alternative dispute resolution (ADR) or settlement options available.

Prior to April 2020, Brazilian legislation did not provide for alternative dispute resolution methods. The closest method was contained in certain guidelines issued by the National Treasury Office in regard to possible negotiations involving minor procedural aspects in tax disputes (e.g., guarantees, deadlines for submitting motions, requests and opinions). Although the Brazilian Tax Code provided for the possibility of tax settlements being made between taxpayers and tax authorities, it depended on ordinary legislation that was not issued until this year.

On 14 April 2020, Law 13,988, which resulted from the conversion of Provisional Measure 899 of 2019, provided for three different types of tax settlement that could be negotiated between taxpayers and tax authorities: by means of an individual request or by adherence, when relating to tax liabilities enrolled in the federal debt roster; by adherence, when relating to a widespread tax litigation subject; or by adherence, when relating to tax disputes (e.g., guarantees, deadlines for submitting motions, requests and opinions).

Tax settlement still depends on compliance with many requirements set forth by the National Treasury Office and it may not be freely negotiated by the taxpayer with the tax authorities. In addition, the tax authorities are still bound to certain guidelines provided for under the applicable rules, among which (there being certain matters in which they cannot settle) there are certain thresholds on the reductions that might be granted to taxpayers, and any defences or claims submitted by the taxpayer must be previously withdrawn before settlement is possible.

Collecting overdue payments

10 | How may the tax authority collect overdue tax payments following a tax review?

If the tax is considered due and payable, it is deemed to be ‘enforceable’, which means that it would be subsequently forwarded for registration with the Federal Debt Roster (in which situation a 20 per cent additional legal charges fee is included in the updated amount of the debt) and then its new updated amount is sent to be executed against the company in a Tax Enforcement Proceeding to be moved by the National Treasury Office. In a Tax Enforcement Proceeding, the National Treasury Office will try to forcibly seize whatever assets it finds in the company, including bank accounts and other available assets.

Once the Tax Enforcement Proceeding is filed, the taxpayer will have a specified period to offer a guarantee. After the guarantee is offered, a Motion to Stay Enforcement may be filed to challenge the merits of the enforcement once again. This should open a discussion on the merits of the case.

Penalties

11 | In what circumstances may the tax authority impose penalties?

Penalties may be imposed whenever taxpayers fail to collect and pay taxes in a timely manner or submit their tax returns on time. Penalties for non-compliance with ancillary duties may be charged even if there is no miscollection of taxes.

12 | How are penalties calculated?

There are two types of penalties that can be applied by the tax authorities if they eventually issue an infraction notice against the taxpayer: a 75 per cent default penalty or a 150 per cent aggravated penalty. The 75 per cent penalty is applied in most cases where the tax authorities understand that the taxpayer did not act in wilful misconduct, fraud or simulation. Conversely, the 150 per cent aggravated penalty will be imposed if the tax authorities understand that the taxpayer did practice acts that are to be treated as wilful misconduct, fraud or simulation.

Under Brazilian tax law, an aggravated penalty of 150 per cent can only be imposed in cases where an evident intent of fraud is proved, that is, when the tax authorities are able to establish unequivocally the taxpayer’s purpose of deluding, hiding from or deceiving them.

There are also other types of penalties, such as an isolated penalty of 50 per cent if the taxpayer fails to anticipate taxes in a certain collection regime or if it has an offset request denied by tax authorities. Furthermore, under Brazilian law, if the taxpayer acknowledges any debts prior to any action being taken by the tax authorities and settles these before any Notice is issued, it will be subject to a penalty equivalent to 20 per cent on the claimed taxes, added to SELIC interest (the base interest rate set by the Brazilian Central Bank to control inflation). Depending on the circumstances, there will be arguments to justify that the 20 per cent penalty would not have to be paid, as this would be a voluntary disclosure procedure.

In the case of non-compliance with ancillary duties, there are a series of penalties that the taxpayer may be subject to. Those penalties may involve either a small fixed amount or a percentage of the taxpayer’s gross revenues or of the challenged transaction.

13 | What defences are available if penalties are imposed?

If an infraction notice is issued, the following options are available: settling the notice within 30 days, with a 50 per cent discount on whatever penalty was applied, or filing an objection to the infraction notice, outlining the reasons why the notice should be cancelled and then officially initiating the litigation in the tax administrative sphere.

If the notice is settled within 30 days with a 50 per cent discount on the penalty applied, any litigation in the administrative sphere will be permitted. Nonetheless, the taxpayer will still have the option of filing a lawsuit in a court of law seeking to receive back the amounts paid in settlement of the infraction notice.
THIRD PARTIES AND OTHER AUTHORITIES

Cooperation with other authorities
17 | Can a tax authority involve or investigate third parties as part of the authority’s review of a taxpayer’s returns?

Yes, this is legally possible. The Brazilian tax code determines that certain entities and institutions must cooperate with tax audit proceedings (eg, government employees, financial institutions, asset managers, brokers, auctioneers and official forwarding agents).

18 | Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

Within the country, the tax authorities of different spheres (ie, federal, state and municipal) may cooperate in mutual exchange of information and assistance, based on article 199 of the Brazilian National Code and specific internal regulations.

It is legally possible to cooperate with the tax authorities in other countries. Brazil has entered into double taxation conventions and treaties for exchange of tax information (including the Foreign Account Tax Compliance Act and the OECD’s Common Reporting Standard).

SPECIAL PROCEDURES

Voluntary disclosure and amnesties
19 | Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

There are certain special regimes for companies in bankruptcy situations, such as instalment programmes. One of them is set forth under Law 13,043/14.

20 | Are there any voluntary disclosure or amnesty programmes?

In recent years, the Brazilian authorities (federal, state and municipal) have issued a series of instalment and amnesty programmes. In parallel to that, federal legislation also provides for the possibility of tax debts being paid in 60 monthly instalments.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers
21 | What rules are in place to protect taxpayers?

Brazilian law provides for a series of principles, prerogatives and rights for taxpayers when dealing with tax matters. Most of them derive from the Federal Constitution, but there are also rules referring to taxpayers’ rights.

Requesting information
22 | How can taxpayers obtain information from the tax authority? What information can taxpayers request?

As long as the information does not lead to a breach of tax confidentiality, there are certain mechanisms by which tax authorities may disclose tax information. Also, in recent years, many rules, private letter rulings, ordinances and normative opinions have been published by the Brazilian IRS.

Federal Law 12,527/11 also provides for a mechanism for citizens to obtain information from federal, state and municipal authorities.
Tax authority governance

23 | Is the tax authority subject to non-judicial oversight?

Yes. Tax authorities are subject to internal oversight within the administrative government body, as they must act in compliance with applicable rules.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

Tax claims may be filed either at the administrative level of review or at the judicial level of review.

Lodging a claim

25 | How can tax disputes be brought before the courts?

Tax claims may be started either by the taxpayer or by the tax authorities (the latter usually involving an assessment), and there are two main levels where taxpayers may discuss tax matters: the administrative level of review and the judicial level of review. Both have a similar structure, grounded in three different levels of review.

At the administrative level, after the claim being submitted, there is a first level decision issued locally by the Federal Revenue Chief Officer (if the dispute derives from an assessment, the taxpayer may present a protest, in which it will make its arguments and provide evidence). Once the first level decision is issued, an appeal (called Voluntary Appeal) may be filed by the party, requesting that its case be reviewed by the Tax Administrative Appeals Council (CARF) at the second level within the administrative sphere.

Each Judgment Chamber in the Tax Appeals Council has six members, three being appointed by the tax authorities and three by the taxpayers’ associations.

There is a third level in the administrative sphere, which is the Tax Appeals Superior Chamber (CSRFF), but this will only review a case if the party (either the taxpayer or the government, as the case may be) is able to show that a conflicting decision was made on the same subject by the Tax Appeals Council, either by the same chamber or by a different one.

Each chamber of the Superior Chamber has 10 members, five being appointed by the tax authorities and five by the taxpayers’ associations. The trial session is similar that which takes place at the second level of review.

Until the enactment of Law 13,988/20, whenever a trial session resulted in a tie at the administrative level of review (either in CARF or in CSRFF), it would be deemed to have ruled in favour of the government.

Nonetheless, on 14 April 2020 the Federal Government enacted Law No. 13,988, which, among other provisions, extinguished this casting vote at the administrative level of review. According to newly issued provisions (article 28), whenever a case results in a tie at the administrative level of review, it must be decided favourably to the taxpayer, including the principal amount.

Although there are still debates among tax scholars on the extension and application of such a provision and, in practice, CARF and CSRFF have not applied it so far to more relevant cases, in our view Law 13,988/20 should play an important role in cases still pending analysis.

The taxpayer cannot litigate the same case at the same time in the administrative or judicial courts. At the federal administrative level of review, for instance, where there are three different levels of review (first level, second level – CARF – and third level – CSRFF), the decisions may reach different ones.

In turn, the judicial level of review is also made up by three levels: 1st degree court of law, Appeals Court, and the Superior Court of Justice (STJ) and the Supreme Federal Court (STF). In the 1st degree court of law, a single judge will examine and rule on the case. In the event of an unfavourable decision, the party (taxpayer or the tax authorities) will be allowed to file an appeal to the Appeals Court, which is made up of three judges. In case of another unfavourable decision, the party may file another appeal to the STJ and the STF.

While the STJ will review every case in which the appealed decision had allegedly violated a law, the STF will only do so if it deems the case to be of general interest to the country and the society.

Combination of claims

26 | Can tax claims affecting multiple tax returns or taxpayers be brought together?

Although not mandatory, this may be possible depending on the specific situation. However, when the superior courts apply binding effects to a case that should be analysed, all other proceedings regarding that matter should be suspended, until the decision is finally issued.

Pre-claim payments

27 | Must the taxpayer pay the amounts in dispute into court before bringing a claim?

It is possible for the taxpayer to settle the debt and pursue a refund at the judicial level of review. Nonetheless, such a procedure is rather unusual in Brazil.

Cost recovery

28 | To what extent can the costs of a dispute be recovered?

At the administrative level of review, each party bears its own costs. At the judicial level of review, the defeated party may be required to reimburse the costs of the dispute costs, depending on the type of action.

Third-party funding

29 | Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

There are no restrictions. When it comes to judicial proceedings, the taxpayer may be required to post bonds and guarantees for discussing the merits, and procedural legislation expressly provides for the possibility of third-party funding or insurance bonds being appointed by taxpayers.

Court decision maker

30 | Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

This depends on whether the taxpayer is disputing the debt at administrative or judicial courts. At the federal administrative level of review, for instance, where there are three different levels of review (first level, second level – CARF – and third level – CSRFF), the decisions may reach a board known as the Superior Chamber of Tax Appeals, which is made up of 10 councilors, five appointed by the federal revenue service, and the other five by the tax authorities.
five by taxpayers’ associations. At the state and municipal adminis-
trative levels there are similar structures (although with different
denominations).

At the judicial level of review, in turn, decisions are issued by a
single judge at the first level of review, by a board of judges at the
second level and by Superior Courts (STF or STJ), depending on the
matter being specifically challenged.

Whenever an assessment is cancelled at the administrative level of
review, tax authorities are not generally allowed to challenge that deci-
sion at judicial courts. On the other hand, if an administrative decision
is issued against the taxpayer, it is still allowed to litigate at the judicial
level of review.

Time frames
31 | What are the usual time frames for tax trials?

There is no defined time frame for tax trials. On average, an administra-
tive tax review takes from five to seven years, while a judicial dispute
may take from eight to 12 years, including the final avenues of review
(Superior Court of Justice or Federal Supreme Court).

Disclosure requirements
32 | What are the requirements concerning disclosure or a duty to
present information for trial?

Taxpayers may produce evidence in both administrative and judicial
proceedings, although it is more common in the latter type of litigation.
At the first level of judicial review, there is a specific moment in
the hearing (before the decision is issued) when the parties may appoint
evidence to be produced, indicate assistants, etc.

Permitted evidence
33 | What evidence is permitted in a tax trial?

Any evidence may be presented. For the issues generally involved in tax
matters, it is not common to have testimony. Expert opinions are rela-
tively common for to confirm technical aspects (accounting, regulatory
or factual circumstances).

Permitted representation
34 | Who can represent taxpayers in a tax trial? Who represents
the tax authority?

At the administrative level of review, there is no formal obligation to
have an attorney for filing defences, appeals and presenting the argu-
ments before CARF or CSR, although it is rather common and even
recommended, due to the technicalities usually involved in tax cases.

For judicial claims, it is mandatory to have a lawyer duly enrolled
with the Brazilian Bar. If the taxpayer is not able to afford legal repre-
sentation, it may request free judicial assistance (although not common
in tax disputes). Brazilian legislation (Federal Law No. 1,060 of 1950)
and Special Court’s Ruling No. 481 (STJ) allows the taxpayer to be
represented by a public attorney, provided that the absence of financial
conditions is proved.

Tax authorities are represented by public attorneys.

Publicity of proceedings
35 | Are tax trial proceedings public?

At the administrative level of review, only the judgment sessions and
decisions issued by CARF or CSR are public. All other case matters
are strictly confidential, to which only the involved party and its repre-
sentative may have access. On the other hand, judicial proceedings are

public, except if the parties request judicial confidentiality to be imposed
by the judge.

Burden of proof
36 | Who has the burden of proof in a tax trial?

As a general rule, in the Brazilian legal system, the burden of proof lies
with whoever asserts the claim, and it is important to be aware that tax
legislation usually grants to the tax authorities an assumption of validity
of their allegations, so that the taxpayer is also required to counter-
argue such claims when made.

Case management process
37 | Describe the case management process for a tax trial.

In general terms, all tax proceedings are written, and only after a
written defence or appeal is filed is the case set for trial. At the first level
of review, only written arguments are taken into account by the deci-
sion maker, there not being a specific trial session. At the second and
third levels of review (at both administrative and judicial courts) a trial
session is scheduled, and the attorneys representing both the taxpayers
and the tax authorities may distribute briefs to the councilors or judges,
present their defence arguments orally and clarify factual aspects of the
case that may influence the judgment.

Appeal
38 | Can a court decision be appealed? If so, on what basis?

Yes, at both administrative and judicial courts. It may also be the case
that a favourable decision is issued to the taxpayer and is automatically
subject to an appeal at the second administrative or judicial level, as the
case may be. This is called an ex officio appeal, which aims to protect
the public interest whenever a relevant assessment is cancelled.
Moreover, even a final administrative decision may be disputed by the
taxpayer in court.
Key developments of the past year

What are the current trends in enforcement of tax controversies? What are the current concerns of the authorities and taxpayers in relation to the enforcement and handling of tax controversies and are these likely to change? Are there proposals to change the relevant legislation or other rules?

At the federal level of review, the most relevant subjects under discussion between taxpayers and tax authorities still involve transfer pricing disputes and assessments disallowing the tax deduction of goodwill amortisation expenses, which involve the most significant amounts assessed by the federal tax administration.

The two most relevant developments since the last update are the regulations issued regarding tax settlement proceedings and the end of the casting vote to maintain tax assessments at the federal administrative level of review (Tax Administrative Appeals Council or Tax Appeals Superior Chamber).

The Brazilian Congress is also focusing on tax reform bills that aim at simplifying the current tax environment in Brazil, especially when it comes to VAT. Even though such bills may pass in the short term, there will still be a transition period of some years and subsequent regulations to be expedited by the tax authorities. In practice, any of such changes may become effective upon approval only in the long term.

Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The tax authorities have issued many rules to address the economic difficulties arising from the pandemic, among which are tax deferral rules, certain tax exemptions and the suspension of certain charges. Further details about these measures as well as any updates may be found at www.pinheironeto.com.br/pages/covid19.aspx. We provide you with further details on those measures and their corresponding updates.