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June 10, 2024

Ms. Claudia Pimentel
Auditora-Fiscal da Receita Federal do Brasil
Subsecretária de Tributação e Contencioso Undersecretary of Taxation

Via email: claudia.pimentel@rfb.gov.br

RE: Potential Brazilian Cooperative Compliance Program with Taxpayers

Dear Ms. Pimentel:

I am writing on behalf of Tax Executives Institute, Inc. (“TEI”)¹ in view of the recent participation of your colleague Daniel Teixeira Prates on your behalf at TEI’s Inaugural Transfer Pricing Conference on a panel regarding “A Paradigm Shift: Fostering Cooperation Between Tax Authorities and Taxpayers to Prevent Tax Disputes under Brazil’s Revised Transfer Pricing Rules” in São Paulo, Brazil on December 12, 2023. The event was a major success with over 120 participants representing more than 80 companies and taxpayers. The panel was thought provoking to all and in view of TEI’s vast international experience I would like to encourage the Brazilian government to adopt certain mechanisms to avoid disputes between taxpayers and the Brazilian tax authorities stemming from Brazil’s recent transfer pricing reform legislation under Law No. 14,596 of 14 June 2023 (the “New TP Legislation”).

We commend the adoption of the New TP Legislation, which aims to align Brazil’s transfer pricing rules with the Organisation for Economic Co-operation and Development (“OECD”) Guidelines (“Guidelines”). In particular, the adoption of the arm’s length principle and its entire toolkit, including the various internationally recognized transfer pricing methods, brings Brazilian transfer pricing law within the ambit of the international tax system.

The New TP Legislation will require major changes in how Brazil approaches transfer pricing from a technical as well as operational perspectives. However, at the crux of this change is the fundamental need for taxpayers and the

¹ TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the Internal Revenue Code of 1986, as amended.

tax authorities to adopt a cooperative approach comparable to that of countries such as the United States, Canada, Australia, as well as many European jurisdictions, to avoid unnecessary tax disputes. Cooperative compliance is still a very new concept for most countries and even though the New TP Legislation is based on cooperative compliance principles there is a need to build a platform based on trust for taxpayers and tax authorities not only to enter into advanced pricing agreements (“APA”) for transfer pricing purposes, but also to settle disputes amicably.

APAs are used in many countries around the world to set an agreed transfer price for certain transactions in advance, which is then carried forward for several years. Brazilian law incorporates the use of APAs through the New TP legislation. As acknowledged by the Receita Federal do Brasil (“RFB”), APAs can avoid many disputes between taxpayers and tax authorities with respect to the transactions at issue, avoiding the need for audits and litigation.

Most importantly, the New TP Legislation requires a significant evolution in the taxpayer-tax authority relationship from a place of conflict to one of cooperation. This mindset change will take time to develop while Brazil moves to the adoption of a full APA program, but in our view and as per the successful experience of other jurisdictions, it cannot stop there.

TEI therefore recommends the Brazilian tax authorities work toward cooperative compliance with taxpayers beyond having a robust APA Program, and along the lines of the OECD’s International Compliance Assurance Programme (“ICAP”). TEI believes Brazil could adopt a similar selection and risk assessment approach to transfer pricing and permanent establishment issues that underly ICAP, as detailed below.

About TEI

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 56 chapters in North and South America, Europe, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 6,000 individual members represent over 2,900 of the leading companies around the world.

OECD ICAP

ICAP is a voluntary program for a multilateral cooperative risk assessment and assurance. It is designed to be an efficient, effective, and coordinated approach to provide multinational enterprise groups (“MNE groups”) willing to engage actively, openly, and in a fully transparent manner with increased tax certainty in respect of certain of their activities and transactions.² ICAP does not provide an MNE group with legal certainty as may be achieved, for example, through an APA. Not every fact pattern warrants an APA application; yet many fact patterns in large and complex economies such as

² The OECD has published a handbook for the ICAP program detailing the roles of tax authorities and taxpayers in the program (the “ICAP Handbook”). The handbook is available at <https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.pdf>.



Brazil may be peculiar enough or complex enough to warrant tax audits. Through ICAP, an enhanced level of voluntary disclosure decreases the need for such audits or highlights issues that need further attention through cooperation facilitating a non-litigious resolution (i.e., adjustment or settlement) often before any tax assessments are even written.

ICAP programs give comfort and assurance to both taxpayers and tax authorities, reducing potential controversies and avoiding an unnecessary increase in APA applications. If the features of the Program allow tax administrations participating in an MNE group's risk assessment to consider "covered risks" (disclosed in ICAP) to be "low risk", no further audits or adjustments are needed. Where an area is identified as needing further attention, work conducted in ICAP can improve the efficiency of actions taken outside the program, such as adjustments which may embody a technical settlement, if needed.

ICAP has three main stages: (i) selection, (ii) risk assessment and issue resolution, and (iii) outcomes. During the selection stage, MNE groups apply for ICAP by submitting the selection documentation package that enables the tax administrations to efficiently determine whether the MNE group is suitable for ICAP, which tax administrations will opt-in (or out) for the risk assessment, and the scope of the transactions that will be reviewed in ICAP.

The risk assessment stage begins with the submission of the main documentation package, which includes detailed information about the MNE group's intercompany transactions and enables the tax administrations to conduct a coordinated risk assessment in collaboration with one another and with the MNE group. Where one or more tax administrations determine they cannot provide assurance for a transaction, the tax administrations and the MNE group may engage in an optional issue resolution procedure, which may take place concurrently with, or after, the risk assessment stage.

During the outcomes stage, tax administrations inform the MNE group of the results of the risk assessment.

In general, the scope of the ICAP risk assessment includes transfer pricing and permanent establishment issues, as in many OECD jurisdictions there would not be a need for risk monitoring or clarity regarding characterization of remittances or application of withholding taxes (another area where in theory ICAP could be useful). Issues that are included in the scope of the ICAP risk assessment are referred to as covered transactions. It is anticipated that, in most cases, an ICAP risk assessment will focus on one or two consecutive tax years, which will be the most recent for which necessary documentation, including the MNE group's country-by-country report, is available ("covered period(s)"). In addition, based on our experience in the United States, for example, the Internal Revenue Service also aims to extend any assurances provided in ICAP to the two tax filing periods immediately following the covered period(s) ("roll-forward periods"), provided there are no material changes during these periods and the MNE group complies with certain annual filing requirements.

ICAP in Brazil

While Brazil joining OECD ICAP would be preferred to not recreate a tested process, we understand that this is unlikely given that Brazil is not yet a member of the OECD, and in light of



potential resource limitations. Nevertheless, TEI believes Brazil could adopt a similar selection and risk assessment approach to transfer pricing and permanent establishment issues, at a minimum. As noted, the purpose of an ICAP-like cooperative compliance regime is to efficiently and effectively provide tax authorities with transparency and taxpayers with greater certainty via collaboration between the two.

For purposes of a Brazilian ICAP program, the primary advantage lies in the risk assessment process. Ideally, properly implemented risk assessment tools will enable the Brazilian tax authorities to focus on taxpayers that are more likely to be out of compliance, while relieving likely compliant taxpayers from the burden of scrutiny on audit. Further, once an audit process begins procedures that must be followed are investigative and may become prosecutory, while if cooperation formally begins before an audit, there would be more room for collaborative fact finding and collaborative interpretation of uncertain provisions of the law or the Guidelines.

In addition, in TEI's view adopting an ICAP-like process would also enhance the efficiency of Brazil's nascent APA program and complement it. Such a program would have the added advantage of building further trust between taxpayers and tax authorities as they learn from each other through regular interactions, especially in view of the backlog of APA applications that will exist as soon as the APA program is implemented.

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TEI appreciates the opportunity to establish a dialogue with the Brazilian Federal Tax Authorities on how to best adopt an ICAP-like process. We believe that in view of our international experience we can help Brazil further improve its transfer pricing system in this regard and hope that we can explore this in person meeting at your earliest convenience. Should you have any questions regarding this letter, please reach out to Benjamin R. Shreck of TEI's legal staff at bshreck@tei.org or +1 202.464.8353 or to Lionel Nobre, TEI Latin America Chapter President, at Lionel.Nobre@dell.com.

Respectfully submitted,

Sandhya Edupuganty

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International President
TAX EXECUTIVES INSTITUTE

cc: Daniel Teixeira Prates
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Lionel Nobre, TEI Latam Chapter President