Brazil

Closing the Brazilian Tax Gap: Public Shaming, Transparency and Mandatory Disclosure as Means of Dealing with Tax Delinquencies, Tax Evasion and Tax Planning

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1. Introduction

Countries around the globe face growing challenges in meeting their expenditure needs with tax revenues. This trend has led to growing global concerns with tax evasion and tax avoidance, and initiatives to curtail them, such as the BEPS initiative, the US Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS). Brazil is no exception to such revenue needs, especially during the current economic downturn.

Brazil has a notoriously complex tax system, with a significant tax gap and an appallingly low rate of back tax collection (fuelled by pervasive litigation, draconian tax penalties and late payment interest rates). This article will shed light on public shaming, transparency and mandatory disclosure strategies to close the Brazilian tax gap and deal with tax delinquencies, tax evasion and abusive tax planning.

This article will first present an overview of the Brazilian tax system and tax gap, followed by a discussion of selected unorthodox means of dealing with back taxes in Brazil, including tax instalment payment programmes and taxpayer naming and shaming. Next, the article will analyse the scope and major features of information transparency and disclosure in Brazil, in terms of both international and domestic instruments. The tax planning and tax litigation scenario in Brazil will then be examined, especially regarding tax penalties, litigation and private letter rulings, as well as the uncertainty as to whether Brazil has a general anti-abuse rule (GAAR). Finally, mandatory disclosure rules are discussed, building on the BEPS Action 12 Report in order to review the recent Brazilian tentative rule on mandatory disclosure.

2. The Brazilian Tax System and Tax Gap

2.1. The Brazilian tax system: A bird eye's view

As foreseen under article 1 of the 1988 Federal Constitution, the Brazilian federation formally comprises three levels of government, each with significant means to raise revenues and expenditure responsibilities: (i) the federal government, (ii) 26 states and a federal district and (iii) a constantly growing number of municipalities.

Brazil has one of the most comprehensive, complex and costly tax systems in the world, with multiple taxes levied on consumption, capital, income, property, commodities and services. All levels of government – federal, state and local – have significant taxing powers, with access to major tax bases. The aggregate national tax burden in 2014 amounted to 33.74% of the GDP.[1] Federal taxes accounted for 68.9% of the tax burden, with the remaining 25.22% from state taxes[2] and 5.82% from local taxes.[3] This article will focus on federal taxes, as the measures analysed herein are all federal.

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1. BR: Receita Federal do Brasil, CTB – *Carga Tributária Brasileira* (2014).
2. The main state tax is the ICMS (*imposto sobre a circulação de mercadorias e a prestação de serviços de comunicação e de transporte interestadual e intermunicipal*), a VAT levied on the circulation of goods and on two specific types of services, namely communication services and intrastate/ interstate transportation services. States also levy taxes on gifts and inheritances, as well as on vehicles.
3. The main local tax is the ISS (*imposto sobre serviços*), which is a type of turnover tax levied on gross receipts from the provision of services. Land taxes on urban real estate are also levied by municipalities.

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At the federal level, the so-called “social contributions” are the main source of tax revenue, departing from established international practice. These contributions are an interesting feature of the Brazilian tax framework. Besides the typical payroll, wage and self-employment earnings taxes seen in most federations,[4] article 195 of the 1988 Federal Constitution grants the central government[5] broad taxing powers to levy social contributions[6] on gross receipts, net profits, lottery receipts and the import of goods and services.[7]

Prior to enactment of the 1988 Federal Constitution, social contributions were regarded as a narrow and specific instrument to finance selected social expenditures of the federal government. New constitutional provisions changed this reality by considerably broadening the role and scope of such contributions, which have progressively taken a leading role in the federal aggregate tax burden over traditional ability-to-pay taxes.[8] This pattern can be explained by the fact that in Brazil, the federal government has limited alternatives for raising own-source revenues that do not have to be shared with subnational governments. Thus, the fiscal federalism system provides strong incentives for the central government to heavily rely on social contributions, as they are non-shared, high revenue-yielding taxes.

To put into perspective the role played by social contributions in federal tax collection, they amount to roughly two thirds of the federal tax burden. The income tax amounts to a modest 17.7% of the national tax burden (personal income tax, corporate income tax and withholding tax combined). Even when the social contribution on net profits (*contribuição social sobre o lucro líquido* (CSLL)) is taken into account, the share of the national tax burden stemming from income taxation reaches only 20.71%.[9]

2.2. Data on the tax gap

While Brazilian tax agencies – both federal and subnational – do not publish[10] official data on the tax gap,[11] a recent assessment undertaken by the Union of Prosecutors of the National Treasury (*Sindicato Nacional dos Procuradores da Fazenda Nacional* (SINPROFAZ)) asserted that in 2014, the national tax gap represented 23.6% of the aggregate tax revenue collection in Brazil, amounting to 8.6% of the country’s GDP.[12]

Several auditing initiatives actions have been undertaken by Brazilian tax agencies to reduce the tax gap, including heavy investments in IT[13] and tax auditor training, the creation of large taxpayer units and continuous monitoring of strategic industries and taxpayers.

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4. For a comparative description of social contributions in various federations, *see* G. Anderson, *Fiscal Federalism: A Comparative Introduction* (Oxford University Press 2010), at 32.
5. Under art. 149 of the 1988 Federal Constitution, as a general rule these levies may be enacted only by the federal government; a narrow concession to states and municipalities was made by the constitutional framers, allowing these governments to collect social contributions from state and municipal public servants, in order to finance their social security programmes.
6. In practical terms, Brazilian social contributions mostly resemble ad hoc earmarked ability-to-pay taxes, as revenues collected via the former must be channelled to expenditure programmes involving health care, public education, social assistance benefits and social security. Since 1994, successive amendments to the Transitional Constitutional Provisions Act (*Ato das Disposições Constitucionais Transitórias* (ADCT)) have put into force an “unearmarking” mechanism dubbed federal revenue unearmarking (*desvinculação das receitas da união* (DRU)), under which 20% of federal public revenues which otherwise would be constitutionally earmarked, may be allocated to fund various expenses by congressional direction (through annual budgetary laws).
7. Art. 195(4) of the 1988 Federal Constitution also assigns to the federal government a residual power to enact new social contributions, through complementary laws, to finance social security programmes. Furthermore, the federal government has enacted a social contribution to finance elementary education (the so-called “education-salary contribution”, *contribuição ao salário-educação*), in accordance with art. 212(5) of the 1988 Federal Constitution. It is levied on compensation paid by companies to their employees.
8. Indeed, social contributions currently represent the most significant revenue source for the federal government, indeed surpassing ability-to-pay taxes.
9. Corporate net income and capital gains are taxed at the corporate level, with combined levies by the corporate income tax and the CSLL. The CSLL is a federal social contribution that resembles a piggy-back surcharge rate on the corporate income tax.
10. *See* A. Lemgruber Viol, *A Administração Tributária Moderna e a Maximização do Cumprimento Tributário: Algumas Reflexões sobre o Caso Brasileiro*, 1 Revista da Receita Federal: Estudos Tributários e Aduaneiros 2 (2015), at 20, available at http://www.revistadareceitafederal.receita.fazenda.gov.br/index.php/revistadareceitafederal/article/download/128/30+&cd=1&hl=pt-BR&ct=clnk&gl=br.
11. The tax gap can be defined as the estimate of the difference between what taxpayers should remit to the various government levels in a given tax year, and what they actually remit. What should be paid refers to the amount of tax that taxpayers owe, based on a reasonable interpretation of existing tax laws as applied to particular taxpayers’ circumstances. G.G. Vettori & K.D. Logue, *Narrowing the Tax Gap Through Presumptive Taxation*, University of Michigan Law School Scholarship Repository – Law and Economics Papers (2010), at 1.
12. SINPROFAZ, *Sonegação no Brasil: Uma Estimativa do Desvio da Arrecadação do Exercício de 2014*, available at http://www.quantocustaobrasil.com.br/artigos/sonegacao-no-brasil%E2%80%93uma-estimativa-do-desvio-da-arrecadacao-do-exercicio-de-2014.
13. *See* sec. 4.2.1.

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An increasingly significant focus of federal tax audits and examinations has been abusive tax planning structures, created by taxpayers with the sole purpose of reducing or avoiding taxes.[14] As discussed in section 3., information systems and information exchange have been critical tools used by the Brazilian federal tax authorities to deal with evasion and avoidance structures. As far as tax avoidance is concerned, efforts are still being made to strengthen Brazil's currently unclear general anti-avoidance rule (GAAR) and to improve disclosure mechanisms.[15]

In 2014, the federal tax authorities (Department of Federal Revenue, *Secretaria da Receita Federal do Brasil*) undertook a total of 365,832 audits and examinations that resulted in the filing of tax assessments and deficiencies totalling BRL 150.5 billion in late or unpaid taxes, penalties and interest.[16] Of such amount, taxpayers voluntarily paid a tiny fraction of BRL 7 billion (roughly 19%).[17] Conversely, in 2014 a staggering 81% of the federal tax assessments were challenged by taxpayers in administrative procedures. This high litigation rate seems to be largely the result of two forces:

- the excessive penalties imposed on late or underpaid taxes (the standard federal penalty is 75% of the tax owed)[18] and high accrued interest (the official annual interest rate in early 2015 is a whopping 14.15%); and
- the protective effect that the National Tax Code provides to administrative tax litigation, effectively insulating the taxpayer from any liens or judicial collection procedures while a case is pending.

Recent data from the Administrative Appellate Tax Court (*Conselho Administrativo de Recursos Fiscais*) shows that in late 2015 more than 118,000 cases were pending, amounting to roughly BRL 586 billion in back taxes.[19]

Once administrative challenges to a tax assessment are exhausted, uncooperative tax debtors face the risk of having their physical and financial assets seized under judicial tax enforcement procedures. Nevertheless, such procedures usually take very long to be initiated, as the assessments tend to be made close to the expiration of the five-year regulatory statute of limitations, and, after that, lengthy administrative litigation takes place in most cases.

In 2014, there were close to 7.5 million ongoing judicial tax enforcement procedures in federal courts, involving more than 3.5 million taxpayers (of which 18,728 are large debtors), resulting in more than BRL 1.25 trillion in uncollected tax debts,[20] which basically corresponds to the entire national yearly tax burden. A tiny share of such tax debts end up being successfully collected by the federal government, as on average only 1.8% of judicial tax enforcement procedures result in effective payments of back taxes (amounting to roughly BRL 15-20 billion per year).[21]

This appallingly low rate can be explained by the fact that, as a rule of thumb, when the draconian Brazilian tax penalties and interest rates are taken into account, the amount of back taxes owed by a taxpayer may easily triple in value over the course of a few years of litigation.

3. Unorthodox Means of Dealing with Back Taxes

Considering the immensely high amount of uncollected back taxes in Brazil, this section analyses some more unorthodox means of dealing with this aspect of the tax gap and their effectiveness in Brazil. The recurring enactment of instalment payment programmes and recent taxpayer-shaming strategies will be examined.

3.1. Tax instalment payment programmes

Several federal and subnational tax instalment payment programmes (TIPPs) have been enacted in Brazil over the past couple decades in order to boost revenue-raising[22] and reduce the amount of tax liabilities. Under article 155 of the

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14. BR: Receita Federal do Brasil, *Plano Anual da Fiscalização 2015*, at 11, available at http://idg.receita.fazenda.gov.br/dados/resultados/fiscalizacao/arquivos-e-imagens/2015_03_05-plano-anual-da-fiscalizacao-2015-e-resultados-2014.pdf.
15. *See* sec. 4.2.2.
16. 30.2% of these assessments were under the responsibility of the large taxpayers' unit of the federal tax authorities.
17. Furthermore, 28.3% of 2014 examinations that resulted in assessments, allegedly had indicia of tax evasion, which led to 4,859 tax crime investigation procedures (*representações fiscais para fins penais*) initiated by federal prosecutors at the request of tax authorities. Receita Federal do Brasil, *supra* n. 14.
18. *See* sec. 3.2.2.
19. BR: Conselho Administrativo de Recursos Fiscais: *Dados Abertos, Estoque de processos por valores e prioridade*, available at https://idg.carf.fazenda.gov.br/dados-abertos/relatorios-gerenciais/estoque-processos-por-faixa-de-valores.pdf
20. BR: Procuradoria Geral da Fazenda Nacional, *Procuradoria em Números 2015*, at 3, available at http://www.pgfn.fazenda.gov.br/acesso-a-informacao/institucional/pgfn-em-numeros-2014/pgfn%20em%20numeros%202015%20ultima%20versao.pdf.
21. Procuradoria Geral da Fazenda Nacional, *supra* n. 20, at 2.
22. In 2014, revenues collected under the various federal TIPPs and standard instalment arrangements in place amounted to roughly BRL 13 billion. Tax liabilities included in TIPPs and standard instalment arrangements amounted to BRL 93.755 billion in 2014. *See* Procuradoria Geral da Fazenda Nacional, *supra* n. 20, at 3.

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National Tax Code, tax instalment plans must be enacted by law. Tax agencies have no authority to arrange instalment plans on their own without a specific legal mandate to do so. Also, tax agencies and attorney generals have no authority to negotiate tax settlements with the taxpayer. Under the Brazilian Tax Code, any such settlements must be foreseen by law and made strictly within the framework of such law. Thus, TIPPs[23] often provide not only for a more extended payment timeframe, but also for reduced penalties and interest, working as a substitute for tax settlements.

At the federal level, the first broad TIPP, the Fiscal Recovery Programme, known as "REFIS" (an acronym for *Programa de Recuperação Fiscal*) was enacted in 2000 by Law 9,964. Several other federal TIPPs ensued, with the impressive rate of a new programme almost every couple years, as follows:

- Special Instalment Programme, (*Programa de Parcelamento Especial* (PAES, informally known as "REFIS 2"), enacted in 2003 by Law 10,864;
- Exceptional Instalment Programme (*Programa de Parcelamento Excepcional*, PAEX, informally known as "REFIS 3"), enacted in 2003 by Provisional Measure 303;
- 2009 Ordinary Instalment Programme (informally known as "REFIS 4" or "Crisis REFIS", as it was allegedly created to assist taxpayers facing financial distress due to the 2008-2009 crisis), enacted in 2009 by Law 11,941 and made available for taxpayers once again in 2013 by Law 12,856;
- Agency and Public Foundations Instalment Programme (*REFIS das Autarquias e Fundações*), enacted in 2010 by Law 12,249 and made available for taxpayers once again in 2013 by Law 12,865;
- 2014 Ordinary Instalment Programme (informally referred to as "World Cup REFIS", an allusion to the soccer tournament hosted by Brazil), enacted by Law 13,043;
- Financial Institutions Instalment Programme, enacted in 2013 by Law 12,865; and
- Controlled Foreign Corporations Profits Instalment Programme, enacted in 2014 by Law 12,865.

States and municipalities followed suit and have enacted several TIPPs of their own across the country over the years, such as the state of Sao Paulo's Special Instalment Programme (*Programa Especial de Parcelamento* (PEP)) and the municipality of São Paulo's Incentivized Instalment Programme (*Programa de Parcelamento Incentivado* (PPI)).

Brazilian TIPPs – both federal and subnational – have offered generous benefits to taxpayers that decided to opt in and settle their tax liabilities, allowing for extended payment timeframes (up to 180 months in many cases), reduced or waived penalties and reduced late payment interest.

As a general rule, and in contrast to best practices,[24] Brazilian TIPPs do not require taxpayers to show any proof of financial distress, nor to demonstrate the viability of their business.[25] Also, such programmes generally do not prescribe any threshold for the amount of owed taxes. Even though Brazilian TIPPs largely require the taxpayer to stay current with all future tax payments, with a failure to doing so resulting in the plan's termination, administrative and judicial procedures to place liens and collect unpaid instalments tend to be overly complex and take too long.

It does not come as a surprise then that anecdotal evidence collected by practitioners suggests that a significant number of taxpayers opt into TIPPs merely to postpone or avoid tax liens and help secure the right to receive certificates of good-standing. Those TIPP participants usually meet payment obligations in the first few months of the programme and then become delinquent, resulting in low continuity rates for such programmes.

Furthermore, recurring TIPPs tend to undermine the taxpayer's resolve to pay taxes on a timely basis. The idea that the next TIPP may just be around the corner conditions taxpayers to think of such programmes as alternative means to meet their tax obligations at a future date and with reduced cost. Many taxpayers then cease to feel constrained by tax delinquencies and become serial TIPP participants, opting into several programmes over the years as a strategy to generate cash flow and reduce the immediate cost of doing business.

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23. Standard instalment arrangements are also in place to help cash-strapped taxpayers. However, in such cases, no penalty is waived and late payment interest accrues. At the federal level, the standard instalment arrangement allows for the payment of tax liabilities over a maximum of five years (60 months). Similar to TIPPs, there is no requirement to demonstrate an inability to fully pay the tax liability in the short term. In any case, Brazil's infamously high interest rates effectively serve as a deterrent for most taxpayers to opt for such standard instalment arrangements, which therefore end up being a strategy of last resort to avoid non-compliance and ensuing tax liens.
24. On the discussion of best practices for TIPPs, *see* J. Brondolo, *Collecting Taxes During an Economic Crisis: Challenges and Policy Options*, IMF Staff Position Note (2009), at 12, available at https://www.imf.org/external/pubs/ft/spn/2009/spn0917.pdf.
25. There is, however, a specific TIPP available solely for companies in a judicial recovery and reorganization procedure. This TIPP is necessary, as companies cannot negotiate tax debts with tax authorities and attorneys general, as Brazilian law does not allow for such negotiation. Thus, the TIPP works as the sole alternative for a company under judicial recovery and reorganization to negotiate its tax debts.

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As a result, while the literature on TIPPs considers them to be effective tax policy instruments to promote compliance,[26] in Brazil the practice of relying on broad and repeated TIPPs – often with lax requirements and generous benefits – has generated short-term revenue collection boosts at the expense of long-term deleterious effects on taxpayer behaviour.

One can even argue that the Brazilian TIPPs play an incentivizing role for taxpayers willing to engage in aggressive tax planning strategies, as such programmes offer a quasi-certain and highly expected second chance for settling back taxes, penalties (even aggravated penalties in some cases) and interest.

3.2. Taxpayer naming and shaming in Brazil

Brazilian authorities have also been trying to use naming-and-shaming methods to aid the collection of back taxes. Two such methods are noteworthy.

First, in late 2015, the Ministry of Finance published an index of the 500 largest delinquent taxpayers.[27] The aggregate amount of back taxes, penalties and interest owed by the 500 largest delinquent taxpayers surpasses BRL 392 billion. Individuals and companies are listed merely on basis of the amount they owe, regardless of the nature of each tax debt (resulting from tax evasion or otherwise from mere late payment). The index also does not differentiate between tax debts under judicial enforcement procedures (58%) and those with enforcement suspended by judicial rulings (11.14%), included in instalment payment programmes (26.33%) or pledged as collateral in tax litigation (4.14%).

This taxpayer hall of shame publicly outs the largest delinquent taxpayers, as it is easily available online with free and open access to any interested party.[28] Although ostensibly an instrument to consolidate data on large tax debts and facilitate collection, the index can be regarded as a means to reduce tax delinquencies and curb tax avoidance, by publicly naming and shaming taxpayers, thereby pushing them into settling back taxes or risk having their reputation damaged. There is no available data, however, on the effectiveness of this naming-and-shamming strategy as to its impact on tax collection for the listed taxpayers.

Second, in the past few years, Brazilian tax authorities have devised a strategy of registering tax liability certificates of default at notary public offices, in an effort to force taxpayers into settling their debts. Such registrations place the affected individual or company under significant constraint, as they generally hamper access to credit and may disrupt attempts at doing business or engaging in commercial transactions. Unless the tax liability is fully settled, the registration remains in place. A 180-day deadline is provided to the delinquent taxpayer; after that a judicial enforcement procedure may be initiated to collect the owed amount. In 2014, 313,859 certificates of tax liability were registered as such, 18% of which resulted in successful collection of back taxes, totalling BRL 224 billion.[29]

These unorthodox means of reducing the tax gap are clearly contentious and can be construed as coercive extrajudicial tax collection instruments, arguably violating constitutional rights of taxpayers. In the near future, Brazilian courts will rule on their validity.

4. Information Transparency and Disclosure

Unlike the measures analysed in section 2. (which deal with the collection of back taxes), information transparency and disclosure are fundamental to aid auditing and facilitating tax assessments. Disclosure and information transparency have progressively been viewed globally as effective means of dealing with tax planning, avoidance and evasion. Brazil has jumped onto this bandwagon by adopting several measures to increase information transparency and improve disclosure.

4.1. International measures

On an international level, Brazil has been entering into agreements to improve information exchange in an effort to curb tax evasion and avoidance. Accordingly, besides information exchange provisions regularly found in tax treaties,[30] Brazil has signed several tax information exchange agreements in recent years.[31]

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26. Brondolo, *supra* n. 24, at 12.
27. The index is regulated by Ordinance 721 of 11 Oct. 2012, issued by the Office of the National Treasury Attorney General.
28. Available at http://www.pgfn.fazenda.gov.br/divida-ativa-da-uniao/todos-os-servicos/informacoes-e-servicos-para-pessoa-fisica/lista-de-devedores/lista-de-devedores.
29. Procuradoria Geral da Fazenda Nacional, *supra* n. 20, at 2.
30. Thirty two tax treaties signed by Brazil are in effect, all of which incorporate exchange of information provisions (usually in art. 26). Nevertheless, departing from up-to-date OECD recommendations, only one of those treaties provides for automatic exchange of information, namely the Brazil-Portugal Income Tax Treaty (2000); the remainder foresee exchanges only upon request.

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Moreover, to deal specifically with evasion effected through the hiding of foreign assets, Brazil has adhered to FATCA standards. On 25 June 2015, the Brazilian Congress approved the intergovernmental agreement (IGA), signed on 23 September 2014, for FATCA implementation. The IGA between Brazil and the United States follows Model 1A, through which financial institutions inform tax authorities of their own countries, and the latter exchange such information with their counterparts. The Brazilian IGA framework is based on reciprocity, meaning that, while the IRS will receive from the Brazilian federal tax authorities information regarding US (resident and national) taxpayers with accounts in Brazilian banks, the Brazilian federal tax authorities will receive from the IRS information regarding Brazilian residents with accounts in US banks. However, the extent of the IGA information exchange is not fully reciprocal, as Brazilian banks need to take a beneficial owner approach to account holders, while US banks will only need to look at the first tier, i.e. the formal holder of the account, with no beneficial owner reporting requirement.

Furthermore, in 2011 Brazil signed the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which has yet to be examined by Congress (and thus, at the time of writing, is not effective). And while not having signed the OECD Multilateral Competent Authority Agreement (MCAA) yet, Brazil committed to the Common Reporting Standard (CRS) and should begin implementing it no later than 2018.

Brazilian taxpayers with undisclosed foreign accounts and assets face a wide range of potential civil, tax and criminal penalties for non-compliance with reporting obligations. Prior to 2016, a non-compliant taxpayer faced a deadlock situation when wanting to disclose its assets. As there were no disclosure programmes available, if the taxpayer simply chose to start reporting, it would be subject to civil, tax and criminal penalties for the non-compliance or underreporting in previous years.

In order to resolve this impasse and allow for the full disclosure of foreign assets, in early 2016 Law 13,254 created an offshore voluntary disclosure programme for Brazilian residents (*Regime Especial de Regularização Cambial e Tributária*, RERCT). The goal of the programme is to allow for the full disclosure of such assets with a settlement structure that will eliminate civil, tax and criminal penalties related to previous failure-to-file, failure-to-pay and accuracy-related compliance issues. The programme provides for a 15% income tax and a corresponding uniform penalty on the same amount, which will be levied on the market value of the disclosed assets.

This law has been passed as a measure to advance fiscal austerity goals, aimed at raising extra tax revenues to lessen the budget deficit. However, it undeniably follows the global trend of fiscal transparency and information exchange and is inspired by offshore voluntary disclosure programmes already adopted by countries such as the Canada, Italy, Mexico, Spain, the United Kingdom and the United States.

Finally, international transparency and information exchange have also been used in Brazilian internal law as triggers for certain rules that provide for differentiated treatment for taxpayers dealing with uncooperative jurisdictions. For example Brazilian law defines tax havens as countries or dependencies that (i) do not tax income, or tax it by a rate lower than 20%[32] , [33] and/or (ii) do not allow for access to information related to the corporate ownership or title of its legal entities, or the identification of the beneficial owner of income attributed to non-residents.

Also, in 2008, Brazilian law introduced the concept of tax-favoured regimes. A tax-favoured regime is a legal regime which, regardless of its jurisdiction, allows for at least one of the following:

- non-taxation of income, or taxation at a rate lower than 20%;
- the granting of a tax advantage to non-resident individuals or legal entities (i) without any requisite of economic activity being undertaken in the country or (ii) conditioned on the non-exertion of any economic activity in the country;
- non-taxation of income earned outside its territory or taxation thereof at a rate lower than 20%; and/or
- denial of access to information related to the corporate ownership structure, title of assets or rights or regarding the economic transactions that have taken place.

There are several consequences of dealing with residents in tax havens or beneficiaries of a tax-favoured regime, including:

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31. Brazil has signed tax information exchange agreements with the following countries: United States (2007); United Kingdom (2012), Uruguay (2012), Bermuda (2012), Cayman (2013), Guernsey (2013), Jersey (2013) and Switzerland (2015). While the Brazil-United States tax information exchange agreement has been in force since 2013, the remainder still need to be examined and approved by Congress.
32. For this purpose, taxation of labour and capital are to be considered separately, and as should dependencies of any particular country.
33. The 20% threshold has been lowered to 17% on certain occasions, depending on whether the country exchanges certain information.

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- more stringent transfer pricing and thin capitalization rules on transactions with such persons and overall harsher rules regarding the deductibility of expenses and costs paid to such persons;
- harsher rules on the taxation of profits of foreign controlled corporations resident in tax havens or that are beneficiaries of a favoured regime;
- increased rates for withholding taxes on certain income paid to residents in tax havens;[34] and
- non-applicability of the favoured portfolio offshore investor regime for investors in tax havens.[35]

4.2. Internal measures

The international measures mentioned in the prior section are aimed mainly at curbing tax evasion effected through the hiding of foreign assets and avoidance through profit shifting to low-tax jurisdictions. In addition to such measures, Brazil has also put in place tools aimed at dealing, through information and disclosure, with evasion and avoidance internally. The first of these, which has been phased in since 2007, is an integrated digital information system for taxpayer compliance, known as the Public System of Digital Bookkeeping (*Sitema Público de Escrituração Digital* (SPED)). The second, which eventually was not passed into law by Congress, was a mandatory disclosure system aimed specifically at tax planning, arguably following the trend set by the Final Report on BEPS Action 12.

Each of these instruments will be analysed below.

4.2.1. Digital bookkeeping system: SPED

SPED can be briefly described as a digital bookkeeping system through which information is exchanged between taxpayers and tax authorities by means of digital certification, which allows for all documentation, solely in digital form, to be legally valid and binding.[36] The main goals of the system are (i) to allow for information integration between tax authorities on federal, state and municipal levels, (ii) to make compliance obligations more rational and uniform to taxpayers, by means of a single and standardized data transmission to different tax authorities (i.e. federal, state and municipal) and (iii) to make the identification of tax fraud, non-compliance and deficiencies in general quicker, by means of improving the control of processes and speed of information access, as well as enhancing audits through data cross-referencing and electronic auditing.

The seeds of this system were planted with the constitutional changes made in 2003[37], which required further integration of tax administrations on federal, state and municipal levels. In 2004 and 2005, tax administrators from all three levels of governments held meetings to discuss such integration goals, resulting in two cooperation protocols that were enacted to develop a system of integrated bookkeeping and unified electronic invoicing. In 2007, the federal government took up the goal of implementing such system,[38] which has been phased in since then.

Currently, the system is comprised of the following main working modules:

- *accounting bookkeeping*: this electronic bookkeeping for accounting purposes replaces former paper bookkeeping and includes electronic versions of the daybook and its ancillary documents, the ledger and its ancillary documents and the books comprising daily interim balance sheets, balance sheets and entry forms evidencing the entries made therein. Electronic bookkeeping through the SPED system is currently mandatory for all Brazilian legal entities taxed on their book profits. Thus, legal entities taxed by presumptive systems are exempted from this e-bookkeeping requirement, as it may prove too burdensome to such entities and it is not as fundamental for e-auditing under such presumptive systems. In 2013,[39] 3.02% of all Brazilian legal entities were taxed under the book profit system,

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34. The tax favoured regime concept does not apply in this case.
35. Id.
36. The official SPED website (http://www1.receita.fazenda.gov.br/Sped/) provides information about the system and its current state of development.
37. Amendment 42 to the Brazilian Constitution added to arts. 37 and 52 commandments on certain joint efforts to be undertaken by federal, states and municipal tax authorities.
38. Federal Decree 6,022/07 established the Public Digital Bookkeeping System (*Sistema Público de Escrituração Digital* (SPED)), which, as stated in the Decree, is characterized as a system that unifies the receipt, validation, storage and authentication of books and documents that integrate tax and commercial bookkeeping by a single and digital flow of information. *See* C. Dos Santos, *Auditoria Fiscal e Tributária* (IOB 2010), at 336.
39. This is the latest year with available, officially published data from the Brazilian federal tax authorities. BR: Receita Federal do Brasil, *Dados Setoriais 2009/2013*, at 6, available in http://idg.receita.fazenda.gov.br/dados/receitadata/estudos-e-tributarios-e-aduaneiros/estudos-e-estatisticas/estudos-diversos/dados-setoriais-2009-2013.pdf.

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while the remainder where either taxed under one of the types of presumptive systems (91.32%)[40] or were exempt (5.65%). However, companies taxed under the book profit system accounted, in 2013, for 78.31% of the revenues of federal taxes levied on legal entities. Thus, despite being few in number, the companies obliged to maintain electronic bookkeeping are very relevant insofar their tax revenue share is concerned.;

- *tax bookkeeping*: this relates to the bundle of records, tax documents and other information of interest to tax authorities, as well as data and registers related to the calculation of the tax liability. Also, for legal entities that are taxed on their book profits, there is a specific electronic module on which all adjustments to book profits necessary for determining the taxable profit are made;
- *tax bookkeeping for social contributions*: this comprises the e-documents related to the calculation of the federal social contributions on revenues; and
- *electronic invoicing*: under electronic invoicing, every transaction of sales of goods or services must be supported by an electronic invoice for tax purposes, which is transmitted to the relevant tax authorities and approved by them. The goods, when remitted to the buyer, are accompanied by a paper document to ensure the issuance of the e-invoice. The electronic invoicing process allows for all relevant tax authorities (federal and subnational) to be aware of a transaction with the issuance of a single e-document by the taxpayer. Moreover, information from the e-invoice can feed other modules of SPED used to calculate different tax liabilities (e.g. it can feed data related to the entity's sale's revenue for purposes of taxes on revenue and on profit). Finally, for value added taxes, electronic invoicing allows for the buyer to accurately register the cost of the goods purchased and the VAT credit granted by such purchase.

The adoption of this electronic system is capable of bringing undeniable benefits in the long run for both tax authorities and taxpayers. For the former, as mentioned, the system is capable of increasing available information, integration and improving audits (both electronic and human) overall. For the latter, the adoption of digital bookkeeping, e-documents and electronic tax invoices as the legal standard for tax auditing will reduce the costs related to the issuance and storage of paper documents. Moreover, the system can, in the long run, make it easier for the taxpayers to calculate their taxes and check for mistakes prior to any audit. Finally, if the system is really capable of reducing evasion and tax deficiencies in general, this means a more level playing field will be available for taxpayers, bringing positive outcomes to the business environment.

However, especially in the short run, the adoption of the system has not been a bed of roses for taxpayers. There are difficulties in integrating ERP software to the modules provided by the tax authorities, and this can entail significant migration costs. Moreover, as many of SPED's modules are still currently being phased in, there is much redundancy in tax compliance obligations, which may increase compliance costs dramatically. Hopefully, these will be only migration issues and, in the long run, the system will achieve its expected goals.

4.2.2. Tax planning, information and disclosure

Tax planning strategies usually involve exploring some loopholes regarding the interpretation of tax law (e.g. classification issues) or coupling different transactions which, by themselves, may be acceptable, but, when analysed altogether, entail a result unforeseen (and usually undesired) by Congress (e.g. step transactions, or the coupling of a deductible expense with tax-exempt revenue, or other hybrid mismatches). Such strategies require special attention in auditing because the mere existence of information may not be sufficient to quickly identify and counteract them.

Of course, one could argue that, with all the information obtained in electronic form through the system described above, Brazilian tax authorities would already be adequately equipped to detect tax planning structures if proper risk management strategies and specific information triggers were set. For example in M&A transactions, Brazilian law allows for tax planning strategies that make use of goodwill amortization and accumulated loss compensation following a merger. Thus, an audit system could cross-reference data of companies that were merged with the deduction of expenses related to goodwill amortization and/or accumulated loss compensation. If the data showed that certain deductions or compensations were made following a merger, an audit could be triggered.[41]

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40. 70.06% is taxed under the SIMPLES regime, which is a presumptive and simplified system which includes federal income taxes, social contributions on revenues and payroll taxes, as well as state VAT and municipal services tax. All such taxes are levied as a single tax at progressive rates on revenue. This system is available only for entities with annual revenue of less than BRL 3.6 million. A further 21.26% is taxed under the federal presumptive system, which includes federal income taxes and social contributions on profits and revenue. This presumptive system is available for entities with yearly revenue under BRL 78 million.
41. Of course, other relevant data should also be taken into account. For example, the amount of deductions or losses' offset would be relevant to determine the possible tax liability resulting from an audit and, thus, if such audit would be cost effective.

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However, tweaking data analysis and cross-referencing in this way requires that the planning strategies be known beforehand by the tax authorities. Although it is true that tax authorities already know many common strategies, it is also true that new planning strategies are created every day, especially when new laws are passed. Despite the best efforts of tax authorities to keep up with new planning trends, some time may be necessary to adapt and adjust for such new strategies. This means that new strategies may go unnoticed for a period of time, and the audit response to such strategies would depend on how quickly tax authorities can become aware of them and adapt risk management to properly respond.

Moreover, even if risk management analysis enables the selection of taxpayers that may have engaged in tax planning, the following audit of such taxpayers would necessarily have to be led by a human auditor, as legal reasoning and judgments would be required. For example, if a GAAR (or any GAAR standard) is applicable, the auditor would need to test whether the structure is a purely artificial arrangement or if it has a business purpose. The basis of such judgments may not be provided by, or easily extracted from, the information obtained through the system described above.

This means that access to information is relevant, but may not be sufficient to deal with tax planning. At least, this is the argument made by Final Report on BEPS Action 12[42] when advocating for mandatory disclosure rules to deal with aggressive or abusive transactions, arrangements or structures.

As mentioned in the Final Report, the lack of timely, comprehensive and relevant information on aggressive tax planning strategies is one of the main challenges faced by tax authorities worldwide, and early access to such information could provide the opportunity to quickly respond to tax risks through informed risk assessment, audits or changes to legislation or regulations. Thus, the design of mandatory disclosure rules would, as the Final Report affirms, increase the information flow on tax risks to tax administrations and tax policy makers.

There are also less obvious arguments for the enactment of tax planning disclosure rules. For example, a mandatory disclosure system could serve as a deterrence mechanism, as taxpayers will probably be more reluctant to enter into a scheme if it must be disclosed. Pressure is also placed on the tax avoidance market, as promoters and users will have only a limited opportunity to implement schemes before they are closed down.[43]

Moreover, such a disclosure mechanism may be enacted and adjusted in connection to the penalty structure of a tax system in order to reduce the level of uncertainty surrounding tax law interpretation and to improve cooperation between taxpayers and tax authorities.[44]

Accordingly, a tax system with high penalties, high interpretation uncertainty and low cooperation among tax authorities and taxpayers could benefit from a disclosure system that could work as a substitute for, or in conjunction with, private rulings.[45] It could reduce uncertainty, increase cooperation and eliminate the need for harsh penalties in cooperative cases. This could work to the benefit of both the taxpayer and the tax authorities.

As discussed in further detail below, recent tentative amendments to Brazilian tax law that sought to enact a mandatory disclosure system in Brazil could have pushed the Brazilian system in this direction. However, some of the provisions rendered the disclosure mechanism too unreasonable for taxpayers and it ended up not being passed into law by Congress.

The discussion below presents the current situation in Brazil regarding the existence of a GAAR, the penalty structure for federal taxes and the litigation and rulings mechanisms. Next, section 5 discusses some relevant aspects of the mandatory disclosure rules envisioned under the 2015 Final Report on BEPS Action 12 and compares them to the tentative Brazilian rule on the issue.

42. OECD, *Mandatory Disclosure Rules – Action 12: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 5 Oct. 2015), at 9, International Organizations' Documentation IBFD.
43. OECD, *Action 12 Final Report*, *supra* n. 42, at 9.
44. OECD, *Action 12 Final Report*, *supra* n. 42, at 13.
45. The Action 12 Final Report explores the interplay between mandatory disclosure and other similar disclosure initiatives that serve as means of improving information or compliance, such as ruling regimes, additional reporting obligations, surveys and questionnaires, voluntary disclosure and co-operative compliance programmes. This issue, further discussion of which is beyond the scope of this article, was also dealt with earlier by a 2011 OECD report on tackling aggressive tax planning through improved transparency and disclosure. OECD, Centre for Tax Policy and Administration, *Tackling Aggressive Tax Planning through Improved Transparency and Disclosure: Report on Disclosure Initiatives* (OECD Publishing Feb. 2011).

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5. Tax Planning and Litigation Scenario in Brazil

To better understand the Brazilian landscape on dealing with tax planning, a brief panorama is provided here of (i) the penalty system for tax deficiencies, tax litigation procedures and private letter rulings and (ii) the existence of a GAAR in Brazilian law.

5.1. Brazilian tax penalties, litigation and private letter rulings

Given that tax laws in Brazil are enacted by each competent federative unit (federal government, states or municipalities), penalties are also dealt with by such laws. The discussion here will consider federal penalties, as this article is focused solely on federal measures.

The standard penalty for late payment of federal taxes is 0.33% per day, with a cap of 20%[46] for late payments that are more than 60 days past due. Late penalties are also subject to interest calculated according to a federal basic interest rate (the SELIC[47] rate).

If a tax deficiency is assessed following an audit, the standard applicable penalty is 75% of the tax amount owed. This penalty applies regardless of good faith of the taxpayer. For example, the deficiency can derive from divergent interpretation of the tax law, mistakes in calculation or simply from failure to timely pay due taxes.[48] In addition to the penalty, the SELIC interest rate will also be applied to the amount due and to the penalty itself if the debt is not timely paid after the filing of the deficiency.[49]

The penalty is doubled[50] if the deficiency results from actions of the taxpayer characterized as evasion,[51] fraud[52] or collusion.[53] This means that the overall penalty in these cases would be of 150% of the tax amount due. Tax authorities have been ambiguous as to the application of this doubled penalty to tax planning cases. As discussed further below, this only goes to show the ambiguity of how tax planning cases can be characterized under Brazilian law.

The penalty can also be increased by 50% if, during an audit, the taxpayer does not timely respond to the auditor's demands for clarifications and requests for certain documents. This means that, in such cases, the penalty may be of 112.5% or 225%, depending on whether there is also evasion, fraud or collusion.

Finally, penalties can be reduced by 50% if the taxpayer pays the due amount within 30 days of receiving the deficiency notification.[54]

Once a deficiency is filed, the taxpayer may litigate it before administrative courts and/or in judicial courts. Administrative courts present opportunities within the tax administration for revision of the assessments and deficiencies filed by auditors. At the federal level, administrative courts judges are comprised of auditors and taxpayer representatives, always in even numbers in each judgment session. If there is a draw, the president of the session, always an auditor, decides.

Administrative litigation is always an available alternative for the taxpayer following the assessment of a deficiency. As mentioned, the Tax Code provides a protective effect to administrative tax litigation, effectively insulating the taxpayer from any liens or judicial collection procedures regarding the litigated debt while the case is pending.

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46. BR: Law 9,430/96, art. 61. This penalty is applicable even if the taxpayer spontaneously pays the due tax without any assessment or audit by the tax authorities. There is the possibility of litigating the application of this penalty, based on the argument that the spontaneous payment of taxes should be subject only to interest and not penalties. This argument is backed by art. 138 of the Tax Code, and courts may accept it. *See* L.E. Schoueri, *Direito Tributário*, 2nd edition (Saraiva 2012), at 746.
47. The SELIC rate for Dec. 2015 was 1.16%. The cumulative rate in 2015 was 13.2%. However, interest on late tax payments is not compounded. The rate applicable in the month of the payment is always 1%, regardless of the SELIC rate for that month.
48. However, if the taxpayer has timely and properly declared that it owed the tax, but simply did not pay such debt, one could argue that the 75% penalty is not due. In practice, the taxpayer in this situation is electronically summoned to pay the deficiency and usually solely the 20% penalty is applied.
49. This includes late payments due to litigation of the deficiency.
50. BR: Law 9,430/96, art. 44, para. 1.
51. Evasion, for this purpose, is legally defined by art. 71 of Law 4,502/64 as the taxpayer's action, with intent, to impede or retard, totally or partially, the tax authorities' knowledge of (i) the occurrence of the taxable event, its nature or material circumstances and/or (ii) personal characteristics of the taxpayer capable of defining or altering its tax liability.
52. Fraud, for this purpose, is legally defined by art. 72 of Law 4,502/64 as every action or omission, with malice, that tends to impede or retard, totally or partially, the occurrence of a taxable event, or to exclude or modify its essential characteristics with the purpose of reducing the amount of tax due, or avoid or postpone its payment.
53. Collusion for this purpose, is legally defined by art. 73 of Law 4,502/64 as the malicious agreement between two or more persons or legal entities that has the purpose of tax evasion or fraud.
54. Law 9,430/96, art. 44, para. 3; Law 8,212/91, art. 6, I. If the taxpayer decides to pay in instalments, the reduction will be by 40% and if the taxpayer offsets the due tax with credits that it may have against the tax administration, the reduction will be by 30%.

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For this reason, taxpayers often will choose to litigate administratively, as this at least allows for the postponement of the payment of the debt. However, the SELIC interest will apply on the overall amount of the debt (including the penalty) during this period. This means that if the administrative litigation is unsuccessful, the taxpayer will be charged the full amount with SELIC interest. Considering that administrative discussions may take several years to be concluded and taking into account the high SELIC rates, such interest may easily pile up to a fairly large amount.

As mentioned, once administrative challenges to a tax assessment are exhausted, uncooperative tax debtors face the risk of having their physical and financial assets seized under judicial tax enforcement procedures. Still, the debt may be litigated by the taxpayer before judicial courts. However, to avoid judicial collection procedures and seizure of assets during a judicial discussion, the taxpayer must either deposit the full amount of the debt (including interest and penalties) or obtain a judicial order granting immunity from collection during the judicial litigation.

As far as tax planning litigation is concerned, most of it occurs solely before administrative courts for two main reasons, namely (i) administrative courts tend to be more technically specialized in tax matters than judicial courts and (ii) if the taxpayer is unsuccessful in the administrative litigation, it would rather opt into some TIPP programme that will extend the payment time frame and partially reduce penalty and interest burdens, than litigate it before judicial courts with the risk of having the debts judicially collected and assets seized during such litigation.[55]

As the amounts involved in planning cases are often large, especially if high penalties (e.g. 150%) were to be applied, the risk of litigating before courts is too high compared to the benefits that TIPPs may offer. This reasoning has practically put tax planning at the margin of the judicial court discussions in Brazil, with very few relevant cases argued judicially, especially when compared to the amount of cases decided by administrative courts. The lack of case law of judicial courts relating to tax planning makes it even riskier for the taxpayer. This, in turn, makes the TIPP alternative even more attractive, generating a vicious circle.

Thus, as simple negotiated settlements are not allowed in Brazil,[56] TIPPs are the next best alternatives for taxpayers and tax authorities alike to deal with tax planning litigation.

Finally, Brazilian law allows for private letter rulings to be issued by tax authorities. If a taxpayer requests a ruling from the tax authorities, the taxpayer is allowed to adopt its own interpretation of the tax law until the issuance of the ruling. If the ruling adopts a more burdensome interpretation of the law, the taxpayer will be liable for the tax difference with SELIC interest, but without penalties.

However, rulings are not often used in Brazil to deal with tax planning issues. Although there is no empirical research on the causes of such apathy, some reasons may explain it.

First, rulings are decided solely by auditors, who are naturally biased to adopt interpretations that favour the tax authority. If there is an unfavourable ruling, the taxpayer may not appeal to the administrative court, for example where judgments are made by auditors and representatives of taxpayers in even numbers. Thus, rather than requesting a ruling and exposing planning transactions to the authorities, taxpayers may prefer playing the audit lottery and, if caught, litigate the deficiency before administrative courts, even at the cost of a 75% or 150% penalty.

Second, it may be the case that the taxpayer requesting the ruling would not be interested in entering into the transaction if the more burdensome tax interpretation were adopted. In other words, the taxpayer would not be interested in simply paying the tax difference if the ruling were unfavourable. The taxpayer would rather simply not enter into the transaction in the first place. This means that rulings would need to be issued prior to the taxpayer's entering into the transaction. However, as it might take more than a year for a ruling to be issued, taxpayers typically cannot wait this long to enter into any given transaction. Moreover, even if the taxpayer could wait, tax authorities have been taking a position that rulings may be issued only in relation to a concrete transaction. If a ruling is requested for a transaction that has not already happened or that is on the verge of happening, tax authorities might argue that the request is abstract and simply deny the issuance of the ruling.

Finally, there is a widespread – albeit anecdotal – notion[57] among taxpayers that requesting a ruling might attract audits in general. However, this may not be that relevant, as taxpayers do request rulings regarding issues other than tax planning (e.g. classification of goods for import and excise tax purposes and other more mundane interpretation issues). This shows that the Brazilian scenario regarding tax planning is one of few opportunities for cooperation, as the ruling

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55. L.E. Schoueri, *REFIS e a desjudicialização do planejamento tributário*, Revista Dialética de Direito Tributário 232 (2015).
56. As mentioned, plea bargains must be approved by law and made in line with the exact terms of such law.
57. Solely based on hearsay and beliefs, not on actual data.

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mechanism is inadequate and even negotiated settlements are not an available alternative. Thus, the usual path taken by taxpayers that want to engage in planning is to play the audit lottery and, if caught, litigate before administrative courts. If the litigation is unsuccessful, TIPPs are a last resort.

This situation is aggravated by the fact that there is no certainty as to the existence and extent of a GAAR in Brazil, nor to its application by administrative court judges. This uncertainty makes it even harder for taxpayers to perform a correct risk analysis regarding their planning strategies, and may also hinder any chance of cooperative behaviours. What is even worse, this uncertainty has arguably led to corruption among administrative courts, as discussed in section 4.2.

5.2. Is there a GAAR in Brazil?

There is much discussion as to the existence of a GAAR in Brazil and the extent thereof, if any. The federal government, backed by the Brazilian federal tax authorities, has been trying to pass a GAAR into law for almost two decades now, and there is no unanimous interpretation of the current existing rules. However, this has not stopped the tax authorities and administrative courts from applying the concept to some tax planning cases.

The Tax Code has always dealt with wholly artificial transactions and arrangements in its article 149 (VII). It determines that the tax authorities must file a deficiency claim if there is evidence that the taxpayer, or any third party acting to the benefit of the taxpayer, has acted with malice, fraud or by means of wholly artificial transactions.[58]

In 2001, Complementary Law 104 added a sole paragraph to article 116 of the Tax Code. This is the closest rule to a GAAR in the Brazilian Tax Code and reads as follows:

> The tax authority may disregard transactions or contracts made with the purpose of dissimulating the occurrence of a taxable event or the nature of any element related to such taxable event, according to procedures to be established by the law of the competent federative entity.[59]

Some experts[60] argue that this provision serves the same purpose as article 149 (VII) of the Code, i.e. both deal solely with wholly artificial transactions and arrangements.[61] Thus, the only innovation brought by the sole paragraph of article 116 would be the possibility of the competent federative entity passing into law rules establishing a specific procedure to deal with disregarding a wholly artificial arrangement.

Others,[62] however, read the sole paragraph of article 116 as an actual GAAR. They argue that it would make no sense for the rule enacted in 2001 to deal with exactly the same sort of artificial transactions already previously foreseen by the Code. Thus, this rule would deal with structures that – even if not necessarily being wholly artificial – were entered into with the main purpose of avoiding the occurrence of a taxable event. In this sense, a structure acceptable from a tax perspective would require a business purpose unrelated to the tax savings it would entail.

Finally, in addition to the discussion regarding the content of article 116, sole paragraph, there is also discussion regarding its immediate applicability. As its wording provides that a specific disregarding procedure must be passed into law by each competent taxing entity, some argue that the rule would not be applicable prior to the enactment of such procedure into law.

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58. The original wording mentions "*dolo, fraude ou simulação*". *Simulação* is a concept that derives from civil law, where its exact meaning and foundation lies. Simply put, in civil law, *simulação* is to legally execute one or more transactions that have no correspondence to the facts (this can be done to hide another underlying and different transaction, or simply to manufacture a legal reality without any factual underlying reality whatsoever). In a tax context, to act by means of *simulação* would be to produce a legal structure with no factual correspondence, in order to hide the occurrence of a taxable event, or change some of its aspects (such as the tax base).
59. Authors' translation (Source text: "*A autoridade administrativa poderá desconsiderar atos ou negócios jurídicos praticados com a finalidade de dissimular a ocorrência do fato gerador do tributo ou a natureza dos elementos constitutivos da obrigação tributária, observados os procedimentos a serem estabelecidos em lei ordinária*".)
60. R.M. de Oliveira, *A Elisão Fiscal ante a Lei Complementar n°104*, in *O Planejamento Tributário e a Lei Complementar 104* (V.O. ROCHA ed., Dialética 2001), at 244-276; L.E. Schoueri, *Planejamento tributário: limites à norma antiabuso*, in *Direito Tributário Atual*, vol. 24 (A.J. Alcides ed., Dialética 2010), at 345; A. Xavier, *Tipicidade da Tributação, Simulação e Norma Antielisiva* (Dialética 2001), at 111; P.A. Barreto, *Planejamento Tributário: Perspectivas Teóricas e Práticas*, Revista de Direito Tributário 105 (2009), at 52; R.A. Carazza, *Reflexões sobre a obrigação tributária* (Noeses 2010), at 241; H.T. Tôrres, *Direito tributário e direito privado: Autonomia privada, simulação e elusão tributária* (Revista dos Tribunais 2003), at 355.
61. That view is supported by an interpretation of the term "dissimulate" (in Portuguese, *dissimular*) that relates it to the concept of *simulação*, which, as mentioned on a previous note, deals with wholly artificial transactions.
62. E.g. M.A. Greco, *Constitucionalidade do parágrafo único do artigo 116 do CTN*, in *O Planejamento Tributário e a Lei Complementar* 104 (V.O. Rocha org., Dialética 2001), at 181-204.

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Others argue that the enactment of such procedures would not be necessary for the applicability of the rule present in article 116, sole paragraph. The tax authorities should have full power, upon auditing, to disregard transactions entered into with the main purpose of avoiding the occurrence of a taxable event, and commence audits based on such disregard. It would make no sense, they argue, to limit the auditing powers of the tax authorities prior to the enactment of the applicable procedures. In other words, the procedures, when enacted, should be followed by authorities, but, prior to their enactment, authorities should have full powers to audit and make assessments based on the disregarding rule. Also, when judging tax cases, courts should take into full account the possibility of disregarding certain transactions.

To date, specific procedures for disregarding tax planning structures have not been passed into law, at either the federal, state or municipal level.

However, there was an attempt at such legislation in 2002, when the federal government enacted Provisional Measure 66/02. With the purpose of establishing the procedure required by the sole paragraph of article 116 of the Tax Code, articles 13 to 19 of this provisional Measure first defined the types of transactions that could be disregarded, and then determined how this decision to disregard should be made.

As to the transactions subject to being disregarded, article 14 of Provisional Measure 66/02 clearly provided that the scope was beyond wholly artificial transactions. It provided for the disregarding of any transaction that served to reduce the tax liability, to avoid or postpone the payment thereof, or to conceal the true aspects of the taxable event or the true nature of its elements. Article 14, paragraph 1 added that, for this purpose, factors to be considered include the lack of business purpose or abuse of form.

The lack of business purpose in a transaction was defined as the option, by the taxpayer, for a form which, if not for its tax benefits, was more complex or burdensome for the taxpayer, when compared to other formal alternatives to reach the same material goal. The abuse of form[63] was defined as a transaction that materially is capable of reaching a goal different than that which it would formally reach and, thus, should be considered as to its substantive aspects.

The remainder of the articles established a specific procedure for the disregarding, which involved more steps than would be required for the filing of a common tax deficiency notification.

It is clear that the goal of articles 13 to 19 of Provisional Measure 66/02 was to play the role of a GAAR at the federal level. However, due to the high unpopularity of such rules among taxpayers and scholars alike, Congress did not pass them into law.[64] Yet, this has not stopped tax authorities from filing deficiencies which, in practice, involve the disregarding of planning structures.

To avoid entering into the GAAR discussion, authorities usually classify the planning structures as wholly artificial arrangements.[65] However, a large number of such arrangements are not only “fake” formal structures. They are in fact arrangements entered into to accomplish a tax benefit, be it through step transactions, mismatches or other means. Thus, they would be structures that fall within the scope of a GAAR, but not necessarily within the scope of a simple evasion rule.

This ambiguity is even more clear when one notices that in many of these deficiencies, the tax authorities have been imposing a penalty of 75% and not 150%. If they were all cases of wholly artificial structures, it could be argued that they qualify as evasion and the higher penalty (in addition to criminal implications) should be applied. The application of the 75% penalty proves that such cases may not relate exclusively to wholly artificial arrangements.[66]

Thus, currently there is uncertainty in Brazil as to which structures may be disregarded for tax purposes. This uncertainty affects tax authorities and taxpayers alike, and is also found in administrative case law. There are instances where federal administrative courts considering similar fact patterns have ruled in diametrically opposite ways. As mentioned, because taxpayers rarely litigate such cases before judicial courts, administrative courts are usually the last instance of discussion

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63. This also derives from civil law tradition and can be interpreted as substance over form.
64. Congress has 60 days, extendable by an additional 60 days, to pass a provisional measure into law; otherwise it will lose its validity.
65. Schoueri, *supra* n. 55, at 109, observes this phenomenon and refers to Frederik Zimmer’s general report in a 2002 IFA Cahiers to demonstrate that people (not only auditors, but also practitioners) in jurisdictions that do not have a GAAR have a tendency to expand the concept of wholly artificial transactions (in the case of civil law countries, the concept of *simulação*) to include transactions which, despite not being artificial, lack the purpose that would make them acceptable as regards their tax consequences. *See* F. Zimmer, *General Report*, in *Form and Substance in Tax Law* (IFA Cahiers 2002 Vol. 87a), at 29-33, Online Books IBFD.
66. This practice regarding the penalty also derives from the fact that, in some cases in which the administration attempted to impose the aggravated penalty in planning cases, courts have reduced such penalty to the regular 75%, although accepting the disregarding done by the tax authorities and the resultant tax deficiency.

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in tax planning. This means that there has been little opportunity to make this matter more uniform by means of judicial case law.[67]

To make things worse, a large corruption scheme was recently uncovered that involved bribes taken by some administrative court judges, especially in relevant tax planning cases. The magnitude and cases affected by this scheme is still been investigated, but initial news mentioned an amount that may range from BRL 5.7 billion to 19 billion in 79 cases currently under suspicion and investigation.[68]

6. Mandatory Disclosure Rules

As mentioned, mandatory disclosure rules can play a role in auditing and in counteracting tax planning strategies, as such disclosure may provide adequate and timely information to the tax administration so as to allow it to develop smarter risk management. Thus, audits and related notices of deficiency could be more precise, complete and focused on actual abusive planning structures. Disclosure rules may also serve as tool to improve cooperation between tax authorities, taxpayers and even tax consultants and preparers.

Next, some relevant aspects of the mandatory disclosure rules proposed under BEPS Action 12 are summarized and compared to the mandatory disclosure rule that the Brazilian government recently attempted to enact.

6.1. BEPS Action 12

The 2015 Action 12 Final Report states that the main goals of mandatory disclosure rules are:

- to obtain early information about potentially aggressive or abusive tax avoidance schemes in order to inform risk assessment;
- to identify such schemes, their users and promoters in a timely manner; and
- to act as a deterrent, reducing the promotion and use of avoidance schemes.[69]

The Final Report[70] also asserts that, in fulfilling these goals, mandatory disclosure rules should be governed by the following principles:

- mandatory disclosure rules should be clear and easy to understand. This means they should be drafted as clearly as possible to provide taxpayers with certainty as to what is required by the regime;
- mandatory disclosure rules should balance additional compliance costs to taxpayers with the benefits obtained by the tax administration. This means that the scope and extent of any disclosure obligation is key in terms of achieving a balance between the added burden of compliance costs and the relevance of the information received by the tax administration. In Brazil, this should mean that information that would already be available through SPED should not be required to be reported once again in a mandatory disclosure programme;
- mandatory disclosure rules should accurately identify relevant schemes and be effective in achieving the intended policy objectives. Mandatory disclosure rules need to be drafted so that they capture sufficient information on the schemes and arrangements about which a tax administration is concerned. As it is impractical for a mandatory disclosure regime to target all transactions that raise tax avoidance concerns, the identification of “hallmarks” is a key factor to setting the scope of the rules; and
- information collected under mandatory disclosure should be used effectively. This means that a tax administration must implement effective procedures for making best use of the information disclosed by taxpayers, setting up a process to review disclosures and identify the potential tax policy and revenue implications.

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67. Although it also may be also highly debatable whether such courts would, in fact, do a better job on the matter.
68. All data pertaining the numbers involved in the corruption scandal was extracted from media coverage. Media reports on the subject can be accessed at http://www.economist.com/news/finance-and-economics/21647664-scandal-tax-agency-may-dwarf-one-surrounding-petrobras-taxmen, http://www1.folha.uol.com.br/mercado/2015/04/1611246-entenda-a-operacao-zelotes-da-policia-federal.shtml and http://g1.globo.com/politica/noticia/2015/11/juiz-da-operacao-zelotes-autoriza-quebra-de-sigilos-de-mantega.html.
69. OECD, *Action 12 Final Report*, *supra* n. 42, p. 25.
70. OECD, *Action 12 Final Report*, *supra* n. 42, p. 19-20.

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Although a mandatory disclosure rule may adopt either a transaction-based or promoter-based approach[71] and determine different reporting obligations for different subjects (taxpayers or tax promoters), it is essential that every model identify the reportable transactions.[72]

The question as to what must be reported can be divided into two separate issues.[73] The first relates to what schemes or arrangements are subject to a mandatory disclosure rule. When designing the rule, this issue relates to the choice of *thresholds* and hallmarks used to determine if a scheme should be reportable. The second issue, which relates to what must be reported, arises only if a transaction is reportable. It relates to the *specific information* to be disclosed. A balance should be struck between, on the one hand, the need for clear and useful information and, on the other hand, the goal of avoiding undue compliance burdens for taxpayers.[74] The focus here will be on the first issue.

A threshold is a pre-condition that a scheme must satisfy before it is assessed against the hallmarks. A *de minimis* filter could, for example, be used as a threshold for reporting. Hallmarks, in contrast, are tools to identify the features of schemes that should be reported. They may be generic or specific. Generic hallmarks[75] target features that are common to promoted schemes. Examples include:

- "confidentiality": if the promoter or adviser requires the client to keep the scheme confidential, this is a hallmark that the promoted transaction may involve abusive tax planning;
- "premium fee" or "contingent fee": if the amount the client pays a promoter or advisor is attributed to the value of the tax benefits obtained under the scheme, this is a hallmark indicating the possibility of aggressive planning;
- "contractual protection": the parties agree on an allocation of risk in respect of a failure of the tax consequences of the scheme. This can be in the form of insurance, or simple allocation of liabilities or even obligations of the promoter to provide for further assistance in a tax dispute regarding the transaction; and
- "standardized tax product": this hallmark is intended to capture widely marketed schemes. It can also be used to capture new and innovative tax planning arrangements that can be easily replicated and sold to a variety of taxpayers.

In contrast, specific hallmarks[76] are used to target known vulnerabilities in the tax system and techniques that are commonly used in tax avoidance arrangements. They reflect current concerns of the tax administration with types of transactions or tax behaviours that represent high risk. Thus, while generic hallmarks focus on certain characteristics of the tax planning as a marketed product, with the purpose of capturing even those types of transactions completely unknown by tax authorities, specific hallmarks are meant to focus disclosure obligations in areas already known to be of high risk by authorities, obliging the taxpayer to disclose transactions in those areas regardless of how such transaction was marketed to the taxpayer (or even if it was not marketed by any promoter). Examples of such specific hallmarks include schemes that produce losses, schemes that are capable of changing the nature of income (e.g. ordinary income into capital gains), schemes that are able to convert employment income (e.g. stock options in lieu of salary), and structures involving low-tax jurisdictions.

A mandatory disclosure regime should include a combination of generic and specific hallmarks, and a transaction should be reported if it meets just one hallmark.

Finally, several actions can be taken by the tax administration once the disclosed information is received.

First, the disclosed information can be used to advance changes in tax law. The usefulness of the disclosure regime, in this case, would be to allow the tax administration to be aware of new planning strategies at an early stage and to counteract them with proposed changes in the tax law, thereby closing the loophole that allows for such planning before it becomes endemic in the market. The use of the disclosed information to advance changes in the tax laws is completely independent of any audit strategy, and can be made even in countries that do not have any sort of GAAR in its tax system.

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71. The first approach begins by identifying transactions that the tax authorities deem to give rise to tax revenue or policy risks (a reportable scheme), and then requires disclosure by taxpayers that derive a tax benefit from, and any person who provides material assistance in relation to, such reportable scheme. The second approach, instead, focuses on the role played by promoters of tax planning schemes, but also considers what types of reportable schemes promoters and taxpayers are required to disclose.
72. OECD, *Action 12 Final Report*, *supra* n. 42, p. 32.
73. OECD, *Action 12 Final Report*, *supra* n. 42, p. 36.
74. As mentioned, for Brazilian purposes, a mandatory disclosure rule should not require information that would already otherwise be obtained by tax authorities by other means, such as the system described in sec. 4.2.1.
75. OECD, *Action 12 Final Report*, *supra* n. 42, p. 39.
76. OECD, *Action 12 Final Report*, *supra* n. 42, p. 45.

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The second use of the disclosed information would be for auditing and tax assessment. In this case, tax authorities would utilize the disclosed information to decide upon auditing a taxpayer and accepting – or not – the tax benefits entailed by the disclosed transaction. Of course, the denial of the benefits of the disclosed transaction would depend on how the tax system deals with avoidance and whether there is any applicable GAAR that could be used to disregard the tax effects of the analysed transaction.

In this case, the interplay of the mandatory disclosure regime and a GAAR would allow the tax administration to respond to the disclosed transactions with proper auditing and assessment of taxes. Moreover, the existence of the GAAR would amplify the deterrence effect of the mandatory disclosure regime, as taxpayers would know that the reported transaction could be disregarded.[77]

This does not mean, however, that all reported transactions should be caught under the GAAR. Indeed, many such transactions could fall out of the scope of the GAAR. For example, a transaction could be reported due to the presence of general hallmarks such as confidentiality, or specific ones, such as the generation of losses, but still be acceptable under a GAAR due to, for example, the existence of non-tax purposes for the taxpayer to have entered into such transaction.

In cases where the reported transaction falls out of the scope of a GAAR, or if a country does not have an applicable GAAR, the mandatory disclosure regime may still be useful to inform tax authorities and, at the end of the day, the legislature of changes in the tax law necessary to close existing loopholes.

6.2. Brazilian tentative rule on mandatory disclosure

On July 21, 2015, the President enacted Provisional Measure 685, which, under articles 7 to 12, created the obligation for taxpayers to disclose tax planning transactions. As mentioned, provisional measures are quasi-laws enacted by the president. Congress must vote on provisional measures within 120 days of issuance. On 17 November 2015, Congress enacted the law into which Provisional Measure 685/15 was converted and, in doing so, rejected all rules related to the mandatory disclosure regime.

The rules were allegedly inspired by BEPS Action 12, as the official explanatory memorandum of Provisional Measure 685 clearly states:

> 4. The proposed measure stipulates the necessity of the disclosure of tax planning strategies and is aimed at improving legal certainty as to the country's business environment and saving public resources used in unnecessary and lengthy litigation. The absence of complete and relevant information regarding harmful tax planning is one of the main challenges faced by tax administrations around the world. Timely access to such information enables quick responses, by means of auditing or legal changes, to the risks of revenue loss.
>
> 5. Hence, the Base Erosion and Profit Shifting project, developed by the OECD/G20 and in which Brazil participates, recognized, following the experience of several countries (the United States, the United Kingdom, Portugal, South Africa, Canada and Ireland), the benefits of mandatory disclosure rules. Thus, within the scope of BEPS, there are recommendations as to the drafting of such rules related to aggressive or abusive structures, transactions or arrangements.
>
> 6. The main goal of this measure is to provide the tax administration with timely information regarding tax planning, in addition to providing legal certainty to the corporation disclosing the information, allowing for solely the payment of the tax and interests if the transaction is not recognized for tax purposes by the Federal tax administration. Moreover, one should note that the measure stimulates a more careful posture by taxpayers before engaging in aggressive tax planning.[78]

It is clear that this reasoning is directly extracted from the Action 12 Final Report. The goals of the mandatory rules described in the Final Report and in the memorandum coincide: they work as a means to obtain timely information regarding tax planning and also serve as a deterrent to such planning.

However, although the goals may have been similar, the reporting mechanism of Provisional Measure 685 was very different from the rules proposed by the Final Report, especially as regards what should be reported. This may have been

77. OECD, *Action 12 Final Report*, *supra* n. 42, p. 23.
78. Author's translation.

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one of the reasons why such rules failed to be passed into law. There was strong lobbying from the private sector against the regime, and also voices in academia were raised to criticize the lack of cohesion to the rules proposed under the BEPS initiative.[79]

One should also consider the fact that the decision by Congress to repeal the rules under Provisional Measure 685 on the mandatory disclosure regime was taken at a moment when the government was fighting to pass tax hikes to cover the budget deficit and Congress was taking a stand against most such measures. At another political moment, the outcome could have been different.

In the authors' opinion, the decision by Congress was correct. To support this conclusion, an analysis is provided, below, of the rules enacted by Provisional Measure 685, and some remarks are offered on their consequences for the Brazilian tax system.

Under article 7 of Provisional Measure 685, taxpayers had to report, by 30 September of each year, transactions carried out in the previous year that involved the elimination, reduction or deferral of taxes. These transactions[80] had to be reported, if:

- the performed legal acts or transactions did not have any relevant non-tax reason;
- the adopted form was not usual for the intended transaction or the contract contained clauses that would result in different effects from a typical contract; or
- the transactions performed by the taxpayer were included on a blacklist to be enacted by the Federal tax authorities.

Article 9 provided that if, following a disclosure, the federal tax agency decided to disregard the reported transaction for tax purposes, the resulting deficiency would comprise only the uncollected tax plus interest, with no applicable penalty.[81]

However, if a taxpayer failed to disclose a reportable transaction, article 12 provided that such conduct would be considered an omission with intent of tax evasion or fraud. Thus, if the taxpayer were audited and a non-reported reportable transaction were identified, a deficiency would be filed for the due tax, plus interest and a 150% penalty.[82] Furthermore, an argument could be raised that criminal liability would also be a possible outcome.

The main issue related to the mandatory disclosure system of Provisional Measure 685 is that, except for the blacklist, its definition of reportable transactions relied on hallmarks that one would expect to find in a GAAR, but not in a mandatory disclosure rule. Indeed, when dealing with a GAAR, one would expect to see concepts such as relevant non-tax reasons and substance over form. These concepts are typical to a GAAR because they serve to define the transactions that the tax authorities should be able to disregard if, upon an audit, the tax authorities noticed that aggressive tax planning had taken place.

However, these concepts have absolutely no place in a mandatory disclosure rule. It would make no sense to require that the taxpayer report transactions that had no business purposes or with regard to which the substance was different than the declared form. In doing so, the law would be putting the taxpayer in a catch-22 situation. On the one hand, if the taxpayer were to disclose the transaction, it would be automatically assuming that the transaction was made without a business purpose or involved an abuse of form. This would be equivalent to giving an affidavit that the transaction is aggressive and should be disregarded. On the other hand, if the taxpayer decides not to disclose the transaction, the taxpayer would be subject to a tax evasion penalty upon audit.

The goal of a mandatory disclosure regime is not to snare the taxpayer in this kind of legal trap. The general reporting hallmarks under the Provisional Measure 685 regime only shows that the Brazilian government has yet to grasp the concept of general hallmarks in a mandatory disclosure system. General hallmarks relate to the tax planning business. Indeed, hallmarks such as confidentiality, premium fee, contractual protection and standardized tax products are meant to identify what sort of movements are happening on the planning market, and most of them are even more focused on the promoter than on the taxpayer itself.

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79. L.E. Schoueri & R.A. Galendi Junior, *Transparência Fiscal e Reciprocidade nas Perspectivas Interna e Internacional*, in ROCHA, Valdir de Oliveira, *Grandes Questões Atuais do Direito Tributário*, vol. 19 (Dialética, 2015), at 252-3; R.L. Ribeiro, *O dever de comunicar à Fazenda Pública o planejamento fiscal no Brasil*, Revista Dialética de Direito Tributário 242 (2015).
80. Art. 7 also clarified that the taxpayer should present one report for each bundle of transactions that were connected to achieving the afore-mentioned goals.
81. Art. 8 provided that if a taxpayer reported transactions that were yet to occur, the report would have the effect of a request for a private letter ruling. Thus, if the transaction were to actually occur after the disclosure and prior to the decision by the tax authorities as regards the transaction, and if such decision were negative, also in this case taxes would be charged with interest, but with no penalty.
82. For the penalty structure for taxes in Brazil, *see* sec. 4.1.

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The Brazilian rule, however, completely ignored the role of the promoter and that the general hallmarks should be related to identifying the tax planning market. The main reason for this is probably that Brazil is one step behind this discussion, still figuring out whether a GAAR is in place and to what extent it applies. A tax planning market with promoters selling tax shelter transactions in bulk[83] is yet to be identified in Brazil.

Thus, as the government's main concern is to have a GAAR in place, what it really attempted to accomplish with Provisional Measure 685 was to enact a GAAR disguised as a mandatory disclosure regime, taking advantage of the opportunity brought by BEPS Action 12. And in doing so, if not for the decision of Congress to repeal the system, it would have placed the taxpayer in a very delicate position.

In practice, what would have happened had the Brazilian disclosure system been passed into law is that, except for blacklisted transactions, no taxpayer would ever report a transaction, because no taxpayer would ever be willing to admit that its transaction had no business purpose or that the transaction's substance diverged from its form. This would mean that in every audit in which a tax planning transaction was disregarded, the deficiency would be augmented by a 150% penalty. Thus, in reality, the Brazilian mandatory disclosure system would have worked as a penalty increase on tax planning.

Of course this is not true for the sole specific hallmark present in the Provisional Measure 685 system. As mentioned, under the system a transaction would also be reportable if it were a transaction already blacklisted by the federal tax authorities. In these cases, the reporting system might have worked for some benefit. If a transaction is already identified by the tax authorities as aggressive tax planning, it could make sense to require that the taxpayer report when it engages in such transaction. Under this reporting system, the taxpayer would bear the burden to make sure that the transactions it enters into, despite being blacklisted, are legitimate.

For example, the Brazilian federal tax authorities currently do not accept the use of losses following a reverse merger. The reasoning behind this is that the law forbids the use of losses of a merged company. Thus, tax authorities view a reverse merger as a means of circumventing the prohibition, reaching the same forbidden tax result. As such, a reverse merger could be a blacklisted transaction.

In this situation, a taxpayer that does a reverse merger and make use of tax losses would need to report the transaction. However, if the taxpayer felt safe that it could argue that the merger was reversed for relevant non-tax reasons, the taxpayer could still go forward with the transaction, report it and attempt to justify it to the tax authorities.

This system, if correctly implemented, could make litigation in tax planning more cooperative and with less hefty penalties than under the current system.

Of course, even with regard to this blacklist system, one could argue that, as long as a GAAR is not passed into law, the tax authorities would have no legal power to enact any blacklist regarding tax planning transactions. It is probably for this reason that, during the discussion of Provisional Measure 685 in Congress, not even the blacklist reporting requirement survived.[84]

7. Conclusion

The Brazilian experience reported in this article raises interesting points regarding the outcomes of policies structured to deal with a significant tax gap scenario, with a low rate of back tax collection and pervasive litigation.

It seems clear that the Brazilian penalty structure and litigation proceedings hamper the collection of back taxes, and current, more unorthodox methods to tackle this issue do not appear to be working to the benefit of either the tax authorities or taxpayers. Particularly, Brazilian TIPPs may be playing a catalyst role to lower compliance and collection, and to increase aggressive tax planning behaviours.

The lack of a clear definition of where Brazilian law stands in relation to a GAAR and where the line should be drawn in regard to tax planning, reduces legal certainty in the system and indicates that Brazil is still immature when it comes to dealing with this issue. The symptoms of this immaturity were clear in the recent Brazilian tentative mandatory disclosure rule, which completely missed the point of a disclosure rule and was actually a tentative GAAR in a bad disguise. There is

83. Such as the US market.
84. During the discussion in Congress, there was the proposition of an amendment intended to make the reporting mandatory solely in cases of blacklisted transactions. However, even with such amendment, Congress decided not to pass the rules into law.

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still a long way to go for more cooperative and fruitful policies to be enacted in Brazil, especially in relation to tax planning. This would require not only legal changes, but also a change in the mindset of both taxpayers and the tax authorities.

There are, however, relevant advances in information reporting in Brazil, as well as in its sharing among different levels of tax administration and exchange with foreign counterparts. Brazil has been a laboratory for formidable advances in the application of information technology in tax administration, and the development of the SPED system is certainly something to be monitored by policymakers and tax administrations around the world. Nonetheless, the implementation of such system has its burden and Brazilian policymakers should be more sensitive to tax compliance strains suffered by Brazilian taxpayers, especially large companies. Also, as transparency should be a two-way street, one could say that there is much to be improved as far as government transparency is concerned.

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