



## Newsletter Machado Associados

### **Brazil: Levy of WHT on the remuneration of the license covering the right to sell and distribute software**

*The Brazilian Federal Revenue Service reviews its understanding regarding the levy of the withholding income tax (WHT) on the remuneration of the license of the right to sell and distribute software.*

The Brazilian Federal Revenue Service (RFB), by means of COSIT Conflict Resolution Ruling 18 (published on April 5), has formalised its understanding that amounts paid, credited, delivered, used or remitted to a party resident or domiciled abroad as remuneration for the right to sell or distribute software, for the domestic sale to end consumers that will receive a license to use the software, falls under the concept of royalties and are subject to the 15% WHT rate.

According to the RFB, it refers to the analysis of a transaction model where (a) a party resident or domiciled abroad, holder of a software, executes a license agreement for the right to sell or distribute software with a Brazilian company, and (b) the Brazilian company will subsequently sell the licenses to use software to end-users in the domestic territory. The RFB understands that there are two different legal relationships in such transaction.

In this context, it is interesting to note that the RFB's analysis was limited to the license agreement for the right to sell or distribute software between the Brazilian and the foreign party, namely, the initial stage of the transaction. Therefore, COSIT Conflict Resolution Ruling 18 did not address the taxation applicable to agreements for the right to use the software.

In short, the RFB considered that, as a software is an intellectual work, the acquisition of the right to explore it by means of distribution or sale is characterised as a royalty, pursuant to article 22, "d", of Law 4506/1964, whose remittance abroad is subject to the WHT.

By means of this last statement, the RFB changed its understanding – long consolidated by COSIT Conflict Resolution Ruling 27/2008 – in the sense that remittances abroad in payment for the acquisition or the license of the rights to sell software under the multiple copies mode ("off-the-shelf software") should not be subject to the WHT and the Economic Intervention Contribution (CIDE).

It is noteworthy that COSIT Conflict Resolution Ruling 18/2017 maintained such agency's previous understanding regarding the applicability of the exemption

from the CIDE on the payments for the license to use and right to sell or distribute computer programs when there is no transfer of technology, in compliance with article 2, paragraph 1-A, of Law 10168/2000.

Finally, it should be noted that COSIT Conflict Resolution Ruling is binding on the RFB's scope, and must be complied with by federal tax authorities. Thus, companies that fail to comply with such understanding might be subject to tax assessments, that in any case can be discussed at the administrative and judicial levels.

This is a highly complex and relevant matter to a wide range of companies, and this new interpretation by the RFB can generate insecurity (especially considering the changes of understanding by the tax authorities themselves), contingencies for businesses, and even impact other taxes in such transactions.

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This newsletter contains information and general comments on legal matters that may interest our clients and friends. It does not represent the legal opinion of our firm on the subjects addressed herein. In specific cases, readers should rely on proper legal assistance before adopting any concrete action relating to the matters addressed herein.

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