



Portugal - Brazil Tax Treaty withholding tax on capital gains

MFN clause limits Brazilian withholding tax to 15% on capital gains resulting from the sale of Brazilian qualified shareholdings

1. Background

Pursuant to the Portugal / Brazil tax treaty, both States share taxing rights as far as the taxation of capital gains arising from the sale of shares in Brazilian companies is concerned.

In practice, this means that a corporation or an individual, tax resident in Portugal, may be taxed in Brazil, and later in Portugal, on any gains from the sale of shares. However, Portuguese domestic law may grant an exclusion or an exemption from taxation, or a tax credit.

2. What is new?

The Brazilian tax authorities have now issued a ruling (SC 150/2021, dated 21 September 2021) on the application of the most-favoured nation (MFN) clause clarifying that, pursuant

to the Portugal / Brazil tax treaty, (i) any gains earned by corporations or natural persons tax resident in Portugal and (ii) arising from the sale of Brazilian qualified shareholdings (i.e., 10% voting rights with a minimum 1 year holding period), is limited to 15%.

3. Why this tax ruling is so important?

As explained above, the Portugal / Brazil tax treaty provides for sharing taxing rights granted to both States on the sale of local shareholdings. Therefore, any gains deriving from the transfer of Brazilian shares at a consideration may be taxed in Brazil at its domestic withholding tax, which is currently set at progressive rates up to 22.5%.

However, pursuant to Article 6 of the Protocol to the Portugal / Brazil tax treaty, a most-favoured nation clause applies.

Pursuant to this rule, whenever Brazil concludes a tax treaty with another jurisdiction not located in Latin America that limits the taxing rights in relation to Brazilian sourced capital gains (not resulting from real estate transactions), such provisions must automatically apply to the Portugal / Brazil tax treaty.

In the meantime, Brazil has signed a new tax treaty with Israel that limits the Brazilian withholding tax on capital gains to 15%, as follows:

“Gains derived by a resident of [Israel] from the sale, exchange or other disposition, directly or indirectly, of shares in a company which is a resident of [Brazil], may be taxed in [Brazil], but only if the resident of [Israel] owned, directly or indirectly, at any time within the twelve-month period preceding such sale, exchange or other disposition, shares giving right to 10% or more of the voting power in the company.

However, the tax so charged shall not exceed 15% of the gross amount of such gains.”

Except in the cases where treaty provisions do not apply to excluded situations and others resulting from the respective domestic legislations, the Brazilian tax authorities have now recognised in the above-mentioned ruling that the provision quoted above automatically applies to the Portugal / Brazil tax treaty.

Consequently, on the sale of Brazilian qualified shareholdings made by Portuguese tax residents, the buyer, responsible for withholding the source taxation, will have to collect the Brazilian withholding tax at 15% and not at the higher progressive rates.

The outcome of this tax ruling is that the benefits of Brazil-Israel tax treaty would extend to Portuguese tax residents deriving capital gains from qualified shareholdings in Brazil not falling under specific local exemptions

From a practical angle, the outcome of the quoted ruling has special importance when the seller is tax resident in Portugal and benefits from an exclusion or exemption from taxation on any gains earned.

In fact, when the seller is a corporation tax resident in Portuguese territory, any gains deriving from the sale of qualified Brazilian shareholdings may be excluded from taxation pursuant to the Portuguese participation exemption regime.

Furthermore, an exemption is granted to Portuguese tax resident individuals who benefit from Non-Habitual Tax Residents scheme when the gains come from the transfer for consideration of Brazilian shareholdings.

In both cases mentioned above the Portuguese tax residents will not be able to recover the tax paid in Brazil (because there is no Portuguese tax payable). As a result, the reduction of the Brazilian tax due may constitute an important saving.

Finally, it must be noted that, even in the cases when Portuguese tax residents are liable for tax, the reduction of the Brazilian tax charge may allow them to fully credit the Brazilian withholding tax that has been levied against the Portuguese tax.

How can we help?

TELLES' Tax Team has sound and consistent experience in assisting clients in all tax and immigration related issues, especially those requiring the tailor-made analysis of their tax needs, residence permits and all other needs throughout the process of their domiciliation in Portugal.

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