

memorandum to clients

05.03.2016

Decree no. 8,731/2016 – Changes to the IOF Regulation

Decree no. 8,731/2016 was published on May 2, 2016, which amended Decree no. 6,306/2007 – which regulates on the Tax on Financial Transactions (“IOF”).

The Decree increased the IOF/Exchange charged on the acquisition of foreign currencies in kind, from 0.38% to 1.10%, for transactions occurring as of May 3, 2016.

The Decree also stipulated a tax rate of 0% (“zero tax rate”) of IOF/Exchange on the settlements of simultaneous exchange transactions carried out to convert direct foreign investment registered pursuant to Law no. 4,131/1962 for foreign investments in tradable shares in the stock market, registered according to the system determined in Resolution no. 4,373/2014 of the National Monetary Council.

In addition, the Decree created the IOF levy on Securities on matched transactions performed by financial institutions with debentures issued by institutions of the same economic group. The tax rate will be regressive, varying gradually from 1% to 0% (zero percent) in 30 days.

The Decree also regulated on the IOF/Exchange charged on the settlement of the exchange necessary for the early payment of foreign loans entered into by the taxpayer.

According to the rule currently in force, the exchange necessary to obtain foreign loans of maturity shorter than 180 days is taxed at a 6% rate, whereas the exchange entered into for loans having longer maturity is taxed at a zero tax rate. In the event the taxpayer enters into a loan of longer maturity and settles it within a term inferior to such 180 days, the taxpayer is to pay the tax as if the transaction had always been entered into within a short term. As a result, the 6% tax is to be paid, along with interest and a fine.

Taking into account that the term and the tax rates of said IOF/Exchange charge system may be altered, the Decree then determined how the taxpayer is to proceed in the hypothetical situation in which he enters into a foreign loan during the term of a rule, and then decides to settle it before the end of the term in which it was originally contracted. For such cases, the Decree established that the taxpayer is to verify, at the time of early payment, the new minimum term that entitles him to the most beneficial tax rate.

If the early payment occurs *after* the minimum term, the taxpayer must pay the rate generally charged on exchange transactions, which today is of 0% (zero percent). If, on the other hand, the early payment is made *before* the end of this new term, the taxpayer must then pay the IOF at the rate charged on the exchange transaction necessary for contracting foreign short-term loans, which today is of 6%, but this may change in the future. In the latter case, the taxpayer will not need to pay the tax with the addition of a fine or interest.

Take, for instance, the situation of the taxpayer that entered into a foreign loan in 2012, whose exchange should then be taxed in accordance with the wording in the IOF Regulation in force at the time of that transaction. In this case, the taxpayer should respect a minimum term of 1,800 days in order to be entitled to the IOF zero tax rate, that is, he should have to wait until 2017 to pay the loan without the 6% charge of the IOF. With the issue of Decree no. 8,731/2016 under analysis, this taxpayer is then no longer required to respect the minimum term in force on the date the loan was contracted (of 1,800 days), and then is subject only the term currently in force, which is of 180 days. Therefore, if the taxpayer decides to pay the loan in 2016, he will be taxed at a zero tax rate, and no longer of 6%.

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The last change implemented in the IOF Regulation establishes that the services contained in Sections I to V of the Brazilian Nomenclature of Services, Intangibles, and Other Transactions producing variations to equity (“NBS”) are subject to the zero tax rate of IOF/Exchange. Thus, the Decree clarifies that the reception of royalties from abroad is not reached by the zero tax rate, which is provided for in Section VI of the NBS, the last section of the nomenclature.

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