



memorandum to clients

09.15.2016

RFB Normative Rule no. 1.658 – Changes to the Lists of Tax-Favorable Jurisdictions and with Privileged Tax Regimes

Normative Rule of the Federal Revenue Office of Brazil no. 1,658 (“IN RFB no. 1658/2016”) was published on Sept. 14, 2016. This instrument, which derived from Public Inquiry of the RFB no. 007/2016, to which our firm contributed with suggestions, amends Normative Rule RFB no. 1,037, dated June 4, 2010, which lists countries or jurisdictions with favorable taxation and privileged tax regimes.

IN RFB no. 1, 037/2010, in its article 1, lists the countries or jurisdictions that do not tax income or that tax it at a rate lower than 20% (twenty percent) or whose legislation does not allow access to information relative to the corporate structure or ownership of legal entities. IN RFB no. 1,658/2016 includes the jurisdictions of Curaçao, St. Martin, and Ireland to this list of favorable taxation locations.

In turn, after the issue of IN RFB no. 1,658/2016, the Dutch Antilles and Saint Kitts and Nevis are no longer included as jurisdictions with favorable tax systems, since the respective items have been revoked.

Furthermore, the IN also included in the list of tax-favorable jurisdictions, contained in article 2 of IN RFB no. 1.037/2010, the one applied to legal entities incorporated as holding companies based in Austria.

Another point of IN RFB no. 1.658/2016 worthy of mention is the definition understood as “substantive economic activity”. Although the definition is not established under the law, it is relevant because, pursuant to article 2, III and IV, of IN RFB no. 1,037/2010, tax-favorable regimes are those applicable to holding companies in Denmark and in the Netherlands that do not perform the mentioned “substantive economic activity”. However, nothing prevents the Tax Authorities, in an extensive interpretation, from demanding proof of performance of substantive economic activities by holding companies located in other jurisdictions (already provided for or to be provided for in the future in article 2).

Thus, it was defined that a holding company with appropriate operating capacity for its purposes then performs a “substantive economic activity”. The criterion is subjective, but the IN itself mentioned that an appropriate operating capacity is evidenced, inter alia, by the existence of (i) the company’s own and qualified employees, in a sufficient number and (ii) proper physical facilities for carrying out management and making decisions related to the development of activities with the purpose of obtaining income arising from their assets or to the management of ownership interest with the purpose of obtaining income arising from the distribution of profits and capital gain.

Lastly, it is worth mentioning that article 3 of IN RFB no. 1,658/2016 was published yesterday, but its effects are retroactive as of Aug. 1, 2016, which is clearly illegal.





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