



The Director
CENTRE FOR TAX POLICY AND ADMINISTRATION

H.E. Mr. Fernando Haddad

Minister of Finance

Brazil

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31 March 2023

Dear Minister,

It was a pleasure to meet you in Brasília on 6 March 2023 where we discussed a number of issues including the current issues related to the administrative tax appeal process in Brazil.

We understand that there are several concerns related to the functioning of the Administrative Court of Tax Appeals (CARF), including the nomination of the lay judges or representatives of the private sector alongside the judges nominated from among serving tax officials of *Receita Federal do Brasil* (RFB).

We also understand that until recently there was a practice that in case of a tie between the votes of the judges, the decisive weight would be allocated to the vote of the President of the CARF. This practice was temporarily interrupted due to legislative changes made in 2020 (Law 13,988/2020, resulting from Provisional Measure no. 899/2019), and a Provisional Measure is now pending in Congress to return to this previous practice (Provisional Measure 1.160/2023).

The legislative change adopted in 2020 (currently suspended by the aforementioned Provisional Measure) effectively means that where the votes of the judges representing the private sector and public sector result in a tie, the decision is by default made in favour of the taxpayer, meaning that the taxes and the penalties assessed in such cases will be waived.

Where the administrative appeal decision is against the taxpayer, it can appeal to the judicial court. However, where the decision is reached against the tax administration, the decision cannot be appealed by the tax administration and becomes final, despite the fact that the result was reached due to a tied vote. This seems inappropriate, because if the decision is the result of a tie it indicates that there are some challenging legal questions that likely deserve to be further clarified and resolved through an independent judicial process, rather than concluding that the case is reasonably resolved and should be considered final.

You have also shared with us some data collected by RFB. There is a trend, which indicates that cases, in which a high tax amount is at stake, often lead to a tied decision in CARF. You have also shared that the volume of tax liabilities that are disputed in CARF are in the range of 12% of annual GDP of Brazil and this represents approximately 25% of public debt of Brazil.

You have also provided us with insights on the duration of the administrative appeal process, which in total takes approximately 7 years and can be followed by approximately 11 years of federal judicial review, if the taxpayer chooses to appeal the CARF decision in judicial process. This may extend the litigation to a point that the matters become barred by the statute of limitations, which can make any subsequent enforcement or correction of the initial assessment impossible. Further, taxpayers are not required to make any down-payment or guarantee of tax at the administrative appeal stage, which can motivate taxpayers to endless litigation, since such a disputed tax will not be due for the duration of the administrative process, which may generate significant tax savings for the taxpayer due to time value of money. This may serve as an unintended incentive against voluntary tax compliance, which is key to the proper functioning of every tax system.



Finally, we understand that the number of judges involved in adopting the decisions at CARF, where each case is considered by 8 judges (4 representing the tax administration and 4 representing the private sector). The high volume of cases at CARF, the large amount of tax subject to dispute at CARF, as well as the long duration these cases take to be resolved through the administrative appeal process before they actually reach the judicial review, raise questions about the efficiency and integrity of the current administrative tax appeal process in Brazil.

You have requested our view on the CARF and that we also provide the perspective of international practice and experience on this matter.

Based on your request, we have initiated a preliminary comparative analysis of different administrative review approaches around the world.¹ Our initial research indicates that, unlike Brazil, a majority of the jurisdictions we have reviewed have some form of administrative appeal process, but not one that involves private sector representatives in the decision-making review process. Instead, the reviews are carried out by government officials from the tax administration or Ministry of Finance. In contrast, the current Brazilian rules allow the involvement of lay judges, who prior or after their appointment serve as attorneys or lawyers in the private sector. They are not career judges, but are appointed only for a short-term. We understand that the remuneration received by these lay judges is in most cases significantly lower than the remuneration that they earn in private sector career. The short-term nature of such appointments, comparatively low remuneration and the fact that both before and after this appointment these judges can work for the private sector and may derive direct or indirect benefits due to positions they take in their role as judge in CARF could in some cases also create a potential risk of conflict of interest, which may be very difficult to mitigate.

We have identified so far 3 jurisdictions² with varying degrees of involvement of private sector representatives in the administrative appeal in tax matters, even though this occurrence is otherwise rare in international practice. However, in these cases the private sector representatives do not seem to have the same decisive role in the administrative appeal as they have in Brazil. Where representatives of the private sector are involved in such an administrative or judicial review process, the process is ultimately overseen by professional career judges, including the Supreme Court judges who will have the ultimate say on proper application and interpretation of tax law. The ultimate and final decision on a tax case of large value would not be typically taken by a decision-making body composed of lay judges, where the votes of private sector representatives have a decisive weight in case of a tie of votes.

The other trends observed in the tax appeal process in Brazil – such as the duration of the tax appeal process and the possibility of employing delaying strategies adopted by some taxpayers through the presentation of appeals and reviews, without being required to make any down-payment of tax or guarantee – means that this process presents a significant fiscal challenge for the country. In addition, this process may serve as an unintended incentive to implement strategies to delay payment facilitated by the current system. A more detailed analysis and reform can be contemplated to accelerate the tax appeal process to contribute towards tax certainty, while ensuring that this process better achieves the relevant objectives of administrative review and accelerated access to independent judicial review process.

For all the foregoing reasons, a reconsideration of the approach established in 2020 would be justified, and unless a better and more effective model is developed, it may be appropriate to return to the previous practice. Under the previous system, the CARF president – a representative of the tax administration would be entitled to cast the decisive vote to uphold the tax claimed and the penalties applied by RFB in a

¹ As of today, we collected information on the administrative review approaches of 27 jurisdictions.

² Denmark, Norway and Finland.



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balanced process. A return to that process would mitigate the possible negative consequences of the model established in 2020 that were discussed above. This will not have a negative impact on the rights of taxpayers because the taxpayers will still retain their recourse to the independent judicial review where they will be able to challenge on legal grounds the tax assessment as well as the taxes claimed and the penalties applied.

The OECD Secretariat will continue the process of collection of data on these administrative tax appeal practices and would be happy to share them with you. We also stand ready to provide further information on international practices and experience that may be also useful if a more fundamental reform of the administrative review process in tax matters is contemplated.,

Yours sincerely,

A handwritten signature in black ink, which appears to read "Grace Perez-Navarro". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Grace Perez-Navarro
Director, CTPA