

NORMATIVE INSTRUCTION RFB N° 1846, OF DECEMBER 28th, 2018

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It regulates the request for mutual agreement procedure under international agreements and conventions designed to avoid double taxation on income to which Brazil is signatory.

THE SECRETARY OF THE FEDERAL REVENUE OF BRAZIL, in the use the attribution conferred by item III of Article 327 of the Internal Regulations of the Secretariat of the Federal Revenue of Brazil, approved by Ordinance MF N. 430 of October 9, 2017, and according to the Article on the Mutual Agreement Procedure of the international conventions and agreements in force to avoid double taxation on income of which the Federative Republic of Brazil is a signatory, and the Article 16 of Law 9,779 of January 19, 1999, determines:

Article 1. This Normative Instruction regulates the request for mutual agreement procedure to the Secretariat of the Federal Revenue of Brazil (RFB), under the international agreements and conventions to avoid double taxation on income (DTAs) signed by Brazil.

CHAPTER I GENERAL PROVISIONS

Article 2. The mutual agreement procedure has not a litigation nature, and the competent authorities of the Contracting States are part of it.

Article 3. The mutual agreement procedure may be constituted of:

I - a unilateral phase, in which the RFB receives and analyzes internally a request and, if possible, closes the procedure; or

II - a bilateral phase, in which the RFB negotiates with the competent authority of the other Contracting State in order to seek a solution to the case:

a) not resolved in the unilateral phase; or

b) initiated by a request filed abroad.

CHAPTER II SUBMISSION OF APPLICATION

Article 4. An individual or a legal entity resident in Brazil may request a mutual agreement procedure to the RFB whenever such individual or legal entity considers that actions taken by one or both of the Contracting States have resulted or may result in taxation not in accordance with the DTA.

Paragraph 1 - The request referred to in the head of the Article may also be submitted by:

I - a Brazilian national, as defined in the DTA, regarding the related provisions;

II - a resident in Brazil at the time the actions not in accordance with the DTA were taken, even if the applicant is no longer resident in Brazil; and

III - the resident of the other Contracting State, if it is foreseen in the DTA.

Paragraph 2. Either the applicant or his attorney-in-fact or his legal representative must adhere to the Electronic Tax Domicile (DTE) prior to the request referred to in the head of the Article.

Article 5. The request referred to in Article 4 must be presented to the RFB unit of the tax domicile of the applicant by means of the form Request for Mutual Agreement Procedure in Annex I.

Paragraph 1 - The request referred to in Article 4 must contain:

I - identification of the applicant, stating:

a) in case of a legal entity or equivalent, name, address, telephone number, e-mail address (e-mail or electronic mail box), copy of the articles of incorporation and its last amendment, authenticated or accompanied by the original, Corporate Taxpayer Identification Number (CNPJ) or the Specific Registry of the Social Security (CEI) and its economic activity;

b) in case of an individual, name, address, telephone number, e-mail address (e-mail or electronic mail box), professional activity and Individual Taxpayer Identification Number (CPF); and

c) identification of the legal representative or attorney-in-fact, by means of a copy of a document that contains a photo and signature, authenticated in a notary's office or by a RFB's official having presented the original, accompanied by the respective power of attorney;

II - the periods to which the request refers, except in the case of a measure that may cause taxation not in accordance with the DTA;

III - the taxes involved;

IV - identification of the foreign tax administration involved or, where applicable, identification of the regional or local tax administration whose actions have led to or may lead to taxation not in accordance with the DTA;

V - a statement of how the actions taken by one or both of the Contracting States have caused or may cause taxation not in accordance with the DTA;

VI - an indication of the provisions of the tax legislation which have led or may lead to taxation not in accordance with the DTA, if applicable;

VII - an indication of the DTA and of the violated legal provisions;

VIII - identification of the direct and the final controller, in case of request by a legal entity, as well as the respective countries of residence for tax purposes, if the issue of the request applies to them;

IX - the identification of nonresident related persons involved, where applicable, and their countries of residence for tax purposes;

X - a copy of any document or request received from the foreign administration, including the information provided in response;

XI - a copy of any contract or adjustment made with any foreign tax administration that may be connected to the request;

XII - the evidence that the matter has been submitted to judicial or administrative examination in Brazil or in the other Contracting State, by means of the inclusion of a copy of the petition and the corresponding decision, if that is the case, and other documents concerning the status of the case when the request is submitted;

XIII - a copy of the documents submitted by the applicant or related person to the competent authority of the other Contracting State to request a mutual agreement procedure; and

XIV - a clear statement confirming the accuracy and completeness of the information presented and the documentation provided, and the commitment to send to the Brazilian competent authority, in a timely manner, documents proving any changes in the information presented or new information, including new decisions rendered in administrative or judicial proceedings about the matter or issued by the competent authority of the other Contracting State.

Paragraph 2. The administrative examination referred to in item XII of Paragraph 1 covers advance pricing arrangement (APA), tax consultation proceeding, specific interpretation by the foreign tax administration, ruling or similar procedures.

Paragraph 3. Documents in a foreign language must be accompanied by a Portuguese translated version processed through diplomatic channels or signed by a sworn translator, unless the documents are in English or in Spanish.

Paragraph 4. The mutual agreement procedure shall not be open for a hypothetical situation, and, at the moment of the request, the applicant must present all the documents that support the case.

Paragraph 5. The issue under request may refer to the application of the effects of a previous solution in favor of the same taxpayer in other fiscal years, provided that the applicant proves that the grounds that gave basis to the solution remain applicable to the fiscal years under request.

Paragraph 6. The applicant may submit other documents that he deems relevant for the mutual agreement procedure, in addition to those mentioned in Paragraph 1.

Paragraph 7. For the purposes of item VIII of Paragraph 1, it is considered that:

I - a direct controller is an individual or a legal entity who, individually or jointly, holds partner or shareholder interest that permanently assures him the predominance in corporate decisions and the power to elect the majority of the applicant legal entity directors; and

II - a final controller is a an individual who ultimately has the control of the applicant legal entity, or a legal entity in the same position if such legal entity has its shares traded in a stock exchange abroad, or if there is no one who may be characterized as its controller pursuant to item I.

Paragraph 8. For the purposes of item IX of Paragraph 1, the term “related persons” refers to individuals or entities related to the legal entity domiciled in Brazil, pursuant to Article 23 of Law N. 9,430, of December 27, 1996.

Paragraph 9. In case of a request not in accordance with the provisions of this Article, the applicant will be required to make the necessary changes within 30 (thirty) days.

Article 6. The request to open the mutual agreement procedure must be presented within the term established in the DTA that supports the request.

Paragraph 1. The initial term will be the date of the first notification that characterizes the actions referred to in item V of Paragraph 1 of Article 5.

Paragraph 2. The term referred to in the head of the Article is listed in Annex II.

Article 7. In case the mutual agreement procedure involves a tax credit subject to refunding in Brazil, the applicant must submit an application for the tax credit refund by means of the form in Annex III, together with the application referred to in Article 5.

Paragraph 1. The request for the tax credit refunding will be suspended until the mutual agreement procedure is settled.

Paragraph 2. In case the applicant has previously submitted a request for the tax credit refund, he must inform its process number in the request referred to in Article 5.

CHAPTER III REQUEST ASSESSMENT

Article 8. The request to open the mutual agreement procedure will be received by a RFB order if it meets the requirements set forth in Articles 5 and 6 and provided that it deals exclusively with the following taxes:

I - Income Tax;

II - Social Contribution on Net Profit; or

III - taxes from the other Contracting State covered by the DTA.

Paragraph 1 - The request referred to in the head of the Article will not be admitted if:

I - the applicant does not provide additional information within the term stipulated in the notification, in the case referred to in Paragraph 9 of Article 5;

II - it refers to the same object and fiscal year for which a resolution has already been obtained in a previous procedure or from which the applicant has withdrawn;

III - it is submitted after the term in Annex II; or

IV - it deals with situations concerning a taxpayer other than the applicant, even if such taxpayer belongs to the same economic group.

Paragraph 2. The RFB will inform the competent authority of the other Contracting State on the receipt of requests for mutual agreement procedure.

Paragraph 3. The receipt of a request for taxes other than those mentioned in items I, II and III of the head of the Article will be conditioned to the existence, in the corresponding DTA, of a non-discrimination clause covering them.

Article 9. The taxpayer may be notified by the RFB to present information or additional documents during the mutual agreement procedure.

Sole Paragraph. Failure to comply with the notification referred to in the head of the Article entails withdrawal of the request.

Article 10. In assessing the issue submitted to the mutual agreement procedure, the RFB

will not deviate from administrative or judicial court decisions issued in applicant's proceedings in Brazil referred to in item XII of Paragraph 1 of Article 5.

Sole Paragraph. The provisions of the head of the Article shall not preclude the opening of the bilateral phase of the mutual agreement procedure.

Article 11. The applicant will be notified of:

- I - the admission of the mutual agreement procedure request; and
- II - the establishment of the bilateral phase of the friendly procedure.

CHAPTER IV

CLOSURE OF THE MUTUAL AGREEMENT PROCEDURE

Article 12. The mutual agreement procedure will be closed:

- I - when the applicant is notified of the result of the mutual agreement procedure; or
- II - if the applicant withdraws the request.

Sole Paragraph. The withdrawal of the request must be formalized in the RFB unit of the tax domicile of the applicant or his legal representative or regularly constituted attorney-in-fact.

Article 13. The implementation of the mutual agreement procedure solution shall be preceded by:

I - an explicit acceptance of the solution by the applicant and the related persons resident abroad involved in the solution, by means of the form in Annex IV; and

II - proof of explicit and irrevocable withdrawal of administrative court appeals and of lawsuits with the same subject-matter of the mutual agreement procedure as well as waiver of any claim of right on which these objections and appeals or actions are based, in Brazil and abroad.

Paragraph 1. The term to comply with the provisions of this Article is 30 (thirty) days, counted from the day the applicant is notified of the outcome of the mutual agreement procedure.

Paragraph 2. The failure to comply with the provisions of this Article constitutes withdrawal of the applicant, in which case the mutual agreement procedure will be canceled based on item II of Article. 12.

CHAPTER IV

FINAL PROVISION

Article 14. There shall be no request for reconsideration or appeal under the mutual agreement procedure.

Article 15. Annexes I to IV of this Normative Instruction are hereby approved, and they are available on the RFB website (www.receita.fazenda.gov.br).

Article 16. The Normative Instruction RFB N. 1,669, of November 9, 2016 is revoked.

Article 17. This Normative Instruction enters into force on its publishing date at the Brazilian Federal Official Gazette.

JORGE ANTONIO DEHER RACHID

ANNEX I - REQUEST FOR MUTUAL AGREEMENT PROCEDURE

ANNEX II - TERMS FOR REQUESTING A MUTUAL AGREEMENT PROCEDURE

ANNEX III - REQUEST FOR TAX CREDIT REFUND SUBJECT TO MAP

ANEXO IV - ACCEPTANCE OF THE APPLICANT AND RELATED PERSONS