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Provisional Measure 449/08 – Relevant tax aspects

Issue 36 - February, 2009

International Corporate Tax Brazil

Introduction

Recently issued by the Brazilian Federal Government, Provisional Measure 449, December 3, 2008 (*MP 449/08*) has brought relevant changes to the Brazilian tax legislation. It has also introduced new accounting procedures that are to be followed according to Law number 11.638/07.

Rather than analyzing the complex legislation in question, this article presents general comments on certain alterations introduced by *MP 449*. Taxpayers seeking to completely understand the impacts of such changes on their business activities should examine the issue in more detail based on their own individual characteristics.

The Transitory Tax Regime – *RTT*

The Transitory Tax Regime provided by *MP 449* aims to assure fiscal neutrality of the new accounting methods and criteria introduced by Law 11.638/07, as well as by the consequent regulations stipulated by the Brazilian Securities Commission (*CVM*).

The transitory nature of the government's Provisional Measure results from the express provision that such regime shall remain in place only until a specific law is passed establishing the tax effects of the new accounting methods and criteria.

Companies will have the choice to adopt the transitory regime for calendar years 2008 and 2009. It will however be the mandatory routine as of 2010. Taxpayers opting for the *RTT* system in 2008 are required to use it for calendar year 2009 as well, whereas companies that have decided not to adopt it in their 2008 tax returns cannot do so for calendar year 2009. Taxpayers' decisions cannot be changed and must be stated in their 2009 Corporate Income Tax Return (calendar year 2008).

Companies that choose to benefit from the *RTT* must take into consideration the accounting rules in force on December 31st, 2007 for purposes of calculating the following taxes: Corporate Income Tax (*IRPJ*), Social Contribution on Net Profit (*CSLL*), Employee's Profit Participation Program (*PIS*) and Tax for Social Security Financing (*COFINS*). Such decision would, hence, neutralize the effects of the new accounting methods and criteria that have been in force in Brazil since January 1st, 2008.

It is also important to highlight that the *RTT* also provides the specifications for fiscal adjustments that should be observed in the following cases: **(i)** investment grants, including tax exemptions or reductions for purposes of implementation or expansion of economic enterprises; **(ii)** governmental donations; and **(iii)** premium on the issuance of debentures when calculating the actual profit.

For other taxes and contributions (*CSLL*, *PIS*, and *COFINS*) and for the presumed profit regime, the control of the non-accounting adjustments arising from the adoption of the *RTT* shall be defined by the Federal Revenue Department.

Offsetting of Federal Taxes

The *MP 449* introduced some new hypotheses under which the offset of Federal Taxes is not allowed, such as offsets for debts concerning *IRPJ* and *CSLL* monthly estimate payments.

Interest on Net Equity

As a consequence of the new accounting rules introduced by Law number 11.638/07 and its further amendments, the results of increases or decreases in the value of asset and liability items that result from their fair value evaluation shall be classified as equity evaluation adjustments to the Net Equity, as long as they are not written in the period based on the accrual basis regime.

In this respect, *MP 449/08* established that, for purposes of calculating the interest on net equity, the abovementioned equity evaluation amounts must not be included as one of the Net Equity accounts upon which interest on net equity would be calculated.

In addition, it is worth highlighting the fact that taxpayers should pay special attention when calculating their future interest on net equity payments, given that the new accounting methods and criteria may bear a direct impact on the companies' Net Equity value.

Leasing

Provisional Measure 449/08 determines that leasing operations involving total installment values exceeding 75% of the cost of assets are to be treated as credit operations, despite the name received. This new provision may give rise to implications regarding Tax on Financial Operations (*IOF*) and Withholding Income Tax (*IRRF*), among other implications.

In addition to the changes introduced by *MP 449/08* that were briefly commented above, there are several others that may deserve careful attention by our readers.

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