

## **NEW MANDATORY TAX REGISTRATION FOR FOREIGN INVESTORS IN BRAZIL**

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New Rules issued by the Federal Tax Department (Secretaria da Receita Federal - SRF), establish a mandatory registration before the National Register for Legal Entities of the Treasury Department (Cadastro Nacional de Pessoas Jurídicas do Ministério da Fazenda - "CNPJ/MF") of all foreign legal entities that hold certain rights or property in the country. As such rule will directly affect all foreign investors in Brazil; we shall discuss the due rules, as well as the necessary procedure for the registration before the federal corporate tax roll (CNPJ/MF).

### **1) Preliminary Dispositions**

Intending to maintain the Government informed on the responsible for the management of assets acquired in the country by foreign investors, the SRF issued a Tax Rule (Instrução Normativa) establishing that foreign companies owners of certain assets in the country must be registered before the CNPJ/MF.

As so, the public notaries and asset registrars now require the CNPJ/MF of foreign companies when acquiring or transferring property acquired in Brazil.

According to the Brazilian media such "need for control" resulted from an inspection made by the SRF, where it was verified that Brazilian taxpayers and residents would incorporate abroad and then acquire assets in Brazil in name of the foreign company.

With such rule, the SRF purported intention is to increase the control over money laundering and Income tax dodgers<sup>1</sup>. A secondary purpose is facilitate the international interchange of information to avoid evasion, considering this procedure will make it easier to identify the partners and managers of enterprises with headquarters abroad.

This new rule is being thoroughly discussed among law professionals and the tax consultants. For some of the commentators, the SRF intends to, at first, obtain information on legal entities acting in Brazil and later tax them, restraining the Brazilians who act under the "off-shore" company protection, or else, the opening of companies in tax havens to acquire property in Brazil. Also, the SRF will be requiring the presentation of a Federal Tax Debt Inexistence Certificate (Certidão Negativa de Débito de Tributos Federais) when of the sale of assets, in order to avoid evasion.

### **2) Instrução Normativa SRF nº 167, of June 14, 2002 ("IN 167/02")**

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<sup>1</sup> It shall be noted that the SRF only suspects that there might be money laundering and tax dodging, there is no statistics on these violations.

The referred rule amended many of the provisions of Instrução Normativa SRF nº 02, of January 2nd, 2001 (“IN 02/01”), governing the practice of acts related to CNPJ/MF, obliging the foreign legal entities who owned certain property to register as disposed above.

We hereby copy article 1 of IN 167/02, increasing a 4<sup>th</sup> paragraph on article 14 of IN 02/01:

*"Art. 14 .....  
§ 4º The registration before the Cadastro Nacional da Pessoa Jurídica (CNPJ) is mandatory to the foreign legal entity that acquires real property, aircrafts, vessels and other assets in the country, subject to registration before a public department."*

As it can be verified, the final part of the rule did not specifically refer to all the cases where it shall apply, resulting in a certain doubt if the foreign legal entities owners of trademarks and patents, subject to registration before the Instituto Nacional de Propriedade Industrial – INPI (National Industrial Property Institute), as well as equity holders (shares and quotas), subject to registration before the Boards of Trade (Juntas Comerciais) or Civil Registries of Legal Entities (Registros Cíveis de Pessoas Jurídicas), would be obliged to register before the CNPJ/MF.

Such ambiguity was only settled with the issue of the Instrução Normativa SRF nº 200.

### **3) Instrução Normativa SRF nº 200, September 13 2002 (“IN 200/02”)**

With the existing ambiguity in relation to the industrial property and equity assets, the SRF issued the IN 200/02 that disposed in its article 12, 4<sup>th</sup> and 5<sup>th</sup> paragraphs, *in verbis*:

*“Art. 12 .....  
§ 4º The foreign legal entities that own assets and rights subject to public registration in Brazil, including the hereunder listed, must register before the CNPJ:  
I - real property;  
II - vehicles;  
III - vessels;  
IV - aircrafts;  
V – equity holding;  
VI – current bank accounts;  
VII – investments in the financial market;  
VIII – investments in the capital market.  
  
§ 5º The disposed in § 4º does not apply to rights related to industrial property (trademarks and patents).”*

As so, as disposed in item V of paragraph 4, the foreign legal entities holders of equity in Brazilian companies must register before the CNPJ/MF while the owners of trademarks and patents are not

subject to such requirement.

It must be noted that IN 200/02 also included current bank accounts, investments in the financial market and investments in the capital market.<sup>2</sup>

The hereinabove listed possibilities, including equity holding, dealing with direct foreign investment, derive from the disposed in article 60 of the Medida Provisória nº 66, that included new dispositions in article 81 of Law 9.430/96<sup>3</sup> (specifically paragraph 2, II and paragraph 3<sup>o</sup>), requiring the identification of the sender of values with origin abroad, including the legal entities' partners and managers.

Finally, IN 200/02 abrogated IN 167/02 and IN 02/01, among others.

#### **4) Time period to require the registration before CNPJ/MF**

As disposed in article 54 of IN 200/02, the legal entities that on October 1st 2002 already own real property, vehicles, vessels and/or aircrafts, must require the registration before the CNPJ/MF until November 29th 2002.

Legal entities that on October 1<sup>st</sup>, 2002 held equity in Brazilian legal entities, had current bank accounts and/or investments in the financial or capital market, were granted until December 30<sup>th</sup> to register before the CNPJ/MF.

The corporation that acquires any asset or right listed in Art. 12, Paragraph 4<sup>th</sup> of IN 200/02 after October 1<sup>st</sup>, 2002, shall, before the acquisition, register before the CNPJ//MF.

#### **5) Procedures for registering before the CNPJ/MF**

The requirement to register the foreign legal entity before the CNPJ/MF must be made by filling in the forms with some information of the legal entity<sup>4</sup> available in the SRF's internet site ([www.receita.fazenda.gov.br](http://www.receita.fazenda.gov.br)).

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<sup>2</sup> In the same way Article 2, X of the Instrução Normativa SRF nº 190, August 9 2002, that rules on the Taxpayer Registration (CPF), *in verbis*: “Art. 2<sup>o</sup> According to art. 33 of Decree nº 3.000, March 26 1999, the registration before the CPF is mandatory to the individuals:

X – residents abroad who detain property and rights in the country subject to public registration, including:

- a) real property;
- b) vehicles;
- c) ships;
- d) aircraft;
- e) equity holding;
- f) current bank accounts;
- g) investments in the financial market;
- h) investments in the capital market.”

<sup>3</sup> Lei nº 9.430, de 27 de dezembro de 1996. Dispõe sobre a legislação tributária federal, as contribuições para a seguridade social, o processo administrativo de consulta e dá outras providências.

<sup>4</sup> Article 3<sup>o</sup> of IN 200/02: “Art. 3<sup>o</sup> Documents for registering before the CNPJ :  
I - Ficha Cadastral da Pessoa Jurídica (FCPJ) – Legal Entity Registration form;  
II - Quadro de Sócios e Administradores (QSA) – Managers and Partners Chart;  
III - Ficha Complementar (FC) – Other complementary information.”

After registering through the Internet, the following documents must be sent, by registered mail, duly consularized and translated by a sworn translator to the SRF division, as indicated in the internet site:<sup>5</sup>

- a) Documento Básico de Entrada (Form - DBE), duly signed by the legal entity's attorney-in-fact and notarized;
- b) Copy of the articles of incorporation or equivalent document;
- c) Copy of the corporate act nominating the attorney-in-fact in Brazil;
- d) Power of attorney granting powers to settle any issues before the SRF, enabling to answer for the legal entity and receive summons, as well as nominating the attorney-in-fact manager of the assets referred to in § 4º of art. 12.

It must be noted that the foreign legal entity attorney-in-fact, resident in Brazil, must be regularly registered before the Individual Taxpayer Registration (Cadastro de Pessoas Físicas - CPF) or else the registration before the CNPJ/MF will not be possible. The power of attorney granted by the foreign legal entity must be previously filed before the Registry of Documents (Registro de Títulos e Documentos - Art. 129 § 6 of Law 6.015/73).<sup>6</sup>

When registering the foreign legal entity in the CNPJ/MF and the filing of the power of attorney before the Registry of Documents, the attorney's-in-fact domicile must be observed.

Finally, the legal entities must also inform the SRF, through its attorney-in-fact, by the procedure herein above, any modifications to the information given to the SRF or to the management in thirty days from such amendments, subject to a fine.

## 6) Conclusion

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<sup>5</sup> Article 15, I and II, paragraphs 1, 5 and 6 of IN 200/02: "Art. 15. The registration requirements will be formalized:  
I – By filing the FCPJ, QSA, in case of registering the headquarters and FC, when located in federal unit or city, issued by the CNPJ Program disk (Programa Gerador do Disquete do CNPJ - PGD-CNPJ), available in the internet at [www.receita.fazenda.gov.br](http://www.receita.fazenda.gov.br), with the program Receitanet;

II – By sending to the registering unit in the jurisdiction of the taxpayer, by registered mail (Sedex) of the Brazilian Mail (Empresa Brasileira de Correios e Telégrafos - ECT), at the taxpayer's expense, of a notarized copy of the legal entity's articles of incorporation, duly registered.

§ 1º The documents referred to in II will be sent together with the Form thereby Scheduled (Schedule IV - Documento Básico de Entrada - DBE).

§ 5º In case of a foreign legal entity, the requirement to register before the CNPJ will be sent to the unit with jurisdiction on the individual responsible for the registration, at the legal entity's cost, by registered mail (Sedex) of ECT, together with the following documents:

I – copy of the articles of incorporation or equivalent document;

II – copy of the corporate act nominating the attorney-in-fact in Brazil;

III – power of attorney granting powers to settle any issues before the SRF, enabling to answer for the legal entity and receive summons, as well as nominating the attorney-in-fact manager of the assets referred to in § 4º of art. 12.

§ 6º All documents listed in I to II of § 5 will be duly translated by a sworn translator and validated before the Brazilian consulate in the legal entity's headquarter's jurisdiction."

<sup>6</sup> In case of equity holding there was already a requirement that an individual resident in the country be appointed for individuals and legal entities and the power of attorney be registered before the Board of Trade.

The new dispositions will result in procedures that will burden foreign legal entities in times where simpler proceedings are being preferred to facilitate investment in Brazil.

Nevertheless, for some, it is a necessary mean to avoid evasion and money laundering deriving from illegalities, especially nowadays when international terrorists and traffickers who have a strong monetary capacity apply such resources to spread fear.

However, such measures do not lead to salvation. We must not forget that the money laundering involves businessmen, bank employees, among others, or else, qualified people with important contacts and not only those who own the money to be laundered. Therefore more shall be done to solve this issue.

While some agree with the noble purpose of the new rule, others are extremely against the SRF ruling, arguing that the rule incurs upon a small amount of financial investment made by organized crime to justify measures that are based in the government's taxing ambition.<sup>7</sup>

In conclusion this measure is a war declaration against legal entities incorporated by Brazilians in the tax havens that are listed by the SRF.<sup>8</sup>

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<sup>7</sup> On such theme see “Globalização, Riqueza, Fisco e Preservação Patrimonial – O campo de batalha do Século XXI: entre os burocratas e os outros” Tarcísio Neviani, [www.nbb.com.br](http://www.nbb.com.br)