Global Guide to Criminalization of Tax Offenses - Brazil

International Guide on Criminalization of Tax Offenses

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# 1. Please define provide details of criminal tax fraud offence in your jurisdiction

According to the Brazilian law, some conducts may be considered as fraud that prevents a company or individual from paying taxes, which constitute tax evasion crimes, as set forth in Law n. 8,137, dated 27 December 1990:

Article 1. It is considered a crime to reduce or evade the payment of any kind of tax, social contribution or accessory obligation, through the following acts:

to omit information or falsely declare it to tax authorities;

to defraud the tax auditing by including inexact elements or omitting transactions of any nature in any tax document required by legislation;

to falsify tax invoice, invoice, sale note or any other document related to a taxable operation;

to draft, distribute, supply, issue or make use of document that is known to be false or inaccurate;

to deny or not supply, when it is mandatory, tax invoice or any other equivalent document in relation to the sale of merchandise or rendering of service, effectively performed, or supply such documents not in accordance with legislation in force.

Penalty – Imprisonment, from two to five years, and a fine.

Article 2. It also constitutes crime of the same nature:

to falsely state or to omit declaration on income, goods or facts, or to make use of any other fraud in order to avoid, totally or partially, the payment of taxes;

do not collect, within the legal period, tax amount or social contribution, discounted or collected, as a passive subject of obligation and that should be collected to the public treasury;

to demand, pay or receive, for oneself or for the beneficiary taxpayer, any consideration on the deductible portion or tax incentive or contribution;

do not apply, or applying in disagreement with the law, tax incentive or tax instalments released by a development agency or entity;

to use or disclose a data processing program that allows the passive subject of the tax obligation to have tax information different from that which is, by law, provided to the public treasury.

Penalty – Imprisonment, from six months to two years, and a fine.

# 2. What are the typical trigger points that could lead to criminal investigations? Can the application of certain tax penalties trigger criminal proceedings?

Brazilian public officers have the obligation to report to law enforcement agencies facts that they become aware when performing their duties that, besides constitute a civil or administrative violation, can also characterize a criminal offense. More specifically, if tax agents identify a situation that potentially involves not only an administrative tax violation, but also a criminal wrongdoing, such agents must report the facts to the Public Prosecution Office through a document called *Representação Fiscal para Fins Penais – RFFP* (Tax Report for Criminal Purposes).

It is important to stress that, according to the Bidding Precedent n. 24, issued by the Brazilian Federal Supreme Court, Brazilian tax authorities can only issue a RFFP reporting facts that may characterize tax crimes, after a final decision is reached in the administrative sphere and the company is able to present all its defenses. However, if the tax agent identifies other potential crimes – such as fraud, misrepresentation, money laundering, criminal conspiracy – such facts can be immediately reported to the Public Prosecution Office.

# 3. Can a certain amount of tax adjustment trigger criminal proceedings for tax fraud?

In Brazil, tax evasion crimes are not related with the amount of the tax that was not paid, but rather with the reduction or suppression of the amount of the tax due with fraud or misappropriation, as mentioned in item 1.

# 4. Is criminal intention a requirement, or can mere negligence be the basis of a criminal offence?

Yes, tax evasion crimes will only be characterized when the individual acts with willful intent.

# 5. Does the spontaneous filing of an amended tax return (either through a self-disclosure mechanism or not) have an impact on the initiation of criminal proceedings? Is full payment of tax required?

According to the Brazilian Law, if the total amount of the tax due is paid, both the tax case and the criminal case will be closed. Also, if the total amount of the tax is paid in instalments, the criminal case will be suspended until the conclusion of the payment, when the criminal case will be closed.

# 6. Can the prosecutor, on their own initiative, prosecute the tax fraud offence?

As a general rule, in Brazil, investigations on crimes are conducted by the Police. After the conclusion of the investigation, the Chief of Police drafts a report with the main findings and submit it to the Public Prosecutor. If the Public Prosecutor understands that there is evidence about the occurrence of the wrongdoing and proof to connect the individuals potentially liable, the Public Prosecutor must press charges against such individuals.

# 7. What is the statute of limitation period applicable to the tax offences in your country?

In Brazil, the initial term for the statute of limitation period applicable to the tax offences may change according to the nature of the tax crime.

In the so-called materials crimes (article 1 of Federal Law n. 8,137/1990) – where an effective damage to the public treasury must occur – the statute of limitation period starts, according to the Bidding Precedent n. 24, of the Brazilian Federal Supreme Court, when a final decision is reached in the administrative sphere by the tax authorities. On the other hand, in the formal crimes (article 2 of Federal Law n. 8,137/1990) – where no actual damage must be proved – the statute of limitation period starts at the moment when the criminal conduct (action or omission) is executed.

The statute of limitations for crimes described in article 1 of the Law n. 8,137/1990 is 12 years; for crimes described in article 2 of the Law n. 8,137/1990, four years.

# 8. When does the statute of limitation period start to run e.g., filing of a tax declaration, failure to pay tax by deadline, tax assessment as a result of a tax audit, etc.?

Please refer to the answer for question 7.

# 9. What criminal sentences [e.g., custodial, criminal fines or others ] may be incurred in case of a conviction for tax offenses in your jurisdiction?

The penalties, pursuant to the articles 1 and 2 of the Law nº 8,137/1990, are, respectively, imprisonment, from two to five years, and a fine, and imprisonment, from six months to two years, and a fine. Usually, these penalties are replaced by alternative penalties, such as the loss of goods or values, community services, and temporary restriction of rights.

# 10. Can having a compliance or risk mitigation program in place mitigate criminal liability for a Company in your jurisdiction?

No, considering that, in Brazil, corporate criminal liability only exists in case of environmental crimes. However, a compliance or risk mitigation program can be used to show that C-suite level was not involved in decisions that resulted in tax evasion and that top management adopted the necessary measures to try to avoid the occurrence of wrongdoings in the company.

# 11. Is there a formal or informal program allowing individuals or entities to self-disclose criminal conduct and block prosecution? If not, does such a disclosure mitigate the likelihood of prosecution or reduce the potential sentence and fines?

Yes, self-disclosure programs exist in Brazil. As a general rule, when the taxpayer performs a self-disclosure and pays the tax due before any tax procedure by the tax authorities, the taxpayer is exempted from the payment of penalties provided for in the legislation. However, there are formal procedures to be adopted and if they are not observed, the self-disclosure may be jeopardized.

# 12. Once the criminal proceeding has been initiated is there an impact in terms of liability in case of full payment of a tax assessment issued by the tax authorities (first-time offender rule)?

Please refer to the answer for question 5.

# 13. Does criminal prosecution of a tax offence have an impact on the tax authorities' statute of limitation period?

No, in Brazil it is the opposite situation: a pending discussion on the administrative sphere has an impact on the statute of limitation period on the criminal sphere.

# 14 Can the tax authorities assess and collect underpaid taxes even if the case becomes criminal

Yes, they can.

# 15. Is it possible to reach a tax/criminal settlement with the tax authorities/public prosecutor/judge?

Yes. It is possible to settle an agreement similar to a non-prosecution agreement.

# 16. Who can be prosecuted: just individuals/directors or also companies?

Individuals

As a general rule, only individuals can be held criminally liable under Brazilian Law, meaning that in the vast majority of cases, non-natural persons, such as corporations or other legal entities, cannot be charged with crimes. The only exception to this general rule is the criminal liability imposed on legal entities for environmental crimes.

# 17. Can foreign employees/directors be prosecuted?

Yes, Brazilian Criminal Law applies indistinctly to all individuals (nationals or foreigners) in case there is enough evidence that indicates their involvement or direct participation in the wrongdoing.

# 18. In case of an employee / director being prosecuted in connection with the lack of payment of Company's taxes, is the Company liable for the amounts claimed to such individual?

Criminal and administrative liabilities are independent. As a result, the Company will not be liable for any penalty imposed to the individuals as a result of a criminal conviction, including fines.

# 19. Have you seen an increase of criminal prosecution for tax offenses over the last five years in your jurisdiction? If so, in relation to what topics?

Yes. In the last years, some Brazilian States established task forces with Public Prosecutors and Tax Agents to cooperate on investigations, exchange information and pursue criminal prosecutions against individuals connected with companies with large tax debts.

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