

## White Collar Crime - Brazil

### Forgive and forget: law reduces prosecutors to mere tax collectors

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Brazil is a country full of contradictions regarding the punishment of tax evasion. Under the law, those who can afford it can claim impunity from their crimes. However, this impunity risks bringing the entire criminal legal system (including tax authorities, criminal prosecutors and criminal judges) into disrepute.

#### **Punishment for tax evasion**

Since 1990 Law 8.137 has set down a number of tax-related crimes, each of which results in significant penalties. For instance, Article 1 of the law imposes a penalty of two to five years' imprisonment, plus a fine, on anyone who:

- suppresses information or presents false statements to the tax authorities;
- defrauds the tax authorities by inserting inexact data or covering up trading in any documents or books submitted to the authorities;
- falsifies or alters invoices, tax receipts, sales notes or any other document regarding any transaction for which tax is imposed;
- elaborates, distributes, furnishes, produces or uses documents that are known to be false (or should have been known to be false);
- refuses or fails to present tax receipts to the consumer when obliged to do so, or presents such receipts with a disregard for the legal impositions.

Therefore, in order to charge someone with a tax crime under the law, the authority must prove, among other things, fraud, deceit, dishonesty or intentional omission. In other words, if a person fails to pay duly declared taxes, he or she will not be considered a criminal, but will face administrative fines and possible foreclosure.<sup>(1)</sup>

#### **Writing off debts**

Brazil has a long tradition of pardoning (by extinguishing the liability) crimes committed, particularly in relation to fraud, if the defendant pays his or her debt. When this policy was first introduced in 1964, such pardoning would occur only if the payment was made before closure of the administrative fiscal procedure. In other words, if the taxpayer acted quickly, he or she could avoid a criminal record. Over time, this possibility has been further extrapolated:

- In 1990 Article 14 of Law 8.137 (in its original terms) authorised payment up to the point at which the public prosecutor's charge had been presented and accepted by the criminal judge.
- In 1995 Article 34 of Law 9.249 stated that it was sufficient to "promote the payment" of the debt before the criminal charge had been accepted by the judge; the word 'promote' can be taken to mean to start to or to begin, so the criminal liability could be extinguished even though the debt had not yet been paid in full.
- In 2003 Article 9(2) of Law 10.684 extended the opportunity for the defendant to pay his or her debt at any point during the criminal procedure, even after a conviction, provided that such payment is made before the decision becomes definitive. This possibility was again granted in 2009 by Article 69 of Law 11.941. In both cases, once the payment had been made, the criminal liability for illegal action would be extinguished and the criminal procedure (as well as an conviction that had already been declared, but was still being appealed) would be cancelled.

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## Present law

Following the introduction of Law 12.382 in 2011, which amended Article 83(6) of Law 9.430/96, the situation reverted to that before 2003 (ie, in order to absolve the defendant of its criminal liability in relation to tax fraud, full payment must be made before the public prosecutor's charge has been accepted by the criminal judge).

However, if the charge has not already been accepted by the criminal judge and the defendant does not have the funds available to pay the entire debt, but wishes to do so, under Article 83(2) of Law 9.430/96 (as amended by Law 12.382) the defendant can agree to pay in several instalments; once payment has been initiated, the criminal procedure will be suspended. Criminal liability will be extinguished once the full debt has been paid.

## Comment

Four major concerns can be raised in relation to this legislation.

The first relates to the tax situation in Brazil - the country has extremely high taxes, beating new records for collection every year and stifling entrepreneurial spirit. In 2011 taxes reached 36% of Brazil's internal production. Furthermore, a number of different taxes (eg, federal taxes, state taxes and city taxes) in addition to the standard value added tax and income tax make compliance complicated and increase bureaucracy, further exacerbating the situation. At the same time, when consumers purchase goods, there is little transparency in relation to the applicable taxes and the total amount paid can be excessive. For example, for every litre of gas, the consumer pays almost 40% in taxes; when buying a car, the taxes amount to 42%. If a businessman hires an employee and pays him a \$2,000 salary, he must pay another \$2,000 in taxes. While this does not excuse fraud, it does serve to put the situation in context.

Second, it is clear that the criminal law on tax-related crimes is often used by the state as a way of making more money; if a person commits a crime and thereby perpetrates fraud, the state will not object, provided that the debt is paid. In other words, if the perpetrator can repay what he or she initially omitted to pay the government, he or she will have no criminal record.

The third concern is by far the most unethical. Once a person has perpetrated a crime, the criminal justice system should enforce the law, convict him or her if guilty and pay the debts by confiscating the perpetrator's assets. Instead, if the perpetrator is able to pay the debt, the crime will be written off. It can be argued that criminal punishment should always be exceptional and justifiable only in cases in which other methods of social control have failed to work (eg, administrative monetary penalties) - the prisons in Brazil are already overpopulated, chaotic and expensive to run - but this does not excuse the situation.

The fourth concern also regards an ethical question. For other similar crimes involving money (eg, theft or embezzlement), reimbursement of the stolen money will lead to a slight reduction in the penalty, but the criminal liability will remain. However, in tax-related crimes the opposite is true, resulting in inherent unfairness.

Overall, this situation undermines the seriousness of the criminal system, implying that for tax-related offences, if the debt is paid before the criminal charge has been accepted, the crime will be forgiven. Perpetrators of such offences can thus transcend the proper sense of justice and reduce judges and public prosecutors to little more than tax collectors.

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## Endnotes

(1) This is in accordance with Article 5(67) of the Constitution - which grants that no person can be arrested exclusively for having debts, except if it is related to the non-payment of alimentary pensions (eg, for an ex-wife, son or daughter), as determined by the court - and Article 7.7 of the American Convention on Human Rights.

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