

# Brazil



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### São Paulo

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## 1. Types of tax

From a domestic perspective, taxation on donation and inheritance is regulated at the state level. Rates might vary depending on the location where the donor, donee or asset is domiciled and/or the transaction is concluded.

Generally, the conflict-of-law principle should regulate transactions involving estate rights, but Brazilian courts could keep exclusive jurisdiction to conduct the estate proceedings and to distribute the deceased's assets located in Brazil.



## 1.1 Inheritance tax

### State tax on causa mortis wealth transfer and donation (ITCMD)

ITCMD is a state tax charged on transfers of assets in death-related inventories or gifts (in the case of living individuals), payable on movable and immovable property (for example, real estate or lump sums of money). The collection of ITCMD is made at the domicile of the deceased person. However, ITCMD should be applicable to surviving family members who reside in Brazil or to the beneficiary (the state law regulating the taxation of ITCMD may also indicate the donor as jointly responsible for the payment of ITCMD in case of default by the beneficiary). Brazil underwent a tax reform (PEC 45/19) at the end of 2023 that established some changes in relation to ITCMD collection. These changes will undergo a regulation phase in 2024 and then be applied to succession processes starting from the enactment of the reform.

The new legal text introduced progressivity and expanded the taxation base of inheritances, linking the charge to the value of the inheritance or donation. Thus, states like Sao Paulo that did not yet foresee progressivity of rates should include the new determination in their legislative texts. However, it is important to note that the current 8% limit of the applicable rate is not affected, because the states still depend on complementary law for regulation.

It was also established that ITCMD would not apply on donations made to nonprofit organizations of public and social relevance, including assistance organizations linked to religious entities and scientific and technological institutes.

Previously ITCMD was charged in the state where the inventory or listing of assets took place. Now, the tax will be collected at the domicile of the deceased or of the donor of movable property, titles or credits. This change applies to succession processes opened after the enactment of the reform.

### Tax assessment

The procedures, deadlines and rates vary among the Brazilian states. For a general overview, we have listed below information about São Paulo and Rio de Janeiro.

In São Paulo, ITCMD should be levied on:

- ▶ Causa mortis transfers: Tax should be paid within 30 days after the decision that ratifies the calculation or after the order that determines its payment. The deadline for payment of the tax shall not exceed 180 days from the start of the succession process.
- ▶ Gift transfers: Tax should be collected before the conclusion of the act or contract. In case of sharing or division of common property, the tax must be paid within 15 days of decision *res judicata* or prior to the issuance of the notary registration. Gifts up to BRL88,400.00 (for 2024) per calendar year are considered tax-exempt. Such amount is updated yearly.
- ▶ The ITCMD rate is currently 4% in São Paulo. (The state has not yet updated its rate value, as the new federal legislation establishes, because the rate will depend on approval of a complementary law in the Legislative Assembly of the State of São Paulo. If passed, the bill will be converted into state law and the progressivity of rates will be implemented.)

In Rio de Janeiro, ITCMD should be levied on:

- ▶ Causa mortis/gift transfers: Tax should be paid within 60 days after the taxpayer was made aware of the tax posting, or in four equal and successive monthly installments, without extra charge (the latter option expires the first 30 days after the taxpayer was made aware of the posting).
- ▶ Tax computed by a tax notice: 30 days from the notification.
- ▶ Regarding property donations and related rights, even if the donation instrument is drawn up in another state, the ITCMD must be paid prior to the taxable event within the legal term.
- ▶ Cash gift up to BRL51,044.63 (for 2024) per donee and per calendar year are tax-exempt.

The ITCMD rate in Rio de Janeiro is measured progressively, as below (for 2023):

- a) 4%, for amounts up to BRL317,611.00
- b) 4.5%, for amounts above BRL317,611.01 and up to BRL453,730.00
- c) 5%, for amounts above BRL453,730.01 and up to BRL907,460.00
- d) 6%, for amounts above BRL907,460.01 and up to BRL1,361,190.00
- e) 7%, for amounts above BRL1,361,190.01 and up to BRL1,814,920.00
- f) 8%, for amounts above BRL1,814,920.01

### Determination of the tax basis

The tax legislation of the 27 federal states (including the Federal District) contains specific provisions on the valuation of assets transferred, as well as on the applicable tax rates. Reference needs to be made to the local state rules in any particular case.

## 1.2 Gift tax

See Section 1.1.

## 1.3 Real estate transfer tax

### Municipal tax on real estate transfer (ITBI)

While alive, owners may transfer Brazilian property to anyone, through a donation (in this case, they must observe the mandatory portion of 50% of their assets that are destined to their forced heirs) or through a pecuniary interest. When the

transfer occurs through a donation, it is subject to ITCMD (see Section 1.1). When the transfer occurs through a pecuniary interest (purchase or sale), the transfer of real estate between people or land is subject to the *Imposto de Transmissão de Bens Imóveis por Ato Oneroso Inter Vivos* (ITBI), which is a municipal tax levied on transfers of real estate and rights to real estate. The rates that should apply on such taxation vary from city to city in Brazil, and the ITBI should be calculated based on the assessed value. However, the rates must respect the principle of non-confiscation, stipulating non-abusive rates. The rate in Rio de Janeiro is 3% of the real estate value; in São Paulo, the maximum tax rate is 3% of the real estate value.

### Tax assessment

The procedures, deadlines and rates vary among the Brazilian cities. For a general overview, we have listed below information about São Paulo and Rio de Janeiro.

In São Paulo, ITBI should be levied:

- Before the conclusion of the act or contract, if it is a public instrument
- Within 10 days if the act or contract is made effective by a private instrument, or, in the transmission made by a court decision, as of the *res judicata* of this decision, or as of the date that the calculation is ratified, whichever happens first
- Within 15 days in case of auction, adjudication and award redemption, before the signing of the respective letter, even if it is not extracted

In Rio de Janeiro, ITBI should be levied:

- Before the conclusion of the act or contract, if it is a public or private instrument
- Within 60 days in case of incorporation of real estate in a legal entity
- Within 30 days in case of judicial acts, counted from the date the taxpayer was made aware

### Determination of the tax basis

The tax legislation of all the municipalities (including the Federal District) contains specific provisions on the valuation of assets transferred, as well as on the applicable tax rates. Reference needs to be made to the local municipal rules in any particular case.

## 1.4 Endowment tax

There is no endowment tax in Brazil.

## 1.5 Transfer duty

There is no transfer duty in Brazil.

## 1.6 Net wealth tax

There is no net wealth tax in Brazil.

# 2. Who is liable?

## 2.1 Residency

For ITCMD and ITBI, see Sections 1.1 and 1.3.

## 2.2 Domicile

For ITCMD and ITBI, see Sections 1.1 and 1.3.

## 3. Rates

The rates of ITCMD and ITBI vary depending on each of the 27 states and cities.

## 4. Exemptions and reliefs

State and municipal legislation should be observed regarding the possibility of tax exemption from ITCMD and ITBI. In some cases, there may be no tax incidence (ITCMD), depending on the value of the property to be transferred or even the conditions under which the will is transmitted and who the beneficiary is.

## 5. Filing procedures

The filing procedures for ITCMD and ITBI vary among each of the 27 states and cities.

## 6. Assessments and valuations

Assessments and valuations for ITCMD and ITBI purposes vary depending on each of the 27 states and cities.

## 7. Trusts, foundations and private purpose funds

A trust is an arrangement whereby the ownership of private assets and rights (money, liquid assets, real estate properties and moveable rights) is transferred from an original owner (settlor) to a third party (trustee) who takes on the full responsibility to manage those assets in the exclusive best interest of individuals (beneficiaries or cestui que trust) expressly indicated by the settlor or trustee in the trust deed. The wealth given in trust is protected by mandatory fiduciary obligations (management and loyalty) to be performed by the trustee. Moreover, it does not include the trustee's personal wealth, and therefore, is not subject to the trustee's private judicial demands in the case of insolvency.

It is important to note that although trusts are widely used in common law jurisdictions, the concept of trust was not regulated in Brazil, as its system adopted the civil law regime. While there were no express restrictions in Brazil regarding the use of a trust or its incorporation for Brazilian tax residents, there were no clear rules on how to declare trusts in Brazil or on how to tax income generated by a trust. However, the Law 14754, of 12 December 2023, which amends the taxation of investments abroad by individuals who are tax residents in Brazil, also brought the provision and rules for the incidence of income tax on assets held under the trust.

The Law 14754/23 formalized the trust institute in Brazilian legislation. Below are the highlights:

- ▶ The instrument will be considered transparent for tax purposes, and each asset subject to the trust will be taxed separately according to nature.
- ▶ The trust will be deemed to belong to the settlor for reporting purposes on the income tax return, and the income will be deemed to have been earned by the settlor.
- ▶ The assets and rights must be declared by the settlor until his/her death or distribution of the assets and rights, when they will be declared by the beneficiary.
- ▶ The transfer of the trust to the beneficiary will be exempt from income tax, but will be treated as a donation (if it occurs during life) or causa mortis (if it occurs after the death of the settlor), with the incidence of ITCMD.
- ▶ For trusts that hold subsidiaries abroad, the subsidiaries will be considered as held directly by the settlor and must follow the rules of taxation of investments in subsidiaries abroad present in the law.



- ▶ The settlor or the beneficiary must request the trustee to provide information regarding the financial resources to enable the payment of the tax and the fulfillment of other tax obligations in the country.
- ▶ The settlor, if alive, or their beneficiaries, if they have knowledge of the trust, must, within 180 days from the date of publication of the law, amend the trust deed or the respective letter of wishes, to include wording that obliges, irrevocably and irreversibly, the trustee's compliance with the provisions contained in Brazilian law.

Tax residents in Brazil must still comply with the obligations to enter the trust in their annual income tax return (DIRPF) and in the Declaration of Brazilian Capital Abroad (DCBE), the latter of which must be submitted to the Central Bank of Brazil whenever the resident individual has more than US\$1m outside Brazil. It should be noted that non-Brazilian assets are usually reported in the annual Brazilian income tax return and DCBE.

### **Beneficiary taxation**

As mentioned in item 7, the assets and rights must be declared by the settlor until his/her death or distribution of the assets and rights, when they will be declared by the beneficiary. The transfer of the trust to the beneficiary will be exempt from income tax, but will be treated as a donation (if it occurs during life) or causa mortis (if it occurs after the death of the settlor), with the incidence of ITCMD.

It is important to note that taxation on donations and inheritance is regulated by the Brazilian Federal Constitution. According to Article 155, paragraph 1, item III, only complementary law should provide for the incidence of tax on donations when the donor resides outside Brazil, or when the deceased had assets abroad or lived outside of Brazil. However, such complementary law has not been enacted yet.

Whenever due, the responsible party for collecting the ITCMD is the donee (resident taxpayer). The payment should be made on the date the donation is received. Late payment or noncompliance will trigger fines of 20% on the balance due in cases of insufficient compliance.

It is also important to mention the Brazilian amnesty program for undisclosed overseas assets (RERCT). RERCT, which was implemented in January 2016, enabled holders of previously undeclared offshore assets to report those assets to the Brazilian tax authorities (the program closed on 31 October 2016). Regarding trust structures, the Brazilian tax authorities advised that the trust must be reported by the beneficiary and, in specific cases, by the settlor.

## **8. Grants**

### **Grantor taxation**

From a tax perspective, a different tax treatment would be applicable to revocable and irrevocable trusts involving a settlor/grantor who is tax-resident in Brazil. When considering the setup of an irrevocable trust abroad, in principle there is no obligation to declare the assets under the trust in Brazil, as they do not seem to remain with the settlor/grantor, since there was a perfect donation of the assets to the trust fund. In this sense, such constitution should trigger the taxation of ITCMD.

When considering a revocable trust, the settlor/grantor would have, in principle, the obligation to report to the Brazilian Internal Revenue Service and Brazilian Central Bank the assets under the trust in Brazil since the trust would be considered transparent from a Brazilian perspective. As a consequence, the settlor/grantor would be obliged to report the underlying assets as they were directly held by him or her, and to recognize and pay tax in Brazil on the income (at rates of up to 27.5%) or gains (15%) associated with or generated by them.

Due to the lack of specific legislation on this in Brazil, a case-by-case analysis may be necessary.

## 9. Life insurance

Life insurance is a contract between a person (the insured) and an insurance company. The insured agrees to pay periodic values (the premium), and in return, the insurer guarantees the payment of compensation to persons appointed by the insured in the insurance proposal. This compensation is paid only in the case of the death of the insured. The person who is nominated for this value is called the beneficiary.

The right to receive payment arising from life insurance is not part of the assets that comprise the estate of the insured, by express provision of the Brazilian Civil Code (Article 794).

In general, there are no income or inheritance taxes on the life insurance premium received in Brazil. However, two well-known pension products in Brazil, the PGBL and VGBL, have been generating some discussion about the incidence of ITCMD on the payment of the premium, especially in relation to the VGBL, which is considered insurance. This is because there are interpretations that such insurance has a legal nature of financial application and not social security. This characteristic was due to the fact that it has as its primary purpose the flexibility regarding the redemption of the amounts invested, since in the VGBL-type plans the redemption could be carried out in a single installment or in monthly installments. Some court decisions recognized that the tax is not due on this transfer, given that the amounts would have a social security nature and, in this sense, would be exempt from ITCMD causa mortis. But some contrary decisions have already taken place and the tax has been levied. Accordingly, certain insurance products must be examined on a case-by-case basis to determine tax treatment.

## 10. Civil law on succession

### 10.1 Succession

When an individual dies, his or her assets must be immediately transferred to his or her heirs. Inventory is a procedure that formalizes the division and transfer of assets to heirs; this procedure can be done judicially or extrajudicially. The inventory procedure applies when an individual has assets located in Brazil, even if the deceased was a foreigner and was not a tax resident of Brazil. Under Brazilian law, the inventory procedure must be held in Brazil if the deceased had tax residence in Brazil.

The inventory procedure must be established within 60 days after the death; if it is not, penalties may apply.

#### **Extrajudicial inventory**

An extrajudicial inventory is carried out in the notarial office when the deceased is not a minor (i.e., is 18 years of age or older) and left no will. This kind of inventory is usually faster and less expensive. However, it does need the support of a lawyer.

#### **Judicial inventory**

A judicial inventory is mandatory when:

- (i) There are minors or disabled heirs.
- (ii) The parties do not agree with the division of assets.
- (iii) There is a will.

A lawyer is also required for a judicial inventory.

## 10.2 Will

A will is a legal document that establishes that after the death of the individual, the division of assets to heirs shall be according to his last wishes. Brazilian law provides three types of wills: public, closed and private. A public will is the most commonly used. If, at the time of death, there is no valid will, the inventory process will follow the general rules for the distribution of assets (see Section 10.3). Through a will, the individual is free to dispose of 50% of his or her estate. The other 50% should follow the general rules of succession (see Section 10.3), being distributed to the forced heirs in equal shares.

## 10.3 Forced heirship rules

Brazilian law respects the rights of the deceased's forced heirs. At the time the inventory is opened, the rights of the children and surviving spouse or life partner must be respected. If the individual does not leave descendants, the individual's parents and his or her spouse will be entitled to inheritance. If there are no descendants and no ascendants, the surviving spouse will become the sole heir. If there are no descendants, no ascendants and no surviving spouse, then collateral relatives (i.e., brothers, sisters, uncles, aunts, cousins, nephews and nieces) will inherit.

It is important to note that the governing marital regime can influence the size of the estate subject to the forced heirship rules (see Section 10.4).

## 10.4 Matrimonial regimes and civil partnership

The matrimonial regime chosen by the couple has a direct impact on the division of assets following an individual's death.

In Brazil, there are three main matrimonial regimes:

- Community property: The property of both partners, whether acquired before or after the marriage, is treated as joint property (except for gifts received with an incommunicability clause, i.e., a clause stating that the gift belongs solely to its receiver).
- Partial community property: This is the default regime. Only the property acquired during the marriage is treated as joint property. This does not apply to any property purchased during the marriage using funds or rights that date to before the marriage (such as an inheritance).
- Separate property regime: All property acquired either before or after marriage remains the property of the individual.

Brazil also has a "stable union" that is defined as a living relationship between two individuals that is enduring and has the purpose of constituting a family. Under this type of relationship, the partial community property regime will prevail (unless there is an agreement that stipulates other rules).

It is important to note that Brazil's Supreme Court has recently decided that a life partner shall have the same inheritance rights that a spouse would have if they were officially married. In other words, the partner in a stable union has been equated to a spouse, throughout the Brazilian territory, for succession/inheritance purposes.

As always, a case-by-case analysis may be necessary.

Since 2013, in the same way as heterosexual couples, same-sex couples have the right to civil marriage and the conversion from stable to civil union. Thus, same-sex marriages have all the rights and obligations provided by law and signed in the contract, such as the sharing of assets, inheritance of part of the spouse's assets in the event of death, participation in health insurance and alimony, for example. In addition, notaries and judges are strictly prohibited from refusing to register any such union. Divorce also works the same way.

# 11. Estate tax treaties

Brazil has not concluded any estate tax treaties with other countries in connection with inheritance tax.