

# 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)

Inheritance rights should be exempted from income taxation in the country of residence. However, ITCMD should be enforceable to surviving family members residing in Brazil or to the donee (the state law that regulates the ITCMD taxation may also indicate the donor as jointly responsible to pay the ITCMD in case the donee fails to pay the tax due). The ITCMD is a state tax levied on transfers of goods on death-related inventories or donations (in case of living individuals), which is payable on movable and immovable property (e.g., real estate or cash lump sums). Nevertheless, it is important to note that the maximum applicable rate is currently capped at 8% (however, an increase in the rate is expected up to 20%).

### 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, the 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 BRL72,725 (for 2021) per calendar year are considered tax-exempt. Such amount is updated yearly.
- ▶ The ITCMD rate is currently 4% in São Paulo.

In Rio de Janeiro, the 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 instalments, 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.
- ▶ Gifts offered in cash with the amount up to BRL41,684.62 per donee and per calendar year are tax-exempt.

The ITCMD rate in Rio de Janeiro is measured progressively, as below:

- a) 4%, for amounts up to BRL259,371
- b) 4.5%, for amounts above BRL259,371 and up to BRL370,530
- c) 5%, for amounts above BRL370,530 and up to BRL741,060
- d) 6%, for amounts above BRL741,060 and up to BRL1,111,590
- e) 7%, for amounts above BRL1,111,590 and up to BRL1,482,120
- f) 8%, for amounts above BRL1,482,120

### 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, this transfer 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 and, 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, the 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 legislations 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 ownership of private assets and rights (cash, liquid assets, real estate properties and movable rights) is transferred from an original owner (grantor) to a third party (trustee), who assumes full responsibility of managing those assets under the exclusive best interest of persons (beneficiaries or *cestui que* trust) expressly indicated by the grantor or by the 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 highlight that even though trusts are widely used in common law jurisdictions, the trust concept does not exist in Brazil, as its system adopts the civil law regime. Although there are no express restrictions in Brazil regarding the use of a trust or its constitution for Brazilian tax residents, there are no clear rules on how to report trusts in Brazil or on how to tax the income generated by a trust.

There is still a gray area on the tax impacts to resident taxpayers who participate or get nominated to benefit from investments held outside Brazil, in relation to trust arrangements incorporated outside Brazil. To this extent, even the performance of tax reporting obligations (i.e., the Brazilian annual income tax return – DIRPF and the Declaration of Brazilian Capital Abroad – DCBE that must be submitted to the Brazilian Central Bank whenever the resident individual holds more than USD 1,000,000 outside of Brazil) is unclear. As a general rule, property, income and gains on assets held in a revocable trust tend to be taxed upon the settlor, while property, income and gains arising from an irrevocable trust tend to be taxed upon the beneficiaries when available to them. It should be noted that non-Brazilian assets are usually reported on the Brazilian annual income tax return and the DCBE.

However, despite the fact that trusts are not specifically regulated in Brazil, there is formal guidance from the Brazilian Central Bank that provides that the beneficiary (tax resident in Brazil) must report the trust in his DCBE.

Due to the lack of legislation and guidance, a case-by-case analysis may be necessary so that Brazilian tax residents are comfortable with the reporting and taxation of trusts in Brazil, both for income tax purposes and Central Bank requirements in Brazil.



A bill is under consideration in the Chamber of Deputies, which provides for the regulation of a structure similar to a trust in Brazil. This bill would introduce into Brazilian law the “fiduciary contract”, a regime for the administration of third-party assets “inspired by the figure of the trust.” The text of the bill also contains the procedures that must be followed, what must be included in the contract and how the formalization will take place (in a notary or will). The text does not, however, address tax issues.

### **Beneficiary taxation**

Due to the fact that trusts are not regulated in Brazil, there is a lack of clarity about the nature of the revenue and the taxation of distributions made by the trust – mainly as to whether such distributions would be considered as ordinary income (subject to income tax up to 27.5%) or as donations (subject to ITCMD) to the beneficiaries.

It is important to highlight two recent decisions in Brazil (one administrative - SC n. 41/20, and another judicial, enacted by the Federal Justice of State of São Paulo) regarding the tax treatment given to distributions made by a trust to its beneficiaries. In both decisions, the distributions were considered general income received from sources abroad, received by a resident in Brazil, thus being subject to the Individual Income Tax (IRPF), up to 27.5%.

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 of 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). The 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, there are two well-known pension products in Brazil, the PGBL and VGBL, which 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 an 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 instalment or in monthly instalments. 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 a period of 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 will. 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.