

AUTHORS

DANIELLA ZAGARI
PARTNER / SÃO PAULO

JULIA PAES DE ALMEIDA MENDES
LAWYER / SÃO PAULO

Executive Order (MP) No. 899/19, already known as the Legal Taxpayer's Executive Order, was published on October 17 of this year with the purpose of reducing tax litigation and recovering debts classified as irrecoverable or difficult to recover. To this end, the MP provides for the possibility of settlement to end administrative or judicial disputes at the federal level.

The possibility of settlement between public authorities and taxpayers in tax matters has been allowed since 1966 by article 171 of the National Tax Code (CTN),^[1] which, however, requires a specific provision of law for the competent entity.

The scenarios for and modalities of settlement that are now admitted, and the peculiarities thereof, shall be analyzed below. The conditions are still subject to regulations and a framework to be established, as appropriate, by the authorities indicated in the MP.

1. Settlement in relation to the outstanding debt with the Federal Government

Assumes the existence of debt already registered as outstanding debt, whether or not of a tax nature. It may be proposed by the competent prosecutor, individually or by adhesion, or by the debtor.

The transaction may relate to: (i) the granting of discounts for debts classified by the tax authority as irrecoverable or difficult to recover; (ii) term or method of payment, including deferral and default fine; and (iii) offering, substituting, or disposing of guarantees or encumbrances.

Therefore, this scenario for settlement only allows for proposal of a reduction of amounts for debts considered irrecoverable or difficult to recover, according to criteria that will be established in an act by the attorney general of the National Treasury (PGFN), and provided that there is no evidence of fraudulent depletion of assets.

The total amount of the debt may be reduced by up to 50%, with the possibility of payment within up to 84 months, for companies in general. For individuals, small businesses, and microenterprises the reduction may reach 70%, with a payment term of up to 100 months.

The MP prohibits reduction in principal, settlements for fines for fraud, evasion, collusion, or any penalty of a criminal nature, in addition to settlements for debts related to the Simples Nacional tax system ["Simplified Tax Regime"] or FGTS payments.

The individual settlement must be signed by the PGFN or an authority delegated by the PGFN.

2. Settlement for adherence in tax litigation to a relevant and widespread legal controversy

Settlement for adherence is that which is proposed by the government and subject to the acceptance of taxpayers that meet the conditions and requirements in that regard. It shall be conducted exclusively by adherence to be formalized electronically, as proposed by the Minister of Economy to terminate tax or customs disputes. The settlement should always deal with disputes considered relevant and whose legal theory under discussion involves a considerable number of taxpayers. The existence of an ongoing administrative or judicial proceeding is, therefore, a condition for entering into the settlement in this scenario.

The settlement proposal must be disclosed in the official press and on the respective agencies' website, with a notice specifying the conditions and requirements, including any reductions or concessions offered, terms, and forms of payment. Settlement regard debts related to the Simples Nacional or FGTS is forbidden, and the maximum time limit for discharge may not exceed 84 months.

3. Other provisions and points for attention

In any scenario for settlement, the good faith of the government and the taxpayer must prevail. Therefore, settlement is prohibited in the case of intent, fraud, sham transactions, malfeasance, graft, or passive corruption and fraudulent depletion of assets, among others.

In entering into a settlement to terminate a tax dispute, the debtor must waive all the legal claims that underlie the judicial or administrative proceedings.

Specifically in the case of lawsuits, the waiver must also involve collective actions, and the debtor must request that the judge terminate the case with a resolution on the merits, by ratification of waiver of the claim brought.

This is a point for attention, which is expected to be corrected in the regulations of the standard: the MP deals with a true scenario of settlement, with express reference to article 171 of the National Tax Code (CTN). Settlements are a mechanism of self-composition, whereby the parties provide mutual concessions in order to settle the dispute.^[2] Therefore, the most appropriate approach would be that the claim submitted to the court have the purpose of terminating the case with a resolution of the merits for approval of the settlement. The MP itself refers to judicial ratification of the settlement for the purpose of forming an enforceable judicial instrument.

Far from nitpicking, the clarification is necessary in order to avoid parallel disputes between the government and taxpayers, as the treatment of liability for costs and attorneys' fees is different in each case: in the case of pure and simple waiver, procedural costs and fees shall be paid by the waiving party. In the case of a typical settlement, with mutual concessions from one party to another for termination of the dispute (reduction of debt with the termination of the proceeding), a judgment to pay fees for loss of suit cannot be considered.

Another obscure issue concerns the treatment of tax debts not yet enrolled as outstanding debt but for which the administrative proceeding has already been completed. Apparently, per the framework of the MP, this debt would not be subject to settlement. The same seems to occur in relation to a tax obligation challenged in court by the taxpayer via a preventive measure (writ of mandamus or declaratory action, for example), but for whom a tax credit has not yet been created.

There does not seem to be any reason to exclude these situations from the settlement field. Nor could it be said that the Federal Government would have no interest in entering into a settlement with the private individual in that scenario because there was no proceeding to be closed, in the first case, and a credit created, in the second.

The objection cannot be sustained because litigation does not end simply because the judicial sphere has not yet been activated. Likewise, it exists when one disputes in court a tax obligation not yet created. If, after all, the goal sought is to reduce litigation, it is as important to close ongoing proceedings as it is to avoid the initiation thereof. And it is also irrelevant, for this purpose, whether or not the credits have been created.

Still in the scenario of settlement via adherence, special attention should be paid, with regard to the tax litigation over widespread and relevant legal controversy, to the need for waiver of rights in all proceedings involving the same theory. In principle, it would not be possible to select specific cases.

Having discussed the guidelines of the MP, the framework that will be established by the competent authorities, as the case may be, the Minister of State for the Economy, Federal attorney general, attorney general of the National Treasury, and special bureau of the Federal Revenue Service of Brazil, will shape the success or failure of the objectives sought.

^[1] Article 171. The law may provide the option, under the conditions it establishes, for taxpayers' with tax debts or credits to enter into a settlement which, through mutual concessions, may result in the termination of litigation and consequent extinction of the tax debt.

Sole paragraph. The law shall designate the authority competent to authorize the transaction in each case.

^[2] The only scenario contemplated in the MP that does not represent a typical settlement scenario is the possibility of a settlement over the offering, replacement, or disposal of guarantees and encumbrances, which constitutes a kind of procedural legal settlement, pursuant to article 190 of the Code of Civil Procedure.