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ANALYSIS

Tax

Joint interpretative instrument between Spain and Brazil on the classification of Brazilian *juros*

In this paper we address the controversy that the taxation of Brazilian *juros* has sparked both during the period when the recast version of the Corporate Income Tax Act was in force and since the Corporate Income Tax Act came into effect. Its possible classification, either as dividends or as interest, has been analysed on several occasions by Spanish courts and tax authority, the latter having recently agreed with its Brazilian counterpart to treat it as "interest" for the purposes of the Spain/Brazil Double Taxation Convention.

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1. Context

Juros sobre o capital próprio, created by Brazilian law to encourage the financing of companies through equity, constitute a hybrid financial instrument that combines characteristics of both equity and debt, as they exhibit features typical of both dividends and interest. Thus, although they constitute a form of remuneration to shareholders in proportion to their stake in a company's capital, the company, in accordance with Brazilian tax legislation and under certain conditions and limits, may deduct them from its tax base.

However, the classification of such income as dividends or interest has been a highly controversial issue in our country, both during the period when the recast version of the Corporate Income Tax Act was in force and since Act 27/2014 came into effect.

While the aforementioned recast version was in force, administrative doctrine had been denying the classification of such interest as dividends, treating it as interest, which implied the rejection of the application of the exemption provided for in both Article 21 of said legal text and Article 23(2) of the Convention between the Spanish State and the Federative Republic of Brazil for the avoidance of double taxation and the prevention of tax evasion with respect to taxes on income, signed in Brasília on 14 November 1974, and amended by a Protocol in 2006 (hereinafter, the "Spain/Brazil Double Taxation Convention").

However, the *Audiencia Nacional*, in judgments such as that of 27 February 2014 (app. no. 232/2011), departed from the aforementioned administrative stance, considering it appropriate to apply the exemption under Article 21 of the aforementioned recast version, on the grounds that Brazilian *juros* had a legal nature similar to that of dividends.

This position was affirmed by the Supreme Court in its judgment of 16 March 2016 (app. no. 1130/2014), and the Court reiterated this view in its judgment of 15 December 2016 (app. no. 3949/2015). In those judgment, the court of last resort argued: *a*) that *juros* should be treated as profit distributions, with the shareholder's stake in the share capital being the basis for entitlement to receive it; *b*) that the deductibility of *juros* permitted under Brazilian law is subject to the fulfilment of certain conditions — the existence of net income for the fiscal year or accumulated reserves — which do not apply to interest; *c*) that the *juros* had been taxed in Brazilian subsidiaries in the fiscal years in which the distributed profits were earned, and *d*) that, in any event, the personal requirement regarding the taxation of investees required by Article 21 of the recast version was met, with the presumption established in paragraph 1*b* being applicable.

In light of these considerations, the Supreme Court determined that, under the recast version of the Corporate Income Tax Act, the disputed *juros* met the necessary requirements to apply the exemption in question.

Subsequently, with the entry into force of the current Corporate Income Tax Act (Act 26/2014), the controversy arose again, since Article 21(1) incorporated an anti-hybrid rule under which "the exemption provided for in this paragraph shall not apply to the amount of those dividends or prof-

it shares whose distribution generates a tax-deductible expense for the paying entity" — as is the case with Brazilian juros. However, the Spain-Brazil Double Taxation Convention continues to provide for the application of the exemption method to dividends that may be subject to taxation in Brazil, without any limitation.

In this context, both the Directorate-General for Taxation (in its binding tax query responses V2960-16 and V2962-16) and the Central Tax Tribunal — Decisions of 24 October 2022 (RG 3631/2020) and 24 November 2022 (RG 509/2022) —, even while accepting the legal classification of *juros* as profit sharing — thus falling under Article 21 of Act 27/2014 —, they held that, for the purposes of the Spain-Brazil Double Taxation Convention, they should be classified as interest, which precluded the application of the exemption under Article 23(3) thereof, resulting in the deduction of a theoretical tax of 20% pursuant to said Article 23(2).

> *Brazil's signing of the MLI could lead to the elimination of the exemption in the medium term*

However, this stance was rejected by the *Audiencia Nacional* in its Judgment of 22 May 2025 (app. no. 222/2023), in which it once again classified the Brazilian *juros* as dividends, in this case for convention purposes. To that end, the court recalled that conventions take precedence over domestic laws; that they cannot contravene the spirit and purpose of such conventions; and that tax query responses cannot contradict them either, as they are not a source of law; that, pursuant to the Spain-Brazil convention, *juros* are treated as dividends, and that nothing has changed with respect to the view previously held by the *Audiencia Nacional* on the matter, since the text of the convention has not been amended with regard to Article 23(3).

Thus, the *Audiencia Nacional* concluded that Brazilian *juros* could benefit from the exemption provided for in Article 23(3) of the convention, even after the entry into force of Act 27/2014.

2. Current situation

2.1 *Brazil's signing of the MLI: 20 October 2025*

Following the aforementioned judgment by the *Audiencia Nacional*, a significant development occurred in relation to the matter under analysis: namely, Brazil's signing, on 20 October 2025, of the Multilateral Instrument (MLI), developed by the Organization for Economic Cooperation and Development (OECD), whose Article 5 allows States to remove the aforementioned exemption mechanism from their conventions and replace it with the imputation or credit mechanism.

However, although the MLI has not yet entered into force for Brazil — as the corresponding internal procedures for approval, filing, and notification are still pending — it seems clear that

the exemption will be eliminated once this occurs. To that end, it should be noted that among the various options that Article 5 of said instrument makes available to States, both Spain and Brazil have chosen Option C, which, pursuant to paragraph 7 of that provision, entails the elimination of the exemption and its replacement with the credit system provided for in paragraph 6.

> Juros *shall be considered interest for the purposes of Article 11(5) of the Spain-Brazil Double Taxation Convention*

Although this depends on when Brazil completes the aforementioned procedures, the fact is that the amendments to the text of the convention in the aforementioned sense could still be delayed for some time, a factor that may have influenced the agreements on the reclassification of Brazilian *juros* recently reached by the competent authorities of both States.

2.1. *Joint interpretative instrument*

To that end, the Ministry of Public Finance has announced on its website that, through an exchange of letters dated 25 November, 2025, and 12 March 2026, the competent authorities of Spain and Brazil, in relation to the Spain-Brazil Convention and in accordance with Article 25(3) thereof, have "agreed that interest paid as 'return on equity' (*juros sobre o capital próprio*), as regulated by Brazilian Federal Act no. 9249/1995 of 26 December 1995, shall be considered interest for the purposes of Article 11(5) of the Convention and, consequently, the elimination of double taxation shall be carried out in accordance with the provisions of Article 23(1) and (2) of the Convention."

Therefore, in accordance with this interpretation, the exemption under Article 23(3) of the Convention would not apply, and double taxation must thus be eliminated through the 20% deduction provided for interest in Article 23(2).

However, regarding this matter, it is worth noting the temporal effect of said interpretive instrument, that is, whether this interpretative criterion constitutes a change that will only take effect from its publication — *ex nunc* — or whether, on the contrary, it is understood to be reaffirming a pre-existing criterion, in which case it would have retroactive effect — *ex tunc.*

From this perspective, we consider that there would be well-founded reasons to justify that a change in criterion exists, such as the fact that the interpretative instrument itself does not address its temporal effect, avoiding any express reference to retroactive effect, or that advocating retroactivity in this case could undermine the

principles of legal certainty, legitimate expectations, and the non-retroactivity of criteria unfavorable to the taxpayer, taking into account the above legal doctrine which, we reiterate, has been applied to treaty text that, to date, has not been amended.

However, the fact remains that determining the temporal effects of the interpretative instrument in question requires caution, particularly given the position that both the Directorate-General for Taxation and the Central Tax Tribunal have held on this issue since 2016, as well as certain precedents such as the binding tax query response V0075-03 issued by the Directorate-General for Taxation, in which the Directorate-General endorsed the retroactive application of the position expressed in a 2003 exchange of letters between Spain and Brazil to taxable events occurring prior to that date, without providing any legal basis for doing so.