



BATTELLA, LASMAR & SILVA



**Brazil's Voluntary Disclosure Program:  
Some Practical Aspects**

27 July 2016

[www.blslaw.com.br](http://www.blslaw.com.br)

## Law 13254/2016 – Main Features

- Creates a special voluntary disclosure program (*Regime Especial de Regularização Cambial e Tributária*, or RERCT) for unreported funds, property and rights of licit origin remitted or kept abroad, or subject to repatriation into Brazil, by resident taxpayers.
- Base date: December 31, 2014.
- Filing period: April 4 through October 31, 2016 (*extension expected?*).
- No submission of documents is necessary, but **taxpayer needs to have them for future submission** to the Revenue Department if so requested.
- Need to file specific RERCT application (DERCAT) with the Revenue Department with detailed description of the assets and market value on Dec 31, 2014.
- Available for assets no longer owned by the taxpayer by Dec 31, 2014.
- Available to ongoing probate process.

## Law 13254/2016 – Tax & Penalty

- RERCT burden:
  - ✓ Income tax: de 15% of the market value of the assets on Dec 31, 2014
  - ✓ RERCT penalty: 100% of tax due
  - Total burden: 30% of the market value of the assets on Dec 31, 2014.
  - **Note: additional tax/penalty for income/gains generated by reported assets after January 1, 2015. Need to calculate and pay separately, not in the RERCT application.**
- RERCT tax and penalty must be paid at once until Oct 31, 2016.
- RERCT assets are considered as taxable income in 2014 and subject to definite taxation (no tax deduction available).
- Revenue Department has 5 years to review the RERCT application and market value attributed to reported assets.

## Law 13254/2016 – Main Features

- Persons prohibited from applying to the VDP:
  - Who has been convicted for listed crimes at the time of filing of the application
  - Who was not a tax resident in Brazil on Dec 31, 2014
  - Whose assets are from illicit activities
  - Who was a politically exposed person (PEP), as defined by the law, on Jan 14, 2016  
Statement of fulfillment of these condition is required in the application
- RERCT grants criminal amnesty of the following crimes:
  - ✓ tax evasion, the omission of tax information, tax fraud, failure to issue tax invoices, or social security tax fraud
  - ✓ forgery of public or private documents
  - ✓ fraudulent misrepresentation
  - ✓ unlawful currency conversion, or
  - ✓ money laundering associated with the aforementioned crimes

## Law 13254/2016 – Prohibited Persons (PEPs)

- Law 13254/2016 provides for a unique definition of PEP for RERCT purposes, as follows:

*“Those who, on January 14, 2016, hold a public office, public job or public function, whether elected or appointed, and also to their spouses and relatives by blood, marriage or adoption up to second degree.”* (Art. 11)
- Revenue Department’s clarification: **leading position** in public office, job or function in the direct or indirect Administration of the three levels of the federation (federal, state and municipal), and also those of political nature including elective office.

# Law 13254/2016 – PEPs

FEMALE COLLATERAL LINE		DIRECT LINE	MALE COLLATERAL LINE	
		Great-Grandfather/mother 3 <sup>rd</sup> degree		
		Grandfather/mother 2 <sup>nd</sup> degree		
Aunt 3 <sup>rd</sup> degree		Father and Mother (+ in-Law) 1 <sup>st</sup> degree		Uncle 3 <sup>rd</sup> degree
Cousin 4 <sup>th</sup> degree	Sister (+ in-law) 2 <sup>nd</sup> degree	APPLICANT (spouse)	Brother (+ in law) 2 <sup>nd</sup> degree	Cousin 4 <sup>th</sup> degree
Cousin's Daughter 5 <sup>th</sup> degree	Niece 3 <sup>rd</sup> degree	Son/Daughter (+ in-Law) 1 <sup>st</sup> degree	Nephew 3 <sup>rd</sup> degree	Cousin's Son 5 <sup>th</sup> degree
Cousin's Granddaughter 6 <sup>th</sup> degree	Sister's Granddaughter 4 <sup>th</sup> degree	Grandson/daughter 2 <sup>nd</sup> degree	Brother's Grandson 4 <sup>th</sup> degree	Cousin's Grandson 6 <sup>th</sup> degree
Cousin's Great-granddaughter 7 <sup>th</sup> degree	Sister's Great-Granddaughter 5 <sup>th</sup> degree	Great-grandson/daughter 3 <sup>rd</sup> degree	Brother's Great-grandson 5 <sup>th</sup> degree	Cousin's Great-grandson 7 <sup>th</sup> degree

## Law 13254/2016 – CONTROVERSY : What to do with PEPs?

- Is the prohibition constitutional?
  - ✓ All equal before the law with no distinction of any kind (Art. 5 of the Constitution)  
*“All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property (...)”*
  - ✓ Tax equality principle (Art. 150, II of the Constitution):  
*“Without prejudice to any other guarantees ensured to the taxpayers, the Union, the states, the Federal District and the municipalities are forbidden to:  
(...) II – create unequal treatment for taxpayers who are in an equivalent situation, it being forbidden to establish any distinction by reason of professional occupation or function performed by them, independently of the juridical designation of their incomes, titles or rights”*
  - ✓ Presumption of innocence (Art. 5, LVII of the Constitution)  
*“No one shall be considered guilty before the issuing of a final and unappealable penal sentence”*
  - ✓ Supreme Court precedent (ADI 4.276, of August 20, 2014)

## Law 13254/2016 – CONTROVERSY: What to do with PEPs?

- PEPs are legally prohibited from applying to the RERCT (Article 11 of Law 13254/2016).
- What do do?
  - ✓ Need to review case in detail
  - ✓ Need to determine licit origin of the funds
  - ✓ Prepare legal opinion
- Options available:
  - ✓ Proactive approach:
    - ✓ pros and cons
  - ✓ Passive approach:
    - ✓ pros and cons
- BLS experience



## Law 13254/2016 – RERCT Information

The RERCT application must include the following information:

- ✓ The applicant's identification
  - ✓ Information necessary to identify the each reported assets
  - ✓ **Market value** in USD/BRL of each reported assets
  - ✓ Statement of the origin for each reported asset
- 
- ✓ Possible origins to be declared by the applicant (item by item):
    1. Inheritance
    2. Donation
    3. Rendering services
    4. Trade or industrial activities
    5. Disposition of assets
    6. Financial income
    7. Prizes, contests & competitions
    8. Others (further clarification required)

## Law 13254/2016 – Reportable Assets, Market Value & Documentation

Reportable assets and their market value for RERCT reporting purposes:

- ✓ bank deposits, certificates of deposit, shares of investment funds, financial instruments, insurance policies, certificates of investment or capital redemption operations, credit card deposits, and retirement or pension funds: *the value on December 31, 2014 according to document supplied by foreign financial institution.*
- ✓ loan transactions with individuals or legal entities: *the outstanding balance on December 31, 2014 pursuant to the relevant agreement between the parties.*
- ✓ resources, property, or rights of any nature from illegitimate or unauthorized currency transactions: *the value on December 31, 2014 according to document supplied by foreign financial institution.*

## Law 13254/2016 – Reportable Assets, Market Value & Documentation

- ✓ resources, property, or rights of any nature contributed to the capital of foreign companies in the form of shares, paid-in capital, capital contributions, or any other form of equity participation or right to participate in the capital of legal entities with or without legal personality: *net equity on Dec. 31, 2014 according to **balance sheet**.*
- ✓ intangible assets of any nature available abroad, such as trademarks, copyrights, software, know-how, patents, and any rights compensated with royalties: *market value according to **appraisal report**.*
- ✓ real estate property in general or assets representing direct or indirect rights over real estate: *market value according to **appraisal report**.*
- ✓ vehicles, aircraft, vessels, and other movable property subject to registration, even under financial lease: *market value according to **appraisal report**.*

## Law 13254/2016 – Reportable Assets, Market Value & Documentation

- ✓ resources, property, or rights of any nature, located abroad, of ongoing probate: *the market value of the estate on December 31, 2014 according to relevant documents applicable to each asset*. (Applicant is the estate represented by the executor, not the heirs)
- ✓ Property no longer existent or owned by the taxpayer on December 31, 2014: *the value indicated in the legitimate relevant document supporting the transaction*.

### Items not eligible for RERCT:

- ✓ Jewelry, precious stones, art works, antiques with historical or archeological value, livestock and other movable property not subject to registration.

## Law 13254/2016 – CONTROVERSY: Picture of 2014 or ‘movie of your life’?

- The Revenue Department “clarified” in the RERCT Q&A that monies ‘partially consumed’ prior to December 31, 2014 should also be included in the DERCAT as a non-existing asset (a.k.a., “absence of balance”):
- *Q.39: How to declare assets that were partially consumed prior to Dec 31, 2014?*  
*A: Those who want to entirely extend the effects of the law over the assets and the conducts related thereto must report the portion of the asset existing on Dec 31, 2014 and also the consumed portion.*  
*Consequently, the reporting shall include the balance of the asset existing on Dec 31, 2014 and the consumed amount as “absence of balance” with the description of the conducts.*
- Recent legal opinion from the Revenue Attorney General (PGFN/CAT/Nº 1.035/2016) tries to give legal grounds to this position.

## Law 13254/2016 – CONTROVERSY: Picture of 2014 or ‘movie of your life’?

- Despite the ‘clarification’, the Revenue Department does not say how far back the taxpayer would have to go.
- Structure of the law leads one to say that ‘picture’, not the movie, is the intention of the law. Examples:
  - ✓ Supporting documentation needed for the RERCT: reference to Dec 31, 2014
  - ✓ Art. 6, par. 4, of the Law: The regularization of assets and rights, and payment of the taxes and penalty, shall result in the remission (=release, extinguishment) of tax debts resulting from non-compliance of tax obligations (and 100% reduction of applicable penalties) directly related to those assets and rights in relation to taxable events that occurred until December 31, 2014 (...)
  - ✓ A balance either exists or does not exist. It cannot be partially balance and partially ‘absence of balance’
- Criminal lawyers think differently and take the position that reporting should go back up to 16 years.

## Law 13254/2016 – The importance of the appropriate documentation

- RERCT does not require submission of any documents with the DERCAT, but the taxpayer **MUST** procure and obtain appropriate documentation and keep it on file for a period of 5 years as from October 31, 2016
- The importance of the documentation is confirmed by Law 13254/2016, especially when one considers the situations for exclusion from the RERCT (Art. 9):

*the taxpayer **shall be** excluded from the RERCT if she submits false information or documents concerning ownership or legal condition of the reported assets or concerning the documents related to the value of the assets*

- Conclusion: procurement of appropriate documentation concerning ownership and value of the reported asset cannot be neglected.

## Law 13254/2016 – The importance of the appropriate documentation

Validity of foreign document in Brazil is not automatic and certain steps need to be taken:

### 1) Notarization, Legalization & Apostillation

- ✓ Until August 13, 2016 foreign **public** documents need to be notarized in the foreign country and subject to legalization (stamped) by the nearest Brazilian consulate or embassy.
- ✓ As from August 14, 2016 the 1961 Hague Apostille Convention enters into force in Brazil and, consequently, foreign public documents will no longer need notarization/legalization. Apostilled documents will suffice.

### 2) Translation & Registration in Brazil

- ✓ After legalization/apostillation, documents need to be translated into Portuguese by a sworn translator and subject to registration with a Titles & Deeds Notary Public in Brazil.



## Law 13254/2016 – The importance of the appropriate documentation

- Law No. 6015/1973 (Public Registrations Act) requires that any foreign document submitted to a Brazilian authority **needs to follow these two steps.**
- Because registration of a document with the Titles & Deeds Notary Public makes it public, **recommendation for RERCT clients is to go as far as sworn translation.** Registration should be made **only if and when** the document is requested by the authorities.
- **No document in a foreign language can be validly submitted** to the Federal Revenue Department (or court), including to support ownership, legal condition or value of reported assets under the RERCT.

## Law 13254/2016 – The importance of the appropriate documentation

- Although no documentation needs to be submitted with the DERCAT, the taxpayer MUST have them in place if and when the Federal Revenue Department requests proof of ownership, legal condition or value of a reported assets in the period of five (5) years as from October 31, 2016.
- Failure may lead to exclusion from RERCT and reinstatement of standard taxes and penalties with risk of civil and criminal consequences.
- Documentation in appropriate format should be obtained by the taxpayer as soon as possible, even before the taxpayer receives a tax notice from the authorities.
- Short deadlines to respond to tax notices:
  - ✓ 15 to 20 days to submit documents (extensions possible, but discretionary)
  - ✓ 10 days to appeal from decision that excludes one from RERCT

## Law 13254/2016 – Trusts, Offshore Companies & Foundations

- The Federal Revenue Department clarified (Normative Instruction 1627/2016) the supporting documents for the reporting of trusts, foundations and offshore companies:
  - ✓ Trusts
    - ✓ Identification of settlor, beneficiaries, trustee and protector, if any
    - ✓ Trust deed, letter of wishes(?) and other documents among the trust 'parties'
    - ✓ List of assets signed by the trustee and protector, if any
    - ✓ Accounting/financial documentation signed by the trustee and protector, if any
  - ✓ Foundations
    - ✓ Identification of the founder, foundation board members, protector and beneficiaries.
    - ✓ *No other document?*

## Law 13254/2016 – Trusts, Offshore Companies & Foundations

- ✓ Offshore companies (IBCs, LLCs, PICs, etc):
  - ✓ Name, place and tax ID number, if any
  - ✓ Memorandum/articles of association/incorporation, and documents identifying members and their powers, directors and their powers and relation with members
  - ✓ Indication of condition as holding company, if applicable
  - ✓ If any member is another offshore company(ies), identification of the entire chain of ownership up to the ultimate beneficiaries
  - ✓ Financial statements and identification of all direct and indirect investments and identification of the origin of the investments made

## Law 13254/2016 – RERCT and Swiss Banks

- Disclosure of financial assets above USD 100,000 requires the taxpayer to request and authorize the foreign financial institution to send confirmation to a Brazilian bank
- Confirmation is made via SWIFT (Society for Worldwide Interbank Financial Telecommunication)
- Taxpayer must indicate in DERCAT the name of the Brazilian financial institution that will receive the SWIFT. *Can it be changed?*
- Upon receipt of the SWIFT, the Brazilian financial institution shall report to the Federal Revenue Department
- No repatriation of funds is necessary

## Law 13254/2016 – RERCT and Swiss Banks

- Normative Instruction 1627 makes reference to “balance” of each asset on Dec 31, 2014 to be confirmed via SWIFT.
- The following information must be included in the SWIFT confirmation:
  - ✓ Name of the bank of origin
  - ✓ Country (of the asset or of the bank?)
  - ✓ Bank Identifier Code (BIC)
  - ✓ Identification of the ‘owner’ of the financial assets (name, tax ID number (CPF/CNPJ) and tax ID in the country where the assets are located, if any) (form A or other document?)
  - ✓ Identification of the ‘final beneficiary’ of the assets (same as above), if different from ‘owner’ (form A or other document?)
  - ✓ Account number & type of account (deposit, custody or investment)
  - ✓ Balance(s) on Dec 31, 2014 (each asset?)
  - ✓ Currency (what about multiple currencies?)

## Law 13254/2016 – RERCT and Swiss Banks

- SWIFT is necessary only if the taxpayer holds the financial assets directly
- No SWIFT needed if financial assets are held in an offshore company, trust or foundation.  
These assets are considered as non-financial assets: need to merely supply information in DERCAT at market value.
- What if the foreign bank refuses to send the SWIFT?
  - ✓ Taxpayer's obligation is to 'request and authorize' the foreign bank to remit the information via SWIFT
  - ✓ Risk of exclusion?
  - ✓ Precautions to be taken by the taxpayer

## Law 13254/2016 – RERCT and Swiss Banks

- Advantages and opportunities to Swiss bank
  - ✓ No need to let the client go (for non-compliance)
  - ✓ With negative interest rates in Europe, banks can offer loans to Brazilian clients using their portfolio as collateral
  - ✓ Loans increase the bank's profitability
  - ✓ Loans keep the client with the bank with no reduction of the portfolio
- Advantages to the client (loans)
  - ✓ No need to sell the assets at low prices (wait until prices recover/maturity date)
  - ✓ Client keeps the portfolio
  - ✓ Income generated by the portfolio pays the loan



## Law 13254/2016 – RERCT and Swiss Banks

- Risks

- ✓ Brazilian banks with offshore private banking departments are approaching clients and offering:
  - ✓ To prepare and submit the RERCT application for free
  - ✓ To receive the SWIFT confirmation
  - ✓ To convert money needed to pay RERCT tax and penalty
- ✓ Risk of losing clients needs to be considered
- ✓ What can be done to mitigate the risk?

# Battella, Lasmar & Silva Advogados – VDP Team



- ✓ 2015 Tax Awards: International Tax Law Firm of the Year (Brazil)
- ✓ 2016 Tax Awards: Best in Estate & Succession Planning (Brazil)

+/- 20 professionals

São Paulo

Belo Horizonte

+/- 100 professionals

*BLS  
VDP Team*

- ✓ 1 Senior partner : David Silva
- ✓ 1 Junior partner
- ✓ 3 Senior associates
- ✓ 4 Associates
- ✓ 1 Junior associate
- ✓ 1 Intern

*Experience  
&  
Expertise*

- ✓ 122 VDP cases in progress (20 July 2016)
- ✓ 25 VDP applications submitted to the authorities (20 July 2016)
- ✓ 4 cases where VDP was not necessary (due to specific situations)
- ✓ 3 VDP probate cases
- ✓ 3 PEP cases
- ✓ 13 relocation cases in the past 12 months (Portugal, USA, Uruguay, Canada, Germany, Switzerland, etc.)
- ✓ Main clients in the states of São Paulo, Rio de Janeiro, Minas Gerais, Rio Grande do Sul, Paraná, Federal District (Brasília), Ceará and Maranhão

## DISCLAIMER

- This material is for information purposes only.
- No part of its content shall be interpreted as legal advice or opinion of any kind.
- Legal advice on the content hereof must be sought from licensed professionals under an attorney-client relationship.
- BLS Advogados is not responsible for the inappropriate or unauthorized use of this material.
- BLS Advogados does not undertake to update this material nor ensures that its content is appropriate or suitable to any concrete situation where BLS Advogados has not been formally engaged to deliver legal or tax advice.



For further information, please contact:

David R. Silva (partner)

[dsilva@blslaw.com.br](mailto:dsilva@blslaw.com.br)



BATTELLA, LASMAR & SILVA

**São Paulo**

Rua Surubim, 577 - 22º andar  
São Paulo, SP, Brasil, 04571-050  
Tel.: + 55 11 4085 6200

**Belo Horizonte**

Alameda Oscar Niemeyer, 119 - sala 703  
Nova Lima, MG, Brasil 34000-000  
Tel.: + 55 31 3615 1100

[www.blslaw.com.br](http://www.blslaw.com.br)