

MEMORANDUM TO CLIENTS

03.06.2015

Request for examination suspends Leading Case judgment at STF - Supreme Court with regard to the incidence of social security contributions on the one-third extra holiday pay, health hazard allowance, additional allowance for night work and overtime.

The Supreme Court (STF) has suspended on last Wednesday (March 4th), upon Justice Luiz Fux's regimental request for examination, the judgment of the Extraordinary Appeal (RE) No. 593,068/SC, whose General Repercussion was acknowledged to refer to the claim concerning the incidence or not of the social security contributions on the labor amount, whichever they are, one-third extra holiday pay, health hazard allowance, additional allowance for night work and overtime.

The Reporting Leading Case of the Justice Roberto Barroso refers to an extraordinary appeal filed by a public officer in view of decision of collegiate body issued by the Federal Regional Court (TRF) of the 4th Region that took a stand by the tax collection legitimacy, for understanding, in short, that the referred amounts would have compensation nature.

Prior the request for examination made by Justice Fux, the opinions issued by Reporting Justice, Roberto Barroso, and Justice Teori Zavascki, who showed the existing of different positions within the Supreme Court.

In his opinion, the Reporting Justice partially accepted the taxpayer's appeal, for positioning to the end that there would not be incidence of social security contributions on such amounts, provided that they not compose the customary earnings and public officers' earnings, due to the list set forth in art. 1 of Law No. 9,783/1999¹ is merely illustrative. The partial appeal uphold has exclusively occurred due to the portion of the amount, by which refund was intended, has been reached by the prescription.

The Reporting Justice also noted in his opinion that the claim discussed in the referred Leading Case is not related to the discussion on the social security contributions concerning the retirees of private sector, aiming at that the public employees are under own social security regime, whilst the private sector Social Security is governed by the Social Security General Regime.

In turn, Justice Teori Zavascki had different opinion from the Reporting Justice, in order to refuse the taxpayer's petition, for understanding that the amounts referred to in the appeal are under compensation character, and not indemnifying. That is why they should be inserted in the calculation base of social security contributions. The Justice also caused a stir for the effect the judgment may have on the Social Security as a whole, because, different from what has been stated by the Reporting Justice, the thesis set forth in Leading Case would also impact the social security regime of private sector, considering the similarity of articles 40, §3 and 201, §11 of the CF/88.

¹ Art. 1 The social security contribution from civil public officer, whether active or inactive, and the pensioners of the three Power of Union, for maintenance of the social security regime of its officers, shall be eleven percent levied on the full contribution remuneration, of earning or pension. Sole Paragraph Sole Paragraph. I - the daily rates for travels, provided that they not exceed fifty percent of the monthly remuneration; I - daily rates; (Wording provided by the Provisional Measure No. 2,216-37 of 2001); II - cost of living allowance due to change of head office; III - transportation indemnification; IV - family allowance.

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Upon Justice Teori Zavascki's opinion, Justice Luiz Fux requested for examination of the cases, by stating he was worried about analyzing eventual effects of the collegiate body's decision on the Social Security General Regime, in line with what Justice Teori Zavascki pointed out, thus suspending the Leading Case judgment.

During the judgment, it is emphasized that, Justice Roberto Barroso also stated he considers that such amounts are under compensation character, despite he has understood that such issue would not be relevant for the closing of the claim regarding his opinion. Likewise, Justice Rosa Weber also took a stand, however, she stated would prefer waiting the return required by Justice Luiz Fux, so that she can definitely express her opinion on the issue.

Before the opinions expressed, it is evident the Supreme Court should first express its opinion concerning the compensation nature of the labor amounts concerning the one-third extra holiday pay, health hazard allowance, additional allowance for night work and overtime; however, it should be pointed out that this issue is not entirely established, and it shall be extensively discussed by the Full of the STF.

We remain at your disposal for any further clarifications.

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