

MEMORANDUM TO CLIENTS

09.24.2015

Reintegra and the unlawful reduction of tax incentives

On February 27, 2015, there was published, on the Federal Gazette, Decree no. 8,415 (“Decree no. 8,415/2015”), providing new rules for the Special Reintegration Regime of Tax Credits for Exporting Companies (“Reintegra”), which was created by Law no. 13,043, of November 13, 2014 (“Law no. 13,043/2014”).

Until such date, Reintegra allowed corporations to assess their PIS and COFINS tax credits at a 3% (three percent) ratio on the income derived from the export of goods manufactured in Brazil. These credits could be used (a) to pay off debts of these taxes, (b) to offset debts of other taxes administered by the Brazilian Internal Revenue Service, or (c) for cash refunds.

After the publication of Decree no. 8,415/2015, the assessment of said credits was changed to the following form:

- (a) 1% (one percent), between March 1, 2015, and December 31, 2016;
- (b) 2% (two percent), between January 1, 2017, and December 31, 2017; and
- (c) 3% (three percent), between January 1, 2018, and December 31, 2018.

In our opinion, this reduction is undue for calendar year 2015, or, at least, for a fraction of this period, since the reduction of the benefit entailed an increased tax burden on taxpayers with no respect for the constitutionally guaranteed principle of anteriority, neither in general, nor in its 90-day period form, before increases in tax rates.

The Supreme Court has already ruled that, indeed, the withdrawal of a tax benefit causes an “indirect increase” in the tax burden, and, therefore, “the anteriority principle must be observed.” Such understanding is found in the following Opinion:

“Having the Tax on Circulation of Goods and Services – ICMS – been indirectly raised through the revocation of a fiscal benefit, there arises the duty to observe the principle of anteriority, both in general and in the 90-day interval forms, as set forth in subparagraphs “b” and “c” of paragraph III of article 150 of the Constitution” (our highlights). (Opinion for the Statutory Interpellation on Extraordinary Appeal no. 564,225, argued on 09.02.2014)

In light of the current state of the courts, which favors taxpayers, we understand that the reduction of the tax benefit associated with Reintegra for the calendar year 2015, or, at least, for a fraction thereof, may be questioned in a lawsuit with reasonable perspectives of a favorable outcome.

Souza, Schneider, Pugliese e Sztokfisz Advogados is entirely available to assist its clients and to furnish legal advice regarding this subject.

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Team responsible for preparing Memorandum to Clients:

Eduardo Pugliese Pincelli (eduardo.pugliese@souzaschneider.com.br)

Fernanda Donnabella Camano de Souza (fernanda.camano@souzaschneider.com.br)

Vítor Martins Flores (vitor.flores@souzaschneider.com.br)

Maria Carolina Maldonado Kraljevic (mariacarolina.maldonado@souzaschneider.com.br)

Sérgio Grama Lima (sergio.lima@souzaschneider.com.br)