

MEMORANDUM TO CLIENTS

01.09.2015

Advance Tax Ruling no. 368/2014 – Social Security Contributions on PSP Payments to Employee and Non- Employee Directors of Stock Companies

On December 31, 2014, Advance Tax Ruling no. 368, issued by the General Coordination of Taxation of the Federal Revenue Services (“COSIT”), was published on the Federal Official Gazette. The Advance Tax Ruling discusses the levy of Social Security Contributions on profit sharing plans (“PSP”) paid to non-employee directors and employee directors, made in accordance to Law no. 10,101, from December 19, 2000¹.

According to the Advance Tax Ruling, PSP paid to non-employee directors, which are individual taxpayers for social security purposes, are subject to Social Security Contributions. On the other hand, PSP paid to employee directors, which are employee taxpayers for social security purposes, are not subject to Social Security Contributions.

The tax authorities’ conclusion expressed on the Advanced Tax Ruling is based on the understanding that Law no. 11,101/2000 only approaches cases of PSP paid in favor of employees. Therefore, by determining that PSP paid or credited “according to specific law” are not subject to social security contributions, article 29, paragraph 9, “j” of Law no. 8,212/1991 foresees that only payments made in favor of employee directors would not be subject to Social Security Contributions.

The criteria utilized on the Advanced Tax Ruling to distinguish employee directors from non-employee directors is the existence of typical characteristics of an employment relation, in the first case, and the non-existence of such characteristics, in the second case. Moreover, in both cases, the participation of the director on the economic risk of the company is not relevant to distinguish the characterization of employee and non-employee directors.

It is important to highlight that the advance rulings issued by the COSIT are binding to the Brazilian Federal Revenue, according to the provision of article 9 of Normative Ruling no. 1,396, from September 16, 2013. However, levy of Social Security Contributions on PSP payments to non-employee directors is still the subject of discussion before the Federal Administrative Tax Court (“CARF”) and before the Brazilian judicial courts.

¹ Law no. 10.101/2000 deals about profit sharing plans.

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