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Unconstitutionality of the Restatement of the PIS and COFINS assessment on Financial Income from Transactions for hedging purposes.

The Law number 10,865/2004 provides that the Executive Authorities could reduce and restore up the tax rates to the percentages of 1.65% and 7.6% of contribution to the PIS/PASEP and COFINS assessed on the financial income.

In the year 2005, on the publishing of the Decree number 5,442, the rates of such Contributions assessed on the financial income, also arising from transactions for hedging purposes, were reduced to zero for legal entities subject to non-accrual assessment regime, although only part of the income is subject to non-accrual, except the interest values on equity.

However, on April 1st, 2015, the Decree number 8,426 was published, that revoked the Decree nº 5,442/05, changing the current scenario, to restore, as of July 1st, 2015, the PIS and COFINS assessment on financial income at 0.65% and 4% rates, respectively.

The assessment of contributions also reaches the financial income arising from hedging operations ("hedge").

The sole purpose of Hedge operations is the protection of the asset price established on the date of conclusion of certain legal transactions whose object is the **exportation of goods,** in view of the use of different currencies in export operation (subject, therefore, to the fluctuation).

There are evident connection between (i) the contract signed between the legal entity in Brazil (exporter) and that purchasing the goods abroad and (ii) the contract signed by the exporter for "hedge" purposes intended to cover the risk that export operation, leading to the assertion that both must be designed as corresponding to an integrated operation (as provided for the CPC 38).

Thus, the **financial income arising from hedging transactions** is considered **revenue directly related to export operations** and therefore **exempt from taxation by contributions** in accordance with article 149, 2nd§ of the Federal Constitution. Such guidance is the one the Supreme Court has followed, by means of decision in the records of the Extraordinary Appeal number 606,107-RS (Rapporteur Minister Rosa Weber), in which the Supreme Court understood that in the assignment of ICMS credits to third parties in the internal market, **originating from export of goods**, PIS and COFINS contributions could not be assessed as it refers to **income related to the export operation.**

Moreover, it should be added that incomes from contracts signed for hedge purposes cannot be deemed as "income" subject to the assessment by the contributions as according to the Constitution (article 149, 2nd§, section I) and the vote by Minister Rosa Weber, income *"can be defined as the financial inflow that integrates the equity on condition of* ***new and positive element*** *without reserves or conditions "*. In this way, the income arising from hedging operations cannot be taken into account separately for taxation purposes but integrated with the operation covered (comparing the gains and losses in each of them). Moreover, law Number 11,051/2004 provides that the calculation basis for such Contributions corresponds to the positive result of operations carried out in future settlement markets (hedge), which implies the illegality of the Decree.

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