

MEMORANDUM TO CLIENTS

12.18.2013

CAT Rule no. 122/2013. Requirements for submitting a letter of guarantee and performance bond.

CAT Rule no. 122, of December 4, 2013, introduced rules on the posting of guarantees in the events of article 21 of the RICMS/SP (State Decree no. 45,490/2000), governing the requirements for presenting a bank letter of guarantee and a performance bond.

The bank letter of guarantee should state:

- The Treasury Office of the State of São Paulo and/or Public Treasury of the State of São Paulo as the beneficiary;
- The corporate name, address and state enrollment numbers and Corporate Taxpayers' Registry (CNPJ) of the taxpayer as the guaranteed party;
- As the purpose and extension of the contract: ensure the performance of the obligations of the guaranteed party as to the payment of tax debts, pursuant to article 3 of CAT Rule 122, dated Dec. 4, 2013:
 - a) whose taxable events have occurred within the guarantee term;
 - b) which have occurred in the same period stated by the taxpayer or collected or assessed by the Tax Authorities;
- As an Enforcement clause of the letter of guarantee: the guaranteeing institution will pay the guarantee within 30 (thirty) days as of the date of notice of occurrence of the tax debt;
- As an address to inform the guaranteed event: name of the legal representative of the guaranteeing institution, responsible department, and full address of the establishment responsible for the payment of the guarantee, necessarily located within the State of São Paulo;
- The term of the guarantee;
- The value of the guarantee;
- Clause of the waiver of the benefit of order provided for in article 827 of Law no. 10,406, dated Jan. 10, 2002 (Brazilian Civil Code).
- Lastly, the guarantee agreement may not contain a specific or generic clause of exemption deriving from acts that are exclusive of the guaranteed party or of the guaranteeing institution, or of both jointly.

The insurance of contractual obligations (performance bond) must state:

- The Treasury Office of the State of São Paulo and/or Public Treasury of the State of São Paulo as the insured contracting party;
- The corporate name, address and state enrollment numbers and Corporate Taxpayers' Registry (CNPJ) of the taxpayer as the beneficiary contracting party;

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- As the purpose and extension of the insurance: ensure the performance of the obligations of the beneficiary contracting party as to the payment of tax debts, pursuant to article 3 of CAT Rule 122, dated Dec. 4, 2013:
 - a) whose taxable events have occurred within the insurance term;
 - b) which have occurred in the same period stated by the taxpayer or collected or assessed by the Tax Authorities;
- As an Enforcement clause of the insurance: The insurer institution will pay the insurance within 30 (thirty) days as of the date of notice of occurrence of the tax debt;
- As an address to inform the guaranteed event: name of the legal representative of the insurer, responsible department, and full address of the establishment responsible for the payment of the indemnification, necessarily located within the State of São Paulo;
- The term of the guarantee;
- The value of the insurance of contractual obligations;
- Clause of the waiver of terms contained in article 763 of Law no. 10,406, dated Jan. 10, 2002 (Brazilian Civil Code) and of article 12 of Law Decree 73, of 1966, with statement, pursuant to the terms set forth in item 4.2 of the general conditions of Annex I to SUSEP Circular 232/2003, of the Superintendence of Private Insurances, that “it is hereby understood and agreed that the insurance will remain in force even when the beneficiary has failed to pay the premium on the agreed to dates”.
- On the other hand, the insurance agreement of contractual obligations may not contain a specific or generic clause of exemption deriving from acts that are exclusive of the beneficiary, of the insurance company, or, as the case may be, of all of them, jointly;
- Furthermore, a certified copy of the letter of prior consent of the reinsurance by a reinsurance company is to be submitted, with express authorization from the inspecting body of insurances in the country, under the law, within 30 (thirty) days as of the date the policy is delivered.
- Lastly, the following is to be submitted:
 - a) Copy of the guarantee contact entered into between the insurance and the reinsurance companies;
 - b) Copies of the counter-guarantee agreements entered into between the insurance and the reinsurance companies;
 - c) Certificate of good standing of the insurance and the reinsurance companies with SUSEP, as well as their respective administrators; and
 - d) Proof of registration of the insurance policy with SUSEP.

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Although this normative act is specifically aimed at the situations in article 21 of the RICMS/SP, the requirements provided for in articles 15 to 16, (*with the due adaptations, in which some requirements may also be legally challenged*) serve as a parameter for the posting of letters of guarantee and insurance guarantees in judicial actions related to tax requirements filed by the State of São Paulo (*in parallel, on a federal level, Rules [Portarias] 644/2009, 1378/2009, and 1.153/2009 of the Attorney General Office of the National Treasury govern the bank letters of guarantee and the performance bond*).

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Team responsible for preparing Memorandum to Clients:

Igor Nascimento de Souza (igor@ssplaw.com.br)

Henrique Philip Schneider (philip@ssplaw.com.br)

Eduardo Pugliese Pincelli (eduardo@ssplaw.com.br)

Cassio Sztokfisz (cassio@ssplaw.com.br)

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

Diogo de Andrade Figueiredo (diogo@ssplaw.com.br)

Flavio Eduardo Carvalho (flavio@ssplaw.com.br)

Rafael Monteiro Barreto (rafael@ssplaw.com.br)

Sidney Kawamura Longo (sidney@ssplaw.com.br)

Rafael Fukuji Watanabe (rwatanabe@ssplaw.com.br)

Rodrigo Tosto Lascala (rodrigo@ssplaw.com.br)

Laura Benini Candido (laura@ssplaw.com.br)

Marina Lee (marina@ssplaw.com.br)

Pedro Lucas Alves Brito (pbrito@ssplaw.com.br)

Viviane Faulhaber Dutra (viviane@ssplaw.com.br)

Tiago Camargo Thomé Maya Monteiro (tiago@ssplaw.com.br)

Flavia Gehlen Frosi (flavia@ssplaw.com.br)

Thiago Brazolin Abdulmassih (thiago@ssplaw.com.br)

Thomas Ampessan Lemos da Silva (thomas@ssplaw.com.br)

Maria Carolina Maldonado Mendonça Kraljevic (mmaldonado@ssplaw.com.br)

Gabriela Barroso Gonzaga Ferreira Porto (gabriela@ssplaw.com.br)

R. CINCINATO BRAGA, 340 • 9º ANDAR • 01333-010 • SÃO PAULO • SP
TEL 55 11 3201 7550 • FAX 55 11 3201 7558

BRASÍLIA SHOPPING • SCN QUADRA 5, BLOCO A • TORRE SUL • 14º ANDAR • SALA 1406 • BRASÍLIA • DF • 70715-900
TEL 55 61 3251 9400 • FAX 55 61 3251 9429

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