

## MEMORANDUM TO CLIENTS

### CARF – STOCK OPTION PLAN

Date **07/12/2013**

The Administrative Council of Tax Appeals – CARF, through its 2<sup>nd</sup> Section and in the last meeting held, judged the first two Stock Option cases, which examined whether the assessment for the non-collection of the social security contribution, pursuant to article 22, III, of Law no. 8,212/91, was correct when considering stock option plans as having a remuneration nature.

In his defense, the taxpayer in both cases claimed that the stock option plan does not have a remuneration nature, since it is included in contract law, presenting an option for and a need of payment when exercising the option right. Moreover, he stated that the plan meets the volunteer condition and market risk, meaning it is not a case of remuneration of employees, but rather a commercial contract.<sup>1</sup>

The National Treasury, however, claimed that the stock option plan has a remuneration nature, as the acquisition has a personal nature and, from the tax authorities' standpoint, that would be merely consideration for the service rendered by an individual taxpayer. In this regard, as it lacks market risk, the plan would be an economic retribution for the work, therefore a deferred remuneration policy.

At the end of the trial, all councilors found that, although the concept of remuneration is a broad one, the legal relationship imposed by the stock option plan is the total opposite of the legal relationship supported by the contributions, that is, it has a commercial nature. However, it is necessary to analyze on a case-by-case basis, considering the specificities of each plan, since the structure of each is based on specific criteria. This means that depending on the form the plan is structured, its commercial nature may be dismissed, turning it into a remuneration plan.

Due to this, some features of the stock option plan were rejected, consequently, granting it a remuneration nature, such as the lack of payment of any amount by the

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<sup>1</sup>According to consolidated case laws of the Superior Court of Labor.

employee at the time of adhesion to the plan, as well as the possibility of an immediate sale of the stocks – which, according to some judges, removes the market risk from the plan.

Furthermore, it can be noted that, along the same line of thought adopted by the judges, the stock option plan, as well as the hiring bonus and profit sharing plan (PRL) theses, require a specific analysis of each case, considering the features of each plan.

Should you have any further questions on the above matter, please feel free to contact us.

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