

MEMORANDUM TO CLIENTS

10.09.2014

FEDERAL SUPREME COURT DETERMINES ICMS [State tax-added value] EXCLUSION FROM CALCULATION BASE OF PIS [Social Integration Program] AND COFINS [Contribution to Social Security Financing] CONTRIBUTIONS

The Federal Supreme Court (STF), when judging the Extraordinary Appeal 240,785, declared this Wednesday, Oct/08, by 7 (seven) votes favorable to taxpayers and 2 (two) opposed, the unconstitutionality of the ICMS inclusion in the bases for calculating the Contribution to PIS and COFINS.

After 15 years from the beginning of the judgment of this proceeding, STF recognizes that the assessment of such contributions on the values that necessarily will be transferred to the States (ICMS) violates the Constitution, as they are no revenue/invoicing of the companies. Although the judgment referred exclusively to ICMS, the same reasoning should be applied to the ISS [Services Tax of Any Kind], which is revenue of Cities other than the companies, therefore, it shall be excluded from the basis of contribution to the PIS and COFINS.¹

It is important to point out that, although the examination of this case has ended, Extraordinary Appeal 574,706 (with General Repercussion recognized²) and the Declaratory Action of Constitutionality number 18 (ADC-18) wait for judgment. Such proceedings can be judged at any time. Perhaps STF therein adjust the effects of unconstitutionality recognition, authorizing that only companies that have filed lawsuit until then are entitled to the refund of past payments.³

Thus, we suggest filing immediately the lawsuit requesting the exclusion of ICMS/ISS in future payment of PIS/COFINS as well as the reimbursement of amounts paid during the five years prior to the filing of the lawsuit. We believe it likely that the two proceedings that are waiting for trial should be assessed rapidly as they are in the interest of the National Treasury to discuss the subject again.

¹ The Judiciary authorities have been recognizing it in low and high courts exactly based on the votes cast in this Extraordinary Appeal 240,785 in favour of the exclusion of the ICMS. STF should analyze this issue, ultimately, at the ruling of the Extraordinary Appeal 592,616.

² Article 543-A and 543-B of Civil Procedural Code. The proceeding being judged in this system, the other bodies of the Judiciary Authorities and the Administrative Council of Tax Appeals of the Ministry of Finance (CARF) shall follow STF understanding.

³ We emphasize that out the ten Ministers currently in Office in STF, five – Rosa Weber, Dias Toffoli, Teori Zavascki, Luís Roberto Barroso and Luiz Fux- will rule on the matter for the first time at the judgment of these two cases, as they were not in court at the beginning of judgment of the RE 240,785. Nevertheless, we believe that the understanding on the unconstitutionality of the assessment should be maintained.

MEMORANDUM TO CLIENTS

10.09.2014

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)

Flavio Eduardo Carvalho (flavio.carvalho@souzaschneider.com.br)

Tiago Camargo Thomé Maya Monteiro (tiago.monteiro@souzaschneider.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

WWW.SOUZASCHNEIDER.COM.BR