

MEMORANDUM TO CLIENTS

09.12.2014

Social Security Contribution On Gross Revenues – CPRB or Replacement Contribution – Indirect Exports

The Federal Constitution, in art. 149, paragraph 2, section I, establishes, peremptorily, that Social Contributions will not be calculated upon revenues generated from exports. Thus, it represents a tax immunity which ensures tax exemption for exports, based on the destination taxation principle, where the consumption of goods and services occurs.

Therefore, according to the tax classification adopted by the Supreme Federal Court (RE 138.284), the type of Social Contribution includes, among others, the so-called Social Security Funding Contributions or Social Security Contributions, regulated separately by art. 195 of CF/88.

For tax immunity purposes provided for in art. 149, paragraph 2, section I, CF/88, there are currently three types of Social Security Contributions calculated upon Revenue and Billing: (i) the PIS, (ii) the COFINS and (iii) the Social Security Contribution on Gross Revenues (“CPRB” or the “Replacement Contribution”).

This last type, was established by arts. 7 and 8 of Law No. 12.546/2010, pursuant to paragraph 13 of art. 195 in CF/88, replacing the Social Security Contribution calculated upon the company’s payroll and any other labor income paid to individuals, within the Brasil Maior (Expanded Brazil) Program.

On the other hand, according to the Constitutional Text, art. 9, section II, paragraph “a”, of the Law No. 12.546/2010, provides that the gross revenue from exports is not part of the calculation base for the Replacement Contribution, and it is important to highlight that this condition in analysis does not restrict its own application to the direct or indirect export modalities.

Furthermore, art. 3, paragraph 1, of IN/RFB No. 1.436/2013, on the pretext of making the scope of Law No. 12.546/2010 explicit, states that the “gross revenue from sales to commercial export companies make up the calculation base for the CPRB.” However according to art. 3, section I, of IN/RFB No. 1.436/2013, only revenues linked to “direct exports” are subject to the tax immunity condition.

While adopting such regulatory provisions, the General Tax Coordination Department within the Brazil Federal Revenue Office (Cosit) issued the Verification Solution Document No. 221/2014, published on 8/26/2014, stating that the revenue generated from sales to legal commercial export entities (indirect exports) cannot be excluded from the calculation bases of the CPRB.

However, that declaration is invalid, according to the principles of legality and the regulation hierarchy, as it is supported by a regulatory provision that imposes a restriction that is not provided for in law formally and materially, that is, due to the lack of a legal validity basis.

In addition and above all, art. 3, paragraph 1, of IN/RFB No. 1.436/2013, goes along with the tax immunity condition for revenue generated through exports, and the application scenario should be guided by the teleological aspect of the Institute. After all, tax immunities are, as a rule, interpreted and applied in order to reach the largest possible number of situations, providing maximum effectiveness of the Constitution.

Along this, the Supreme Federal Court, while reviewing tax immunity standards for export operations, acknowledged that the revenues generated from the assignment of ICMS credits generated from exports

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09.12.2014

are not subject to the PIS and COFINS, based on a teleological interpretation (RE 606.107). Accordingly, the immunity of the revenue generated from positive currency variations linked to exports was ensured, supported by art. 149, paragraph 2, section I, CF/88 (RE 627.815).

It is worth stating that the differentiated tax treatment granted by the Constitution to revenue generated from exports is justified by economic fiscal policy issues, to facilitate international border policies, by stimulating exports, as well as due to the fact that Brazil adopts the international destination operations tax system (which considers the tax exemption of exports in the country of origin and the taxation of goods at the destination country).

Thus, the interpretation, according to the Federal Constitution, of art. 9, section II, paragraph “a”, of Law No. 12.546/2010, establishes that the revenue generated from exports should be excluded from the calculation base for the Replacement Contribution, including those practiced directly and indirectly, by sales operations to legal commercial exporter entities that have not been subject to the PIS, COFINS, ICMS or IPI (in this last case due to a suspension).

We hereby reinforce that indirect exports with sales to legal commercial export entities involve specific purpose export shipments, related to operations that are effectively directed to foreign destinations, and such revenue, therefore, is subject to a tax immunity condition, which cannot be mitigated by Law No. 12.546/2010 (subject to a unconstitutionality penalty) and much less by IN/RFB No. 1.436/2013.

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