

MEMORANDUM TO CLIENTS

BRAZILIAN PRESIDENT STRESSES ARGUMENTS FOR THE UNCONSTITUTIONALITY OF SOCIAL CONTRIBUTION TAX TO FGTS IN CASES OF UNJUSTIFIED DISMISSAL

Date **07/29/2013**

Recently, the Brazilian House of Representatives approved Bill of Law n. 200/2012, from the Senate, which provided for the extinction, after June 2013, of the social contribution tax related with the guarantee fund for working period ("FGTS") levied on unjustified dismissals and that was created by Complimentary Law n. 110/2001¹.

However, on June 25th, 2013, President Dilma Rousseff vetoed the referred Bill of Law under the argument that it would be against the public interest, because it would reduce in R\$ 3 billion/year the FGTS' revenue. In the veto message published in the Official Gazette, the President presented the argument that the approval of the Bill of Law would lead to the reduction of the investments in important social programs and in strategic infrastructure measures, especially in those funded by the FGTS Investment Fund ("FI-FGTS"). Particularly, according to the President, the approval would strongly impact the "*Minha Casa, Minha Vida*" social program, whose beneficiaries are mainly the FGTS account holders.

With such veto, we understand that the arguments for the unconstitutionality of the social contribution tax became even more evident, because the reasoning for the veto presented makes clear that the current function of the social contribution tax is different from the initial one, which was the obtainment of resources to allow the FGTS to make the payments related with the inflation adjustments in its accounts.

It is clear that the objective that initially justified the creation of the social contribution tax has been achieved because its resources are been utilized with another objective (funding of "*Minha Casa, Minha Vida*" social program). However, it is important to note that social contributions are taxes which validity is strictly associated with its legal

¹ Complimentary Law n. 110, of June 29, 2001, created the social contribution tax on the unjustified dismissal of employees, which was due by the employer at a 10% tax rate over the totality of the deposits due, related with the FGTS, during the contract of employment's period and added by the account's applicable remunerations.

It is known that such contribution tax was created due to the necessity of the FGTS to pay off the inflation index differences associated with the economic plans "Verão" and "Collor I" in the employees' accounts, from December 1st, 1988 through February 28th, 1989 and in April 1990, according to the Brazilian Supreme Court's ruling.

objective and, once such objective is achieved, there is no constitutional grounds to sustain the existence of the social contribution anymore.

Although the importance of “*Minha Casa, Minha Vida*” social program is recognized, the fact is that the social contribution is tax that is strictly associated to the objective for which it was created and it cannot be used for any other momentary governmental interests without infringing the principle of legality, as it was a tax that is, by nature, not related to any governmental activity.

Therefore, based on the arguments above, we are of the opinion that the argument for the unconstitutionality of the social contribution created by Complimentary Law n. 110/01 became stronger after the Brazilian Congress has approved Bill of Law n. 200/2012, which provided for the extinction of the social contribution, and with the veto of President Dilma admitting the use of the resources for a different objective. For this reason, we suggest the immediate filing of law suits to avoid the collection of the social contribution, as well as to request the restitution of the amounts wrongfully paid in the last five years².

We remain at your entire disposal since you need any further clarification.

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² We understand that the initial objective of the social contribution was achieved in 2006, when the balance sheets presented by *Caixa Econômica Federal* had already informed that the FGTS had all the resources that had been originally provided as necessary in order to make the payments of the inflation adjustment differences.