

memorandum to clients

02.26.2016

The Brazilian Federal Supreme Court (STF) confirms the constitutionality of the Internal Revenue's direct access to bank transactions of taxpayers without previous court authorization – RE 601314 and ADIns 2390, 2386, 2397 and 2859

On 02/24/2015, the STF concluded the joint Trial of the Extraordinary Appeal (RE) no. 601314 (with recognition of general Repercussion) and the Direct Suits for Unconstitutionality (ADIns) nos. 2390, 2386, 2397 and 2859, and through the majority of votes, decided for the constitutionality of the provisions of Complementary Law (LC) 105/2001 that allows direct access of the internal revenue to the bank information of taxpayers without the need for previous court authorization.

In summary, the understanding that bank secrecy is not of an absolute nature prevailed, so as the bank information is necessary for the activity of inspection for tax collection demanding several rules that require the maintenance of confidentiality of information by tax authorities. Justices Edson Fachin, Dias Toffoli, Roberto Barroso, Teori Zavascki, Rosa Weber, Cármen Lúcia, Luiz Fux, Gilmar Mendes and Ricardo Lewandowski voted for the constitutionality of LC 105/2001. On the other hand, Justices Celso de Mello and Marco Aurélio who stood against that and voted for the unconstitutionality of the “breach of bank secrecy,” without prior judicial authorization.

Upon casting his vote, Justice Marco Aurélio maintained that the position adopted by the plenary creates legal uncertainty, as it is amending the jurisprudence set out by the Supreme Court in 2010. On the similar notion was the position of Justice Celso de Mello, saying that only the judiciary, impartial and equidistant body could authorize the measure, since it is not for the tax authorities, part of the legal relationship, to obtain banking information automatically and without restriction.

Nonetheless, the understanding signed by the Supreme Court at the end of the trial is noteworthy as it can also be applied to other authorities responsible for tax collection in State and Municipal levels. At this point, the Justice Gilmar Mendes stressed the need for states and municipalities follow the “requirements, precautions and procedures necessary for the preservation of confidentiality”, given that breach of confidentiality maintenance may result in criminal and administrative punishment to servers that leak or sell data.

All Justices who stood for the constitutionality of Complementary Law no. 105/2001 highlighted the need for states and municipalities to establish a specific regulation for access to banking data of taxpayers, similar to those parameters established by Decree-Law no. 3.724 / 2001.

Before these considerations, the office Souza, Schneider, Pugliese & Sztokfisz Advogados is available to provide any further clarifications on the matter.



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