

MEMORANDUM TO CLIENTS

10.30.2015

Unconstitutionality of Salary-education contribution and other general social contributions assessed on the payroll after the EC number 33/2001- General Repercussion recognized by the Federal Supreme Court

Until the publication of Constitutional Amendment (“EC”) Number 33, of December 11th, 2001, the so-called general social contributions (Salary-Education, e.g.) and the economic intervention (INCRA, SEBRAE, SESI, SENAI etc.), unlike social security contributions (article 195, FC), lacked the specific constitutional provision on the material / economic bases on elements on which it would be assessed.

In order to remedy such deficiency, EC number 33/2001 included the 2nd paragraph in the article 149¹ of Constitution defining the possible vents of general social contributions assessment and the interference with the economic order. Therefore, since then, all contributions established based on article 149 (as the general social contributions, according to the STF’s (Federal Supreme Court) case law– ADI 447 and RE 396,266 and the STJ – REsp. 933,440) should have their material assessment criterion and calculation basis connected to the provisions indicated in such paragraphs, under penalty of unconstitutionality.

However, in accordance with the governing legislation, the contributions to Salary-Education, INCRA [National Institute of Settlement and Agrarian Reform], SEBRAE [Brazilian Small Enterprise Assistance Service], SESI [Industry Social Service] and SENAI [National Service for Industrial Training] are based on the assessment on payroll. Such magnitude could be elected no longer in view of the materiality included in current wording of mentioned article 149, 2nd § of the Constitution. Therefore, the contribution legislation was repealed by EC Number 33/2001, this is no longer compatible (supervening material unconstitutionality – consult ADI 438-STF).

The Supreme Court will discuss the issue, with general recognized repercussion in RE 603,624 (Minister Ellen Gracie, currently reported by Minister Rosa Weber).

In fact, the former Minister Ellen Gracie, in RE 559,937, decided the following regarding the concrete effects of the article 149, 2nd §, reinforcing the supervening unconstitutionality of general and intervention social contributions assessed on payroll.

The wording of article 149, 2nd §, III, a, of the Constitution, therefore, limiting the taxation on invoicing, the gross income and the operation value, the customs value for import had the effect of preventing the contributions spreading on calculation bases that

¹ Article 149. Federal Government is exclusively liable for establishing the social contributions, interference with the economic order and of interest of the professional or economic categories, as an instrument of its performance in the respective areas, subject to the provisions of articles 146, III, and 150, I and III notwithstanding the provisions of article 195, 6th §, concerning the contributions referred to by the provision.

2nd§ The social contributions and interference with the economic order provided for the heading of this article: (Included by Constitutional Amendment number 33, of 2001)

I- it shall not be assessed on revenue arising from export; (Included by Constitutional Amendment Number 33, 2001)

II- it shall be assessed also on the import of foreign products or services; (Wording by Constitutional Amendment number 42, of 12.19.2003)

III - The rates should be: (Included by Constitutional Amendment number 33, of 2001)

a) ad valorem, based on the invoicing, gross revenues or the operation value, the customs value for the import (Included by Constitutional Amendment Number 33 of 2001)

b), specific based on the measure unit adopted. (Included by Constitutional Amendment number 33, of 2001)

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that were not provided for, thus avoiding unexpected and adverse extra fiscal effects that could arise from the possible burden of the payroll. This base was reserved to funding the social security (article 195, I, a), other than establishing other social and intervention contributions. On exemption line of payroll, however, came EC 42/03, adding to 13th § to the article 195 of the Constitution, in order to support regarding the funding of social security that the contribution on payroll shall be replaced gradually by the contribution on the revenue or invoicing.

We are available for any clarification deemed necessary as well as to sponsor the lawsuit to remove the collection of general and intervention social contributions levied on payroll even after the EC number 33/2001.

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