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Provisional Measure no. 627/2013 – Unconstitutional change to the tax basis of PIS/PASEP and COFINS

Provisional Measure no. 627, published on Nov. 11, 2013 ("MP no. 627/2013"), brought considerable changes to the tax legislation. One of them is provided for in its article 2, which amended article 12 of Law Decree no. 1,598/77, presenting a new concept for gross revenue, which previously comprised only of the "proceeds of the sale of goods in own-account transactions and the price of the rendered services", and started to include, as well, the results earned in third-party account transactions, in addition to other revenues deriving from the activity or principal object of legal entities.

It also determined the inclusion in the gross revenue of the taxes levied thereon, including PIS/PASEP and COFINS, pursuant to paragraph 5 , added to the mentioned article 12 of the Law Decree. Due to this determination, there will be an unconstitutional extension of the tax basis of PIS and COFINS , since the concept of revenue, according to Finance Science and to case laws of the Federal Supreme Court ("STF"), does not allow this extension, namely the inclusion in the gross revenue of the taxes levied thereon.

The accounting concept of revenue, according to the Institute of Independent Auditors of Brazil – Ibracon is "(…) the gross entry of economic benefits during the period occurring within the course of the ordinary activities of a company, when such entries result in an increase of net worth, excluding those deriving from contributions of owners, stockholders, or shareholders" (NPC – 14). As to Resolution 1,187, of Aug. 28, 2009, of the Federal Council of Accounting, it approved NBC T 19.30, which in turn defines revenue as the "gross entry of economic benefits during the period arising from ordinary activities of the entity, resulting in the increase of its net worth, except for the contributions of the owners".

As taxes levied on the revenue clearly do not imply equity increase, nor do they exercise any positive effect on the equity, but a negative one, it is unmistakable that the inclusion of taxes in the gross revenue violates the constitutional concept of "revenue".

In a way, this was the position of the majority of Justices of the STF in the trial of Extraordinary Appeal 240.785 , which discussed the constitutionality of the inclusion of the ICMS tax in the COFINS' basis. The inclusion of ICMS in the tax basis of the COFINS was considered unconstitutional, since the tax basis of this Contribution corresponds only to the sum of the amounts obtained in sale or service rendering transactions, that is, on the wealth earned with the performance of the transaction, excluding ICMS, which is a tax burden, an expense, and not revenue.

[1] § 5. The taxes levied on the gross revenue and the sum deriving from the adjustment to the present value –dealt with in item VIII of the heading of article 183 of Law no. 6,404, of 1976– of the transactions provided for in the heading, subject to the provisions in § 4– are included in the gross revenue."
[2] Articles 49, 51, and 52 of MP no. 627/13 amended provisions in Laws nos. 9,718/88, 10,637/01, and 10,833/02, respectively, determining the application of this extended revenue concept to the contributions to PIS/PASEP and COFINS, both cumulative and non-cumulative.
[3] Trial not ended yet.

Therefore, **the unconstitutionality of the inclusion of the Contribution to PIS/PASEP and COFINS in their own tax basis is clear, as it violates the constitutional concept of revenue provided for in article 195, I, "b", of the Constitution,** for which reason we suggest the filing of judicial claims in order to rule out this demand.

It should be pointed out that the term known as inner calculation is authorized by the Constitution for ICMS only and solely, pursuant to article 155, § 2, XII, "i", of the Contributions, and there is no provision for PIS/PASEP and COFINS, which strengthens the argument of unconstitutionality of the inclusion of these contributions in their own tax basis.

Lastly, it is worth stating that for the taxpayers subjecting to the irreversible option provided for in article 71 of MP no. 627/2013, the increase of the tax basis of the Contribution to PIS/PASEP and COFINS will already take place as of January 1, 2014, which violates the rule contained in article 150, III, "c", of the Constitution, which determines that the 90-day term between the collection of taxes and the "date on which the law that created or increased them was published" be followed.

For us, it is clear that the inclusion of PIS/PASEP and COFINS themselves into their tax basis (inner calculation) implies a tax increase, through the increase of the tax basis, and the rule in article 150, III, "c", of the Constitution is to be followed.

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