

# MEMORANDUM TO CLIENTS

02.04.2014

## **Court decision recognized the invalidity of the additional 10% charge of the FGTS since 2007.**

The 4th Judiciary Section of the Federal District rendered the first favorable decision to taxpayers with regard to the invalidity of the Social Contribution created by article 1 of Complementary Law 110/01, levied in cases of employee termination without cause, due by the employer and calculated at a 10% rate on the total sum of deposits relative to the Unemployment Compensation Fund – FGTS made during the term of the employment agreement.

The decision, rendered in a proceeding handled by our Firm, evidences the invalidity of the tax since 2007, owing to the exhaustion and change of purpose of the Contribution, which has always been to recover the accounts tied to the FGTS due to inflation-adjustment losses from the Collor and Verão (Summer) Economic Plans. This argument was also corroborated by several positions of the Executive and Legislative Branches informing of the use of the amounts for government plans, such the housing plan “Minha Casa, Minha Vida” (My House, My Life).

Although this is the first decision on the matter, it reaffirms the position already adopted in injunctions in other 4 (four) cases handled by our Firm, also recognizing the exhaustion and change of purpose of the Contribution. It should be pointed out, however, that the decision is broader in scope, since not only does it rule out the collections on future terminations, but it also recognizes the invalidity of the payments since 2007, authorizing the refund of the unduly collected amounts since then.

Therefore, mainly with regard to the possibility of refund of the payments made in the 5 (five) years prior to the filing of the claim, we recommend the filing of actions for each taxpayer, despite the 3 (three) Direct Actions for the Declaration of Unconstitutionality currently in progress with the Federal Supreme Court<sup>1</sup>.

Should you require any further information on the above, please feel free to contact us.

<sup>1</sup>This is justified for three reasons: (i) although the rapporteur, Justice Roberto Barroso, had granted the actions, he rejected the provisional remedy to suspend the application of article 1 of LC n. 110/01; (ii) at the time of the trial on the merits, which should take many years, the STF may adjust the effects of its decision, limiting the right to a refund only to taxpayers with judicial actions in progress; and (iii) two of the ADIs have not sought the declaration of unconstitutionality since 2007.

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