07.24.2015

Provisional Measure n. 685/2015

The Provisional Measure n. 685/2015 ("MP n. 685/2015"), published in the July 22, 2015 edition of the Federal Official Gazette ("DOU"), establishes, among other provisions, the Reducing Tax Litigation Program ("PROLERIT") and the obligation for taxpayers to report to the Federal Revenue Service ("RFB") any information regarding tax planning involving their company.

I – PRORELIT

The PROLERIT allows taxpayers to pay off their federal taxes expired until June 30, 2015, which are still on litigation in administrative or judicial courts, through the cash payment of at least 43% of the amount due and the remainder by the utilization of credits of tax loss and negative tax base – related to Corporate Income Tax ("IRPJ") and the Social Contribution on Net Income ("CSLL"), respectively – accrued until December 31,2013 and declared to RFB until June 30, 2015.

According to the MP n. 685/2015, the tax losses and the negative tax base can be used between related companies (controlling and controlled, directly or indirectly) and even between companies subordinated to the same controller (directly or indirectly) in December 31, 2014, as long as they keep this status until their adhesion to PROLERIT.

Furthermore, the mentioned tax losses and the negative tax base can be shared between the taxpayer company and a tax responsible or co-responsible in litigation in administrative or judicial courts.

The deadline to subscribe the program is **September 30, 2015.**

In accordance with the new rule, the subscription of the program extinguishes the tax debits until its posterior ratification by RFB. The Tax Authorities have 5 years to ratify the taxpayer act, otherwise it would be considered tacitly ratified. This provision of the MP n. 685/2015 can be discussed by the taxpayers, since the RFB has only 5 years to review the tax losses and the negative tax base.

In the text of the rule, it highlights the impossibility of appropriating PROLERIT for tax debits previously included in other installment taxes programs, even if they are canceled.

In conclusion, this is a good opportunity to liquidate taxes under litigation, mainly for companies that have higher values of taxes losses or negative taxes bases than they can consume on regular operation.

II – Obligation to Report over Tax Planning

Another relevant point treated by the MP n. 685/2015 refers to the institution of the obligation for taxpayers to report to RFB, until the September 30th of the following year, all the operations which implicate tax suppression, reduction or deferral, due to:

(i) Acts or Juristic Acts that do not have another reason but the tax advantage reached; or

(ii) An operation proceeded on unusual form, by the use of Indirect Juristic Acts or Atypical

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Contracts; or

(iii) An Juristic Act specified by the RFB.

It is important to mention that, as this rule is already on enforcement, the companies must analyze if their operations must be declared to Brazilian Tax Authorities. It is recommended to analyze the operations one by one, especially the ones related to the items (i) and (ii) above.

According to the new rule, if the RFB does not ratify, for tax purpose, the acts declared by the taxpayers, the company will be charged to collect the taxes due regarding the operations of the taxpayers, unless it is already under inspection procedure.

In case of declaration of acts not carried yet in the moment of the declaration, this situation will be treated as a tax consultation procedure.

Moreover, the non-declaration of acts listed above, the declaration by the wrong passive subject of tax liability, the omission of essential information related to the act, the fraudulent misrepresentation or declaration, the fraudulent interposition of subjects, characterize as an intentional omission for the purpose of evasion or fraud, thus, giving rise for the imposition of a 150% fine on the taxes on charge increased by interest.

Regarding the 150% fee, it seems that the MP n. 685/2015 instituted the possibility for the RFB to set up presumption of fraud intention, even when there is no declaration, that could even reflect for criminal purposes, entailing the possibility of questioning by the taxpayers – chiefly by the superficiality of the normative provision that lists the operations which must be reported.

Another important point for discussion by the taxpayers is what appears to be a disruption of purpose and motivation – disregarding of Purpose and Motivation Principles –, in view of the inexistence, until this moment, of a general rule for tax avoidance or a rule to support this imposition to declare operations. Indeed, there is no rule in Brazilian legal system that allow the Tax Authorities to discredit the juristic acts.

Further, the use of the normative form of provisional measure requires a situation of exceptional relevance and urgency, according to the article 62 of the Constitution Act, which was not observed by the MP n. 685/2015.

At last, the rules set forth on the MP n. 685/2015 will still be regulated, with regard to both the acts and legal transactions which must necessarily be reported to the Tax Authorities and the form, term and other conditions of presentation of the declaration.

Only when this regulation arises it will be possible to measure the real extension of the obligation to report operations, especially about the necessity to declare on September 30th of the current year reporting past events, since de MP n. 685/2015 is already in force.

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

07.24.2015

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