

MEMORANDUM TO CLIENTS

09.10.2015

COSIT Normative Opinion no. 2/2015

Normative Opinion no. 2, of the General Taxation Coordination (“COSIT”) was published on September 1, standardizing the position and procedures of the Federal Revenue Office of Brazil (“RFB”) relative to requests for refunds, reimbursements, and statements of offsetting performed through the PER/DCOMP (Electronic Request for Refund or Reimbursement and Offsetting Statement), dealing with tax credits that were unduly or erroneously informed in Federal Tax Credits and Debits Statements (“DCTF”).

The Normative Opinion addresses the treatment to be given to the DCTFs that were rectified after the transmission of the PER/DCOMP or of its analysis by the RFB, as well as its impact on administrative proceedings whose subject matter are the PER/DCOMP based on the rectified DCTFs and on the reduction of litigation prompted by contrasting information contained in accessory bookkeeping obligations.

Initially, COSIT recognizes that there is no impediment for the taxpayer to rectify the DCTF after having filed the PER/DCOMP, which uses as credit the payment fully allocated in the original DCTF, even after the rejection of the request for refund or the non-ratification of the offsetting. COSIT establishes as limits to the rectifications only the restrictions imposed by RFB Normative Rule no. 1.110/2010 (“IN RFB no. 1.110/2010”), among which the timely limitations for rectification.

The Normative Opinion further establishes the need to rectify the DCTF for the recognition of the credit sought in the PER/DCOMP, but claims that the rectification of the DCTF will not necessarily be sufficient to grant the intended credit, and the tax or judgment authorities, when analyzing the case in question, may request the proof of the credit, stated in the PER/DCOMP through other evidence elements. COSIT also clarifies that the lack of DCTF rectification by the tax debtor prevented to do so, as a result of any restriction contained in the mentioned IN RFB no. 1.110/2010, does not prevent that the credit informed in the PER/DCOMP, and not yet elapsed, be proven by other means.

COSIT also expressed on the procedure to be adopted in relation to the DCTF transmitted after the decisions that dismissed the PER or did not ratify the DCOMP. In its view, upon the rectification of the DCTF after the decision and upon the filing of a timely statement of discontentment against the dismissal of the PER or the non-ratification of the DCOMP, the relevant Federal Revenue Judgment Office (“DRJ”) may retrieve the administrative proceeding with the Federal Revenue Office (“DRF”) of the taxpayer’s domicile and jurisdiction, so it can examine the factual matters (and only them) involved in the credit analysis. In this case, if the matter involves a factual error (remedied through the DCTF rectification), and the review of the decision implies the full approval or full ratification of the DCOMP, the DRF is then to do so and review the decision, thus ending the proceeding. In case there is a legal matter to be decided or in case the review is partial, the proceeding should return to the DRJ so that the administrative judgment body may rule on the matter.

Along the same lines, COSIT determines that, in cases in which the rectification of the DCTF is suspended, pursuant to article 9-A of IN RFB no. 1,110/2010, and ratification is required by the RFB, the result of the procedure to validate the DCTF rectification should affect the tax administrative proceeding discussing the rejection of the PER or the non-ratification of the DCOMP based on such DCTF. In its view, if the rectification is not ratified and an appeal is filed against this decision by the taxpayer, the administrative proceeding deriving from this appeal is to be attached to the records of the administrative proceeding whose subject matter is the PER/DCOMP. In case there is no appeal against the non-ratification of the DCTF rectification,

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the DRF will inform the DRJ of the outcome of the proceeding, so that the latter may examine the statement of discontentment filed by the taxpayer. In the event the DCTF rectification is accepted, the proceeding discussing the PER/DCOMP based thereon should be retrieved from the DRF in order to have the decision reviewed and the case ended.

Taking into account COSIT's position stated in the mentioned Normative Opinion no. 02/2015, we believe that, upon the verification of the error in the information stated in the DCTF that supports the PER/DCOMP, the rectification of the DCTF should be performed whenever possible and preferably prior to the filing of the PER/DCOMP. In case the decision has already been issued, it is imperative that the DCTF be rectified during the proceeding in order to avoid being challenged by the judging authorities.

We do not disregard, however, the possibility of supporting, based on the rules governing the tax administrative proceeding and its informing principles, as well as on the case laws of the Administrative Council of Tax Appeals ("CARF"), the inexistence of an obligation to rectify the DCTF for the recognition of credit rights.

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