Tax Bulletin

29

The Sao Paulo Tax Court

Specific tax report n° 29 • Year VI • February 2015

Dear Sirs:

The purpose of the publication of **Tax Bulletin # Tax and Fee Court of the State of São Paulo** is to update our clients and interested parties on the main issues being discussed and decided in this court ("TIT/SP").

In this 29th edition of our newsletter, we will comment on topics relative to (i) the right to exemption provided for in ICMS Agreement no. 03/2007, despite the requirements in CAT Rule no. 38/2007 are not fully complied with, as this non-statutory normative rule may not prevail over the Agreement approved by the National Council of Treasury Policy ("Confaz"); (ii) the application of the immunity of article 150, item VI, letter "d", of the Federal Constitution, on transactions with electronic books; (iii) the invalidity of the requirement to complement ICMS-ST values due on account of the tax substitution, in case the taxable event practiced by the substituted party has a value superior to that of the presumed taxable event; and (iv) the position of the Tax and Fee Court is for the charge of the ICMS on indirect exports, in cases in which there is the participation of more than two intervening parties.

Click over the topics below to directly access each text:

Souza, Schneider, Pugliese e Sztokfisz Advogados law firm is available to its clients should they have any questions on the above matters.

Enjoy your reading!

SOUZA, SCHNEIDER, PUGLIESE e SZTOKFISZ ADVOGADOS

ICMS – OPERATION TAXED AS IF NOT TAXED – EXEMPTION – SALE OF VEHICLES TO THE DISABLED – CAT RULE 38/2007 EXCEEDS ICMS AGREEMENT 03/2007

This is a Tax Assessment Notice with the collection of ICMS amounts related to tax invoices of taxed operations declared as not taxed, in sales of vehicles to disabled domiciled in other States. In this case, the authorization issued by the Tax Authorities of the State of São Paulo was not submitted, pursuant to CAT Rule no. 37/2007.

This provision establishes that the interested party, domiciled in another State and seeking to acquire a vehicle from a manufacturer situated in the State of São Paulo, must obtain authorization in order to enjoy the benefit before the authority of its State and submit it to the São Paulo Tax Authorities, which will issue a new authorization.

In its defense, the taxpayer claimed that the assessment violates the principle of legality, since the government cannot impose or prohibit the taxpayer from any behavior, unless there is a law that previously determines this. Furthermore, the exemption granted to the disabled, enabling the acquisition of vehicles with the corresponding price reduction, was granted by a Confaz Agreement, which was ratified, without reservations, by the State of São Paulo.

Initially, the Rapporteur of the Ordinary Appeal partially granted it, only in order to rule out the late payment interest charge, viewing that the taxpayer is correct as to the claim that it is the State's duty to impose an interest rate at the same level as SELIC's Rate.

Upon the interruption of the trial due to a request to examine the case records, a dissenting opinion was included in order to grant the Ordinary Appeal. The reason is that the judge examining the case records viewed that the assessment filed on the grounds of lack of ICMS payment was not correct when, in fact, the Taxpayer had allegedly failed to comply with his accessory bookkeeping obligations, and the Executive Branch had exceeded its powers.

From this standpoint, the reviewing vote recognized that the ICMS Agreement 03/2007 tied the ICMS exemption - as to the State of origin of the vehicle - to the recognition of the exemption through an authorization issued by the State of domicile of the benefitted party, without conditioning its enjoyment to any other elements, not even those brought by CAT Rule 37/2007, enacted later, which established additional requirements to those determined by ICMS Agreement 03/2007.

As to legislative interpretation, the reviewing vote ruled according to the principle of hierarchy of laws leis, repelling the conditioning of the full effectiveness of ICMS Agreement 03/2007 to the new impositions brought by a hierarchically inferior rule, as is the case of CAT Rule 37/2007.

In this regard, the reviewing vote recognized that the ICMS Agreement ratified by a State Decree should prevail over a hierarchically inferior rule. From a territorial jurisdiction standpoint, the reviewing vote concluded that only the relevant authority could enact control rules, that is, only the Tax Authorities where the acquirer of the vehicle is domiciled, and not the São Paulo Tax Authorities.

Due to such arguments, the Rapporteur reformed the vote originally rendered, in order to follow the

reviewing vote and thus fully grant the Taxpayer's Ordinary Appeal.

ICMS – INTERPRETATION OF THE IMMUNITY PROVIDED FOR IN ARTICLE 150, VI, "D" OF THE CF – ELECTRONIC BOOK

This is a Tax Assessment Notice and Fine Charge issued due to the accusation of alleged lack of ICMS payment on the trade of a product named "Barsa Linguaphone", which, according to the Tax Authorities, is not contemplated by the constitutional immunity of books, newspapers or journals, as it is an electronic book (audio and video cassette tapes, CD-ROM and paper cases).

In an Ordinary Appeal, it was decided that the constitutional immunity of books, newspapers or journals should be extended to electronic books, and should be interpreted as generic, adopting an expanded interpretation, since the legislator may not limit the scope of the Constitution.

Dissatisfied, the Public Treasury then filed a Special Appeal against the decision that had granted the Ordinary Appeal.

In the trial of the Superior Chamber, the Rapporteur heard the Treasury's appeal and, as to the merits, ruled in favor of the Public Treasury, restoring the Tax Authorities' accusation, arguing that the interpretation of tax immunity rules must be restrictive under article 111 of the National Tax Code – CTN.

Moreover, the Rapporteur added that the immunity only applies to books, newspapers and journals, i.e., it does not apply to other communication processes that do not involve paper, as affirmed in the Reply to Tax Inquiry no. 651/96, and in decisions of the Federal Supreme Court (Extraordinary Appeals nos. 450.441/SP and 273.308/SP).

In an opposite direction, a reviewing vote was rendered defending the current denominated "extensive", since the immunity rule provided for in the constitutional text aims at the spread of the free access to culture and information, according to the following: "The immunity of article 150, VI, "d" of the CF is much broader in scope than the interpretation given by the Public Treasury to the rule, since by understanding otherwise would render the protection contained in the mentioned rule meaningless, whose ultimate purpose is to protect and promote the free expression of thoughts and of the intellectual, artistic, scientific or of communication activities ".

By majority vote, the position of the reviewing vote won, in order to hear the Special Appeal of the Treasury, though to dismiss it, upholding the appealed decision.

ICMS - COMPLEMENT TO ICMS-ST – VIOLATION OF PRINCIPLE OF LEGALITY – PROVISIONS IN THE REGULATING DECREE

This is a Tax Assessment Notice and Fine Charge issued based on article 265 of the ICMS Regulation of São Paulo and on article 8 of Complementary Law no. 87/1996, from the accusation of an alleged lack of ICMS payment relative to the requirement to complement the tax due on transactions with products subject to the tax substitution system, when the price practiced by the substituted party was superior to the tax

basis value used for the withholding by the tax substitute party.

In his defense, the taxpayer claimed (i) nullity of the tax assessment for not having been subjected to the "Quality Control"; (ii) that the requirement for ICMS-ST complements violates the principle of legality, for the fact there is no law, but rather only a Regulating Decree in this sense; (iii) and that, although the amount collected in the GIAS does not match the Permanent Method Statement, there is no loss to the Tax Authorities, as this is a freight ICMS-ST, not subject matter of the assessment. Despite such arguments, the first instance court granted the tax assessment.

An Ordinary Appeal was filed reiterating all the defense arguments, especially in order to repeat that article 66-B of Law no. 6,374/1989 is not about the charge of ICMS collective in advance by tax substitution and at no time does the mentioned rule create the requirement for an ICMS-ST complement.

Nevertheless, these arguments were not accepted by the Rapporteur judge, who fully upheld the AIIM, claiming that: (i) the "Quality Control" is the guarantee for the Tax Authorities and for the taxpayer, however, if the formal and minimum validity requirements of the assessment are present, there is no nullity, in the event of its absence; (ii) article 66-B provides for the reimbursement of the tax paid in cases in which the final transaction was performed in an amount lower than the one used in the tax basis for the collection of the tax substitution, as a logical and analogical result, in cases in which the final practiced amount is superior to the tax basis. The taxpayer is to collect the complement; (iii) the taxpayer himself declares that the amounts stated in the GIA, refer to the tax substitution collection for acquired transport services, therefore, there is no relation with the ICMS-ST due in accordance with CAT Rule 17/99. Thus, the ICMS-ST was not collected, justifying the formation of the tax credit; and (iv) article 265 of the RICMS/SP, approved by Decree no. 45,490/2000, specifically deals with the complement required by article 66-C of Law no. 6,374/1989, which sets a rule as to the taxpayer's supplementary liability for the full settlement of the tax credit, in cases of tax liability by substitution, based on the legality brought by article 8 of Complementary Law no. 87/1996.

An opinion was rendered otherwise, stating that article 8 of Complementary Law 87/1996 lacks legal grounds for the Treasury to require the ICMS complement in the tax substitution as set forth in article 265 of the ICMS Regulation of São Paulo. Article 8 of Complementary Law no. 87/1996 only set the parameters for choosing the tax basis of the presumed taxable event, establishing criteria to move closer to the effectively practiced taxable event.

Lastly, it was concluded that the existence of a tax substitution system depends on the previous enactment of a state law that respects the rules of superior hierarchy, as is the case of Complementary Law no. 87/1996. For this reason, in the current scenario, the State of São Paulo may not require ICMS-ST complements when the transaction made by the substituted taxpayer is of a higher amount than that of the presumed taxable event, due to the principle of legality (pursuant to article 5, item II, and to article 150, item I, both from the Federal Constitution).

Along these lines, the reviewing vote presented the position of the Federal Supreme Court adopted in the trial of Direct Unconstitutionality Action no. 1,851, in the tax substitution system created based on article 150, § 7, of the Federal Constitution: "the presumed taxable event, for this reason, is not provisory, but definitive, and does not lead to the refund or complement of the paid tax, other than in the first case, in the event it is not performed."

By majority vote, the reviewing vote prevailed, and the Ordinary Appeal filed by the Taxpayer was granted in order to fully cancel the Tax Assessment Notice.

ICMS – INDIRECT EXPORT ALLOW TWO INTERVENING PARTIES – DIRECT REMITTANCE WITH SPECIFIC EXPORT PURPOSES

This is a Tax Assessment Notice and Fine Charge issued due to the accusation of alleged lack of ICMS payment relative to remittance transactions with specific export purposes (indirect export). According to the tax auditors, the submitted documents showed that only part of the goods shipped with specific export purposes was effectively exported, while the other part was reintroduced in the domestic market to be sent abroad.

The Tax Assessment Notice was issued against the company that sold sugarcane byproducts to other companies for export. The acquiring companies, however, shipped the goods to third parties, who traded them abroad.

In an Ordinary Appeal, the 15th Judgment Chamber ruled that there is no legal impediment for the goods to circulate more than once before being exported, provided that the connection between the goods shipped for specific export purposes, those sold for the same purpose, and the exported goods is effectively proven. None of the goods remained in the domestic market, and the purpose of the legal provision was to release the export, for the immunity purpose provided for in article 155, §2, item X, letter "a", of the Federal Constitution.

The State Treasury then filed a Special Appeal under the claim that indirect export does not accept the intervention of three agents, only two (the sender of the goods and the company that effectively exports them), and that there is an ICMS charge when the export is carried out through a third party, based on ICMS Agreement 113/96 and on articles 439 to 446 of the ICMS Regulation of São Paulo, as well as on Response to Inquiry no. 308/2002.

In the trial of the Superior Chamber, the Rapporteur heard the Treasury's appeal and favored it on the merits, restoring the accusation of the tax auditors, under the argument that there was no indirect export, and the tax was consequently due, since there was an internal sale, and, thereafter, a second transaction, disconnected from the first, which resulted in the actual export of the goods.

In an opposite direction, a reviewing vote was rendered ruling that: "There is no legal impediment for the acquirers of the goods with specific export purposes, characterized as trading companies, to ship these goods to other trading companies as well, in order to complete the respective exports."

According to the reviewing vote, if the liability of the seller for changing purposes was accepted, following the Rapporteur's position, he should be given the right to withhold the ICMS or not, for assuming the risk of third parties.

For a small difference in votes, the position of the Rapporteur prevailed, in order to hear and grant the Special Treasury.

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