

THE SAO PAULO TAX COURT

Specific tax report n° 30 • Year VI • June 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 30th edition of our newsletter, we comment on (i) the invalidity of the inclusion of a financial institution as jointly and severally liable in the Notice of Violation and Imposition of Penalty related to purported taxable events practiced by third parties (account holders) and (ii) the conflict of tax competencies, related to ISS and ICMS taxation on magnetic cards customized with “microchip” and the non-requirement of state tax.

Click over the topics below to directly access each text:

[ICMS – Lack of Tax Payment determined by Tax Ascertainment –Jointly And Severally Liable Taxpaying – Financial Institution](#)

[ICMS x ICMS – Magnetic Cards Customized with “Microchip” – Conflict of Tax Competencies](#)

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!

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ICMS – LACK OF PAYMENT OF THE TAX DETERMINED BY FISCAL ASCERTAINMENT –JOINTLY AND SEVERALLY LIABLE TAXPAYING – FINANCIAL INSTITUTION

It's a Special Appeal, filed by the jointly and severally liable party (joint liability), against the decision which kept it subject to the fiscal requirement. The tax accusation derives from alleged lack of ICMS payment, determined through tax ascertainment, with natural persons and the financial institution in which the taxpayer held an account being entered as jointly and severally liable taxpayers.

The financial institution filed the Special Appeal in order to have its joint taxpaying disregarded, due to the inexistence of common interest in the generating facts of the alleged tax obligations, as well as for the inexistence of proofs of its participation in the circumstances leading to the alleged lack of tax payment.

A vote was rendered by the Reporting Judge dismissing the appeal, based on the fact that the joint liability foreseen by State Law n.6.374/89 is not limited to the legal entity neither to the taxpayer of such tax, conclusively stating that the financial institution would have contributed to the non collection of such tax.

Then, the case records were requested, which resulted in a divergent vote that, by delimiting the core of the debate – application of the jointly responsibility precept –, enabled the Special Appeal for understanding that the São Paulo State Tax Authority has no competence to elect as taxable each every taxpayer, whether natural person or legal entity, which is part of a contractual relation that is established. In short, the dissenting vote sustained the impossibility for the ICMS legislation, including its punitive side, to reach the non taxpayer of such tax.

The express understanding gave rise to a new divergence, this time not about the merit, as the understanding is for the disregard of joint responsibility ascribed to the banking institution, but solely about the foundations, in order to document the possibility of tax liability of ICMS non taxpayers, to be determined on a case by case basis (which proved not to be valid in the case then judged).

It was under this divergence that the Higher Court, except for the Reporting Judge, ruled totally valid the Special Appeal of the Financial Institution, excluding it as defendant in the tax deficiency notice.

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ICMS x ICMS – MAGNETIC CARDS CUSTOMIZED WITH “MICROCHIP” – CONFLICT OF TAX COMPETENCIES

The official notification was evidenced by the alleged lack of invoices issuance considering the delivery of magnetic cards with “microchip” (“smart cards”), manufactured and supplied by a services rendering legal entity, with the collection of ICMS added to penalty and interest on arrears. The clients, in this case the financial institutions, were qualified as jointly and severally liable, due to the alleged common interest in the taxable event and alleged participation in the fact that gave rise to the lack of tax collection.

The case refers to the services rendering of magnetic cards customization and enveloping on demand. Such activity consists of rendering customized graphic services of composition and printing, subject to ISS levy. The São Paulo State Tax authorities, by their turn, understand that it is an operation of circulation of goods, taxable by the State tax.

On Ordinary Appeal, it was acknowledged that the cards are customized and destined to a specific objective: So that the registered client of financial institutions may carry out banking operations. In addition, the objective of the financial institution is not the purchase of a new good; in fact, the business transaction is of services rendering nature.

Therefore, the overriding activity is the services rendering, on which no ICMS is levied: The financial institutions are clients of services subject to ISS, according to Abstract 156 of the High Court of Justice (“The rendering of services of graphic composition, customized and on demand, even when including goods supply, is subject solely to ISS.”), whose rationale is applied to the case analyzed, despite the technological advances.

It was acknowledged that a contract was executed for the customization of plastic cards from a data file, so that the consumables were originally supplied by the financial institution; on the other hand, the insertion of a microprocessor does not change the nature and purpose of the card, of a customized product produced on demand.

The insertion of a “microchip” in the cards, containing data of the financial institutions’ clients, does not turn them into goods, even because there is no inclusion of such goods into a trading cycle. Its cost, if passed on, is indirectly done, the reason why it is not disregarded the idea of services rendering in a single step: client and provider.

So, a decision was made to rule valid the Ordinary Appeal of taxpayers, as well as the resulting cancellation of the tax deficiency notice.

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