# tax bulletin

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Dear Readers:

The Tax Bulletin aims to update our clients and other interested parties on the major issues being discussed and decided within the Judiciary, Legislative and Executive level.

In this 92th edition, we address 13 different issues related to Jurisprudence, Regulations and Consultation Solutions.

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## Jurisprudence





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Schneider, Pugliese, Sztokfisz, Figueiredo e Carvalho Advogados law firm is at the disposal of our clients to clarify any questions about the issues addressed in this publication.
We wish you a good reading!



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**STF – Collection of Technical Responsibility Note falling upon engineering, architecture and agronomy services upheld**

On 10/19/2016, the Federal Supreme Court ("STF") Plenary, when considering the Extraordinary Appeals ("REs") 838.284/SC and 704.292/PR, in the course of general repercussion and under decision of the Reporting Justice Dias Toffoli, decided, by majority decision, to maintain the method for charging Technical Responsibility Note ("ART") falling upon engineering, architecture and agronomy services.

According to the Reporting Justice, Law No. 6.994/1982, when providing form maximum limits for ART, has not breached the principle of tax legality, therefore allowing the establishment of professional council of engineering, architecture and agronomy areas within the parameter set forth by such law. Moreover, the Plenary decided not to modulate the effects of such decision, i.e., the aforementioned Law is valid since entering into force.

Justices with dissenting opinion were Marco Aurélio and Ricardo Lewandowski, which deemed there was a breach of the strict legality principle, which occasions non-enforceability of such taxation.

Therefore, the following thesis has been established by the STF: "The law that, upon prescription of the ceiling, allows a non-statutory normative act to reasonably set the fee in line with the State operation costs, being that such amount cannot be restated by means of act of the supervision council at percentages that exceed the monetary correction indexes as legally provided, does not breach tax legality".

**STF - Constitutionality of restitution of ICMS (Tax on Circulation of Goods and Services) overpaid under the regime of tax substitution**

On 10/19/2016, the STF Plenary, when judging the RE 593.849/MG, in the course of general repercussion and under decision of the Reporting Justice Edson Fachin, decided, by majority, for constitutionality of restitution of Tax on Circulation of Goods and Services ("ICMS") overpaid under the regime of tax substitution, when the effective calculation basis of the operation is lower than that assumed.

In summary, Justices decided to supersede the understanding until then consolidated regarding the impossibility of restitution to establish that convenience achieved with the regime of tax substitution cannot override the principles of equality, proportionality, contributive capacity and confiscation.

Therefore, the following thesis has been established: "Restitution of the difference of Tax on Circulation of Goods and Services - ICMS overpaid under the regime of tax substitution and on is due in case the effective calculation basis of the operation is lower than that assumed".

As for modulation of effects, the suggestion of Reporting Justice Edson Fachin was accepted, so that such understanding starts producing effects from the date of decision in Plenary, therefore safeguarding the right of taxpayers with lawsuits in progress and in final and unappealable decisions.

**STF – Suspension of effects of decision favorable to taxpayers, which stated unenforceability of tax credit of PIS/COFINS on financial revenue**

On 03/02/2016, the President of the STF, Ricardo Lewandowski, deemed appropriate to accept request

from the Federal Government, in the case records of Suspension of Anticipated Judicial Protection ("STA") 820, to put the effects of decision issued by the Regional Federal Appellate Court for the 1st Region ("TRF1") on hold, which, on appeal, ceased enforceability of tax credit of installments relating to Social Integration Program and Contribution for the Financing of Social Security ("PIS/COFINS") on financial revenues earned by companies associated to the National Union of Heavy Construction Industry ("SINICON"), as per requirements set forth in Decrees No. 8.426/2015 and 5.418/2015.

In this case, even with the supervenience of decision from the original court, the Justice understood there is a risk of serious harm to public economy, to the extent the Federal Government has demonstrated its finances are to be seriously affected, besides evidencing the multiplier effect due to the irradiation of the effects of decision favorable to the other cases that deal with the same subject.

Therefore, enforcement of anticipated judicial protection to members associated to SINICOM has been suspended until final and unappealable decision regarding Court Injunction No. 0042793-10.2015.4.01.3800.

### STJ – Tax Incentive granted by State – Non-inclusion of ICMS presumptive credit in the calculation basis of IRPJ and CSLL

On 10/06/2016, the 1st Panel of Superior Court of Justice ("STJ"), when deciding on the Special Appeal ("REsp") 1.517.492/PR, understood, unanimously, the ICMS presumptive credit should not be included in the calculation basis of Company Income Tax ("IRPJ") and Social Contribution on Net Income ("CSLL").

According to the rapporteur, Justice Sérgio Kukina, ICMS presumptive credits have been waived by the State in favor of the taxpayer, as a political instrument of economic development of that Unit of Federation, representing actual tax benefit aiming at reducing costs for increasing competitiveness of companies of the Member State.

Under such aspect, the rapporteur acknowledged the amounts relating to ICMS presumptive credit is originated in the State, so that tax immunity should apply on them as provided for Art. 150, VI a, of Federal Constitution ("CF/88"), which prevents the Federal Government from taxing revenue of Member State.

Therefore, the tax benefit consolidated on ICMS presumptive credit should not be characterized as profit of the legal entity, but as a State incentive for the taxpayer's activity to be performed in a better way, being that assessment of any other taxes is not justifiable, under penalty of mitigation or even depletion of benefit granted.

We should stress out that in REsp 1.1210.941/RS, such understanding also applies to IPI presumptive credit in the calculation basis of IRPJ and CSLL, once it constitutes tax benefit of the same nature.

### STJ – Transfer of tax credits exempts agreement of Public Treasury

On 10/20/2016, the 2nd Panel of STJ, in decision of REsp 1.510.725/ES, unanimously reassured the jurisprudence of the court, due to the possibility of tax credits assignment among private individuals, with no need for consent of the Treasury.

In the concrete case, a company has brought suit for restoration of undue payments against the Federal Government to claim for restitution of taxes unduly paid, an opportunity when its credit rights were acknowledged by final and unappealable decision.

Afterwards, the company granted its credits to another, being that such transaction was informed to the Federal Government by means of judicial notice. Then, the new company (assignee) joined in the phase of enforcement of decision, but the original court decided for its illegitimacy to be a party, once credit assignment is only valid with the consent of Federal Government.

Summing up, Justice Herman Benjamim, rapporteur of the appeal, employed understanding already consolidated in REsp 1.119.558/SC in view of recurrent appeals, therefore stating the undue payment recognized in favor of the taxpayer is part of its assets, so that credit assignment is possible, conditioned to notice, for purposes of acknowledgment on the part of the debtor, under the terms of civil legislation, exempting consent of debtor, as acknowledged by REsp 1.091.443/SP also decided under the system of recurrent appeals.

### STJ – Exemption of previous communication of disposal of inventoried property to Tax Authorities

On 10/27/2016, the 1st Panel of STJ, when judging REsp 1.217.129/SC, unanimously decided for exemption of previous communication on the sale of inventoried property to Tax Authorities.

Under the terms of Law No. 9.532/1997, which regulates administrative proceedings for statement of assets, Tax Authorities are authorized to list properties and rights of taxpayers when the amount of tax debt exceeds 30% of acknowledged equity.

For Justices, legislation does not demand communication prior to disposal, even because such sale may not occur.

Because of that, absence of previous communication cannot be the grounds for filing tax-related preventive measure, as understood by STJ.

### TJSP - Exemption of ICMS [Tax on Circulation of Goods and Services] in sale and import of vegetables that undergo simple procedures for commercialization

On 10/27/2016, the 2nd Public Law chamber of Tribunal of Justice of São Paulo (“TJSP”), in decision of Appeal n. 1005694-37.2016.8.26.0562, decided for the exemption of ICMS on sale and import of horticultural grocery items, as they do not undergo industrialization for later commercialization.

The ICMS Regulation of São Paulo State (“RICMS/SP”) grants exemption in cases where the sale operation involves products ‘in natura’, i.e., products that have not undergone processing or industrialization process.

In the concrete case, the conflict resides in learning whether the products traded by the company (artichoke and mushroom), even if subjected to cooling, freezing, natural drying and packaging procedures, should be considered industrialized products or not for purposes of tax collection.

For Associate Justices, the fact that products have been subjected to those procedures described above

does not represent industrialization, and does not jeopardizes the quality of primary product, once there were no changes in the nature or purpose, so that these are tax-exempt transactions. Additionally, Associate Justices understood such exemption should be also observed in imports, as such goods are originated from country signatory of the General Agreement on Tariffs and Trade (GATT).

In this sense, decision favorable to the taxpayer was upheld, which prevented collection of ICMS in operations involving such products.

### COSIT Solution on Divergence No. 09/2016 – Cession of Credit – IOF/Credit

On 09/14/2016, Resolution on Split Decision No. 09/2016 was published, by means of which the General Coordinator's Office for the Tax System ("COSIT") has standardized understanding of federal tax authorities regarding the assessment of Financial Transactions Tax in credit assignment ("IOF/Credit") in which financial institution appears in the position of assignee, no matter if credits are embodied in credit instruments or not.

According to COSIT, whenever there is an assignment with the purpose of providing credit to the assignor, there will be incidence of IOF/Credit. The purpose of providing credit to the assignor is characterized, according to Resolution on Split Decision, when there is an express contract clause of co-obligation between assignor and debtor or, if there is no such clause, the legal framework of transaction attributes liability to assignor for paying the assigned credits.

### COSIT Solution on Divergence No. 07/2016 – Credits from Contribution to PIS and COFINS– Trading Cellulose and Afforestation and Reforestation Preparatory Activities

By means of Resolution on Consultation COSIT No. 07/2016, COSIT manifested on the possibility of taking credits from Contributions to PIS/COFINS by taxpayers that develop activities for trading mechanical pulp, cellulose, paper, cardboard and associated products, and perform afforestation and reforestation preparatory activities.

We recommend taxpayers that operate in that branch check for the list of items eligible to crediting, as per criteria of Tax Authorities.

### COSIT Consultation Solution No. 130/2016 – Off-the-shelf Software – IR/Source – CS/Source – PIS /Source – Cofins/Source

Resolution on Consultation COSIT No 130/2016 was published, acknowledging exemption for requirement of Income Tax Withheld at Source ("IR/Source"), Social Contribution on Net Income Withheld at Source ("CSLL/Source"), Contribution to PIS/PASEP Withheld at Source ("PIS/Source"), and Contribution to Social Security Financing Withheld at Source ("COFINS/Source") on payments and credits carried out by legal entity due to licensing of series-produced computer programs – customizable or not –, i.e., off-the-shelf software, not developed on demand.

However, there will be a requirement for withholding and collecting IR/Source, CS/Source, PIS/Source, and COFINS/Source in cases where the software is customizable and a legal entity carries out payments or

credits to another legal entity, so that improvements and/or upgrades of functionalities are made on demand of the resident, for meeting its necessities.

According to COSIT, in the first case, there is no provision of professional service, therefore exempting any withholdings. As for the second case, there is characterization of such services and requirement for withholding those taxes at issue.

### Joint Ordinance RFB/PGFN No. 1.525/2016 – Creation of Groups to Fight Against Frauds in Enforcement of Tax Credits

On 10/18/2016, Joint Ordinance RFB/PGFN No. 1.525/2016 was published and created the Special Groups to Combat Fraud to Administrative Collection and Tax Execution within the scope of Internal Revenue Office and Office of Attorney-General of the National Treasury (PGFN) ("GAEFIS").

GAEFIS will be composed of members of the Brazilian Internal Revenue Service ("RFB") and the Office of Attorney-General of the National Treasury ("PGFN"), and its purpose is identifying, preventing and restraining tax frauds that jeopardize recovery of tax credits constituted or enrolled as Federal Overdue Liability Debt.

### Note PGFN/CRJ/n. 801/2016 – Habeas Data - Data on Payment of Taxes

PGFN acknowledged, by means of Note PGFN/CRJ/n. 801/2016, waiver of challenge and/or appeal in cases involving the utilization of Habeas Data for accessing information included in computerized systems for controlling payments, in view of decision issued by the Supreme Court (STF) in RE 673.707/MG.

In the summary of reasons for such waiver, the Note includes: "Habeas data is the proper constitutional guarantee for obtaining data regarding taxes of the taxpayer itself, as included in computerized systems that support collection of agencies of treasury administration of State-owned entities".

### Note PGFN/CRJ/n. 798/2016 – Habeas Data - Data on Payment of Taxes

By means of Note PGFN/CRJ/n. 798/2016, waiver of challenge and/or appeals lodged by PGFN in cases involving discussion about unconstitutionality of Art. 1, I, of Law No. 7988/1989, whose unconstitutionality has been acknowledged by STF regarding the reference date 1989.

The summary of reasons for such waiver is the following: "Incident unconstitutionality with effects of general repercussion, of Art .1, I, of Law 7.988/89, once the increase of aliquot from 6% to 18%, which is reflected on the calculation basis of legal entities Income Tax falling upon the earnings from transactions under incentive in the reference date 1989, breaches the principles of non-retroactivity and legal certainty".

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