Tax Bulletin

The Administrative Council of Tax Appeals

67

Specific tax report n° 67 • Year VI • October 2013

Dear Sirs:

This publication **Tax Bulletin # The Administrative Council of Tax Appeals** aims to update our clients and others interested about the main subjects that are being discussed and judged in this body.

In this 67th edition of our newsletter, we will comment on a decision in which the CARF recognized that in order for social security contributions not to be levied on amounts paid by the company in supplementary pension plans, it is not necessary for there to be proportionality between the employer's contribution and the employee's remuneration, nor that all the beneficiaries must be subject to the same pension plan.

We also examined a decision in which the CARF does not accept the deductibility of expenses with the contracting of companies that have as partners a common person in their management, when the effective service provision has not been demonstrated.

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

"SUPPLEMENTARY PENSION. LACK OF PROPORTIONALITY BETWEEN THE CONTRIBUTION AMOUNT AND THE EMPLOYEE'S SALARY AND THE ISONOMY AMONG ALL EMPLOYEES AS TO THE PAYMENTS MADE TO THE PLAN. ABSENCE OF SUCH REQUIREMENTS IN THE RULE THAT EXCLUDED THE CONTRIBUTION SALARY BOOKKEEPING ENTRY.
The rule that provides for the exclusion of the contributions to supplementary pension plans from the contribution salary does not require for there to be proportionality between the contribution and the employee's remuneration or even that the payments to the plan should be equal for all beneficiaries."

The present case deals with an Assessment Notice referring to employer-sponsored contributions to the Social Security, from 2001 to 2006. The assessment derives from the Tax Authorities' perception that the payments made for supplementary pension would consist, in fact, of amounts paid for Profit Sharing ("PLR"), on which social security contributions would be levied.

According to the Authorities, this position stems from the fact that the payments were not based on the individual income of the insured, but instead were defined by the results obtained by the company, and failed to comply with Law no. 10,101/2000 (which regulates the sharing of the company's profit by the employees).

Furthermore, the Authorities affirmed there was a discrepancy between the amounts earned by employees in management positions and other employees, which constitutes an unequal treatment among all workers of the company. In addition, this benefit would not be extended to all employees and officers, since the permanence at the company for at least one year was a condition to enjoy this benefit.

Due to this alleged lack of statement of the taxable events of the social security contributions and, consequently, an indication of criminal offense, a Tax Complaint for Criminal Purposes was issued.

In the Objection, the taxpayer affirmed that it had entered into a pension plan with an open private pension plan company and that the requirement of extension of the benefits to all employees and officers (provided for in article 28, § 9, letter "p", of Law no. 8,212/91), after the enactment of Complementary Law no. 109/01 ("LC no. 109/01"), is applicable only to benefit plans of closed entities.

The taxpayer claimed his pension plan is under all the legal provisions and that on the amounts intended to its funding no social security contributions are charged.

The taxpayer further claims that such amounts set for the pension plan do not constitute retribution for work and have no habitualness nature. Thus, the assessment would be violating article 142 of the National Tax Code ("CTN") and social security rules, for failure to prove the claimed taxable events.

Moreover, the taxpayer stated that LC no. 109/2001 does not require the correspondence between the value of the contributions to the plans and the individual income of the employees, and that the only requirement would be the conformity of the contributions, so as to ensure the performance of the plans.

The taxpayer further clarified the way the contributions to its supplementary pension plan were composed and explained that there was no unequal treatment.

According to the taxpayer, the alleged imbalance pointed out by the Authorities occurred due to two situations: (i) start or end of the employees' activities throughout the year, generating proportional payments to the number of workers; and (ii) additional contributions to management positions, in order to maintain the financial and actuarial balance of the plan and the economic situation of the beneficiaries.

The taxpayer also defended that the redemption of the amounts due to unilateral termination of the contract by the worker does not change the legal nature of the sum, nor is there any legal prohibition for such.

In addition, it questioned the applicability of article 116 of the CTN as grounds for disregarding the supplementary pension plan, since no evidence of simulation was presented and the mentioned provision lacks regulation.

When hearing the Objection, the Federal Revenue Judgment Office (DRJ) upheld the Assessment Notice under the argument that (i) the imposition of length of service as a condition to participate in the pension plan would constitute a limitation to the benefit, confirming that it did not extend to all employees and officers of the company; and (ii) that LC no. 109/01 is a general rule, while letter "p" in § 9 of article 28 of Law no. 8,212/91 would be a special rule, which avoids the repeal of the latter by the former.

Owing to this decision, the taxpayer then filed a Voluntary Appeal, repeating the claims previously stated and claiming nullity of DRJ's decision for failing to address all the issues presented in the Objection and to prove the occurrence of the levy event of the required tax.

In analyzing the case, the CARF ruled out the claims of nullity and stated that, in fact, there was no disregard of the Taxpayer's supplementary pension plan, since the Tax Authorities lacked this jurisdiction. Instead, there was only the attribution of tax consequences due to the alleged failure to comply with legal provisions.

On the merits, the Rapporteur Councilor affirmed, after examining LC no. 109/2011, that there is no provision that would oblige the contributions made by the employers to the pension plans to be proportional to the employees' remuneration.

Furthermore, he disregarded the conclusion made by the Tax Authorities that the plan did not have a pension nature because of lack of correlation with the workers' remuneration. The reason is that the mentioned plan was composed of a fixed installment (corresponding to the employee's nominal wage, meaning the proportionality required by the Tax Authorities was present) and by a variable installment (exclusively reverted to the officers, relative to the result of the fiscal year and performance of functions).

In turn, the justification of the Tax Authorities for disregarding the plan in relation to the disproportion between the contributions to employees in management positions and other employees, according to the Rapporteur Councilor, would also not be supported. In fact, the Rapporteur Councilor viewed that there is no requirement, in the legislation in force, for an isonomic treatment among all the workers, and cited a CARF precedent to corroborate his conclusions.

Lastly, the Authorities, according to the Reporting Councilor, failed to prove their claim that the pension plan did not extend to all the workers. As a matter of fact, the exclusion of any employee as a beneficiary of the plan was not proven. As to those hired or terminated during the year, the respective payment was made proportionally, according to the rules set in the plan.

Therefore, by unanimous vote, the CARF rejected the preliminary argument of nullity of the DRJ's decision. On the merits, by majority vote, it granted the Taxpayer's appeal, recognizing the non-levy of social security contributions on contributions made by the Taxpayer for supplementary pension plans created for its personnel.

"MATTER: CORPORATE INCOME TAX IRPJ Fiscal Year: 2000, 2001, 2002, 2003, 2004, 2005 TAXABLE INCOME. PAYMENT FAILING TO STATE THE OPERATION OR CAUSE. DEDUCTION. IMPOSSIBILITY.
The classification of expenditures of the legal entity as deductible expenses in the determination of the taxable income is subordinated to specific rules of the income tax legislation, which set its own concept of operating expenses and establish the objective conditions that guide the imputability or not of the corresponding amounts for such an effect.
MATTER: SOCIAL CONTRIBUTION ON NET INCOME CSLL Fiscal Year: 2000, 2001, 2002, 2003, 2004, 2005 RELATED TAXATION.
The amounts established for the IRPJ apply to the assessment of the CSLL, as they derive from the same elements of evidence and refer to the same taxable matter.
MATTER: WITHHOLDING INCOME TAX IRRF Fiscal year: 2000, 2001, 2002, 2003, 2004, 2005 IDENTIFIED BENEFICIARY.
Due to the elements of evidence brought by the Appellant, demonstrating the causal link between the service acquirer, a legal entity, and the service provider, an individual, in the capacity of officers/administrators of the Appellant, it is valid to consider that the identification of the receiver of the payments, for purposes of eliminating the tax accusation, is justified".

The present case deals with a Tax Assessment Notice referring to the IRRF, IRPJ and CSLL, due to the verification by the Tax Authorities of the existence of non-deductible expenses and unidentified payments.

According to the Authorities, it was verified that the taxpayer made payments to management and officers and recorded them as technical assistance expenses. These services were allegedly rendered by companies whose partners were the taxpayer's administrators.

After verifications in the head offices of the hired companies, the Tax Authorities confirmed that the companies did not have a physical and logistic structure to render the hired services and concluded that the "*payments made by the audited company were expenditures with individuals, meaning its officers and administrators disguised as technical assistance payments to legal entities formed by the beneficiaries, in theory, with the purpose of providing documental support for these payments, so they could be used as operating expenses of the company*".

For such reasons, the Authorities decided to reject the expenses referring to services rendered by the mentioned companies, pursuant to articles 302 and 304 of the Income Tax Regulation, approved by Decree no. 3,000/99 (“RIR/99”). According to these provisions, the payments to partners or officers of the legal entity will be non-deductible for IRPJ and CSLL purposes, in case it is not possible to prove the effective rendering of services or the actual occurrence of the underlying operation.

Due to the payments to beneficiaries allegedly not identified, the collection in connection with the IRRF was issued, based on article 674 of RIR/99.

In an Objection, the Taxpayer, in sum, defended the effectiveness of the operations and the reception of the hired services. He also stated the expired statute of limitations on part of the tax credit.

When hearing the Objection, the DRJ recognized that part of the assessed period had been reached by the statute of limitations expiry and upheld the Tax Assessment as to the other periods.

Due to this decision, the Taxpayer then filed a Voluntary Appeal, repeating the same reasons claimed in the Objection.

In examining the case, the 2nd Chamber of CARF’s 2nd Ordinary Panel ruled that the taxpayer did not fail to comply with its obligation to “prove, through valid and proper documentation, the effective incurrence of the expense for deductibility purposes in the ascertainment of the taxable income and tax basis of the CSLL”. In addition, it affirmed that the proof of the effectiveness of the operation is an “absolute requirement” for the deductibility of expenses with the rendering of services, and stated administrative precedents on the matter.

In this regard, the Rapporteur Council summarized the notes made in the Tax Verification Report prepared by the Tax Authorities, which demonstrated the non-occurrence of the service rendering operations, namely, (i) absence of employees in the hired companies or, when existing, without the due technical qualification (ii) the hired companies had the same head office, and did not effectively operated at the stated address (iii) the hired companies provided services exclusively to the taxpayer, a fact demonstrated by the invoices issued in sequence, and (iv) payments made to the administrator’s personal account.

With regard to the IRRF levy, the CARF, by majority vote, recognized that the payments had been made to identified beneficiaries, ruling out the violation pointed out by the Tax Authorities and confirmed by the DRJ.

Therefore, the CARF, by a casting vote, dismissed the Voluntary Appeal as to the rejection of expenses for purposes of IRPJ and CSLL and, by majority vote, granted the Appeal as to the lack of grounds to collect the IRRF.

Souza, Schneider, Pugliese e Sztokfisz Advogados

Team responsible for preparing The Administrative Council of Tax Bulletin:

Igor Nascimento de Souza (igor@ssplaw.com.br)

Henrique Philip Schneider (philip@ssplaw.com.br)

Eduardo Pugliese Pincelli (eduardo@ssplaw.com.br)

Cassio Sztokfisz (cassio@ssplaw.com.br)

Fernanda Donnabella Camano de Souza (fernanda@ssplaw.com.br)

Diogo de Andrade Figueiredo (diogo@ssplaw.com.br)

Flávio Eduardo Carvalho (flavio@ssplaw.com.br)

Rafael Monteiro Barreto (rafael@ssplaw.com.br)

Sidney Kawamura Longo (sidney@ssplaw.com.br)

Rafael Fukuji Watanabe (rwatanabe@ssplaw.com.br)

Rodrigo Tosto Lascala (rodrigo@ssplaw.com.br)

Laura Benini Candido (laura@ssplaw.com.br)

Marina Lee (marina@ssplaw.com.br)

Pedro Lucas Alves Brito (pbrito@ssplaw.com.br)

Ana Paula Caldin da Silva (acaldin@ssplaw.com.br)

Viviane Faulhaber Dutra (viviane@ssplaw.com.br)

Maria Carolina Maldonado Mendonça Kraljevic (mmaldonado@ssplaw.com.br)

Tiago Camargo Thomé Maya Monteiro (tiago@ssplaw.com.br)

Flavia Gehlen Frosi (flavia@ssplaw.com.br)

Thiago Brazolin Abdulmassih (thiago@ssplaw.com.br)

R. Cincinato Braga, 340 • 9º andar • 01333-010 • São Paulo • SP
tel 55 11 3201 7550 • fax 55 11 3201 7558

Brasília Shopping • SCN quadra 5, Bloco A • Torre Sul • 14º andar • sala 1406 • Brasília • DF • 70715-900
tel 55 61 3251 9400 • fax 55 61 3251 9429

www.ssplaw.com.br