

## # THE ADMINISTRATIVE COUNCIL OF TAX APPEALS

Specific tax report n° 88 • Year VIII • July 2015

Dear Readers:

This publication **Tax Bulletin # The Administrative Council of Tax Appeals** is to inform our clients and interested parties on the main issues being discussed and decided in this court.

In this 88<sup>th</sup> edition of our newsletter, we will comment on a decision in which the Superior Chamber of Tax Appeals (“CSRF”) cancelled the assessment for the collection of the Corporate Income Tax (“IRPJ”), the Social Contribution on the Net Income (“CSLL”), the Employee Profit Distribution Program (“PIS”), and the Contribution to the Social Security Funding (“COFINS”) due to its non-compliance with the accrual basis method and also because the Chamber understood that the criteria and fundamentals used by the Tax Authorities for the issue of the Tax Assessment Notices shall not be changed.

We also commented on a decision in which the CSRF adjusted the tax basis of the punitive fine to the IRPJ and CSLL value ascertained at the end of the calendar year, ruling out the sanction imposed on the insufficient value of the monthly advances.

To directly access the text referring to each of these topics, click on:

[Limitation to the Review of the Assessment – Revenue Recognition system](#)

[Punitive fine – Monthly estimates – Adjustment to the Amount Due at the end of the Calendar year](#)

**Souza, Schneider, Pugliese e Sztokfisz Advogados** law firm is available to its clients should they have any questions on the decisions commented on in this newsletter.

Enjoy your reading!

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Specific tax report n° 88 • Year VIII • July 2015

### “MATTER: CORPORATE INCOME TAX IRPJ

Calendar year: 2006

**IRPJ. COST SHARING. COMMON EXPENSES TO COMPANIES OF THE SAME ECONOMIC GROUP.** – It is up to the tax debtor, duly summoned, to demonstrate the regularity of the procedure he adopted with regard to cost sharing among connected companies. In failing to do so, the Tax Authorities are then correct in utilizing the indirect sharing, based on the revenues.

**APPROPRIATION OF REVENUES. ACCRUAL BASIS METHOD. FORMATION OF BURDENSOME USUFRUCT OF SHARES** – The revenue arising from the burdensome assignment of a portion of the Permanent Assets for the creation of the usufruct is taxable according the accrual basis method. The judgment bodies should be limited to reviewing and exercising the control of the tax assessment as placed in the proceeding, having no jurisdiction to alter it.

**Special Appeal of the Prosecutor Partly Granted.”**

The decision in question relates to Tax Assessment Notices issued for the creation and collection of the IRPJ, CSLL, PIS and COFINS referring to the calendar years of 2001 and 2002. Among other violations ascribed to the Taxpayer, the Tax Authorities concluded that the Taxpayer mistakenly recorded the price received from the creation of a burdensome and temporary usufruct of shares it owns.

The Taxpayer created a usufruct on shares it owns in favor of a third party for a term of 12 months and received from the beneficiary, in November 2001, the amount paid for the temporary acquisition of the rights, recording the amount received as “dividends/profits derived from these same shares”. However, according to the Tax Authorities, the full amount received should have been recognized as revenue and subjected to taxation in 2001, which led to the Tax Assessment Notices.

These Tax Assessment Notices were opposed by the Taxpayer, but the Federal Revenue Judgment Office (“DRJ”) dismissed the Opposition, upholding the assessment.

Next, the Taxpayer filed a Voluntary Appeal claiming that, with regard to the amounts received as consideration for the usufruct of the shares, the assessment was incorrect when measuring its tax basis for the requirement of the taxes. The reason is that the Tax Authorities, in the calendar year of 2001, taxed the entire revenue that should have been appropriated throughout 12 months of 2001 and 2002 (Nov. 1, 2001 to Oct. 31, 2002) as to the accrual basis method provided for in article 177 of Law no. 6.404/76. According to the Taxpayer, the assessment adopted the cash basis method for the recognition of revenues to the detriment of the accrual basis method.

When examining the Taxpayer’s arguments, the Administrative Council of Tax Appeals (“CARF”) fully canceled the assessment. However, the Attorney General Office of the National Treasury (“PGFN”) filed a Special Appeal claiming that the decision relative to the amounts received for the usufruct of shares violated article 187, §1, of Law no. 6,404/76, as well as the accrual basis method set forth in CFC Resolution 750/1993. Secondly, the PGFN claims that the assessment should not have been fully canceled, but rather only reduced to the proportion of the revenues that should have been recognized in 2001.

In the trial of the Special Appeal of the PGFN, the CSRF ruled for the maintenance of CARF’s decision, which determined that the assessment by the Tax Authorities was incorrect, as they viewed that the assessment had violated the accrual basis method when taxing in a single calendar year (2001) the revenue that

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should have been recognized over 12 months, divided into two calendar years (2001 and 2002).

As to the PGFN's claim that the assessment should have been reduced and not fully canceled, the CSRF viewed that the judgment administrative courts are limited to reviewing and controlling the assessment, but have no jurisdiction to alter it, as they may not modify the criteria and fundamentals of the original assessment. For this reason, the CSRF ruled it was impossible to reduce the assessment and determined the need to fully cancel it.

Therefore, the CSRF then fully canceled the assessment relative to the requirement of the IRPJ, CSLL, PIS and COFINS on the operating revenues deriving from the creation of the burdensome usufruct of shares.

### **“Matter: Administrative Tax Proceeding**

**Calendar year: 1997, 1998, 1999, 2000, 2001**

### **PUNITIVE FINE. ESTIMATED OF THE IRPJ AND CSLL. APPLICATION LIMITS.**

**The punitive fine concerns the breach of the juridical fact of anticipation, which is related to the breach of the principal obligation. The tax due by the taxpayer arises when the taxable event is ascertained on December 31 of each year. If the application of sanctions is made after the end of the calendar year, the final balance sheet of the period is sufficient evidence to determine the limit of the fine whose basis may not exceed the tax value, when due, under penalty of losing its nature of fine attributed to the breach of a principal obligation. This position is exclusively applied to fines imposed after the end of the respective calendar year. Special Appeal of the Taxpayer Partially Granted.”**

The decision at issue relates to the requirement of the punitive fine on the failure to collect the monthly advances of the IRPJ and CSLL, computed on the estimated tax basis, with regard to the calendar years from 1997 to 2001.

In analyzing the case, the 2nd Ordinary Panel of the 2nd Chamber of the 1st Section of the CARF partially granted the Taxpayer's Voluntary Appeal, only to reduce the fine percentage from 75% to 50%, based on the new wording of article 44, item II, of Law no. 9,430/96, given by Law no. 11,488/07, and pursuant to the principle of positive retroactivity provided for in article 106, item II, letter “c”, of the National Tax Code (“CTN”).

Against this decision, the Taxpayer then filed a Special Appeal with the CSRF, claiming, in sum, that after the end of the calendar year the imposition of the punitive fine is not applicable in relation to the insufficient payment of IRPJ and CSLL monthly estimates.

When hearing the appeal, the drafter Councilor, appointed to prepare the concurring opinion of the appellate decision, argued that after the end of the calendar year it is already possible to compute the precise value of the due tax, which should limit the quantitative criterion of the imposition of the punitive fine due to insufficiency of the collected advances, and the application of the fine on the non-anticipated amounts is to be ruled out.

Thus, the position viewing that the fine in question, as it is tied to the breach of the principal obligation – meaning the lack of payment of the IRPJ and CSLL – may not be applied to a tax basis superior to the tax value ascertained in the last balance sheet of the period in which the insufficient collection of the advances

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was verified, then prevailed.

Due to this, the CSRF, by majority vote, partially granted the Taxpayer's Special Appeal, in order to adjust the tax basis of the separate fine to the IRPJ and CSLL amounts ascertained at the end of each period, and no longer on the insufficient amounts of the monthly advances.

## # THE ADMINISTRATIVE COUNCIL OF TAX APPEALS

Specific tax report nº 88 • Year VIII • July 2015

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