tax bulletin

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The Administrative Council of Tax Appeals

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Dear Readers:

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

In this 111st issue of our note, we comment a decision in which the Superior Chamber of Tax Appeals ("CSRF") cancelled the imposition of Contribution to PIS and COFINS on investment subsidies.

We also comment a decision in which CSRF analyzed the imposition of Social Security Contributions on private pension and health care plans in cases where employees should choose between one benefit and the other offered by companies.

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

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

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"CONTRIBUTION TO PIS/PASEP Computation period: 01/01/2003 to 06/30/2003, 02/01/2004 to 12/31/2004, 02/01/2005 to 02/28/2005, 04/01/2005 to 12/31/2005 PIS. NON CUMULATIVE. CALCULATION BASIS. STATE TAX INCENTIVE. DEFERRED ICMS.
The amounts related to tax incentives granted by the States of the Federation to a legal entity, in the form of deferred ICMS, are not included in the calculation basis of non-cumulative PIS/PASEP and COFINS, because they cannot be framed in the definition of turnover or gross revenue.
CONTRIBUTION TO FINANCE SOCIAL SECURITY COFINS Computation period: 01/01/2003 to 06/30/2003, 02/01/2004 to 12/31/2004, 02/01/2005 to 02/28/2005, 04/01/2005 to 12/31/2005 COFINS. CALCULATION BASIS. DEFERRED ICMS. INVESTMENT SUBSIDY.
The amounts related to tax incentives granted by the States of the Federation to a legal entity, in the form of deferred ICMS, are not included in the calculation basis of non-cumulative PIS/PASEP and COFINS, because they cannot be framed in the definition of turnover or gross revenue. "

The precedent in question deals with the imposition of PIS and COFINS on investment subsidies, judged by the Superior Chamber of Tax Appeals ("CSRF"), when trying a Special Appeal filed by the National Treasury against a partially favorable decision rendered in the trial of the Taxpayer's Voluntary Appeal.
In the present case, the Taxpayer benefited from an ICMS tax incentive granted by the State of Bahia. The incentive allowed the deferral of ICMS on items received from abroad and applied to the company's production process, provided that the amount of ICMS not collected was invested in the improvement of the Taxpayer's production process and in the generation of jobs in the State.
However, in view of the tax incentive granted, an infraction notice was issued against the Taxpayer to charge PIS and COFINS on amounts of deferred ICMS, since Tax Authorities understood that such subsidies are operating income of the legal entity, so, they are included in the definition of turnover, being subject to these contributions.
In the trial of this case carried out by the CARF's Lower Chamber, the Counselors cancelled PIS and COFINS charge, on the grounds that the amounts of ICMS a legal entity does not collect, but, in turn, undertakes to invest in the modernization of the production process, do not constitute a positive new element or revenue.
In fact, they understood such incentives consist of income conditioned to an expense related to the improvement of the legal entity's activities, being booked in an investment account at the company's accounting records and resulting in positive outcome to the State Government. Therefore, if contributions were imposed on the incentives received, companies would not be able to comply with the legal conditions of the subsidies, namely, improving their activities and aiding the development of the State that granted the benefit.

The National Treasury then filed a Special Appeal against the decision issued by CARF, pointing out that there was divergence between decisions already issued by the Council on the subject. However, CSRF Counselors affirmed the Lower Chamber's decision, having adopted the understanding of recent precedents of the Superior Court of Justice ("STJ"), which ruled that PIS and COFINS are not imposed on presumed ICMS credit.

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According to CSRF's vote, although presumed ICMS credit cannot be mistaken for deferred ICMS, both may be considered investment subsidy, since they are State subsidies conditioned to the fulfillment of requirements established by law. Thus, based on the STJ's understanding concerning presumed ICMS credits, the Counselors argued that investment subsidies in general should be understood as cost reductions, not as earning or revenue, so they are not subject to PIS and COFINS.

Therefore, the CSRF denied relief to the Treasury's Special Appeal by majority of votes, cancelling the imposition of PIS and COFINS on investment subsidies.

"SOCIAL SECURITY CONTRIBUTIONS Computation period: 01/01/2004 to 12/31/2004 PRIVATE COMPLEMENTARY PENSION. MEDICAL EXPENSES. NON INCLUSION OF ONLY 02 DIRECTORS. EXTENSION TO ALL EMPLOYEES. EMPLOYEE'S CHOICE. AVAILABILITY.
The need to encompass all employees and directors in order not to pay social security contributions on such earnings is a unique characteristic. The fact that the employee has to opt for a private pension or health care plan, due to a rule set by a collective arrangement, does not affect the legislation, so it shall be considered in the definition of contribution salary, because it is available to all employees. The choice happens after the availability.
FINE. BENEFICIAL RETROACTIVITY. APPLICATION.
For the purpose of applying beneficial retroactivity, when ex officio proceedings apply simultaneously the fine provided by the revoked section 32, paragraph 5, of Law 8212/1991, which refers to the filing of inaccurate declaration in GFIP, and the pecuniary sanction for the non-payment of the tax due, set forth in section 35(II) of the same Law, the sum of the two sanctions that may be applied at the time of the infraction notice shall be compared with the pecuniary penalty of section 44(I) of Law 9430/1996, since the latter intends to penalize both of the infractions mentioned above and because Provisory Act 449/2008 made it applicable in the context of the collection of social security contributions. Thus, the threshold for the sum of fines applied in ex officio proceedings is 75%."

In this precedent, the CSRF analyzed the imposition of Social Security Contributions on private pension and health care plans in cases where employees should choose between one benefit and the other offered by companies. In effect, section 28, paragraph 9.p, of Law 8212/1991, provides that the contribution-salary does not include "the amount of contributions actually paid by a legal entity in relation to an open or closed supplementary social security program, provided that it is available to all its employees and directors, observing, where applicable, sections 9 and 468 of the CLT". Based on this provision, the CSRF discusses whether the expression "the totality of its employees and directors" implies the possibility of collecting Social Security Contributions in cases in which employees can choose one plan or the other.

The charge was motivated by the fact that the Taxpayer allows its employees to choose between a private pension plan and health care plan. According to the Tax Authority, not offering both benefits to all employees implies a restriction that makes it impossible to offer the private pension program to "the all its employees". In addition, two of the Taxpayers' directors did not receive either benefit.

The charge was affirmed by the DRJ, and the Taxpayer filed a Voluntary Appeal, which was granted relief (with respect to the matter submitted to CSRF). According to CARF, the fact that the Taxpayer offers these plans to all employees, even if they do not opt for the benefit, complies with the provisions of section 28, paragraph 9.p, of Law 8212/1991. CARF ruled that the existence of other requirements - such as the identity of plans - is not provided by law, and cannot be used as objection to the application of section 28, paragraph 9.p, of Law 8212/1991. That is, if the Taxpayer offers the plan to all employees, Social Security Contributions will not be imposed.

With regard to the allegation that two of the Taxpayers' directors did not have access to the plans and, consequently, the provisions of section 28, paragraph 9.p of Law 8212/1991 were infringed, CARF understood that the principle of reasonability would be disregarded if Social Security Contributions were imposed as result of the fact that few directors were not covered by the benefits.

PGFN filed a Special Appeal, which was partially accepted and led the CSRF to discuss the scope of the concept of "all of its employees". When examining this matter, CSRF understood it is sufficient to offer to all employees: if the employees opt for one or the other, section 28, paragraph 9.p of Law 8212/1991 still applies. In addition, there is no legal provision establishing the requirements used by the Tax Authority to formalize the tax credits.

With respect to the argument that two directors did not have access to the benefits and that, for that reason, section 28, paragraph 9.p, of Law 8212/1991 was violated, CSRF understood that it is not reasonable to charge Social Security Contributions based on these grounds, in view of the number of persons not covered by the plan and their role in the Taxpayer's structure. In effect, the purpose of section 28, paragraph 9.p, of Law 8212/1991 is to encourage the equitable treatment of employees and directors.

Based on these grounds, the CSRF dismissed the Treasury's Special Appeal.

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