

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 87th edition, we address 7 different issues related to Jurisprudence, Regulations and Consultation Solutions.

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Schneider, Pugliese and Sztokfisz 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!



Jurisprudence

STF – ADI 2418 – Constitutionality of art. 741, sole paragraph of Civil Procedure Code CPC/73 and its correspondence in the Civil Procedure Code/15 – Judicial Bond based on a rule declared to be unconstitutional by the Federal Supreme Court

On 05/04/2016, was tried by the Full Panel of the Federal Supreme Court (STF), Direct Unconstitutionality Action n. 2418 which provides for a dispute involving the constitutionality of (i) the existence of a doubled deadline for the Treasury Department to file a Motion to Stay Execution (1-B of Law 9.494/1997); (ii) for the 5-year statute of limitations for filing claim for damages (1-C of Law 9.494/1997); and (iii) of the sole paragraph of Article 741 of the Civil Procedure Code/73, which deems unenforceable a judicial bond based on law or regulatory provision declared unconstitutional by the STF or in application o interpretation deemed to be incompatible with the Federal Constitution .

In summary, the lawsuit was brought by the Brazilian Bar Association challenging art. 4 of Executive Order 2.102-27/2001, which changed the term for the Treasury Department to file Motion to Stay Execution and the 5-year statute of limitations for seeking damages, for understanding these rules violate the principles of equality and proportionality. Moreover, the Bar Association argued the sole paragraph of art. 741 of the 1973 Civil Procedure Code is unconstitutional, for violating the principle of res judicata, legal safety and social peace.

In his opinion, Justice Teori Zavascki, reporting Justice of the case, decided there is just cause for doubled deadline and that the 5-year statute of limitations is reasonable. As for the sole paragraph of art. 741 and its correspondent in the new Civil Procedure Code, the Justice understood to be constitutional, interpreting that the unenforceability would only apply when the STF declares the unconstitutionality of the rule used as basis for sentencing prior to the sentence being enforced becomes final (res judicata). Therefore, by majority, the Court dismissed the lawsuit brought by the Bar Association, pointing out that the case in question does not dispute the mitigation of res judicata after the case is finalized and declaring the constitutionality of art. 741 of the 1973 Civil Procedure Code.

STJ – No PIS/COFINS levied on typical cooperative acts.

On 04/27/2016, the 1st Panel of the Superior Court of Justice (STJ) tried Especial Appeal n. 1141667/RS and Especial Appeal n. 1164716/MG, appeal and counter-appeal, which provided for the contribution destined to PIS and COFINS being levied on the income from typical cooperative acts carried out by cooperatives, in light of article 79, sole paragraph, of Law 5.764/71.

In his opinion, Reporting Superior Court Justice Napoleão highlighted that cooperative acts are those transacted between cooperative members and cooperatives and, pursuant to article 79 of Law 5764, they do not imply in market operation. Therefore, the Justice understood that the sentence contained in the sole paragraph of the aforementioned article “does not characterize market operation”, has provided for an exception for the tax PIS/COFINS being levied. Consequently, the Justice opined for granting compensation of the amount unduly paid and exclusion of PIS and COFINS on typical cooperative acts transacted by cooperatives, partially granting Appeal 1141667 filed by the Cooperative, for understanding there was no violation of Article 535 of the 1973 Civil Procedure Code, and entirely dismissed Appeal 1164716 filed by the Treasury Department.

Finally, the other justices have followed the opinion of the reporting Justice and the 1st Panel unanimously partially granted Appeal filed by the Cooperative and dismissed Appeal 1164716 filed by the Treasury Department for consolidating the understanding that PIS/COFINS is not to be levied on typical cooperative operations.

TRF1 – Panel Decides for prevalence of res judicata in sentence that overruled charging CSLL prior to the Federal Supreme Court ruling on the constitutionality of the taxation.

On 04/04/2016 the Eighth Panel of the Regional Federal Appellate Court for the 1st Region (TRF1), in a unanimous decision, ruled for the prevalence of res judicata in relation to the decision rendered by the Superior Court of Justice (STJ) in the scope of constitutionality concentrated control.

In short, the Panel reformed the sentence, applying the understanding set by the First Panel of the Superior Court of Justice, on grounds of the systematic of Article 543-C of the Civil Procedure Code, in Special Appeal (REsp) n. 1.118.893/MG, in the sense that neither the previous decision of the STF, which rejected the unconstitutionality of Law 7.689/88 concerning taxation of Social Contribution on Net Income (CSLL), nor the legislation referring to the relation of this tax from a constitutional standpoint, which has not changed the material aspects of the Contribution, which may serve as grounds for charging taxpayers beneficiary of res judicata in legal proceedings whereupon was incidentally declared the unconstitutionality of the aforementioned Law.

We point out that, despite of courts widely applying the Superior Court of Justice (STJ) precedent to settle controversy on res judicata, two Special Appeals to the Federal Supreme Court (STF) with recently recognized general repercussion are awaiting trial before the STF for a definitive ruling on the matter. The first, Special Appeal (REsp) n. 949297 provides for the permanence of res judicata in relation to a decision rendered on a concentrated constitutionality control basis, by the STF, and Special Appeal (REsp) n. 955227 provides for decisions issued by the STF in a scope of diffuse constitutional control.

Therefore, the tendency is that proceedings on these matter are stayed in the Court of Appeals until the matter is tried and definitively set by the STF.

Regulations and Consultation Solutions

Solution for Consultation COSIT 29/2016 – compensation (offsetting) of debits relating taxes managed by the Internal Revenue Service

On 03/30/2016, was published Solution to Consultation COSIT 29 which sets forth the understanding that own debits relating to taxes managed by the Internal revenue Service can be offset with credits relating to taxes managed by the Internal Revenue Service, which have been recognized as such by a final court decision, even if such decision has only allowed said offsetting with debits relating to taxes of the same type.

Act of the Chairman of the Committee of the House of Representatives n. 17 – Reduction of the Rate of Withheld Income Tax for remittances of capital abroad, personal expenses, tourism, business and others

On 04/22/2016, was published the Act of the Chairman of the Committee of the House of Representatives n. 17 (“Act 17/2016”) which extends for another 60 days the effectiveness of Executive Order 713/2016,

responsible for amending Law 12.249/2010 and reduce to 6% the Withheld Income Tax rate levied on amounts paid, credited, delivered, used or remitted for individuals or corporate entities residing or domiciled abroad, destined to cover personal expenses abroad, of individuals residing in the Country, in tourism, business, service, training or official mission trips, up to the global limit of R\$ 20,000.00 (twenty thousand reais) per month, pursuant to the limits and conditions set forth by the Executive Branch.

Regulatory Instruction SMF n. 7/2016 – Electronic Domicile of Citizens of São Paulo

On 04/12/2016, was published Regulatory Instruction n. 7, by the Municipal Department of Finance of São Paulo (“IN SMF n. 7/2016”), amending IN SMF n. 2/2016, to provide that corporate entities or individual business-owners, building condominiums and public service delegates who have not yet registered for Electronic Domicile of Citizens of São Paulo (“DEC”) will be registered ex officio until May 10, 2016 by the Municipal Department of Finance of the City of São Paulo. Attorneys appointed in ongoing administrative proceedings who have not yet registered with the system will be registered ex officio when visiting or filing motions in case records.

Upon registration in the DEC, the taxpayer will pass to receive notices, notifications and subpoenas and service of process electronically, sent to his/her virtual mailbox, whereby not required publishing of these acts in the Official Municipal Press.

Joint Ordinance PGFN/RFB n. 550/2016 – Consolidation World Cup Refis (Tax Refinancing) – Installment Plan – Law n. 12.996/2014

On 04/12/2016, was published Joint Ordinance n. 550, issued by the Federal Treasury Attorney’s Office (“PGFN”) and the Internal Revenue Service of Brazil (“RFB”), providing for procedures for consolidation of social security debits included in installment plans set forth by Law 12.996/2014 (“World Cup Refinancing Plan”).

According to the regulatory provisions, the taxpayer who adhered to the aforementioned installment plan and which has debts to consolidate relating to social contributions shall, until 06/05/2016, waive ongoing installment plans, if deciding to include in this consolidation outstanding balances of installment plans; and perform, if applicable, the obligations provided in Regulatory Instruction RFB 1.491/2014.

Moreover, between June 7 and 24, the taxpayer must indicate the debits to be included in the installment plan, the number of intended installments that the tax loss amount and the negative basis of Social Contribution on Net Profit (CSLL) to be used for settling the amounts corresponding to fines and later interests.

As for taxpayers who have adhered to the cash payment modalities for using tax loss and negative calculation basis for the Social Contribution on Net Profit, within the same period, must indicate the settled debits and the amounts of tax loss and negative calculation basis used for settling fines and interests.

Finally, the Joint Ordinance warns the consolidation of installment plans or certification of cash payment will only be implemented if the taxpayer pays, between June 7 and 24, all installments due until the month of May, for installment plan modalities, and settlement of an eventual outstanding balance, for the cash payment modality.

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