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 94th edition, we address 18 different issues related to Jurisprudence, Regulations and Consultation Solutions.

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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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Jurisprudence

STF – Recognized General Repercussion on the constitutionality of infra-legal rules seeking to change the rates of PIS and COFINS on financial income

On 03/03/2017, was recognized the General Repercussion of the Extraordinary Appeal ("RE") 986.296/PR, which provides for the possibility of the rates of Contribution to the Social Integration Program ("PIS") and the Contribution for Financing of Social Security ("COFINS") to be reduced and reestablished by infra-legal regulations, pursuant to article 27, § 2, of Law 10.865/2004.

The case in question discusses the existence of a violation of the principle of legality in light of the reestablishment, via Decree 8.426/2015, of the rate of contribution to PIS and COFINS to the level of 4.65%, considering that said regulatory instrument is not competent to change the rates of the taxes in question, pursuant to articles 150, Section I and 153, §1, both of the Federal Constitution.

STF – No ICMS exemption for acquisitions by de facto taxpayers

On 02/23/2017, the Full Panel of the Federal supreme court ("STF") concluded trial of Appeal 608.872/MG, recognizing General Repercussion, where discussed the theory whether philanthropic institutions are or not beneficiaries of tax immunity relating to the Tax on Circulation of Goods and Services ("ICMS") charged by its vendors (taxpayers in law) and forwarded to them as consumers (de facto taxpayers).

The reporting justice of the case, Dias Toffoli, issued an opinion in the sense that immunity granted to philanthropic institutions could not be expanded in situations where standing as de facto taxpayers. For the Justice, the forwarding of cost in these cases is difficult to measure, since they are contingent upon other factors that determine the price of the goods, such as the profit margin.

In this sense, the Full Panel of the Federal supreme court, has unanimously set forth the following theory: "Subjective Tax Immunity applies to its beneficiaries in the capacity as taxpayer under law, but not in the capacity as de facto taxpayer, and for the verification of the existence of the constitutional benefit, the economic repercussion of the tax involved is immaterial."

STF – Full Panel rules unconstitutional the establishment, through Ordinary Legislation, of requirements for civil entities to enjoy immunity

On 02/23/2017, the Full Panel of the Federal supreme court, on regime of General Repercussion, concluded trial of Appeal 566.222/RS, declaring unconstitutional article 55 of Law 8.212/1991, which provided requirements for the purposes of enjoying immunity of social contributions by civil entities, which are currently provided by Law 12.101/2009.

To Justice Joaquim Barbosa, the reporting justice in the case, joined by the majority of the Justices, the institute of immunity must have its requirements provided by Complementary law (articles 9 and 14 of the National Tax Code), and is thereby unconstitutional an Ordinary law that creates restrictions for enjoying immunity of social contributions provided by Article 195, Paragraph 7 of the Federal Constitution.

The dissent headed by Justice Teori Zavascki, distinguished the formal from material rules, whereby the Ordinary law would not be unconstitutional when providing for the procedures necessary to render viable the concession of the immunity.

At the end, the following thesis was consolidated: "The requirements for enjoying immunity have to be provided by Complementary Law."

STF - 1st Panel decides that ICMS paid in a reduced calculation basis, by the taxpayer's option, does not create a right to credit

On 02/21/2017, the 1st Panel of the Federal supreme court, in the trial of Interlocutory Appeal 765.420/RS, declared the constitutionality of the rule enacted in the state of Rio Grande do Sul, which determines the full reversal of ICMS paid in inbound operations, when the taxpayer chooses for paying the tax with the tax benefit relating to the reduction of the calculation basis.

To Justice Marco Aurélio, the reporting Justice in the appeal, the consideration required by the State of Rio Grande do Sul violates the principle of non-accumulation, and must be assured to the taxpayer use of credits arising of the acquisition of input in the same proportion as of the outtake operations taxed.

However, the understanding of Justice Rosa Weber prevailed, joined by the other Justices, in the sense that, once the taxpayer chose to use the benefit of the reduced calculation basis, there is no possibility of credit, not even proportionally.

TRF2 – Declared the statute of limitations and decay when the debtor is not found and the checks conducted by the Public Treasury are unfruitful

On 02/20/2017, the 4th Specialized Panel of the Regional Federal Court of Appeals for the 2nd Region ("TRF2"), when ruling on the Motion to Clarify filed in connection with Appeal 0504641-29.2005.4.02.5101, admitted the occurrence of the statute of limitations and decay in a different situation, provided by Law 6.830/80 ("the Tax Execution Act").

In the specific case, tax execution action was filed because the taxpayer terminated the payment of the tax credit in installments, whereby the Federal Government used all measures possible to locate the debtor and the assets possible to be placed a lien on, however, the search was unsuccessful.

The Panel resolved two relevant matters. The first, aligned to the understanding of the Superior Court of Justice ("STJ") in Appeal ("REsp") 1.144.963/SC, that reestablished the requirement of the tax credit in installments, and, therefore, of the very decay period for its collection by the Tax Authority, only starting after the conclusion of the administrative proceeding for exclusion of the taxpayer from the installment plan, and not as of the verification of its delinquency. In fact, on this point, was suppressed the occurrence of decay for the Tax Authority to file a Tax Execution Action.

The second issue refers to the possibility of decreeing the decay in a case different than as provided by the Tax Execution Act, specifically when there is no suspension and archiving of the execution, the date considered the initial one for counting the five-year statute of limitations.

In short, based on the understanding consolidated by the Superior Court of Justice in Review Appeal filed in connection with AREsp 224.014/RS, the Panel deemed fit to decree the statute of limitations reached in the case in question, since elapsed more than five years since the suspension of the proceeding, due to the inaction by the plaintiff or when the debtor and the assets possible to be placed a lien on were not found within the term set forth in Article 174 of the National Tax Code, since, otherwise, the tax debt would not be subject to any statute of limitations.

Legislation and Solution

COSIT Consult Solution No 07/2017 - Withheld Income Tax applies to resources remitted abroad for keeping the subscription of electronic periodical publications

Was published on 01.30.2017, the Solution to Consultation 07, of the General Taxation Coordination ("COSIT"), referring to the application of withheld Income Tax ("IRRF") on amounts paid, credited, delivered, used or remitted to a person residing or domiciled abroad for maintaining the subscription of electronic periodical publications.

The taxpayer has questioned whether would be mandatory to withhold income tax on amounts remitted abroad concerning the acquisition of electronic periodical publications. The Taxpayer claims the Income Tax Regulation ("RIR/99") fails to address this matter specifically.

According to COSIT'S understanding, Withheld Income Tax applies to resources remitted abroad for keeping the subscription of electronic periodical publications, for this activity being considered provision of services. Provision of services, pursuant to article 682, Part II, of RIR/99, is subject to application of 25% in Withheld Income Tax.

COSIT Consult Solution No 60/2017 – Exemption of PIS and COFINS contribution for services provided abroad when received by a local representative based in Brazil

Was published, on 19/01/2017, Solution to Consult No 60, of COSIT, referring to exemption of PIS and COFINS contribution for services provided abroad when received by a local representative based in Brazil.

According to COSIT'S understanding, so long as the third party ("representative") in the business relation does not act on its own behalf, but simply as an agent of the foreign customer, money is exchanged across federal borders and therefore, there is exemption of PIS and COFINS contributions.

COSIT Consult Solution No 75/2017 – Depreciation quotas - Entity calculating income tax on assumed profit basis, and, subsequently passes to calculate based on actual profit

Was published, on 23/01/2017, Solution to Consult No 75, of COSIT, referring to the mandatory nature of the calculation of quotas of depreciation of items in the noncurrent assets, for corporate entities taxed on assumed profit migrating to actual profit.

According to COSIT'S understanding, the corporate entity calculating income tax on assumed profit basis, and, subsequently passes to calculate based on actual profit, must issue an opening Balance Sheet, considering the depreciation quotas of the previous periods, in order to avoid the deduction thereof in periods

when the calculation of the tax is made based on actual profit.

COSIT Consult Solution No 88/2017 – Acquisition of Shares – Nonresident – Capital Gains

Was published, on 01/31/2017, Solution to Consult No 88, of COSIT, which provides for the application of Withheld Income Tax on supposed capital gains earned by nonresident investors in the acquisition of shares of Brazilian companies by other entities residing in Brazil.

According to COSIT'S understanding, the eventual positive difference in the value verified in the acquisition of shares characterizes a capital gain of the nonresident investor, taxable according to Article 26 of Law 10.833/2003.

On its turn, is incumbent upon the acquirer of the shares, the Brazilian acquiring company to pay the tax, when the taxpayer is a nonresident investor.

COSIT Consult Solution No 99/2017 - Electric Power Utility Concession Holders shall recognize the income under CVA and offer these amounts to taxation

Was published on 1.25.2017, the Solution to Consultation 99.017, of COSIT concerning the recognition of income by Electric Power Utility Concession Holders referring to amounts registered under the Account for Offsetting of Amounts in Items of "Portion A" (CVA) and the consequent inclusion of this income in the calculation basis of the taxes managed by the Internal Revenue Service of Brazil ("SRFB").

According to COSIT'S understanding, the taxpayer shall recognize the income under CVA and offer these amounts to taxation in the period when verified the positive differences that will comprise the increase of future rates, and not only at the moment when this invoice is increased and applied.

COSIT Consult Solution No 104/2017 – Contribution to PIS and COFINS – Not Applicable – Refunding of ICMS-ST to Tax Substitutes

On 02/01/2017, was published Solution to Consult No 104/2017, providing for the application of the Contribution to PIS and COFINS on refunding of Tax on Operations Relating to the Circulation of Goods and Services and Provision of Interstate and Inter-Municipality Transportation and Communication Services ("ICMS") received by electric power utility companies, due to the tax substitution regime applicable to this tax.

According to COSIT, in these cases, the ICMS-ST can be excluded from the calculation basis for the Contribution to PIS and COFINS in the regime of cumulative calculation and the non-cumulative regime, so long as these amounts are highlighted in the invoice. However, only the tax substitute can benefit from this exclusion, and it does not reach the party replaced in the tax obligation.

COSIT Consult Solution No 119/2017 – Tax Offsetting – Binding Matter – Judicial Action – Requirement for Being Rendered Res Judicata – Article 170-A of the National Tax Code

On 02/13/2017, was published Solution to Consult No 119, issued by COSIT, where established the understanding that the prohibition to offsetting of taxes prior to becoming res judicata provided by Article 170-A

of the National Tax Code ("CTN"), also applies to cases when the non-enforceability of the tax has been recognized in the superior courts and by agencies of the Ministry of Finance.

Therefore, according to COSIT, if the taxpayer is claiming a right in the relevant legal action, it shall wait until the ruling becomes final (res judicata) for continuing with the administrative proceeding, relevant to obtaining the credit through offsetting, irrespective of the binding position to the Internal Revenue Service on the non-enforceability of the debit.

COSIT Consult Solution No 126/2017 – Contribution to PIS and COFINS – Share Loan – Reimbursement

On 02/20/2017, was published Solution to COSIT Consultation No 126/2017, providing for the application of Contributions to PIS and COFINS on reimbursement amounts received by corporate entities in share loan operations.

In these operations, the original holders loan their shares for a predetermined term, by charging a fee, provided that, at the end of the agreed upon term, the transfer of the custody of the shares returns to the original holders. It is important to point out these operations shall be necessarily provided by clearing and settlement entities authorized by the Brazilian Securities and Exchange Commission ("CVM") for providing services of custody of securities and are brokered by brokerage firms or distributors.

According to COSIT'S understanding, reimbursement received by the original holders of the shares due to the load have the nature of financial revenue, and, as such, are not included in the concept of sale, outside of the scope of application of Contribution to PIS and COFINS in the cumulative application regime. Moreover, in this sense, COSIT clarified that the fact that amounts reimbursed throughout the loan agreement exceeding the value of the shares registered in the assets of the company that owns the shares, the nature of these revenues does not change.

COSIT Consult Solution No 169/2017 – Nonresident Returning to the Condition of Resident in the Same Calendar Year – DIRPF

On 01/31/2017, was published Solution to Consult No 169/2017, rendered by COSIT.

The Solution to the Consultation sets the premise that an individual leaving the country permanently and presenting the Report of Definitive Leaving within the required term is considered nonresident in brazil as of the date of departure, pursuant to Regulatory Directive 208/2002. As a nonresident, earnings obtained by the individual abroad during the period of the definitive leave are not subject to taxation in the country.

Therefore, when an individual restores its status as a resident in Brazil in the same calendar year when becoming a nonresident, the earnings obtained abroad during the period of non-residency must be declared in the field Exempt and Nontaxable Income in the Tax Return of Individuals ("DIRPF").

COSIT Divergence Solution No 11/2017 - Expenses with transport between the same establishment of the corporate entity - Verified credit on PIS and COFINS

Was published on 1.27.2017, Divergence Solution 11, of COSIT, which made uniform the understanding of

federal tax authorities regarding the classification of several expenses relating to input, which allows the verification of credit on the contribution to PIS and COFINS.

According to COSIT, expenses with parts and pieces referring to maintenance services and fuel and lubricants, when used for transportation within the same establishment of the corporate entity, raw materials and products undergoing preparation, can be classified as input. Therefore, there is a possibility of being verified credit on PIS and COFINS. On the other hand, these same expenses with transportation between different establishments of the same corporate entity, do not create a right to credit.

COSIT Divergence Solution No 13/2017 – International Transportation of Cargo – Logistics Contract – Credits in Contribution of PIS and COFINS

On 01/31/2017, was published Divergence Solution 13, issued by COSIT, whereupon consolidated the understanding that expenses with international transportation of exported goods, even if incurred by a company domiciled in the country and when the burden has been integrally borne by the seller, do not create a right to credit in PIS and COFINS contribution on a non-cumulative systematic.

According to COSIT, the fact of the international transportation of cargo is sheltered by exemption would render unfeasible the calculation of credits of these contributions, due to the provision of Articles 3, Paragraph 2, Section II, of Laws 10.637/2002 and 10.833/2003.

On the other hand, recognizing that the logistics contract encompasses several services, such as storage, inspection of goods, inventory control, packing and distribution, among others, COSIT has reaffirmed the understanding that is possible to accrue credits in relation to certain services considered individually, so long as provided by the PIS and COFINS contributions' legislation, as well as so long the relevant amounts are expressly detailed and are both reasonable and proportional in light of the contractual provisions and the operations effectively carried out.

Regulatory Directive RFB 1.688/2017 – CPF – Mandatory Enrollment – Above the Age of 12

On 02/02/2017, was published Regulatory Directive 1.688, of the Internal Revenue Service of Brazil ("IN RFB No 1.688/2017"), which amended Regulatory Directive 1.548 de 2015 ("IN RFB No 1.548/2015"), providing for the Individual Taxpayer's Registry of the Ministry of Finance ("CPF").

Among other provisions, said IN changed the age limit for enrollment of individuals registered as dependents in the DIRPF, from 14 (fourteen) to 12 (twelve) years.

Ordinance MF 63/2017 – Change of the Limit for Filing Ex Officio Appeal by the DRJ

On 02/10/2017, was published Ministry of Finance Ordinance No 63, which changed the limit for filling ex officio appeals by the Offices of the Internal Revenue Service of Brazil for Trial ("DRJ").

According to the Ordinance, the Office of the Internal Revenue Service of Brazil for Trial, shall appeal on an ex officio basis when the decision exonerates the taxpayer from paying taxes and charges levied in a fine, in an amount total or in excess of R$ 2,500,000.00 (two million and five hundred thousand Reais).

The previous limit was R$ 1,000,000.00 (One million Reais).

Is important to point out that the Ordinance also binds the DRJ to appeal ex officio when the ruling excludes the taxpayer from the proceeding, even if the decision in question has maintained the enforceability of the tax credit in full.

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