

THE SAO PAULO TAX COURT

Specific tax report n° 27 • Year V • September 2014

Dear Sirs:

This publication **Tax Bulletin # Tax and Fee Court of São Paulo (TIT)** aims to update our clients and others interested about the main subjects that are being discussed and judged in this body.

In this 27th issue of our newsletter, we comment about the need of regular tax assessment notice to toll the statute of limitations, as well as the decision concerning the rights to ICMS book credits for acquisitions of intermediary products exhausted in the industrialization processes.

Click over the topics below to directly access each text:

[ICMS – toll of statute of limitations – sole paragraph of the Article 173 of the Brazilian Tax Code – inapplicability](#)

[ICMS credit rights on acquisition of products exhausted in the industrialization process](#)

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!

THE SAO PAULO TAX COURT

Specific tax report n° 27 • Year V • September 2014

ICMS – TOLL OF STATUTE OF LIMITATIONS – SOLE PARAGRAPH OF THE ARTICLE 173 OF THE BRAZILIAN TAX CODE – INAPPLICABILITY

This is a Tax Assessment Notice (“AIIM”) based on alleged non-payment of ICMS taxed on the receipt of airplanes imported under the leasing regime, notified on 02/01/2008, related to alleged taxable events in 2002.

Considering there was an injunction staying the tax liability under the notice, the Tax Assessment Notice was granted at the first instance, grounded on the fact that the assessment was carried out to prevent lapse.

An Ordinary Appeal was filed, and further forwarded to the Decision Chamber, which acknowledged the lapse of the right to establish tax liability grounded on the article 150, 4th Paragraph of the Brazilian Tax Code.

The Representatives of Tax Authorities filed an Appeal to the Superior Court, arguing that there was a preparatory measure for the assessment, prior to the Tax Assessment Notice. Such, in the opinion of Tax Authorities, had stayed the statute of limitations, and rendered the Notice as proper and timely, as per the sole paragraph of the Article 173 of the Brazilian Tax Code.

The foregoing provision sets forth that tax liability elapses 5 years “as of the date of the establishment of the tax liability via notification to the taxpayer of any preparatory measure necessary to the assessment.”

The Superior Chamber of the State of São Paulo Tax and Fee Court (TIT/SP) acknowledged the Tax Authorities’ Appeal to the Superior Court; nonetheless, upon the majority of the votes, dismissed it as it understood that preparatory measures are not the proper procedures to affect the progress of the statute, which is affected, solely, by the actual assessment and upon the drawing of the Tax Deficiency Notice, and regular notification to the Taxpayer.

ICMS CREDIT RIGHTS ON ACQUISITION OF PRODUCTS EXHAUSTED IN THE INDUSTRIALIZATION PROCESS

This is a Tax Assessment Notice (“AIIM”) discussing the right to credits arising out of non-accrual of ICMS for intermediary products exhausted in the industrialization process.

Following the presentation of expert report, the proceeding was converted into an order to produce more evidences, so the first instance could issue a final decision as to the evidences. The Tax Assessment Notice was granted at the first instance. Further, the records were remanded to the Decision Chamber, who maintained the tax deficiency notice, and the defendant filed an Appeal to the Superior Court.

The Superior Chamber of the State of São Paulo Tax and Fee Court (TIT/SP) acknowledged the Appeal to the Superior Court; nonetheless, dismissed the right to book credits as the products at hand were not fully and immediately exhausted in the industrialization process, but were assets subject to regular wear and tear.

THE SAO PAULO TAX COURT

Specific tax report nº 27 • Year V • September 2014

To these effects, the leading vote in the decision stated: “This full bench admits, also, alternatively, that merchandise fully and immediately exhausted in the industrialization process allows ICMS credits. Nevertheless, in the matter at hand, the appealed decision registered that the merchandises stated in the complaint are not exhausted, fully and immediately, in the industrialization process but are subject to wear and tear. Assets subject to wear and tear, not exhausted in the production process, such as the ones stated in the complaint do not give rise to ICMS credits.”

The decision issued by the Superior Chamber, nevertheless, opposes the treatment set forth in the CAT Normative Ruling no. 1/2001, which in its Item 3.1 acknowledges the calculation of credits on intermediary products, i.e., the products that as per the definition under the IPI legislation “though not part of the new product are exhausted during the industrialization process, unless if they are assets of the fixed assets group.”

Moreover, the CAT Normative Ruling no. 01/2001 does not limit the time for exhaustion of intermediary products. In other words, it does limit to full and immediate exhaustion. In its wording, supplies are “raw materials, the secondary and intermediary products, the packing material, the fuel, and the power consumed along the industrialization process or used up as a part of the end product of the industrialization activity, of the taxpayer itself or for third parties, or used in the services rendering activities.”

In view of the foregoing, the decision issued by the Superior Chamber of the State of São Paulo Tax and Fee Court (TIT/SP) leaves room for questionings, based on the position released by the State of São Paulo Treasury Secretary itself, via the CAT Normative Ruling no. 01/2001.

THE SAO PAULO TAX COURT

Specific tax report n° 27 • Year V • September 2014

Team responsible for the preparation of the Tax Bulletin of Tax and Fee Court of SP:

Eduardo Pugliese Pincelli (eduardo.pugliese@souzaschneider.com.br)

Rafael Fukuji Watanabe (rafael.watanabe@souzaschneider.com.br)

Amanda Mateoni Salvestrini (amanda.mateoni@souzaschneider.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.SOUZASCHNEIDER.COM.BR