# tax bulletin

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*The São Paulo Tax Court*

Specific tax report n° 31 • Year VII • July 2016

Dear Sirs:

The purpose of the publication of **Tax Bulletin # Tax and Fee Court of the State of São Paulo** is to update our clients and interested parties on the main issues being discussed and decided in this court ("TIT/SP").

In this 31th edition of our newsletter, we will comment on (i) the lack of reversal ICMS credits arising from the utilization of diesel oil in activities not connected to the manufacturing process of an establishment; and (ii) the impossibility of tax reclassification of goods carried out by the Federal Revenue of Brazil.

Click over the topics below to directly access each text:

**ICMS – Lack of Reversal of ICMS credits deriving from the use of diesel oil in activities not connected to the manufacturing process of an establishment**

**ICMS – Lack of Tax Payment – Impossibility of Tax Reclassification of Goods Carried Out by the Federal Revenue of Brazil**

**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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## ICMS – LACK OF REVERSAL OF ICMS CREDITS DERIVING FROM THE USE OF DIESEL OIL IN ACTIVITIES NOT CONNECTED TO THE MANUFACTURING PROCESS OF AN ESTABLISHMENT

This refers to a Tax Assessment charging ICMS for undue register of credit at the acquisition of goods not directly related to the manufacturing activity of the establishment, not consumed in the productive process.

In an Ex-Officio Appeal, it was decided that the goods (diesel fuel) were not utilized for other purposes than those related to the activities of the Assessed Company's establishment, since the vehicles were used to transport agricultural machinery and implements, all of which directly related to its productive process, thus concluding it is fundamentally important for the performance of its activities. On the other hand, the reversal of credits was maintained in relation to vehicles utilized by a third party and the vehicles used by the farming manager (in this case, there would be no hard evidence of what would be its effective use, whether in the interests of the activities of the Company or for one's own use).

Dissatisfied with the decision, Public Treasury filed a Special Appeal against the decision that had granted the Ex-Officio Appeal.

In the trial at the Superior Chamber, the Rapporteur heard the Treasury's appeal and, as to the merits, concurred with the State Treasury of São Paulo, reestablishing the auditors' charges, under the argument that the register of credits cannot be carried out if the acquired goods are only related to the company's activities, contributing to its operations, but they rather would need to be effectively employed in the productive process, essentially contributing to the achievement of the final purpose of its activities.

The Rapporteur further added that the evidentiary elements demonstrated the utilization of the vehicles in the preservation of patios and gardens, loading of parts and equipment, mechanical help and fueling, ambulance, tow truck/crane services, patio cleaning, movement of equipment in the patio, weighing of experiments, welding machine, without any proof that such activities are directly related to the production sector.

A reviewing vote was then rendered, pointing out the importance of the vehicles and equipment described in the case records and that are utilized by the Assessed Company in its activities, since they contribute, directly and in a relevant manner, to its productive process, therefore the tax requirement was considered to be groundless.

At the end, the understanding of the Rapporteur was accepted by majority decision (10 x 6), for hearing and granting the Treasury's Special Appeal, overruling the appealed decision and reestablishing the tax demands.





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## ICMS – LACK OF TAX PAYMENT – IMPOSSIBILITY OF TAX RECLASSIFICATION OF GOODS CARRIED OUT BY THE FEDERAL REVENUE OF BRAZIL

This refers to a Tax Assessment issued as result of charges of an alleged lack of ICMS payment in relation to issued Invoices that depicted the product as "simple distilled sugarcane spirit" – classified under NCM/SH code no. 2208.40.00, which ICMS is deferred at the time of exit (article 1, CAR Rule (Portaria) 10/2007). According to the auditors, the traded product was "ethyl alcohol", classified under NCM/SH code no. 2207.10.00, which operation is regularly taxed.

In an Ordinary Appeal, the tax audit was considered valid, since several elements in the tax and accounting documents indicated it was "ethyl alcohol", and not "simple distilled sugarcane spirit", such as: (i) certificates of analysis of the traded products stated the alcoholic strength of 94.8%; (ii) the field Complementary Information shows risk for the loading, unloading, transhipment and transportation; (iii) there is no accounting record of the production of "simple distilled sugarcane spirit", only of alcohol; (iv) in the Inventory Records there is no record of the product denominated "simple distilled sugarcane spirit"; and (v) the position no. 2208 of the TIPI (Tax Levy on Manufactured Products) Table, in which the Assessed Company classified its product, described a product having alcoholic strength lower than 80%, which differs from the product traded by the company.

Dissatisfied with the decision, the Assessed Company then filed a Special Appeal against the decision that had dismissed the Ordinary Appeal and upheld the tax requirement.

In the appeal, the Assessed Company claimed that the product in question was classified by the Federal Revenue of Brazil, in reply to an Inquiry made under the effectiveness of the TIPI, approved by Decree no. 2,092/96, according to which the product informed by the Assessed Company, code no. 2208.40.00, should be adopted, even if the alcoholic strength was higher than 80%. In their reply to the Inquiry, the Federal Revenue of Brazil also added that the alcoholic strength does not determine the classification of the product under nos. 2208 or 2207, meaning that the Assessed Company was correct when following the instructions set by the federal agency for the classification of the products.

In the trial of the Superior Chamber, the Rapporteur heard the Special Appeal and, as to the merits, concurred with the Assessed Company, overruling the appealed decision in order to cancel the auditors' charges, under the argument that there is no doubt that the authority for tax classification of goods is held by the Federal Revenue of Brazil, which meant the Assessed Company could not be punished for having followed the instructions of the federal agency.

A preference vote was rendered stating that the Special Appeal could not be heard, since the discussion would lead to the analysis of evidence.

By majority decision (9 x 6), the position of the Rapporteur then prevailed, for hearing and granting the Special Appeal of the Assessed Company, overruling the appealed decision and cancelling the tax requirement.





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