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The Administrative Council of Tax Appeals

Specific tax report n° 93 • Year VIII • December 2015

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 93rd edition of our newsletter, we will comment on a decision in which the Administrative Council of Tax Appeals ("CARF") ruled that there is no charge of social security contributions on payments made to corporate officers as part of profit sharing plans ("PSP").

We also commented on a decision in which the CARF ruled out the liability attributed to managing partners, as they viewed that the mere fact of being a partner does not result in the joint liability provided for in article 124 nor the liability contained in article 135, both from the National Tax Code ("CTN").

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

PSP – Corporate Officers – Non-Levy of Social Security Contributions

Joint Liability and Tax Liability – Need for Distinction

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

Enjoy your reading!

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"MATTER: SOCIAL SECURITY CONTRIBUTIONS
Ascertainment period: April 1, 2006 to April 30, 2006
CORESP. JOINT LIABILITY. The imputation of liability provided for in article 135, III, of the CTN is not tied only to the breach of the tax liability, but to proof the other conducts described therein: the practice of acts with excess of powers or violation of the law, articles of organization or articles of incorporation. PSP. CORPORATE OFFICERS. POSSIBILITY. The sharing of profits of the company relative to non-employed officers fits into the cases provided by Law no. 8,212/91 relative to portions not integrating the contribution salary, due to express legal provision (Law 6,404/76). Voluntary Appeal Granted. Tax credit Removed"

The decision in question deals with a Tax Assessment Notice issued for the collection of Social Security Contributions levied on payments made to corporate officers appointed under the bylaws as part of profit sharing plans ("PSP"). Furthermore, the managers of the company were deemed to be jointly liable.

In this case, the Tax Agent viewed that the payment of PSP to corporate officers integrates the tax basis of the social security contributions, due to the lack of a specific exemption rule, since Law no. 10,101/00 would only apply to employed workers.

The Federal Revenue Judgment Office of Brazil ("DRJ") dismissed the taxpayer's motion of opposition, as it saw, in sum, that the payment of PSP to appointed officers, pursuant to Law no. 6,404/76, is subject to the social security contributions, as this characterizes consideration for rendered services. In addition, it viewed that the purpose of including the names of the administrators in the Tax Assessment Notice is only to provide background information for any enforcement of the tax credit.

The DRJ decision was subject of a voluntary appeal by the Taxpayer, who defended, preliminarily, the nullity of attributing tax liability to individuals related to the company, and on the merits, claimed the statute of limitations expiry of part of the taxable events and the non-levy of social security contributions on payments made as PSP, owing to the lack of a remuneration nature.

When examining such arguments, the CARF ruled out the joint tax liability of the company's administrators, ruling that the mere default on the tax, without the practical demonstration of the practice of acts in excess of powers or violation of the law, of the articles of organization or of articles of incorporation, does not fit into the liability provision established in article 135, item III, of the National Tax Code ("CTN"). The CARF further ruled out the statute of limitations expiry, under the claim that the initial term to start the limitation period must take into account the reference date on which the payment of the Social Security Contributions was effectively made, and not the date of accounting recognition made by the Taxpayer.

Moreover, the CARF ruled that the payments in question are protected by the immunity provided for in article 7, item XI, of the Federal Constitution, considering that the profits earned by the company derive from the mutual effort of all workers, regardless of their ties with the legal entity. In addition, the Rapporteur Councilor stated that Law no. 6,404/76 always separated the concept of remuneration of administrators from payments made as PSP.

In light of these arguments, the CARF unanimously granted the voluntary appeal in order to rule out the charge of social security contributions on amounts paid to corporate officers.

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"Matter: Administrative Tax Proceeding
Calendar year: 2007, 2008, 2009 (...)
JOINT LIABILITY AND TAX LIABILITY. NEED FOR DISTINCTION. 4. The joint tax liability addressed in the situations provided for in article 124, I, of the CTN, presupposes the existence of two tax debtors practicing the unlawful act described in the tax levy. From the taxable event, in such situations, there is the possibility of the tax creditor requiring the payment of taxes from any of the debtors that integrated the legal-tax relation. 5. The tax liability arising from the situations provided for in article 135 of the CTN is tied to the practice of acts in excess of powers, violation of the law, of articles or organization or of articles of incorporation, by those not integrating the legal-tax relation, but are held liable for the tax credit due to the unlawful act practiced. 6. The situation provided for in article 124, I may not be taken for those dealt with in article 135 of the CTN. In the events stated in article 135 we will find two autonomous rules, one applicable in relation to taxpayer, the one practicing the taxable event (art. 121, I) and the other in relation to the third party not participating in the legal-tax relation, but who, by violation of certain duties, may be held accountable for the obligation) - (RE 562.726/PR, j. Nov. 3, 2010, under article (543-B of the CPC). 7. The situation of the case records reveals that liability was ascribed to the stated persons by the mere fact that they are partners of the company. No personal conduct contrary to the interests of the company was attributed thereto, or to the right from which the non-payment of the assessed taxes may have derived. The liability derived from the simple fact of the non-payment of the taxes due by the company. However, this situation does not constitute joint liability of those not part of the legal-tax relation (REsp 1.101.728/SP, ruled pursuant to art. 543-C, of the CPC). Ex-Officio Appeal Dismissed. Voluntary Appeal Partially Granted."

The decision in question addresses a Tax Assessment Notice issued for the collection of IRPJ, CSLL, PIS and Cofins, relative to the calendar years of 2007 to 2009, plus interest and a punitive fine of 150%, increased to 225%.

Furthermore, the managing partners were assigned as jointly liable to tax pursuant to articles 124, 128 and 135 of the CTN, due to the practice or knowledge of acts that "resulted in the situations that formed or were related to the taxable events of the evaded taxes", and to the earning of benefits, since the evaded taxes contributed for the legal entity's results.

Upon the opposition of the assessment, the case records were then sent to the DRJ in Blumenau, which ruled out the fine increase, upholding the assessment in relation to the other aspects.

Voluntary and ex-officio appeals were filed, and the CARF ruled out the tax liability, ruling the lack of grounds of the assessment, since the attribution of liability only took place because the tax debtors were partners of the legal entity.

As stated by the Rapporteur Councilor, the joint liability provided for in article 124 of the CTN is not to be taken as the liability of third parties, contained in article 135 of the CTN. The reason is that the joint tax liability applies to those that have elements to be tax debtors of the tax liability, therefore not deriving from unlawful acts; while the liability of third parties applies in relation to the third party that does not participate in the legal tax relation, but that, due to the violation of certain duties, may be held accountable for the liability.

For this reason, the Rapporteur Councilor concluded that "the partner is not indeed liable, due to the mere fact of being a de facto partner." Rather, it is necessary for there to be the practice of a "forfeiture or omissive conduct relative to the taxable event resulting in the tax found to be defaulted on". That is, only when the partner

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violates corporate law, articles of organization or of incorporation, without the company's knowledge, may the liability provided for in article 135 of the CTN be applied, otherwise, the person practicing the act is the legal entity, which should be individually responsible for the payment of the tax.

Within this context, the ex-officio appeal was dismissed and the voluntary appeal was partially granted, in order to exclude the liability assigned to the only partner who opposed to the assessment.

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