

THE ADMINISTRATIVE COUNCIL OF TAX APPEALS

Specific tax report n° 72 • Year VI • March 2014

Dear Readers:

This publication **Tax Bulletin # The Administrative Council of Tax Appeals** aims to update our clients and others interested about the main subjects that are being discussed and judged in this body.

In this 72st edition of our newsletter, we analyze the decision in which the Administrative Council of Tax Appeals (“CARF”) decided that mere indications regarding the ownership of a current account located abroad is not enough to prove the omission of income deposited in the account.

We also analyzed a decision in which the CARF understood that the Contribution to the PIS and COFINS are deductible from the tax basis of the IRPJ/CSLL, assessed jointly, in the same action, once the Administrative Authority, when issuing the assessment, should reestablish the Net Income and the Taxable Income in order to ascertain the due taxes, considering all the entries affecting them.

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

[IRPF – Omission of income – Current account located abroad.](#)

[PIS/COFINS – Ex-officio Assessment – Deduction from the tax basis of the IRPJ/CSLL.](#)

Souza, Schneider, Pugliese e Sztokfisz Advogados law firm 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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“Income Tax on Individuals – IRPF

Fiscal Year: 2002

ADMINISTRATIVE TAX PROCEEDING. LITIGATION DELIMITATION. The litigation phase initiates upon the objection to the demand. If there is no specific refutation of a given issue in the objection, then there is no controversy. In the objection, the taxpayer expressly agreed to part of the assessment.

IRPF. BANK DEPOSITS OF NON-VERIFIED ORIGIN. ‘BEACON HILL’ OPERATION. APPELLANT IS STATED AS THE BENEFICIARY OF FUNDS IN A BANK ACCOUNT ABROAD. It is up to the Audit to prove unequivocally the ownership of the account abroad, in which deposits considered as omitted earnings were deposited. An event in which there is no evidence of the connection between the appellant with the bank account abroad.

PERCENTAGE OF EX-OFFICIO FINE. ANALYSIS OF THE CONSTITUTIONALITY OF THE LAW. The CARF does not have jurisdiction to rule over the unconstitutionality of tax laws. Application of CARF Precedent no. 2.

LATE PAYMENT INTEREST. SELIC RATE. APPLICABILITY. Since April 1, 1995, late payment interest charged on tax debts administered by the Federal Revenue Office are due, within the default period, at the reference rate of the Special System for Settlement and Custody - SELIC for federal securities. Application of CARF Precedent no. 4.”

The decision in question deals with a Tax Assessment Notice issued for the collection of the Income Tax on Individuals (“IRPF”), under the claim that the Taxpayer had allegedly omitted earnings credited into a bank account abroad of which he was supposedly the holder, during the calendar year of 2002.

From an investigation conducted by the Federal Police, the Tax Auditors had access to magnetic files and documents that allegedly proved that the Taxpayer would be the holder of such bank account held abroad and, consequently, the beneficiary of the amount transferred to the account.

In an objection, the Taxpayer affirmed that the magnetic files, through which the Audit based the assessment, are not documents capable of demonstrating whether he is the beneficiary of the earnings, and not even the holder of that account, thus concluding that the conduct attributed to the Taxpayer was never practiced, seeking the nullity of the Tax Assessment Notice given the lack of irrefutable evidence proving the assessment issued by the Auditors.

After the Objection was examined by the Federal Revenue Office of Judgment (“DRJ”), the DRJ found that it lacked grounds, since it viewed that although there was no specific document proving the remittance of the allegedly omitted funds, the documents obtained through the Federal Police Operation –object of an expert report prepared by the National Criminalist Institute, which had demonstrated what had been claimed by the Audit– had credibility and public faith.

Therefore, due to the rejection of the DRJ, the Taxpayer then filed a Voluntary Appeal with the Administrative Council of Tax Appeals (“CARF”), which decided to grant the Taxpayer’s Appeal.

In its decision, the CARF viewed that the presence of a document that only relates the name of the Taxpayer with an account abroad, as well as the submitted report, do not constitute sufficient evidence to prove that the Taxpayer is the holder of the account attributed to him by the Tax Auditors.

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Likewise, the need to submit more consistent evidence was declared, such as the registration form with the signature in the bank records or receipts proving that the Taxpayer had effectively moved the funds from the account.

Thus, it was determined that the Tax Auditors had failed to provide undisputed evidence that the Taxpayer is the holder of the bank account associated to him.

Based on this position, the Council granted the Taxpayer's appeal in order to cancel the assessment arising from the alleged omission of earnings deriving from deposit in a bank account abroad.

“PIS AND COFINS EX-OFFICIO ASSESSMENT. SAME TAX ACTION. DEDUCTION FROM THE TAX BASIS OF THE IRPJ/CSLL. APPLICABILITY

The PIS and COFINS assessed jointly, in the same action, are to be deducted in the reestablishment of the Net Income and the Taxable Income. The reason is that there is no legal impediment in this sense, as the ex-officio assessment does not imply the suspension of enforceability of the demanded taxes, which will only occur in case of a timely objection. The sanction for violations is the ex-officio fine, charged proportionally to the tax, and not the tax increase.”

The decision in question deals with Tax Assessment Notices issued for the collection of the Corporate Income Tax (“IRPJ”), Social Contribution on Net Income (“CSLL”), Contribution to the Employee Profit Participation Program (“Contribution to the PIS”), and of the Contribution for the Social Security Funding (“COFINS”), relative to the calendar years of 2007 and 2008, and due to the rejection of costs and credits of the Contribution to the PIS and COFINS, in connection with Invoices declared to be inadequate by the Treasury Office of the Federal District and whose payment was not proved by the taxpayer.

In an objection, the assessed Taxpayer claimed, among other arguments, that the rejected invoices represent an effective purchase of goods intended to resale, and that any irregularities with the tax situation of the suppliers cannot affect him, as well as the need for a deduction of the Contribution to the PIS and COFINS, of ex-officio assessment, from the IRPJ CSLL tax basis.

The decision of the Federal Revenue Office of Judgment, which dismissed the objection, prevailed, upholding the tax credit. Dissatisfied, the Taxpayer then filed a Voluntary Appeal with the CARF, which decided to partially grant the appeal only to accept the deduction of the Contribution to the PIS and COFINS from the IRPJ CSLL basis.

The reason is that, pursuant to the reporting Councilor's vote, the deductibility of the taxes in the determination of the Taxable Income, authorized by article 41 of Law no. 8.981/95, is objected by the taxes with suspended enforceability, however, the ex-officio assessment does not imply an automatic suspension of the enforceability of the tax credit, which only occurs with the filing of an objection.

Furthermore, there is no legal provision prohibiting the deductibility of the Contribution to the PIS and COFINS, assessed on an ex-officio basis, from the tax basis of the IRPJ CSLL subject matter of the same tax proceeding, and the Administrative Authority, when issuing the assessment, is to reestablish the Net Income and the Taxable Income in order to ascertain the due taxes, considering all the entries affecting

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them, pursuant to article 142 of the National Tax Code and to the principle of administration's loyalty to the administered parties. That is, the nature of the obligation is not altered because it arises from an act of the Tax Authorities' themselves, therefore, the normally deductible costs and expenses are to be considered in the assessment, under penalty of taxing a portion that does not correspond to the tax basis.

The reporting Councilor, however, views that in the event the assessment relative to the Contribution to the PIS and COFINS is canceled, it is up to the Taxpayer, after a final and unappealable decision has been rendered, to subject the IRPJ and the CSLL levied on such gain to taxation, under penalty of a new ex-officio assessment.

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