

## # THE SAO PAULO TAX COURT

Specific tax report nº 26 • Year V • February and March 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 26th edition of our newsletter, we will comment about the illegality of tax assessment notice that was based on information obtained by the Tax Authorities from credit cards companies before the start of administrative proceeding, and the annulment of tax assessment notice due to the rectification of the Individual Income Tax Statement.

Click over the topics below to directly access each text:

[Illegality of tax assessment notice that was based on information obtained by the Tax Authorities from credit cards companies before the start of the administrative proceeding.](#)

[Annulment of tax assessment notice due to the rectification of the Individual Income Tax Statement.](#)

**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!

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**RED CARD OPERATION – THE TAX SEARCH CARRIED OUT THROUGH INFORMATION OBTAINED WITH CREDIT CARD COMPANIES COMPARED WITH AMOUNTS STATED IN INFORMATION AND ASCERTAINMENT SLIPS (GIA) PRIOR TO THE START OF THE AUDIT VIOLATES THE PROVISIONS IN LC 105/01.** The instructions in article 6, of Complementary Law no. 105/01 and those in CAT Rule (Portaria) CAT 12/10 were not followed, since the Federal Revenue Auditor (AFR) already had the information with credit card companies before the start of the tax proceeding. Dismissed ex-officio appeal.

This is an Administrative Tax Proceeding discussing the validity of the Tax Assessment Notice and Fine Charge (“AIIM”) issued under the claim of alleged lack of payment of the ICMS calculated on transactions paid through debit or credit cards, based on financial information provided by credit card companies to the Tax Authorities in what was termed the “Red Card Operation”.

Tried in the Tax Judgment Office, the Tax Assessment Notice was cancelled in full, on the grounds that the evidence used by the Tax Authorities was illegal, due to undue breach of secrecy of the assessed company’s financial information. According to the Judge, the Tax Authorities violated Complementary Law no. 105/2001, which classified credit card companies as financial institutions.

Also according to the decision, from the outset of Complementary Law no. 105/2001, the access to financial information depends on the previous filing of an administrative process or proceeding, pursuant to Decree no. 54.240/2009 and CAT Rule no. 12/2010, making the evidence used by the Tax Authorities illegal.

Lastly, the AIIM was cancelled based on the “Fruit of the Poisonous Tree” theory, according to which, evidence that is obtained unduly, as this is null, will nullify the entire process deriving from it.

Furthermore, as the value of the assessment exceeds 5000 UFESPs (Tax Unit of the State of São Paulo), an Ex-Officio Appeal was filed, followed by information of the Tax Representation as to the validity of the Tax Assessment, affirming that the evidence used by the Tax Agents was lawful.

In the trial of the Ex-Officio Appeal, the vote of the Rapporteur followed the opinion of the Tax Representation, accepting the thesis that the secrecy provided for in Complementary Law no. 105/2001 only applies if the collection of data adversely affected card users, who are entitled to privacy as to their accounts, movements, as well as fund and investment sources. In the case at issue, the Rapporteur defended that the Tax Authorities have access only to overall amounts concerning credit card transactions, where there is no individualization of their clients, and therefore no undue breach of secrecy.

The concurring opinion, in turn, was based on a decision of the Full Bench of the Federal Supreme Court handed down in the trial of Extraordinary Appeal 389.808 / PR, to provide the grounds for its position, viewing that the breach of bank secrecy without a judicial order is unconstitutional and violates individual privacy.

In addition, the concurring opinion stated that Complementary Law no. 105/2001, State Decree no. 54.240/2009, and CAT Rule no. 12/2010 are clear when establishing that the Tax Authorities may have access to financial information “when an administrative proceeding has been filed, and if such examination is deemed to be essential by the relevant administrative authority”.

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As in that case the Tax Authorities failed to follow this procedure, the Court, by majority vote, dismissed the Ex-Officio Appeal, rejecting the dissenting Rapporteur's opinion, and the AIIM was fully cancelled.

**ITCMD-DIRPF was the only evidence of the tax claim – At the time it was rectified, the claim lost is evidentiary elements - AIIM was canceled.**

This is an Administrative Tax Proceeding discussing the validity of the Tax Assessment Notice and Fine Charge ("AIIM") issued for the lack of payment of the estate and gift tax (ITCMD) required due to alleged gifts informed by the Assessed party in his Individual Income Tax Statement ("DIRPF").

The assessment was tried in the Tax Judgment Office and was fully upheld. Against this decision, the Taxpayer then filed an Ordinary Appeal, seeking the review of the appealed Appellate Decision.

The Taxpayer claimed that the amounts derive from the assignment of hereditary rights related to shares of a limited liability company and were initially mistakenly informed in the title "EQUITY TRANSFER"; subsequently this mistake was corrected by submitting a Rectifying Statement, shifting the amounts to the "DEBTS AND SECURITY INTEREST" field.

The Rapporteur, in his vote, dismissed the Appeal, upholding the AIIM in full, although in a dissenting opinion, Judge Adolpho Bergamini viewed that the rectification of the DIRPF removed the grounds of the AIIM, as the latter had the rectified DIRPF as the only supporting evidence.

Lastly, he argued that the DIRPF is an evidence that the Treasury Office of the State of São Paulo borrowed from the Federal Revenue Office, and that it was not up to the former (State Treasury) to disregard the rectified DIRPF, which is accepted by the latter (Federal Revenue).

The vote of Judge Juiz Adolpho Bergamini eventually prevailed and the AIIM was fully canceled, recognizing the lack of grounds of the rectified DIRPF and the need to recognize the rectifying DIRPF.

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