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Prezados Leitores:

A publicação **nota tributária** tem por objetivo atualizar nossos clientes e demais interessados sobre os principais assuntos que estão sendo discutidos e decididos no âmbito do Judiciário, do Legislativo e do Executivo.

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The offices of Souza, Schneider, Pugliese and Sztokfisz Advogados are available to its clients for any clarification regarding the above-mentioned subjects.

Enjoy the reading!

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Jurisprudência

STJ – Precedents no. 554, 555, 556, 558, 559 and 560

On 12/09/2015, the First Session of the Superior Court of Justice (STJ) approved 6 (six) new precedents arising out of the generally accepted understanding of Tax Law matters:

Precedent no. 554: In case of corporate succession, the liability of the successor includes not only tax owed by the original taxpayer, but, also late payment or punitive fines regarding the taxable event occurred to the date of the succession.

Precedent no. 555: If there is no statement of debit, the 5-year statute of limitations for the Tax Authority to constitute the tax liability is counted exclusively as per the article 173, I, of the CTN [National Tax Code] for the instances where the legislation attributes to the taxpayer the duty to accelerate payment, without previous verification by the administrative authority.

Precedent no. 556: Taxation of income taxes on the amount to complement the retirement pension paid by private retirement fund is not due, as well as it is not due for the redemption of the contributions collected for the respective sponsoring entities, from 1/1/1989 to 12/31/1995, under the exemption granted by the art. 6th, VII, b, of the Law no. 7.713/1988, as per the wording prior to the one awarded by the Law no. 9.250/1995.

Precedent no. 558: In tax execution proceedings, the Initial cannot be dismissed on the grounds of lack of statement of the Individuals Taxpayer Registry [CPF] number, and/or ID card RG or the Corporate Taxpayer Registry [CNPJ] of the defendant.

Precedent no. 559: In tax execution proceedings, it is not necessary to gather, to the Initial, the liability calculation sheet, as it is not a requirement set forth under the art. 6th of the Law no. 6.830/1980.

Precedent no. 560: The freezing of assets and rights as per the art. 185-A of the CTN, presupposes the exhaustion of the diligences to find attachable assets, which is characterized by the negative responses to requests of restriction on financial assets and the issuance of official letters to the public registries in the domicile of the defendant, to Denatran or Detran.

STF – General Repercussion – IPTU – Unconstitutionality of progressive rate does not bar the collection of the tax

On 11/04/2015, the Plenary of the Federal Supreme Court (STF) issued a decision on the Leading Case, i.e., the Appeal to the Supreme Court (RE) no. 602347/MG and established the understanding for the possibility of collection of IPTU at the minimum rate, in accordance with the purpose of the real estate if it is decided for the unconstitutionality of the progressive tax. The general repercussion of the matter is acknowledged and it affects, directly, 526 (five hundred and twenty-six) proceedings stayed at other instances of the Judicial Branch, in accordance with information by the Supreme Court, itself.

By the majority of the votes, the Supreme Court Judges granted the appeal filed by the City Hall of Belo

Horizonte (MG), against the decision of the Justice Court of Minas Gerais (TJMG), which deemed the progressive rate of IPTU set forth in the Law 5.641/1989 as unconstitutional and, additionally, removed the collection of the tax for the timeframe as of 1995 to 1999.

In accordance with the Reporter of the appeal, Supreme Court Judge Edson Fachin, in spite of the application to the decision of the TJ-MG of the STF Precedent no. 668, which deems as unconstitutional the municipal legislation setting forth progressive rates for IPTU, prior to the constitutional amendment 29/2000, STF jurisprudence was set to assure the collection of the tax based on the minimum rate, and not cancel, in full, its enforceability. The Reporter emphasized that the unconstitutionality of the Law refers, solely, to the progressive character and, thence, collection must observe the minimum rate.

The thesis of general repercussion set by the Plenary of the STF was stated as thus: "Upon the statement that the progressive tax rate is unconstitutional, the tax ought to be assessed based on the minimum rate, in accordance with the purpose of the real estate".

STJ – Court deposit, even if prior to tax proceeding does not establish spontaneous confession

On 10/28/2015, the First Session of the Superior Court of Justice (STJ), upon deciding on the Appeal Against a Divergent Decision as an Appeal to the Superior Court no. 1.131.090/RJ, defined that the court deposit of tax liabilities, plus interests eventually due does not establish spontaneous confession, even if it takes place prior to the tax proceeding tending to enforcement.

In accordance with the Reporter, Superior Court Judge Campbell Marques, the principle of spontaneous confession is the acknowledgement of default to the tax obligation followed by full payment of the liability by the taxpayer. In view of such, the Plenary stated that spontaneous confession is a two-way street by which the fine for non-payment of the tax whenever due is removed, and, in return the Administration shall not bear expenses to assess amounts due as the taxpayer, itself, states and pays the amounts it owed.

In brief, the First Session has unified the jurisprudence, which the STJ First and Second Team diverged upon, to the sense that the court deposit, only, stays the enforceability of the tax liability and does not close the discussion regarding the tax, thus not fulfilling the principle of spontaneous confession.

Anyhow it is important to note that this theme still requires several discussions. The STJ must decide, still, if a spontaneous confession generates effects when the taxpayer pays the tax liability via offset of debits and credits held at the Tax Authorities.

TRF1 – Financing – mistake in the modality of accession does not hinder the granting of the tax benefit

On 11/10/2015, the Seventh Team of the Regional Federal Court of the First Region (TRF1), upon deciding the Civil Appeal no. 0053253-34.2011.4.01.3400/DF, has concluded that a mere mistake as to the choice of accession modality of financing does not hinder the granting do tax benefit .

In the matter at hand, the taxpayer chose the financing set forth in the Law no. 11.941/2009 and instead of checking the modality "balance from previous financings", it mistakenly chose "debt not previously financed". In accordance with the Reporter, Federal Associate Justice Hercules Fajoses, it was a mere

clerical mistake, not enough to bar the granting do financing. In addition, he highlighted that the common interest, of the State and of the taxpayers, is what must be considered.

Legislation and Query Solutions

Law no. 13.202/2015 – Tax Planning – PRORELIT – CSLL – IRPF

On 12.09.2015, the Law no. 13.202 ("Law no. 13.202/2015") was published as a result of the conversion of the Provisional Measure no. 685, of July 21 2015 ("MP no. 685/2015") which, among others, instituted the Tax Litigation Decrease Program ("PRORELIT") and set forth the obligation of tax planning.

The articles from 7th to the 13th of the MP no. 685/2015, which handled the taxpayers obligation to report to the Brazilian Revenues Department ("RFB") the transactions deemed as tax planning were dismissed by the National Congress and therefore lost their effects.

In regards to PRORELIT, the Law no. 13202/15 extended to November 30 2015 the period for inclusion of tax liabilities, which had expired on October 30. The other provisions regarding PRORELIT in the MP 685/2015 were upheld.

Moreover, the Law no. 13.202/2015 has extended to the Social Contribution on Net Profits ("CSLL") the construction of international agreements and treaties entered into by Brazil to avoid double taxation, as well as allowed the deduction of the Individual Income Tax ("IRPF") from the contributions to private retirement funds domiciled in the Country, a burden previously undertook by the Taxpayer.

Query Solution COSIT no. 47/2015 – IRRF

On 12.03.2015, Query Solution no. 228 issued by the General Coordination of the Taxation System ("COSIT") was published stating the understanding that the amounts remitted abroad as rights and emoluments, collected in Brazil by consular department of a Foreign State are not subject to Income Taxes Withheld at the Source ("IRRF") considering the exemption set under the Vienna Convention on Consular Relations, enacted by the Decree no. 61.078/1967 even if the collection takes pace via legal entity domiciled in a tax haven country.

According to COSIT, this understanding agrees with the guideline adopted by the Coordination for the application of agreements and treaties executed by Brazil to avoid international double taxation, in which the source of income ought to be identified as located in one of the Member States and the beneficiary as resident or domiciled in the other Member State, irrespective of the intermediaries involved in the payment of this income.

Query Solution COSIT no. 206/2015 – IRPJ – Presumptive Profit – Revenues Recognition – Amount paid per Securitization Company

On 12.03.2015, Query Solution no. 206, issued by the General Coordination of the Taxation System ("COSIT") was published stating the understanding that the recognition of the company's revenues

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opting for taxation based on the Presumptive Profit regime, who exploit real estate activities concerning land division, real estate development, construction of building for sale, as well as sale of buildings constructed or acquired for resales ought to be considered at the time of the actual receipt of the amount paid by the Securitization Company regarding the alienation of real estate credits.

As per the wording of the Query Solution, if the legal entity received the amounts regarding the alienations immediately, either directly from the real state buyer or via the alienation of the right to the credit, with a discount to the Securitization Company three is no pending condition to recognize the revenue.

Therefore, even if the alienation of the real estate took place contingent upon financing by the buyer, if the Securitization Company paid the amounts of the real estate credits cash, the revenue must be fully recognized at payment.

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