Tax Bulletin

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The Sao Paulo Tax Court

Specific tax report n° 25 • Year V • January 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 25th edition of our newsletter, we will comment about the non-levy of the ICMS in the provision of asphalt mixture deriving from an asphalt paving job contract with the supply of materials and the recognition of the statute of limitations on the tax credits due to the expiry stated in article 150, § 4, of the CTN.

Click over the topics below to directly access each text:

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!

SOUZA, SCHNEIDER, PUGLIESE e SZTOKFISZ ADVOGADOS

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"ICMS. LACK OF PAYMENT. SUPPLY OF ASPHALT MIXTURE (CBUQ). ASPHALT PAVING JOB CONTRACT WITH THE SUPPLY OF MATERIALS. ORDINARY APPEAL. GRANTED. The repeated case laws that form the 1st Section of this Court recognize that the tax basis of the Service Tax (ISS) is the full cost of the service, and the subtraction of amounts corresponding to the material used and to subcontracts is not allowed." (STJ. Justice Herman Benjamin. Appeal 1038141-SP (2008/0079981-4), p. 25/06/2008)."

This is an Administrative Tax Proceeding discussing the validity of the Tax Assessment Notice and Fine Charge ("AIIM") issued as a result of the payment of the ICMS (Tax on the Circulation of Goods and Provision of Interstate and Intercity Transportation and Communications Services) allegedly due from the exit of asphalt mixture produced in the taxpayer's establishment, intended to work sites, the purpose of which being the paving of streets and roads in the city of São Paulo, characterizing an "operation related to the circulation of goods", according to the Tax Authorities.

The assessment was tried at the Tax Judgment Office and was fully upheld.

Due to this decision, the taxpayer then filed an Ordinary Appeal, seeking the review of the appealed appellate decision.

The Reporting Judge on the case at the 12th Judgment Chamber, Mr. Belmar Costa Ferro, adopted the position of the Superior Court of Justice, which considers that the nature of the asphalt mixture produced outside the place where the paving service is rendered is that of input, used for the performance and fulfillment of the obligation to do included in the paving contract. Furthermore, on the materials acquired or imported by the contractor in the execution of the work, no ICMS tax is charged, since the supply of the materials derived from the hiring of the work itself.

Therefore, if the preparation of the asphalt mixture consists of a paving phase, thus characterizing a specific and inseparable need of the service rendering, no ICMS is levied thereon, even if it is not prepared at the place of construction.

The reason for this is that the tax basis of the Service Tax of Any Nature (ISSQN) is the entire cost of the service, so the disassociation of the amounts corresponding to the material used by the contractor is not acceptable.

Therefore, the position stated by the Reporting Judge is that there is no ICMS in the preparation and supply of the CBQU (Hot-mixing Bitumen Concrete), when it derives from civil construction building contracts (paving), even if prepared outside the construction site.

With this decision, the 10th Judgment Chamber presented the position that the asphalt mixture produced by the Taxpayer may not be considered as goods subject to the charge of the ICMS just because Complementary Law 116/03 determined the exemption of the supply of goods produced by the service provider outside the construction site from the ISS charge.

Thus, the AIIM was fully cancelled, excluding the tax credit deriving from an alleged lack of ICMS payment in connection with the rendering of service with provision of materials for the execution of the contracted paving work, since such materials are included in the scope of the ISS.

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"VIOLATIONS RELATED TO THE PAYMENT OF THE TAX – STATUTE OF LIMITATIONS – Special Appeal supported by paradigm decisions able to oppose the thesis of statute of limitations expiry - In the violations related to the lack of payment of the tax, the limitation period should start to count according the rule in article 150, §4 of the CTN, provided that there is no malice, fraud, or simulation, for which reason the Taxpayer's appeal is granted – Appeal claim of nullity of the AIIM due to lack of proof of the effective occurrence of the taxable events, which may not be heard, as this demands the reexamination of the set of evidence, not allowed at this point in the appeal. APPEAL PARTIALLY HEARD AND GRANTED."

This is an Administrative Tax Proceeding discussing the validity of the Tax Assessment Notice and Fine Charge ("AIIM") issued under the claim of an alleged lack of payment, through the special collection slips, of the ICMS tax in import operations charged on "Import Complement" invoices.

In its defense, the Taxpayer claimed expiry of the statute of limitations on part of the tax credit, based on article 150, § 4 of the CTN.

The Public Treasury, in turn, defended the non-examination of the statute of limitations claim, arguing that the limitation period is included in the rule of article 173, item I of the CTN, as there was no payment of the ICMS.

The Assessment Notice was found to be entirely valid by the Tax Judgment Office and by the 10th Judgment Chamber of the Tax and Fee Court (TIT/SP), at which time the Taxpayer filed a Special Appeal to the Superior Chamber of the TIT/SP.

According to the Rapporteur of the case in the Superior Chamber, in the event of violations relative to the lack of payment of the tax, the limitation period must start to count in accordance with article 150, § 4 of the CTN, if no malice, fraud or simulation is present, a position that was followed by the majority of Judges of the Superior Chamber.

Therefore, according to the Superior Chamber, as the tax is subject to self- assessment, the Tax Authorities have a five-year term to analyze and review the Taxpayer's assessment, as of the date the taxable events occurred. In case the review of the assessment is not carried out within the five-year period, the assessment is considered to have been approved and the tax credit is ended, even if deriving from an accessory bookkeeping requirement, pursuant to article 150, § 4 of the CTN.

According to the concurring opinion, malice is understood as the subjective element of the agent, which cannot be presumed or mentioned without any evidence support that can demonstrate its occurrence. Fraud, in turn, presupposes malice and the use of forgery, tampering, etc. Lastly, the occurrence of simulation requires a flaw in the legal transaction practiced, showing an appearance that is different from the real one.

With this decision, the Superior Chamber indicated the position that the five-year statutory period is to be applied as of the occurrence of the taxable events, even when the tax has not been paid, provided that there is no malice, fraud, or simulation, pursuant to article 150, § 4 of the CTN.

Therefore, the AIIM was partially cancelled, recognizing the application of article 150, § 4 of the CTN in the counting of the limitation period for violations arising from the lack of collection of the ICMS.

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