Tax Bulletin

tax report

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We are pleased to present the sixty-first edition of our **TAX BULLETIN**, the newsletter whereby we update clients, as well as those interested in the most recent tax issues.

Enjoy your reading.

Case Laws

STF – The increase of the IPTU basis without a formal law is declared unconstitutional

On August 2 this year, the Full Court of the Federal Supreme Court (STF) heard Extraordinary Appeal no. 648.245/MG, which discussed the possibility of increasing the assessed value, tax basis of the Urban Property Tax (IPTU), above the official inflation adjustment rates by way of an Executive Branch Decree.

The Full Court unanimously denied the Appeal of the Municipality of Minas Gerais, viewing that the definition of tax basis calls for a mandatory action of the legislature, meaning it is impossible to set it through a Decree of the Executive Branch. In the trial, the STF also pointed out that the jurisdiction of the Executive Branch should be limited to the adjustment of the value of properties, based on annual inflation indexes, since it does not alter the IPTU basis.

This position of the Full Court reaffirms before the Government Power the need for article 97 of the National Tax Code to be fully observed as to the tax requirements, so that only the Law may have the authority to interfere in the calculation of taxes.

STJ – Transfer of Tax Enforcement Action – Absence of indication of irregular dissolution

The Second Panel of the Superior Court of Justice (STJ), in the trial of the Internal Interlocutory Appeal (AgRg) in Special Appeal (Resp) no. 1.368.377 (PB), ruled unanimously that the transfer of the Tax Enforcement Action to the managing partner of the company is only possible when the latter acts *ultra vires* or in violation of the law or articles of incorporation.

The Rapporteur, Justice Humberto Martins, pointed out that there is no irregular dissolution of the company in the event a letter by Acknowledgment of Receipt (AR) merely returns.

It is worth noting that although the mentioned precedent repeats the Judiciary's already clear position as to the situations in which the personal property of the managing partner of the company may be reached, it explains that it is not any situation that may create a

presumption of irregular dissolution, making it clear there is a need for evidence or real indications of such a dissolution before the enforcement action is transferred by the relevant authorities.

TRF of the 3rd Region – Tax Enforcement Action – Debt of Parent Company – Impossibility of the BACENJUD blocking reaching branches

The Third Panel of the Federal Regional Court of the 3rd Region, by unanimous decision rendered in the case records of Interlocutory Appeal no. 0029768-29.2012.4.03.0000, found that it is not feasible that the electronic blocking of funds through the *BACENJUD* system, as a means to guarantee the tax enforcement action, should fall on branch establishments of the parent company responsible for the debt.

This blocking was required by the Federal Government based on article 45 of the Brazilian Civil Code, whose interpretation would lead to the position that only the filing of the formation documents with the Commercial Registry or the Registry Office of Legal Entities would attribute a legal identity to the Company, for which reason the existence of several enrollments with the Corporate Taxpayers' Registry (CNPJ) for the same company (parent company and branches) does not grant different legal identities.

In the decision, the Rapporteur of the case, Associate Justice Carlos Muta, found that as the parent company and its respective branches have their own enrollment with the CNPJ, they are to be treated as different legal entities and therefore comply with their tax liabilities with their respective assets.

In his decision, the Associate Justice mentions the position adopted by the STJ and by the Third Panel of the TRF of the 3rd Region in analogous cases.

TRF of the 3rd Region – Remittances Abroad – Service Rendering –Brazil–Netherlands International Treaty – IRRF and CIDE – Non-Levy

The Federal Regional Court of the 3rd Region, through its Third Panel, in the trial of Civil Appeal no. 0025200-76.2007.4.03.6100/SP, ruled that the amounts sent abroad on the basis of remuneration for services rendered by a parent company would not be subject to taxation in Brazil.

The process involves the application of article 7 of Decree no. 355, dated December 2,1991, which brings the Brazil–Netherlands international agreement, **according to which the profit earned by a company located in one of the contracting countries is only taxable in that State**, except if the company in question maintains a permanent establishment in the other country.

The Federal Government upheld that the amounts were revenues of the foreign company for the provision of administrative support services in the Brazilian territory. It also upheld that in addition to the taxation on the remitted amounts, the Contribution of Intervention in the Economic Domain (CIDE) would be due, pursuant to Law 10,168/00, given the acquisition of foreign software by the Brazilian company.

The Third Panel of the TRF-3 found that the Brazil–Netherlands treaty would be applicable to the case, meaning the amounts received by the holding company would not be subject to taxation in Brazil. Although

there is a subsidiary in Brazil, in order for a permanent establishment to be characterized as such – with the consequent internal taxation of the amounts remitted – it is necessary for "this second company to have autonomy", as per the treaty. However, according to the TRF, this autonomy was not verified. Therefore, the Court recognized that the Brazilian legislation would not apply.

As to the CIDE, it affirmed that although the claim had been filed while Law 10,168/00 was in force, Law 11,452/07 brought the need for there to be an effective transfer of technology for the levy of the contribution. Thus, without evidence of technology and the rendering of services, recognized by the Court being limited to the implementation of the software, no CIDE would have to be paid.

TRF of the 4th Region – Tax on Manufactured Products. Import Duty. Nonprofit Social Welfare Association - Immunity

The Federal Regional Court of the 4th Region, through its Second Panel, in the trial of Appeal/Required Review no. 5003115-59.2010.404.7108, unanimously ruled that the immunity of the nonprofit education and social welfare institutions, provided for in article 150, item VI, letter "c", of the Federal Constitution, comprises the Tax on Manufactured Products and the Import Duty.

The appellate decision explained, however, that the recognition of the mentioned immunity event is contingent upon the fulfillment of the requirements in article 14, items I to III, of the National Tax Code, by the institutions, namely that they I) may not distribute any portion of their assets or income, in any way; II) fully invest their funds in the Country in the maintenance of their institutional objectives; and III) that they record their revenues and expenses in books with formalities able to ensure their accuracy.

In addition, it is necessary that the assets imported by the entity be intended to the rendering of its specific purposes, relative to its essential purposes, pursuant to article 150, § 4, of the Federal Constitution.

Lastly, the Court viewed that claim of the Federal Government that the import of machinery would not be reached by the immunity because it would be used to sell health services to private individuals and holders of health plans did not have grounds, since the collection from those who have sufficient funds does not prevent the social welfare entity from being recognized as charitable and receiving the constitutional immunity.

Although the positions set in this appellate decision are not new, it is worth noting that it confirms positions that are still subject to judicial controversies, such as that in which the mere exercise of an economic activity would alone not disregard the activity of nonprofit social welfare entities nor would it rule out its right to the constitutional immunity – a position that, subject to the conditions provided for in the Law, may be applied to the other entities cited in the constitutional rule that grants the immunity, such as union entities and education institutions.

Furthermore, it is also confirmed that the expression "assets, income and services" provided for in the Constitution should be construed in a broad sense, encompassing taxes that are not directly levied on the assets, income and services of the immune entities, but may affect such portions indirectly.

Legislation and Response to Inquiries

PIS/COFINS – Input used in trade activities

Response to Inquiry no. 42/13 was published on June 27, 2013, rendered by the Regional Superintendence of the Federal Revenue of the 4th Tax Region ("SRRF 4ª RF"), establishing that it is not possible to appropriate credits of the Contribution to the Employee Profit Sharing Program ("PIS") and to the Social Security Funding ("COFINS") on the goods and services used as input in the trade activity that is not exercised by industrial legal entities or service providers.

IRPJ and CSLL − Capital gain arising from easement

Response to Inquiry no. 65/13 was published on July 1, 2013, issued by the Regional Superintendence of the Federal Revenue of the 6th Tax Region ("SRRF 6ª RF"), establishing that any capital gain arising from the formation of easement, to be calculated by the matching of the amount received for the formation of easement and the book value of the fraction of assets affected by it, is subject to the charge of the Corporate Income Tax ("IRPJ") and of the Social Contribution on the Net Income ("CSLL").

IRPJ, CSLL, and IRRF – Fine for termination of agency agreement

Response to Inquiry no. 64/13 was published on July 1, 2013, issued by the Regional Superintendence of the Federal Revenue of the 6th Tax Region ("SRRF 6ª RF"), establishing that the fine deriving from the termination of an agency agreement should be added to the presumptive profit for the computation of the tax basis of the Corporate Income Tax ("IRPJ") and of the Social Contribution on the Net Income ("CSLL"). Moreover, the mentioned fine is also subject to the Withholding Income Tax ("IRRF") at a 15% (fifteen percent) rate, and the withholding tax should be deducted from the tax ascertained at the closing of the quarterly or annual ascertainment period, the exclusive treatment of taxation on the source not applying.

Res. CMN/BACEN 4.246/13 – Accredited Investor – Simultaneous exchange operations in internal migrations

Resolution of the National Monetary Council ("CMN") no. 4.246/2013 was published on July 2, 2013, repealing the requirement of simultaneous exchange operations of internal migration in the following investments by non-resident investors: (i) in variable income made in the stock exchange or in commodities and futures market, except for transactions with derivatives that result in predetermined earnings; (ii) in the acquisition of shares in registered public offerings or exempt of registration with the Brazilian Securities and Exchange Commission ("CVM") or in the subscription of shares, provided that in both cases, the issuing companies have the registration to trade the shares in the stock market; (iii) in the acquisition of securities issued pursuant to articles 1 and 3 of Law no. 12,431, dated June 24, 2011; and (iv) all internal migrations of funds in Real intended for the formation of an initial or additional guarantee margin made by nonresident investors in the Country, required by stock exchange and commodities and futures market.

SISCOSERV – Services connected to foreign trade of goods

Response to Inquiry no. 106/13 was published on July 6, 2013, issued by the Regional Superintendence of the Federal Revenue of the 9th Tax Region ("SRRF 9ª RF"), dealing with the registration of services connected to the foreign trade of goods in the Foreign Trade Integrated System of Services, Intangibles, and Other Transactions Producing Equity Variation ("SISCOSERV").

According to the position consolidated in the mentioned Response to Inquiry, related services (e.g., transportation, insurance, and external agent services) may be registered with the SISCOSERV as they are not incorporated to assets and goods.

In these operations, the definition of services to be registered depends on the Incoterm used in the operation, which defines the sharing of responsibilities of the importer and exporter for contracting and paying the services, for example, the moment in which the goods are loaded into the ship at FOB prices.

Therefore, in the case of import of goods, the services rendered by residents or domiciled abroad are to be registered in the Purchase Module of the SISCOSERV, from the moment their contract and payment are of responsibility of the importer resident or domiciled in the Country. In the case of export of goods, the services rendered by residents or domiciled in the Country are to be registered in the Sale Module of the SISCOSERV, from the moment their contract and payment are of responsibility of the importer resident or domiciled abroad.

Furthermore, the mentioned Response to Inquiry defines that the legal responsibility for the registration with the SISCOSERV is of those resident or domiciled in the Country that maintains a contractual relationship with the person resident or domiciled abroad for the rendering of the service. For this reason, for example: (i) in the foreign trade of assets and goods, the responsibility for registering the related services is of the importer or exporter, not of the customs broker; (ii) at the import of goods on behalf of a third party, the responsibility for registering with the SISCOSERV is of the acquirer and the importer, each of which for the related service they hire; and (iii) at the import of goods under order, the responsibility for registering the related services with the SISCOSERV is of the importer, not the those ordering them.

Lastly, the Response to Inquiry provides that in the foreign trade of assets and goods, in case the freight agency is rendered by a person resident or domiciled in the Country to a transporter resident or domiciled abroad: (i) the registration of the transport agreement with the Purchase Module of the SISCOSERV is of responsibility of the agent and the value to be registered will correspond to that of the freight; and (ii) the registration of the agency agreement with the Sale Module of the SISCOSERV is also of responsibility of the agent, but the value to register will correspond to that of the commission or brokerage fee.

IRPF and Social Security Contributions – Service partner

On July 15, 2013, the General Tax Coordination of the Federal Revenue Office of Brazil ("COSIT") published Internal Response to Inquiry no. 12, which deals with

the charge of the Individual Income Tax ("IRPF") and of the Social Security Contributions on the amounts paid to the service partner.

According to COSIT, the amounts paid to the service partner on the basis of compensation (*pró-labore*) are subject to the Income Tax, and are to be withheld and detailed in the Annual Adjustment Statement, in addition to the charge of Social Security Contributions, since this partner is an insured individual taxpayer.

However, if part of the income derived from profit sharing, which is accepted also in cases of service partners, the Income Tax is not withheld, nor are the Social Security Contributions, provided that this distribution observed the provisions in the legislation and in the articles of organization.

REINTEGRA – Exclusion of the tax basis of the Contribution to the PIS and COFINS – Application term

Law no. 12,844 was published on July 19, 2013, which is the conversion of Provisional Measure no. 610, of 2013, bringing several changes to the Brazilian tax legislation.

Among them, this Law provides that the amounts refunded under the Special Tax Rebate System for Export Companies ("Reintegra") are not to be computed in the ascertainment of the tax basis of the Contributions to the Employee Profit Sharing Program ("PIS") and to the Social Security Funding ("COFINS").

Moreover, Law no. 12,844/13 determines that Reintegra will apply to exports made between June 4, 2013, and December 31, 2013.

Social Security Contributions – Foreign Temporary Workers

Response to Inquiry no. 77/13 was published on July 22, 2013, issued by the Regional Superintendence of the Federal Revenue of the 6th Tax Region ("SRRF 6ª Região"), ruling that when a foreign worker is hired for a period no longer than five years, the social security contributions relative to this employee will not be due, provides it is confirmed, through proper and suitable documentation, that this employee is being supported by the Social Security of his/her country of origin.

IPI – Exemption for helicopters of exclusive use of the Fire Brigade

Response to Inquiry no. 77/13 was published on July 22, 2013, issued by the Regional Superintendence of the Federal Revenue of the 6th Tax Region ("SRRF 6ª Região"), ruling that helicopters, as well as their parts, are exempt from the payment of the Tax on Manufactured Products ("IPI") when they are exclusively used by the Fire Brigade within the Brazilian territory.

This response also established that when there is import and the subsequent resale of helicopters for the exclusive use of the Fire Brigade, the importing establishment must reverse the entry of the IPI credit paid to the customs, as there is no legal provision supporting this collection.

COFINS Import – Credit appropriation

Response to Inquiry no. 48/13 was published on July 25, 2013, issued by the Regional Superintendence of the Federal Revenue of

the 10th Tax Region ("SRRF 10ª Região") ruling that the increase of the 1% (one percent) tax rate of the Contribution to the Social Security Funding ("COFINS/Import") in the case of import of assets classified in the Table of Taxes on Manufactured Products ("TIPI") does not give the right to credit appropriation.

PIS/COFINS – Freight paid at the acquisition of vehicle with concentrated taxation does not give right to credit

Response to Inquiry no. 50/13 was published on July 25, 2013, issued by the Regional Superintendence of the Federal Revenue of the 10th Tax Region ("SRRF 10ª Região"), ruling that the freight paid at the acquisition of vehicles for resale subject to concentrated taxation, although integrating the price of the goods, does not generate credit of the Contributions to the Employee Profit Sharing Program ("PIS") and to the Social Security Funding ("COFINS").

IRPF – Revenue Omission– Contribution of primary holder of joint accounts

On July 30, 2013, the General Tax Coordination of the Federal Revenue Office of Brazil ("COSIT") published Internal Response to Inquiry no. 13, establishing that for purposes of calculating the tax basis of the omissions of earnings verified in taxpayers that have joint account(s), it should be observed, in relation to each primary holder, whether the credits deposited or invested in the joint account(s) total the individual amount equal or inferior to R$ 12,000.00 (twelve thousand reais), provided that its sum, within the calendar year, does not exceed R$ 80,000.00 (eighty thousand reais).

The reason for this is that once this limit is exceeded by a primary holder, and the latter fails to prove the origin of the exceeded credits, the legal presumption of revenue omission will be characterized, and the result of the division of the total omission presumed by the number of holders will be attributed to this holder.

General Tax Law Rules – Statute of Limitations Rules

On July 30, 2013, the General Tax Coordination of the Federal Revenue Office of Brazil ("COSIT") published Internal Response to Inquiry no. 16, ratifying the position in article 210 of the National Tax Code ("CTN") that when the tax legislation sets a term in business days, only the days on which there is effectively regular working hours at the local RFB unit are to be considered when counting the term.

Statement of Tax on Rural Property– Fiscal Year 2013

Normative Rule of the Federal Revenue of Brazil ("IN/RFB") no. 1,380 was published on August 1, 2013, providing for the filing of the Statement of Tax on Rural Property ("DITR") relative to the fiscal year of 2013.

This Rule established the forms of preparing the statement and deals with the payment and mandatory requirement for its filing, which is to be done between August 19 and September 30 (electronically, until 11:59:59 PM).

The software necessary for filling out and sending the DITR 2013 are available on RFB's homepage for download.

PIS and COFINS – Possibility of expense sharing under the multiple regime

Response to Inquiry no. 80/2013 was published on August 1, 2013, issued by the Regional Superintendence of the Federal Revenue of the 6th Tax Region ("SRRF 6º Região"), ruling that for purposes of appropriation of the Contributions to the Employee Profit Sharing Program ("PIS") and to the Social Security Funding ("COFINS") credits, legal entities that are bound simultaneously by the cumulative and non-cumulative system may opt for the proportional expense sharing, provided that they consider, for such, all the non-accumulated revenues, tied to such expenses, including (i) the financial revenues subject to the zero tax rate under the non-cumulative taxation system of COFINS and (ii) the proceeds from the resale of products subject to the subject to the zero tax rate under the non-cumulative concentrated taxation system of the COFINS.

Statement of Transactions in Regulated Securities Markets – Alteration of first delivery term

Normative Rule of the Federal Revenue of Brazil ("IN/RFB") 1.379 was published on August 1, 2013, altering IN/RFB no. 1,349/2013, which deals with the issue and sending of the Statement of Transactions in Regulated Securities Markets.

This Rule alters the wording of articles 6 and 7 of IN/RFB no. 1,349/2013, with regard to the date the effects of the IN come into force and the date of delivery of the first Statement of Transactions in Regulated Securities Markets. Thus, IN/RFB no. 1,349/2013 will then have effect only as of January 1, 2014, and the First Statement is to be filed in 2014, within 20 days as of the closing of the calculation period.

IRPJ and CSLL – Deduction of JCP under the Transition Tax System

Response to Inquiry no. 103/2013 was published on August 2, 2013, issued by the Regional Superintendence of the Federal Revenue of the 8th Tax Region ("SRRF 8ª região"), establishing that for purposes of calculating the deduction of Interest On Shareholders' Equity ("JCP") under the Transition Tax System ("RTT"), the composition and the value of the shareholders' equity defined as per the accounting methods and criteria in force on December 31, 2007, are to be considered.

PIS/COFINS Import - Royalties not tied to service rendering

Response to Inquiry no. 121/13 was published on August 2, 2013, issued by the Regional Superintendence of the Federal Revenue of Brazil of the 8th Tax Region ("SRRF 8ª RF"), establishing that the remittance of funds to residents or domiciled abroad, on the basis of royalties, for the mere license of trademark or patent use does not characterize consideration for rendered service, and therefore does not lead to the charge of the Contributions to the Employee Profit Sharing Program ("PIS/Import") and to the Social Security Funding ("COFINS/Import").

Transfer pricing – Rules on the deductibility and recognition of financial revenue of interest

Rule no. 427/2013 of the Treasury State Justice was published on August 2, 2013, dealing with transfer pricing, mainly with regard to the deductibility and recognition of financial revenues of interest in transactions with related parties.

Pursuant to the Rule, as of January 1, 2013, the following margins, on the basis of spreads, are to be added to the interest rates applicable to transactions with related parties or persons resident or domiciled in countries of tax-favored jurisdiction: (i) 3.5% (three point five percent), when the purpose of the interest rates is the deductibility of financial revenues in the determination of the taxable income and of the tax basis of the Social Contributions on the Net Income ("CSLL"); and (ii) 2.5% (two point five percent when the purpose of the interest rates is the recognition of the minimum financial revenue amount in the determination of the taxable income and of the tax basis of the CSLL.

IRPJ and CSLL – Profits Earned abroad

On August 2, 2013, the General Tax Coordination of the Federal Revenue Office of Brazil ("COSIT") published Internal Response to Inquiry no. 18, establishing that the application of article 74 of Provisional Measure no. 2,158-35/01, which deals with the charge of the Corporate Income Tax ("IRPJ") and the Social Contribution on the Net Income ("CSLL") on profits earned by a subsidiary or associated company abroad, does not conflict with the international treaties entered into to avoid double taxation, due to the (i) do principle of territoriality and (ii) of the possibility to offset the tax paid abroad.

SOUZA, SCHNEIDER, PUGLIESE E SZTOKFISZ ADVOGADOS law firm is available to its clients should they have any questions on the above matters.

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