Tax Bulletin

tax report

SOUZA, SCHNEIDER, PUGLIESE E SZTOKFISZ ADVOGADOS

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

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Case Laws

STJ – Trial of Repetitive Appeal – Impossibility of collecting the tax credits subject matter of non-judicial debt acknowledgment after time-barred dismissal (article 156, V, of CTN)

The First Section of the Superior Court of Justice (STJ), under the system of Repetitive Appeals, tried Special Appeal (Resp) no. 1.355.947, which deals with the discussion of the possibility of acknowledgment of a tax debt formalized in the adhesion to installment plans for the assessment of tax credits, even after the expiry of the statute of limitations provided for in article 173, I, of the CTN.

In that case, the taxpayer acknowledged the debt in July 2003, when entering into a tax debt installment plan. On the other hand, the *a quo* term of the statute of limitations, pursuant to article 173, I of the National Tax Code (CTN), was in January 1996 (for taxes due in 1995) and January 1997 (for taxes due in 1996).

Therefore, if on the one hand the statute of limitations expired in January 2002 (for more recent due dates), the debt acknowledgment, on the other hand, was verified only in 2003, when all the tax credits had already been dismissed due to expiry of the statute of limitations.

Justice Mauro Campbell, rapporteur of the case, clarified that as the statute of limitations expiry is a form of dismissal of the tax credit, as set forth in article 156, V, of the CTN, the Tax Authorities’ right “may not be strengthened by any assessment system or self-assessment, whether through a debt acknowledgment document, debt statement, debt installment plan or the like (DCTF, GIA, DCOMP, GFIP, etc.)”.

Thus, the First Section rejected the Special Appeal of the Treasury, ensuring the taxpayers’ right to not be subject to the Tax Authorities’ resuming the collection of the dismissed tax credit, even in case of an (untimely) acknowledgment of the tax debt.

STJ – ICMS – Seller's Subjection to Tax – Difference between internal and interstate tax rates - Sales containing FOB clauses

The STJ, through its First Panel, in the trial of Special Appeal (Responsibility) no. 1.305.856, ruled that the seller in good faith may not be held responsible for tax debts in cases in which the acquirer has given a different destination to the goods sold under an FOB ("Free on Board") clause from the one provided for in the contract.

The case involves interstate sales of hydrated alcohol made under an FOB clause, and the seller is established in the State of São Paulo and the acquirers in the State of Bahia, for which reason the transactions were originally taxed by the ICMS at a 7% tax rate.

It is also stated that the seller was cautious to both verify that the acquirers were in good standing with public registries and to adopt all the regular sales procedures (receive purchase orders, advance and identified payment, loading orders etc.).

In addition, it is stated that the acquirers were responsible for the transport of the goods to their destinations (Bahia). That is, by force of an FOB clause, the seller was no longer liable for the goods, including for its effective destination.

On the other hand, according to the Tax Authorities of the State of São Paulo, after the goods are delivered by the seller to the acquirers, they were not sent to the State of Bahia, but instead to receivers located in the State of São Paulo.

For this reason, the authorities viewed that the transactions were internal and not interstate, meaning the ICMS tax should have been taxed at a 25% rate, applicable to internal hydrated alcohol transactions.

Due to this, the São Paulo Tax Authorities issued Tax Assessment Notices against the seller, for the collection of the ICMS corresponding to the difference between the internal (25%) and interstate (7%) tax rates, plus lay payment and punitive charges.

The assessed company (seller) defended itself demonstrating good faith and the entire good standing of the procedures it had adopted. Therefore, the taxpayer claimed that the São Paulo Tax Authorities could not issue the assessments against it, as there is no legal rule concerning liability for that case.

The First Panel of the STJ granted the Special Appeal and ruled out the tax liability of the seller, as they viewed that the São Paulo Tax Authorities failed to indentify the "agent or those responsible for the different destination of the goods stated in the Invoice", meaning the liability rule contained in article 136 of the CTN does not apply.

The Panel also saw that the seller acted with caution and good faith, meeting all the requirements when performing the business operations. Due to this and as they viewed that the case does not fit into the events of articles 124 and 135 of the CTN, the First Panel of the STJ concluded that the seller "may not be held liable for any different destination of the cargo occurring due to a possible collusion between other parties (carrier and buyer)."

STJ – Pledge via BACEN-JUD – Blocking of Future Financial Assets – Impossibility

The First Panel of the STJ, in the trial of REsp no. 1.304.224/MG, ruled by unanimous vote that the pledge via BACEN-JUD does not encompass future financial assets.

In other words, the order to block them is only valid for the date they are effective, which only includes the existing credit at the time.

Therefore, it is up to the creditor, should he deem it necessary, to renew the blocking request in order to obtain a new pledge order.

Furthermore, it is important to mention that according to the Rapporteur of the case, Justice Benedito Gonçalves, the determination contained in article 11, § 2, of the former BACEN-JUD Regulation presupposed "(...) the universal non-availability of assets of the debtor, an extreme measure of preventive nature, which requires specific presuppositions in order to be determined, as set forth in article 185-A of the CTN, **which is therefore not to be taken for the blocking of financial assets for online pledge purposes (article 655-A of the Code of Civil Procedure - CPC).**" (emphasis added)

Legislation and Response to Inquiries

PIS/COFINS – Non-levy – Intermediation in the export of services

On June 10, 2013, the Regional Superintendence of the Federal Revenue of the 2nd Tax Region ("SRRF 2ª RF") published Response to Inquiry no. 15/13, stating the position that for purposes of non-levy of the Contribution for the Employee Profit Sharing Program ("PIS") and the Contribution to the Social Security Funding ("COFINS"), the existence of intermediation of a person domiciled in the country of the business relationship between the provider of domestic service and the service acquirer resident or domiciled abroad is irrelevant, provided that the third party acts on behalf of and by order of the latter, in the capacity of a mere proxy, and the payment of the exported service price represents the inflow of foreign currency, following the rules set by the Central Bank of Brazil.

PIS/COFINS Import – Tax rate increase

Response to Inquiry no. 35/13 published on May 17, 2013 and rendered by the Regional Superintendence of the Federal Revenue of the 7th Tax Region ("SRRF 7ª RF"), stated the position that, as a rule, the tax rates for the ascertainment of the credits of the Contributions for the Employee Profit Sharing Program and to the Social Security Funding levied on Import ("PIS/COFINS Import") will be of 1.65% (one point six five percent) and 7.6% (seven point six percent), respectively, pursuant to article15, §3, of Law no. 10,865/2004.

Therefore, the tax rate increase of the Cofins-Import does not alter, in principle, the tax rate to be used for the ascertainment of the credits deriving from the payment of this contribution, which, unless otherwise expressly stated in the law, will be pursuant to the legislation in force, of 7.6%.

Mixed real estate ventures (RET and PMCMV) – Taxation system

Response to Inquiry no. 29/13, published on May 28, 2013 and rendered by the Regional Superintendence of the Federal Revenue of the 4thTax Region ("SRRF 4ª RF"), stated that in real estate ventures that fit into the Special Taxation System ("RET"), provided for in Law no. 10,931/2004 and which contemplate both the real estate units that fall into the housing plan "*Minha Casa Minha Vida*" (My House, My Life) and other units, the total revenue earned in the sale of the real estate units composing the venture (as well as the financial revenues and monetary variations arising from this transaction) is subject to the RET and is taxed by the Corporate Income Tax ("IRPJ"), Social Contribution on the Net Income ("CSLL"), Contribution for the Employee Profit Sharing Program ("PIS") and by the Contribution to the Social Security Funding ("COFINS"), at a single tax rate of 4% (four percent).

Withholding IR, PIS and COFINS at source – Civil Construction

Response to Inquiry no. 57/13, published on May 31, 2013 and rendered by the Regional Superintendence of the Federal Revenue of the 6th Tax Region ("SRRF 6ª RF"), ruled that the Withholding Income Tax ("WHT") and the Contributions for the Employee Profit Sharing Program ("PIS") and for the Social Security Funding ("COFINS"), will not be withheld at source in payments made by a legal entity, on the basis of remuneration in contracts that are not exclusively related to engineering services, that is, which comprise other services relative to the execution of civil construction works. However, if this payment is made for engineering services rendered separately from the execution of civil construction works, it must be subject to the withholding of the IR, PIS and COFINS at source.

Reassessment Reserve – Presumptive profit

Response to Inquiry no. 61/13, published on June 10, 2013 and rendered by the Regional Superintendence of the Federal Revenue of the 9th Tax Region ("SRRF 9ª RF"), stated that in the event of alteration of the taxable income system to that of presumptive profit, the legal entity is not required to add the reassessment reserve value not yet performed to the tax basis of the Corporate Income Tax ("IRPJ"), corresponding to the first ascertainment period based on the presumptive profit.

PIS and COFINS – Royalties – License of trademark or patent use without related services

Response to Inquiry no. 78/13, rendered by the Regional Superintendence of the Federal Revenue of the 8th Tax Region ("SRRF 8ª RF"), was published on April 30, 2013, and stated the position that the payment of royalties to companies domiciled abroad for the license of trademark or patent use, without any connected services, are not subject to the charge of the Contributions for the Employee Profit Sharing Program ("PIS") and for the Social Security Funding ("COFINS"). The reason is that, if there is no rendering of services associated to the use of trademark or patent, these amounts are not characterized as consideration for rendered services, which rules out the PIS and COFINS' charge.

IRPJ – Release of judicial or administrative deposit– Financial and non-indemnification revenue

Response to Inquiry no. 51/13, published on April 30, 2013 and rendered by the Regional Superintendence of the Federal Revenue of the 8th Tax Region ("SRRF 8ª RF"), stated the position that in the release of the deposit in court in which the dispute was ruled in favor of the taxpayer, the active monetary variation is characterized as financial revenue and has no indemnification nature, which subjects the released amounts to the charge of the Corporate Income Tax ("IRPJ").

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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