

Tax Bulletin of the Administrative Council of Tax Appeals

specific tax report

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Dear Readers:

In this 64th edition of our Tax Bulletin of the Administrative Council of Tax Appeals (“CARF”), we will comment on a decision in which the Council cancelled the assessment of social security contributions on the payment of profit sharing to appointed officers.

We also examined a decision in which the CARF recognized the nullity of the Tax Assessment, since they found that there was a change to the legal criteria serving as basis for the assessment.

Enjoy your reading.

Non-Charge of Social Security Contributions on Profit Sharing Paid to Appointed Officers

“SOCIAL CONTRIBUTIONS. SECURITY PROFIT SHARING TO APPOINTED OFFICERS. LAW NO. 6,404/76. NON-APPLICATION OF LAW NO. 8,212/91. The profit sharing of appointed officers dealt with in article

152 of Law no. 6.404/76, derives from a legal relationship entered into between “Shareholders x Officers/Administrators”, and is not subject to the rules provided for in Law no. 8.212/91, which refer to the legal relationship of the “Employer x Employee”. Voluntary Appeal partly granted.”

The case in question deals with a Tax Debt Notice (“NFLD”) issued for the collection of the security contributions levied on payments made to appointed officers as profit sharing.

The reason is that the Tax Authorities found that the amounts paid by the Taxpayer to the officers have a remuneration nature, meaning the social security contributions are then levied on such amounts.

The Taxpayer filed an Objection to this assessment, claiming, in sum, that the profit sharing paid to the officers has no remuneration aspect.

This Objection was dismissed by the Federal Revenue Judgment Office

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(“DRJ”) on the grounds that the appointed officers are considered individual insured taxpayers and, for this reason, when they are remunerated, the social security contributions should also be collected.

Dissatisfied, the Taxpayer then filed a Voluntary Appeal repeating the arguments previously presented in the Objection.

In examining the case, the Judgment Panel partially granted the Voluntary Appeal, cancelling the assessment of the social security contributions required on the profit sharing payments made by the Taxpayer to its appointed officers.

As grounds for his opinion, the Rapporteur Councilor firstly dealt with the profit sharing nature. To him, the payment of profit sharing to the officers, provided for in the company bylaws, was made as profit distribution, because the Taxpayer is a business corporation, ruled by Law no. 6.404/76.

For the basis of his position, the Reporting Councilor states that Law no. 6,404/76 authorizes the payment of the profit sharing both to officers and to appointed administrators in business corporations and points out that this legal relationship is entered into between shareholders x directors/administrators.

He continues by highlighting that *“the profit sharing of the appointed officers is recorded in the shareholders’ equity account, by reducing the retained earnings, and not paid by the company itself (through the recording in the profit and loss account)”*.

He therefore concludes that *“there is no application of article 28 of Law no. 8,212/91, since the amounts earned by the appointed officers are not part of the “Employer x Employee” legal relationship, meaning there are no social security contributions.”*

The other Councilors followed his opinion, by granting the Voluntary Appeal as to the exclusion of the portions related to the profit sharing paid by the Taxpayer to its appointed officers.

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<p style="text-align: center;">Nullity of Tax Assessment by Substantive Flaw</p>

“TAX ADMINISTRATIVE PROCEEDING . TAX ASSESSMENT. AUDIT IN FEDERAL TAX DEBT AND CREDIT STATEMENT. A proceeding failing to meet the formalities required by law shall be null and void.”

The present case deals with an electronic Tax Assessment concerning the Contribution for the Social Security Funding (“COFINS”) issued due to the non-confirmation of the existence of a judicial proceeding able to result in the suspension of the tax credit enforceability.

When required to reply to the assessment, the Taxpayer filed an Objection attaching a substantiating certificate of the existence of a judicial proceeding, which awaits the rendering of a decision, and court deposit payment

slips proving the deposit in court of the amounts related to the period stated in the Tax Assessment, requesting, lastly, the cancellation of the tax debt.

Thereafter, in analyzing the Objection filed by the Taxpayer, the DRJ dismissed it, claiming that although the existence of the judicial action related to the credit subject matter of the Tax Assessment was confirmed, its enforceability could not be considered, since the deposits in court had not been converted into income.

In other words, the DRJ expressly recognized the proof of the existence of the judicial measure, but conditioned the cancelation of the assessment to the deposits into income.

Dissatisfied, the Taxpayer filed a Voluntary Appeal with the CARF, repeating its arguments and requesting the cancellation of the Tax Assessment.

In his opinion, the Rapporteur Councilor argued that the refusal of the DRJ to cancel the assessment under the claim that the enforceability of the credit would not be suspended because the deposit in court had not yet been converted into income of the Federal Government, lacked grounds, since there was a clear change in the legal grounds of the Tax Assessment.

The Councilor pointed out that there was a violation of the rule contained in article 142 of the National Tax Code (CTN), defending that the lack of any of the elements contained in this legal provision “*gives rise to the nullity of the assessment due to a structural flaw and not only a formal defect, characterized by the non-compliance with the*

necessary external or intrinsic formality of for correctly constituting this legal act”.

The Councilor then found that once the Tax Assessment is formalized and objected to, the assessing authority no longer has jurisdiction to change it. By doing otherwise, altering the legal criteria used as grounds for the Assessment Notice, there would be a new Tax Assessment with a new motivation.

According to the Rapporteur Councilor: “*What I see in the decision rendered by the DRJ is that instead of cancelling the Tax Assessment from the moment the existence of the judicial action pointed out by the taxpayer in his DCTF was verified, to then proceed with the assessment through the proper legal grounds in an attempt to “validate” the Tax Assessment, the legal criteria was then modified”*”.

Thus, by unanimous vote, the CARF ruled for the nullity of the Tax Assessment, recognizing the change of legal criteria performed by the DRJ.

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