Tax Bulletin

80

The Administrative Council of Tax Appeals

Specific tax report n° 80 • Year VII • November 2014

Dear Readers:

This publication **Tax Bulletin # The Administrative Council of Tax Appeals** is to inform our clients and interested parties on the main issues being discussed and decided in this court.

In this 80th edition of our newsletter, we have commented on the decision where the Tax Appeal Board (Conselho Administrativo de Recursos Fiscais, CARF) determined the need for factual validation when changing the core business of companies, for the purposes of adjusting the SAT/GILRAT (Working Disability Event Degree Arising from Risks at the Workplace) rate.

We also comment on the decision where CARF understood that social security contributions apply to payments made on a Profit Sharing basis to officers appointed under articles of incorporation.

In order to access directly the text for each theme, click:

Souza, Schneider, Pugliese e Sztokfisz Advogados law firm is available to its clients should they have any questions on the decisions commented on in this newsletter.

Enjoy your reading!

SOUZA, SCHNEIDER, PUGLIESE e SZTOKFISZ ADVOGADOS

"Social Security Contributions - Calculation Period: 07/01/2004 to 07/30/2004 SOCIAL SECURITY CONTRIBUTION PAID BY THE EMPLOYEE. APPLICABILITY TO THE PROFIT SHARING PROGRAM. COMPLIANCE WITH THE RULES INCLUDED IN ACT No. 10.101/2000. NON-APPLICABILITY. The regulation governing the Profit Sharing Programs (Participação nos Lucros e Resultados, PLR) accepts that profit sharing negotiations should be conducted after the earnings are posted, i.e., negotiations should precede the payment, but not necessarily the realization of the earnings. RATE ADJUSTMENT BY AUDITING AUTHORITIES. CORE BUSINESS BASED ON THE NUMBER OF EMPLOYEES. NEED FOR FACTUAL EVIDENCE. The SAT/GILRAT rate adjustment conducted by the auditing authority should be based on factual evidence of the core business of the companies, matching the number of employees for each line of business. The absence of on-site review constitutes grounds for nullity due to substantive fault. Voluntary Appeal Granted".

The decision in question refers to an assessment for the collection of Social Security Contributions payable by the company, applied to payments to employees on a Profit Sharing ("PLR") basis, as well as for the collection of SAT (Labor Accident Insurance) due to reclassification of the CNAE code by the Tax Authority, on the grounds that the corporate purpose of the assessed Company covered several Information Technology items, where code 72.90-7 should prevail, since it is the best that represents the overall corporate activities conducted, thus incurring the SAT at the rate of 2 percent, not the 1-percent rate applied.

As the assessment has been duly challenged, the Judgment Office of the Brazilian Federal Revenue Service (Delegacia da Receita Federal do Brasil de Julgamento, DRJ) converted the judgment into an investigation to clarify the reclassification of the CNAE code, making it clear to the Tax Authority that this has been based on the provisions of the Articles of Incorporation of the Company to do so, resulting in the difference regarding the SAT payable.

Such reasoning has been rejected by the Taxpayer as a statement related to the outcome of the investigation, demonstrating the absence of justification to substantiate the use of a CNAE code other than the one used.

As the judgment was resumed, the DRJ decided for dismissing the Challenge submitted, under the argument that, among others, the CNAE code classification could be related to the Taxpayer's business, which would justify the SAT contribution to at the rate of 2 percent.

Rejecting the decision, the Taxpayer filed the due Voluntary Appeal with the Tax Appeal Board (Conselho Administrativo de Recursos Fiscais, CARF), claiming, regarding the collection of the SAT offset, that the reclassification carried out by the Tax Authority lacked any justification, and that the DRJ has innovated by invoking the issue of actual business, not reviewed within the context of the tax inspection, to justify the assessment. Again in this respect, the Taxpayer made it clear that the classification under the CNAE code accurately represents the company's business, since the Tax Agent has not actually validated the primary job performed by the company's employees.

When reviewing the appeal, CARF acknowledged the lack of grounds to reclassify the intended CNAE code, since the Tax Authority failed to validate on site the Taxpayer's business, being solely based on the corporate purpose outlined in the Articles of Incorporation, thus failing to comply with the provisions of Article 22, II, of Act No. 8.212/91, combined with Article 202, § 3, of the Social Security Regulation - Decree

No. 3.048/99.

Thus, CARF has unanimously held that no motivation supports the reclassification of the CNAE code conducted by the Auditing Authority, which failed to comply with the provisions of Article 50 of Act No. 9.784/99, fully acknowledging the Voluntary Appeal and avoiding the assessment.

"SOCIAL SECURITY CONTRIBUTION APPLICABILITY ON THE INSTALLMENTS PAID ON A PROFIT-SHARING BASIS TO OFFICERS APPOINTED UNDER ARTICLES OF INCORPORATION
Since officers appointed under articles of incorporation are not registered as wage workers, they are treated as business owners; even not assuming the business risk, they represent the company under the guidance of shareholders, which prevents them from being treated as employees hired under the Labor Code (CLT).
Officers appointed under articles of incorporation, or non-employee directors, are those who - either assuming or not the business risk - are elected by the General Shareholders' Meeting to hold a management position in public or limited liability private, not being covered by an employment relationship.
For these reasons, the payment of the PLR (Profit Sharing) to shareholding directors is not covered by the social security contribution exemption provided for in Act No. 10.101/2000".

The decision in question refers to the Assessment Notice issued regarding the required Social Security Contributions, based on the mischaracterization of the Taxpayer's Profit Sharing Plan (Participação nos Lucros e Resultados, PLR). Among other requirements, the Tax Authority has posted the Social Security Contributions, understanding that payments made to officers appointed under articles of incorporation would not be covered by the exemption granted to PLR payments under the Federal Constitution, as these are not employees.

The Taxpayer has challenged the assessment, claiming - regarding this requirement - the impossibility of collecting Social Contributions on PLR paid to officers appointed under articles of incorporation, and such challenge has been dismissed by the DRJ.

In a Voluntary Appeal, the taxpayer argued that Act No. 10.101/2000 would apply to PLR payments made to its officers appointed under articles of incorporation. The CARF, when reviewing such claims, dismissed the Voluntary Appeal and upheld the assessment, understanding that the Social Security Contributions exemption on the PLR covers only payments made to wage workers, since Article 7 of the Federal Constitution refers to employees subordinated to an employer under an employment agreement. On the matter, since officers appointed under articles of incorporation are not equivalent to employees, are not registered as wage workers and are not governed by the Labor Code (CLT), the aforementioned contrbutions on the payments made on a PLR basis apply.

Thus, as CARF understands it, if a director is appointed by the shareholders or partners within the context of a regular General Meeting, i.e., he is appointed under the articles of incorporation and does not have an employment relationship with the entity where he holds a management position, Act No. 10.101/2000 does not apply, and the Social Security Contributions apply to the payments made to him on a PLR basis.

Tax Bulletin

80

The Administrative Council of Tax Appeals

Specific tax report n° 80 • Year VII • November 2014

Team responsible for preparing The Administrative Council of Tax Appeals Bulletin:

Igor Nascimento de Souza (igor.souza@souzaschneider.com.br)

Henrique Philip Schneider (philip.schneider@souzaschneider.com.br)

Eduardo Pugliese Pincelli (eduardo.pugliese@souzaschneider.com.br)

Cassio Sztokfisz (cassio.sztokfisz@souzaschneider.com.br)

Fernanda Donnabella Camano de Souza (fernanda.camano@souzaschneider.com.br)

Diogo de Andrade Figueiredo (diogo.figueiredo@souzaschneider.com.br)

Flávio Eduardo Carvalho (flavio.carvalho@souzaschneider.com.br)

Rafael Fukuji Watanabe (rafael.watanabe@souzaschneider.com.br)

Vitor Martins Flores (vitor.flores@souzaschneider.com.br)

Rodrigo Tosto Lascala (rodrigo.tosto@souzaschneider.com.br)

Laura Benini Candido (laura.candido@souzaschneider.com.br)

Marina Lee (marina.lee@souzaschneider.com.br)

Pedro Lucas Alves Brito (pedro.brito@souzaschneider.com.br)

Tiago Camargo Thomé Maya Monteiro (tiago.monteiro@souzaschneider.com.br)

Viviane Faulhaber Dutra (viviane.dutra@souzaschneider.com.br)

Flavia Gehlen Frosi (flavia.frosi@souzaschneider.com.br)

Thomas Ampessan Lemos da Silva (thomas.ampessan@souzaschneider.com.br)

Maria Carolina Maldonado Kraljevic (mariacarolina.maldonado@souzaschneider.com.br)

Gabriela Barroso Gonzaga Ferreira Porto (gabriela.porto@souzaschneider.com.br)

Ana Cristina de Paulo Assunção (anacristina.assuncao@souzaschneider.com.br)

Vanessa Carrilo do Nascimento (vanessa.nascimento@souzaschneider.com.br)

Sergio Grama Lima (sergio.lima@souzaschneider.com.br)

Pedro Paulo Bresciani (pedro.bresciani@souzaschneider.com.br)

Renata Ferraioli (renata.ferraioli@souzaschneider.com.br)

Luana da Silva Araujo (luana.araujo@souzaschneider.com.br)

R. Cincinato Braga, 340 • 9º andar • 01333-010 • São Paulo • SP
tel 55 11 3201 7550 • fax 55 11 3201 7558

Brasília Shopping • SCN quadra 5, Bloco A • Torre Sul • 14º andar • sala 1406 • Brasília • DF • 70715-900
tel 55 61 3251 9400 • fax 55 61 3251 9429

www.souzaschneider.com.br

Souza, Schneider, Pugliese e Sztokfisz Advogados