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Dear Readers:

The Tax Bulletin aims to update our clients and other interested parties on the major issues being discussed and decided within the Judiciary, Legislative and Executive level.

In this 93th edition, we address 14 different issues related to Jurisprudence, Regulations and Consultation Solutions.

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Schneider, Pugliese, Sztokfisz, Figueiredo e Carvalho Advogados law firm is at the disposal of our clients to clarify any questions about the issues addressed in this publication.
We wish you a good reading!

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Jurisprudence

STF - Constitutionality of protest of outstanding debt certificate

On 11/09/2016, Plenary of Federal Supreme Court ("STF") decided on the constitutionality of protest of outstanding debt certificate ("CDA"), by ruling on the groundless of the Direct Unconstitutionality Action ("ADI") No 5135, filed by National Industry Confederation ("CNE") in order to challenge the constitutionality of sole paragraph of 1st Article of Law No 9492/1997.

Briefly, Justice Roberto Barroso, rapporteur of the proceeding, understood there is no formal unconstitutionality and dismissed the offense allegation to proper legal proceeding, affirming to be possible to devise a new form of extrajudicial collection to be carried out harmonically with the tax execution.

The Justice pointed out that the rule does not breach the free enterprise, as the difficulty of the credit does not originate in the advertise of protest but the default of taxpayer. Lastly, he pointed out that the proportionality is maintained, thus the protest meets the suitability and the need, therefore, it is not subject to political penalty.

In opposite direction, Justice Edson Fachin, stated that according to the precedents No 70, 323 and 547, all issued by STF, Federal Treasury is not allowed to use coercive means to enable the payment of taxes. There are legal means for collection of the amount payable, thus CDA is an enforceable extrajudicial warrant and Justice understood there is no need or reason to create new means of collection. In this respect, he considers the restrictions opposed to obtaining the credit related to protest, is an actual penalty that has damaged the business operation.

At the end of trial, however, by majority, ADI was ruled groundless, and the constitutionality of the CDA protest was confirmed.

STJ - Decision is maintained that suspended the auction of asses for company under court-supervised reorganization

On 11/08/2016, 1st Chamber of Superior Court of Justice ("STJ"), during the trial of Internal Appeal of Special Appeal ("REsp") 1.605.862/SC, it has ruled that despite the Law No 11.101/085 provides the request for court-supervised reorganization does not suspend the executions proceedings, the possible continuity of the tax execution does not give rise automatically, to the continuity of enforcement acts, as constrictive acts could not be performed that could damage the attempt of recovery of the company

In this case, the assets under attachment taken to auction was a real estate owned by the judgement debtor on which supported all productive complex. The Justice Sergio Kukina, rapporteur of the appeal, considered the court of origin has pointed out that judgement debtor could not continue, without that assets, its activities and fulfill the plan of judicial reorganization.

Therefore, unanimously, the Chamber kept the decision issued by court of origin, that has determined the suspension of the auction of the real estate in order to prevent the performance of the judicial recovery plan of company.

STJ - Consolidation of case law on non-assessment of Import Tax on wharfage

Discussion in Judicial Branch deals on the legality of the Normative Instruction ("IN") No 327/2003, issued by Brazilian Federal Revenue Service ("RFB") to include the wharfage expense in customs value, basis of the Import Tax ("II") calculation.

During 2016, several STJ decisions recognized that the wharfage expense is not part of the calculation basis of II, as it is not included in the customs value concept, as provided for in Customs Valuation Agreement (AVA/GATT) and Decree No 6.759/09.

Therefore, current case law of STJ is favorable to the taxpayers, and the chances are reduced of the discussion to be submitted to STF ruling; after all this is an issue mainly infraconstitutional.

STJ - The preliminary injunction effects being maintained, which has restored the tax incentive of "Lei do Bem"

On 12/06/2016, Special court of STJ ruling on the Suspension of the Preliminary injunction and Sentence ("SLS") No 2161/DF, confirmed the maintenance of the effects of the injunction to restore the tax incentive of Law No 11.196/05 known as "Lei do Bem".

The provision being discussed ensured the exemption of PIS/COFINS on the revenues from retail sales of computer products, related to the Digital Inclusion Program up to 12/31/2018. However, the tax incentive was revoked prematurely by Provisional measure ("MP") No 690/2015. In this case, the court of origin granted the injunction protection when determining to restore the tax incentive.

Unanimously, STJ decided to maintain the exemption of PIS/COFINS considering the revocation of the Digital Inclusion Program, with no doubt, violates the principle of trust, as taxpayers had the expectation that the tax benefit should be kept until 2018, and the legitimate confidence of taxpayers should be preserved.

STJ - Possibility of new change of guarantee in the tax execution.

On 12/06/2016, 2nd Chamber of STJ granted to REsp 1.637.094/SP recognizing there is no quantitative limit to replace the offered guarantee in execution process.

In this case, Appellate Court of the State of São Paulo ("TJSP") denied the request to replace the guarantee by surety alleging the judgement debtor has already replaced the attachment by collateral, therefore, the right of new replacement is unable to perform.

Justice Herman Benjamin, rapporteur of the appeal has considered the art. 15 of Law of Tax Executions ("LEF") does not define the quantity of times an attachment replacement could be made, therefore the legal authority is entitled to the analysis on case-by-case basis.

In this respect, the Chamber unanimously has granted the taxpayer appeal to recognize the right on the new replacement of the guarantee by surety.

TRF1 - Impossibility of credit in single-phase regime of PIS/COFINS

On 11/22/2016, 7th Chamber of the Regional Court of the 1st region ("TRF1") ruling on Appeal No 2453-27.2011.4.01.3400, decided by the incompatibility of single assessment of PIS/COFINS with credit technique.

In summary, federal judge José Amilcar Machado, rapporteur of the appeal, pointed out the non-accrual of PIS/COFINS contributions should not be confused with non-accrual of Tac on Manufactured Products ("IPI") and Tax on Circulation of Goods and Transportation and Communication Services ("ICMS"). Moreover the social security contributions have single phase assessment and apply widely on credit possibility provided for in art. 17 of Law No 10.033/2004, "REPORTO" Law, breaches the provision of literal interpretation of the tax laws that grants benefits.

In this respect, the chamber unanimously denied the grounds to the taxpayer's appeal thus followed the understanding to the time established by the First and Second Chamber of STJ.

It must be recorded, however, the issue is revised by First Chamber of STJ, in Resp 1.051.634/CE. This appeal, in view of the two favorable votes of taxpayers (justices Benedito Gonçalves and Regina Helena Costa) has actual chances to establish a precedent to allow the credit, as the last justice to vote is Napoelão Nunes Maia Filho, who has stated in another time favorable to the taxpayers thesis, according to vote issued in REsp 1.346.181/PE

TRF1 - Non assessment of PIS/COFINS on ISSQN

On 11/08/2016, 7th Chamber of TRF1 decided unanimously on non-assessment of PIS and COFINS on Municipal Service Tax ("ISSQN").

In summary, federal judge Angela Catão stated in her vote the reasoning adopted to exclude the ICMS from calculation basis of PIS and COFINS is also appropriate to exclude ISSQN.

Therefore, she pointed out that STF has stated the unconstitutionality of the expansion of invoicing concept provided for the 3rd article, 1st§ of Law No 9.718/1998, therefore understanding was established that does not include the value corresponding to ICMS and ISSQN in the contribution calculation basis, considering the invoicing.

TJSP - Undue requirement of accessory obligations not provided for in Law

On 11/09/2016, 13th Chamber of Public Law of TJSP denied the grounds to Appeal No 6608-37.1994.8.26.0224 filed by State to remove the settlement of debt object of tax execution due to the non-fulfillment of the accessory obligations provided for in resolution of the General Prosecutor's Office of State ("PGE").

In this case, during the processing of Tax Execution, State Law No 9.974/1998 was published authorizing the amnesty through the cancellation of penalty and interest in payment at sight. In the scope of that law, judgment debtor has paid in full the debt by settling the collection document issued by State Treasury.

However, after judgment debtor has settled the debt, Treasury requested the continuity of the tax execution as the form has not been submitted to request the payment at sight as provided for in PGE Resolution No 233/1998, and payment lower than the debt.

During the appeal trial, the judge rapporteur stated that the PGE Resolution should not require the accessory obligations that are not provided for in State Law, under penalty of breach to the legality and unfair enrichment principle. In respect to the allegation of payment lower than the debt, judge considered that the payment form was issued by State Treasury, which to date had not proven the existence of the balance.

Therefore, Chamber unanimously denied grounds to Appeal of State to recognize the illegality of requirement of the form provided only in Resolution, without legal support, and maintain the termination of the tax execution.

Legislation and Solution

Solution of DISIT Consultation No 8020/2016 - Income Tax of Legal Entity ("IRPJ") and Social Contribution on Net Income ("CSLL")

On 09/05/2016 Solution of Consultation was published, which was issued the Taxation Division of 8th Tax Region ("DISIT"), establishing the understanding that to determine the notional profit, concessionaire of public service of electric transmission shall apply 32% presumption percentage (for IRPJ and CSLL) on gross income during the rendering of construction, recovery, remodeling, enlargement and improvement service of infrastructure related to the concession agreement, and 8% for IRPJ and 12% to CSLL on gross income from operation and maintenance of this infrastructure.

According to DISIT, the approval of taxation according to actual receipt used for profit purposes and taxation result from the construction revenue, which counterpart is financial assets (according to art. 83, 3rd § of RFB Normative Instruction No 1515 of 2014), reaches only legal entities subject to taxable profit, which is not assessed to the concessionaires that opt by cash regime, when subject to notional profit.

RFB Interpretative Declaratory Act No 11/2016 - Tax on Financial Transactions ("IOF")

On 11/22/2016, RFB Interpretative Declaratory Act (ADI) No 11 was published, wherein Federal Revenue Service of Brazil stated the understanding that IOF Credit is assessed on credit rights assignment operations if the financial institution is the concessionaire, regardless the credits are or are not embodied in securities, provided that the business purpose is to provide credit to assignor.

PGFN Ordinance No 1110 of December 08, 2016 - Installment Plan of debts determined by Simples National

On 12/09/2016, Ordinance of General Prosecutor's Office of National Treasury ("PGFN") No 1110 was published, which guides the installment plan of debts determined by Simples National provided for the 9th article of Complementary Law No 155/2016.

According to Ordinance, the debts before PGFN determined in special regime of Simples National should be up to 120 monthly installments subject to the minimum value of R$ 300.00 by installment.

Such benefit is not applicable to the debts recorded in outstanding debt of Federal Government with suspended enforceability or not, also those previously in installments, provided that related to the reference up to May 2016.

Adhesion to the installment plan shall take place as of December 12, 2016 until March 10, 2017 by the Portal e-CAC PGFN.

It shall be pointed out the adhesion to the installment plan implies in irrevocable and irreversible confession of debts included in installment plan.

RFB Normative Instruction No 1.680 of December 28, 2016 - Common Reporting Standard.

On 12/29/2016, Normative Instruction of Inland Revenue Service of Brazil No 1680 ("IN RFB No 1680/2016") was published that provided on the identification of financial accounts according to the Common Reporting Standard - CRS, which was established jointly by several countries under the coordination of the Organization for Economic Cooperation and Development ("OECD").

According to RFB IN No 1680/2016, legal entities obliged to submit 'e-financeira' shall identify the financial accounts in accordance with the Common Reporting Standard-CRS, for facts taking place as of January 01, 2017.

If no information is subject or they are submitted with inaccuracies or omissions, penalties shall be assessed as provided for in 13 article of RFB Normative Instruction No 1571/2015. The Sole Exhibit o RFB IN No 1680/2016 establishes the procedures of diligence for proper identification of financial accounts.

RFB Normative Instruction No 1.681 of December 28, 2016 - Country to Country Reporting

On 12/29/2016, Normative Instruction No 1.681 of Inland Revenue Service of Brazil ("RFB IN No 1681/2016") established the obligation to render information of "Country-to-Country Statement" based on international treaties, agreements and covenants signed by Brazil for tax purposes.

RFB IN No 1.681/2016 establishes the Country-by-Country Reporting should be delivered by entity resident in Brazil for tax purposes that is controlled by multinational group annually, as of the tax year started in January 2016.

Although the entity resident in Brazil for tax purposes is not the final controller of multinational group, it must submit the Country-to-Country Reporting, if the jurisdiction of final controller residence: (i) does to require it to submit the Country to Country Reporting; (ii) does not have the proper authorities agreement with Brazil until the deadline for delivering Country to Country Statement; or (ii) has systemic failure on the notice by RFB. This obligation will not remain, if the multinational group provides the Country-to-Country Reporting by a substitute entity, according to the provisions provided for in 3rd § of 3rd Art. of IN.

Entities are released to deliver the Country to Country Reporting, if the total consolidated income of the multinational group in tax year prior to the reporting year, as contained in the consolidated financial statement, is lower than: (i) R$ 2,260,000,000.00 (two billion two hundred sixty million Brazilian reals), if the final

controller is resident in Brazil for tax purposes; or (ii) €750,000,000.00 (seven hundred fifty million euros) or equivalent, according to the rate of 01/31/2015, in local currency of jurisdiction of the final controller.

Entity resident in Brazil for tax purposes that has not delivered the Country-to-Country Reporting, deliver it in delay or deliver with omissions or inaccuracies is subject to the penalties provided for in art 11 of RFB IN No 1.681/2016.

RFB Normative Instruction No 1.683 of December 29, 2016 - Privileged Tax Regime

On 12/30/2016, Normative Instruction No 1.683 of Inland Revenue Service of Brazil ("RFB IN No 1.683/2016") amending the list of Privileged Tax Regimes (" RFP ") defined by RFB Normative instruction No 1.037 of June 04, 2010 ("RFB IN No 1.037/2010").

The normative text amends the wording of Section XI, 2nd Art. Of RFB IN No 1.037/2010, providing the Austrian holding companies are considered RFP, if they do not carry out substantive economic activity. This limit is provided for Dutch and Danish holding companies. Therefore, The Netherlands, Denmark and Austria holdings shall have the same treatment and considered under this RFP if they do not carry out substantive economic activity.

It shall be pointed out RFB IN No 1.658/2016 provided that for the purposes of RFP identification, holding company is the legal entity performing substantive economic activity and has in the domicile country the operational capacity suitable for its purposes. Such capacity can be evidenced, among other factors, by its qualified employees in enough number and physical facilities proper to perform the management and actually make decisions related to: (I) performance of activities in order to obtain revenues from its assets; or (ii) to management of the equities in order to obtain revenue from profit distribution and capital gain.

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