

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 95th edition, we address 10 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!

Jurisprudence

STF – General Impact - PIS/COFINS on financial revenues – Decree No. 8,426/2015

On 03/03/2017, the Full Bench of the Federal Supreme Court (“STF”) acknowledged the general impact of RE (Extraordinary Appeal) No. 986,296-PR, which discusses the increase of the PIS/COFINS (Social Integration Program/Social Security Funding Contribution) rates on financial revenues, reinstated by Decree No. 8,426/2015.

The general impact was defined Theme No. 939, in the following terms: “The possibility that the PIS and COFINS contribution rates are reduced and reinstated by non-statutory regulation, pursuant to art. 27, paragraph 2, of Act No. 10,865/2004.”

The discussion will also be defined on the basis of concentrated control, in the records of ADI (Direct Unconstitutionality Challenge Lawsuit) No. 5,277/DF.

STF – General Impact – Constitutionality of the increase of the Social Security Contribution rate

On 02/16/2017, the Full Bench of the STF acknowledged the general impact of RE (Extraordinary Appeal) No. 875,958/GO, which discusses the constitutional framework for laws that increase the social security contribution rates on civil servants, especially in light of the contributory nature of the social security system and the principles of financial and actuarial balance, the prohibition of confiscation, and reasonableness.

The general impact was defined Theme No. 933, in the following terms: “Constitutional framework for the increase of the social security contribution rate for proprietary social security regimes”.

STF - General Impact - Linking of tax fines to the payment of productivity bonuses - State Law (RO) No. 1,052/2002 and Decree No. 9,953/2002

On 02/23/2017, the Full Bench of the STF (Supreme Federal Court) acknowledged the general impact of RE (Extraordinary Appeal) No. 835,291/RO, which discusses the constitutionality of linking the tax productivity bonus to civil servants in the tax-related career.

The general impact was defined Theme No. 934, in the following terms: “Constitutionality of linking the revenue collected from tax penalties for the payment of tax productivity bonuses”.

STJ – Repetitive Appeal – Legal nature of the 20-percent charge on active debts

On 02/22/2017, the 1st Panel of the STJ submitted the REsp (Special Appeal) 1,525,388/SP to the repetitive appeals method to decide, with binding effects, on the legal nature of the 20-percent charge added to tax credits entered in the Federal Active Debt, for the purpose of classifying it as privileged or unsecured credit in the application for authorization of creditors in bankruptcy proceedings. The discussion contained in the repetitive appeal was recorded as Theme No. 969.

STJ - Acknowledgment of the possibility of crediting PIS/COFINS in the single-phase method

On 03/28/2017, the 1st Panel of the Superior Court of Justice (“STJ”), at the end of the trial of REsp (Special Appeal) No. 1,051,634/CE, acknowledged the right to use non-cumulative PIS/COFINS credits in cases when a taxpayer is subject to the single-phase method.

In short, the majority of the Justices followed Justice Regina Helena, according to whom the legal prohibition regarding the calculation of credits in the single-phase method, provided for in Art. 3, subparagraph I, letter “b”, of Acts No. 10,637/02 and 10,833/03, was tacitly revoked by Art. 17 of Act No. 11,033/04, ensuring that all taxpayers, irrespective of whether or not they benefit from REPORTO (Tax Regime for Incentive to the Modernization and Extension of the Port Structure), the maintenance of PIS/COFINS credits, in strict compliance with the non-cumulativene principle.

Such opinion is not yet settled within the scope of the Public Law panels in the STJ, since the precedents of the 2nd Panel still follow the reasoning that there are evident inconsistencies between the regimes.

However, overcoming the previously unfavorable jurisprudence issued by 1st Panel is a substantial indication that the Court should re-examine the matter.

STJ – Inapplicability of the ISS (Service Tax) tax when a developer independently builds on own land

On 03/28/2017, when hearing REsp (Special Appeal) 1,108,192/RN, the 1st Panel of the STJ unanimously decided for the inapplicability of the ISS (Service Tax) when a developer independently builds on own land.

In short, the Panel acknowledged the understanding of Justice Napoleão Nunes Maia, rapporteur for the appeal, in that no services are rendered to third parties so as to give rise to the ISS, when a developer independently builds on land it owns.

In this sense, the Panel accepted the taxpayer’s request for clarification of Court Decision – granting thereto reconsideration effects – dismissing the Special Appeal filed by the Municipality that intended to enforce the collection.

STJ – 1st Panel decides for the legality of including TUSD in the calculation base of ICMS on electricity distribution

On 03/21/2017, the 1st Panel of the STJ, by majority vote, when deciding on REsp (Special Appeal) 1,163,020/RS, concluded for the legality of applying the Value-Added Tax (“ICMS”, Tax on Circulation of Goods and Services) on the Distribution System Usage Fee (“TUSD”, Tarifa de Uso do Sistema de Distribuição), charged in the electricity bill as a distribution fee.

In short, the opinion that the electricity supply stages are indivisible prevailed, so that the costs of generation, transmission and distribution are essential components and, therefore, they form together the material aspect of the ICMS taxable event applicable to electricity.

Following this line of reasoning, the Panel dismissed the Taxpayer's REsp, upholding the applicability of ICMS to the TUSD, with the dissenting votes of Justices Napoleão Nunes Maia Filho and Regina Helena Costa.

Despite the change of understanding by the 1st Panel, the jurisprudence of the Court is firm in that the electricity Transmission and Distribution fees cannot be included in the ICMS calculation basis because there is no taxable event.

Even after the decision against the taxpayers, the 2nd Panel of the STJ continues to rule on the illegality of such inclusion (REsp No. 1,649,658/MT).

TJSP – Withdrawal of the collection of the Healthcare Solid Waste Fee provided for in Municipal Act No. 13,478/02

On 03/23/2017, the 18th Public Law Chamber of the São Paulo State's Court of Justice dismissed the collection of the Healthcare Solid Waste Fee ("TRSS", Taxa de Resíduos Sólidos da Saúde) established by Municipal Act No. 13,478/02, intended to cover the collection, transportation, treatment and final disposal of solid waste from healthcare services, of compulsory nature, provided by the local government of the City of São Paulo.

This is a declaratory action for non-existence of a legal-tax relationship, whereby the plaintiff pleads the dismissal of the TRSS charge on the grounds that its cardiology practice does not actually or potentially generate the solid healthcare services waste set forth in Art. 94, §1 of the Municipal Act.

Expertise determined that the activities performed at the practice were limited to visits and care, and no waste was generated so as to require special treatment in relation to household waste. Accordingly, the rapporteur decided to remove the TRSS requirement because the business was not addressed by solid waste regulations.

Legislation and Solution

Query Solution COSIT No. 140/2017 – PIS and COFINS credits calculation on expenditures with software

On 1/23/2017, Consultation Solution No. 140 was issued by the General Taxation Coordination Office ("COSIT"), addressing the use of credits from the non-cumulative nature of PIS and Cofins taxes by industrial taxpayers on expenditures incurred with the purchase of software.

COSIT understood that software intended to the purposes reported by the querying taxpayer – planning, production scheduling, creation, product development and industrial design – could not be deemed input, since it is not directly used in the production processes. Therefore the opinion was that such expenses generate credits from the non-cumulative nature of PIS and Cofins taxes only when incorporated into the intangible corporate assets, pursuant to item XI of Art. 3 of Act No. 10,637 of 2002, and to item XI of Art. 3 of Act No. 10,833 of 2003, observing the accounting requirements for this purpose.

Normative Instruction RFB No. 1,700/17 - Superseded non-statutory regulations addressing the CSLL

On 3/16/2017, Normative Instruction of the Brazilian Federal Revenue Service (“IN RFB”) No. 1,700 was issued revoking IN RFB No. 1,515/14, which addressed the Corporate Income Tax (“IRPJ”, Imposto sobre a Renda da Pessoa Jurídica), and superseded several other non-statutory regulations addressing the Social Contribution on Net Earnings (“CSLL”. Contribuição Social sobre o Lucro Líquido).

The new rule includes nine Exhibits containing tables that systematize points such as additions to and exclusions from net earnings, annual depreciation rates, and methods for equity holdings valuation.

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