Tax Bulletin

tax report

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

Enjoy your reading.

Case Laws

STF – Recognition of the General Repercussion on the possibility of using ICMS credits in export operations

The Federal Supreme Court (STF) recognized the general repercussion on matters dealing with the possibility of using ICMS credits in export operations in two situations: when the credit is created at the acquisition of goods intended to the fixed assets and when it derives from the acquisition of goods for use and consumption.

In the first event (RE 662976), the State of Santa Catarina filed an appeal claiming that the goods acquired to compose the fixed assets do not integrate the exported goods, therefore they cannot be subject of the exemption provided for in article 155. § 2, X, a, of the Federal Constitution, which provided for the ICMS appropriation in light of the non-cumulative principle.

As to the use of credits deriving from operations aimed at obtaining the material used in situations prior to the sale abroad (RE 704815), the Office of Attorney General of the State of Santa Catarina appealed so that a restrictive position of the constitutional benefit mentioned above be applied, and thus reach only the exported goods and not the input used.

The Supreme Court viewed that, in both cases, it will be necessary to define the scope of the non-cumulative principle, for which reason it unanimously recognized the general repercussion of the matters.

STF – PIS and COFINS on revenues from property awaits the recognition of the General Repercussion

Justice Luiz Fux took Extraordinary Appeal (RE) no. 599658 to be heard by the online full court, which deals with the charge of the PIS and COFINS on revenues earned from the lease of

properties, including those owned by the company.

According to the Reporting Judge, the general repercussion has already been recognized in this matter in two other appeals, however, with different aspects. In RE no. 400.4479-AgR, the PIS charge refers to revenues arising from insurance agreements, while in RE no. 609.096-RG, the charge is on the gross operating revenue of financial institutions.

As stated in his opinion, which is for the existence of the general repercussion, Justice Fux affirmed it is of vital importance that the debate on the matter be extended to revenues from the lease of real estate, also because the STF itself has conflicting decision on the matter, whether in favor of the tax levy or against it.

STJ – Acknowledgment of Debt. Possibility of Tax Credit Assessment after the expiry of statute of limitations

Special Appeal (RESP) no. 1.355.947, which deals with the discussion on the possibility of the tax debt acknowledgment document being able to constitute a tax credit, even after the expiry of the statute of limitations provided for in article 173, I, of the National Tax Code (CTN), was affected for trial at the First Section of the STJ, under the Repetitive Appeal system.

In this case, the taxes were due between September 1995 and December 1996, and the term '*a quo'* of the statute of limitations period, pursuant to article 173, I of the CTN, took place in January 1996 (for taxes due in 1995) and January 1997 (for taxes due in 1996).

The Taxpayer, in turn, acknowledged the debt in July 2003, at the time of adhesion to the installment program. Therefore, the confession of the debt happened after the five-year term.

The STJ has conflicting decisions within its Panels integrating the First Section, for which reason the trial of the Repetitive Appeal will serve for the Court's position and standardize the matter.

STJ –Reanalysis of the charge of the ICMS on the transfer of goods among establishments of the same tax payer

The First Section of the STJ will once more analyze, in the RESP 1254915 trial, the issue concerning the validity of the ICMS charge on the transfer of goods among establishments of the same taxpayer, a matter that, as known, has been decided favorably to the taxpayers.

In fact, the current position of the STJ on the matter is consolidated in Precedent no. 166, according to which "the mere shifting of the goods from one establishment to another of the same taxpayer does not constitute a taxable event of the ICMS". Along these lines, it

is worth remembering that the mentioned position was confirmed in the decision of RESP 1125133, handed down under the repetitive appeal system.

What happens is that, according to the Treasure of the State of Rio Grande do Sul, Precedent no. 166 of the STJ became invalid as of the effectiveness of article 12, item I, of Complementary Law no. 87/1996, a provision that considers the taxable event of the ICMS to have occurred at the time "*the goods leave the taxpayer's establishment, even if to another establishment of the same taxpayer*".

Based on this, the State Tax Authorities claim that the ruling out of the rule in article 87, item I, of Complementary Law no. 87/96, in the manner decided by the STJ, led to the statement of unconstitutionality of the provision which, to the Authorities, would only be possible if the plenary reserve clause in article 97 of the Federal Constitution of 88 had been observed.

Despite the State Tax Authorities' position, we believe that the current view of the STJ applies the legally correct solution to the issue, considering that the ICMS may only be charged on operations of the circulation of goods, which presuppose the practice of effective trading acts, having a profit purpose, and the transfer of property of the asset subject matter of the transaction.

STJ –Repetitive Appeal – ICMS Communications – No charge on preparatory, accessory, or intermediary services

The First Section of the STJ, in the trial of RESP 1176753, performed under the system in article 543-C of the Code of Civil Procedure (CPC), ratified its position in the sense that there the ICMS is not levied on preparatory, accessory, or intermediary communications services (such as the change of ownership of cell phones; detailed account; change of telephone sets, telephone numbers, telephone account collection address, registration area, service plan; blocking of long distance calls (DDD and DDI), license, and reconnection), as they are secondary support activities. According to the Court, the ICMS is validly charged only on the target activity, that is, on the rendering of communications services in which the "the process of transmission (issue or reception) of any kind of information" has been verified.

On the other hand, although there is a decision of the STF stating that the matter does not have a general repercussion (RE no. 592.887/AC), the matter is being examined by the Full Constitutional Court (RE 572020), in which the voting of its judges is currently tied (one favorable to the Tax Authorities by Justice Marco Aurélio and one to the Taxpayers by Justice Luiz Fux). This trial has been currently suspended due to Justice Dias Toffoli's request for examination.

Legislation and Response to Inquiries

Withholding Income Tax – Taxation

On Nov. Nov. 22, 2012, a Regional Superintendence of the Federal Revenue ("SRRF") of the 6th Tax Region published Response to Inquiry no. 141/2012, stating the position that, for the purpose of the Withholding Income Tax ("WHT"), the remuneration paid by Brazilian companies to a resident in Italy, on account of a job performed in that country, is not subject to the charge of the mentioned tax in Brazil.

Concept of Gross Revenue – Social Security Contribution of Law no. 12,546/2011

On Nov. 27, 2012, the Federal Revenue ("RFB") published Normative Rule no. 3/2012, stating the position that the gross revenue constituting the tax basis of the social security contribution created by articles 7 to 9 of Law no. 12,546, dated December 14, 2011, replacing the contributions provided for in items I and III of article 22 of Law no. 8,212, dated July 24, 1991, comprises: (i) revenue deriving from the sale of goods in own-account transactions; (ii) revenue deriving from the rendering of services; and (iii) the result earned in third-party account transactions.

Furthermore, the RFB viewed that the following can be excluded from the mentioned revenue: (i) gross revenue from exports; (ii) cancelled sales and discounts granted unconditionally; (iii) the Tax on Manufactured Products ("IPI"), when included in the gross revenue; and (iv) the Tax on the Circulation of Goods and Provision of Interstate and Intercity Transportation and Communications Services ("ICMS"), when charged by the seller of the goods or service provider as the tax substitute.

Refis – Concept of Gross Revenue

On Nov. 28, 2012, Response to Inquiry no. 83/2012 was published, issued by the Regional Superintendence of the Federal Revenue of the 4th Tax Region ("SRRF"), stating that gross revenue, used as the basis of the minimum installment of the Tax Recovery Program ("Refis") created by Law no. 9,964/2000, comprises: (i) the product of the same of goods in own account transactions; (ii) the price of rendered services; and (iii) the result earned in third party accounts.

Moreover, the SRRF of the 4th Tax Region complemented that the so-called "other operating revenues", should not compose the mentioned gross revenue, among them the result in ownership interest, with the inclusion of the result distributed to the silent partner of the unincorporated joint venture.

Expenses not connected to production – PIS/COFINS Credits

On Dec. 6, 2012, the Regional Superintendence of the Federal Revenue of Brazil of the 9th Tax Region ("SRRF 9ª RF") published Response to Inquiry no. 214/12, stating that legal entities manufacturer of goods that have expenses that are not connected to the production– such as workers' food, medical plans, welfare, life insurance, uniforms, transportation vouchers, cleaning and maintenance material, safety material, water expenses, insurances, trips and representations, sales commissions, tolls, IT material, ads and publications, mail and mail pouches, newspapers and magazines, telephone and telex – may not discount the credits of the Contributions to the Employee Profit Sharing Program ("PIS") and to the Social Security Funding ("COFINS").

REFRI – PIS/COFINS Credits

On Dec. 6, 2012, the Regional Superintendence of the Federal Revenue of Brazil of the 9th Tax Region ("SRRF 9ª RF") published Response to Inquiry no. 215/12, stating that legal entities taxed by the non-cumulative system of the Contributions to the Employee Profit Sharing Program ("PIS") and to the Social Security Funding ("COFINS") that have opted for the Special Beverage Taxation System ("REFRI") may discount PIS/COFINS' credits at the acquisition of packaging, and at the costs in connection with the manufacture of the products listed in REFRI.

Minimum Average Period of Permanence of Funds in the Country – IOF Exchange

On Dec. 4, 2012, president Dilma Rousseff published Decree no. 7.853, which created the Regulation of the Tax on Credits, Exchange, and Insurance Transactions, or relative to Securities ("IOF"), introduced by Decree no. 6.306/2007.

According to the modifying Decree, as of December 5, 2012, the IOF will now be levied at 6% (six percent) on the settlement of exchange transactions entered into "for the inflow of funds into the Country, including by way of simultaneous operations relative to foreign loans subject to registration with the Central Bank of Brazil, entered into directly or through the issue of securities in the international market, with a minimum average maturity of up to three hundred and sixty days".

Nevertheless, the rule according to which loans with average maturity superior to the one mentioned above will be taxed by the IOF at a 0% (zero percent) rate remains in force.

Easement Revenues – PIS, COFINS, IRPJ, and CSLL

On Dec. 14, 2012, the Regional Superintendence of the Federal Revenue ("SRRF") of the 8th Tax Region published Response to Inquiry no. 265/12, stating that amounts received on the basis of easement interest (in rem rights on third-party things) on real estate integrating the stock of companies whose business purpose is the take-over, purchase, sale, lease, and management of real estate that integrate the tax basis of the PIS/Pasep and Cofins.

For purposes of ascertainment of the IRPJ and CSLL basis, 32% (thirty-two percent) is to be applied to the mentioned received amounts, whether by estimate or presumption of profits.

Contribution Immunity on Exports – PIS and COFINS

On Dec. 6, 2012, the Regional Superintendence of the Federal Revenue ("SRRF") of the 9th Tax Region published Response to Inquiry no. 218/12, stating that the constitutional immunity as to the non-levy of PIS and COFINS on transactions related to exports continues, even if the one trading the operation is a third proxy of the legal entity exporter.

The rules releasing exporters from the immunity may only be applied when the third trader of the transaction acts in his own name or whose payment of the services rendered by a legal entity resident or domiciled abroad is made in a different form from the one set by the Central Bank of Brazil in Circular no. 3280. This circular determines, as a general rule, that the payments be made through bank transfer.

Non-ascertainment of revenues– Social Security Contributions

On Nov. 28, 2012, the Regional Superintendence of the Federal Revenue of Brazil of the 4th Tax Region ("SRRF 4ª RF") published Response to Inquiry no. 89/12, stating that legal entities that practice the activities provided for in articles 2 and 3 of Law no. 12,546/2011 – that is, the export of goods manufactured in the Country – in the months that revenues are not ascertained, may not collect social security contributions.

It is of note that the position stated in the mentioned Response to Inquiry is in agreement with the Special System of Reinstatement of Tax Amounts (Reintegra), which is a part of the tax and economic incentive plan denominated "*Brasil Maior*" (Greater Brazil).

Nondeductibility – Shelving fee of the Special Interest Fund

On Dec. 14, 2012, the Regional Superintendence of the Federal Revenue of Brazil of the 8th Tax Region ("SRRF 8ª RF") published Response to Inquiry no. 260/12, stating that the amount paid

to the Special Interest Fund for the shelving of proceedings in which a company is investigated for an alleged practice of violations against the economic order is not deductible from the ascertainment of the tax basis of the Corporate Income Tax ("IRPJ") and the Social Contribution on the Net Income ("CSLL"), even if there is no recognition of fault, since this payment is not considered necessary and customary for the company's activities.

IRPJ, CSLL, PIS, and Cofins – Judicial and Administrative Deposits

Response to Inquiry no. 264/12 was published on Dec. 14, 2012, issued by the Regional Superintendence of the Federal Revenue of the 8th Tax Region ("SRRF"), which deals with the charge of the IRPJ, CSLL, PIS, and Cofins on surcharged or monetary variations of the amount deposited in judicial or administrative courts.

According to the SRRF, at the return of the judicial or and deposits added by interest or other surcharges, what is characterized is the occurrence of the taxable event of the IRPJ and CSLL only when a decision is favorable to the taxpayer; or in exceptional situations, when the release of the amount deposited with surcharged is authorized by the administrative or judicial authority before the end of the proceeding.

Furthermore, the SRRF views that as to the monetary variation of the judicial or administrative deposits made by health plans subject to the PIS and Cofins cumulative system, these contributions are not charged, as the revenue earned due to the monetary variation does not derive from a corporate activity.

Law no. 12,741/2012 – Obligation to inform the consumer of the levied taxes – ICMS, ISS, IPI, IOF, PIS/Pasep, COFINS and Cide Fuels

Law no. 12,741/2012 was published on Dec. 10, 2012, which provides for measures of clarification to consumers on the taxes charged on goods and services. Pursuant to the commented normative act, the approximate amounts of the federal, state, and municipal taxes influencing the sale price should be listed in the tax or equivalent document covering the sale transactions of goods or services. It is not necessary for the establishment itself to ascertain the amounts of the taxes levied on each good, as the Law allows establishments to use the values calculated and provided, semi-annually, by a national institution engaged in the ascertainment and analysis of economic data.

The establishment may also opt for disclosing the information on the taxes on a board placed on a visible location, or any other printed or electronic form. In this case, the value of the levied taxes separately and individually in relation to each good and service, which are to be

expressed in percentages on the price to be paid (in case of ad valorem tax rate) or monetarily (in case of a specific tax rate).

As to the taxes that must be informed to the consumer, Law no. 12,741/2012 determines that the amounts of the following taxes must be contained in the tax document or in a visible place: ICMS, ISS, IPI, IOF, PIS/Pasep, Cofins, CIDE Fuels, and Social Security contributions (when the payment of the staff constitutes a cost item). The PIS/Pasep/Import and Cofins/Import values are to be provided to the consumer only when more than 20% of the product is composed of input or components deriving from foreign trade transactions.

The law sets forth that when the IPI and/or Import Duty are charged on Import, the suppliers are required to transfer to the acquirers the value of such taxes separately, per item.

Lastly, in the event of failure to comply with the provisions of the Law, offenders will be subject to the administrative penalties provided for in the Consumer Code of Defense, which vary from fines to the interdiction of the establishment.

For information purposes, it should be pointed out that the President of the Republic banned, among other provisions, the mandatory requirement for the establishments to inform the IRPJ and CSLL amounts charged on sales transactions, since implementing the ascertainment of the taxes that indirectly influence price formation is difficult, which would lead to the distortion of the information provided to the end consumer, thus violating the very purpose of the law.

Circular BACEN no. 3.617/2012 – RMCCI – Advancement of Funds to Exporters in long-term exports

Circular of the Central Bank of Brazil Joint Board no. 3.617, dated Dec. 4, 2012, was published on Dec. 5, 2012, altering the provisions in the Regulation of Exchange and Capital Markets ("RMCCI") with regard to the advancement of funds to exporters of goods and services in long-term exports.

This Circular conditions the effective entry of funds into the Country to obtaining the Financial Transaction Registration ("ROF") related to the reception of export revenues with anteriority longer than 360 days following the date of shipment of the goods or provision of services. In addition, the Central Bank views that the advancement of funds to exporters can be made by the importer or by any legal entity resident abroad, including financial institutions.

Lastly, the Circular includes Subsection 2-A to Title 3, Chapter 3, Section 2, of the RMCCI, which regulates the registration of advancement of funds in

long-term exports with the Electronic System of the Central Bank of Brazil.

IOF – Refinancing

On Dec. 14, 2012, the Regional Superintendence of the Federal Revenue of Brazil of the 8th Tax Region ("SRRF 8ª RF") published Response to Inquiry no. 263/12, stating that in the event of financing, in which the principal amount of the loan agreement to be used is known and without the existence of delay, the procedure to be adopted in refinancing cases is the recalculation of the IOF for the amount subject matter of refinancing, as well as any additional amount made available to the debtor, using the quantitative criteria set by the legislation in force.

Furthermore, this Response to Inquiry determines the inclusion to such procedure of the situations in which there is a change of the original term in which the original non-settled amount becomes available to the borrower, or in case of a new release of funds.

Lastly, the Response to Inquiry states that once the due IOF has been calculated, the taxpayer may offset the portion of the mentioned collected tax, relative to the period not elapsed, against the originally financed amount subject matter of refinancing and not yet settled.

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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