Tax Bulletin of the TAX AND FEE COURT OF SÃO PAULO

specific tax report

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Dear Readers:

In this 24th edition of the **TAX BULLETIN OF THE TAX AND FEE COURT OF THE STATE OF SÃO PAULO ("TIT/SP")**, we present our clients and readers with a decision rendered by the Superior Chamber of the Tax and Fee Court of São Paulo, in which, in a unanimous decision, the tax credit subject matter of a Tax Assessment Notice and Fine Charge ("AIIM") issued due to allegedly undue credit –arising from transfers of credit and outstanding balance carried out with the centralizing establishment– was canceled, without the option for this tax ascertainment method being recorded in the accounting books of the centralized establishment.

In addition, we also comment on another important decision of the 19th Judgment Chamber of the TIT/SP, which examined the violations relative to the ICMS credit within the context of the so-termed "Tax Competition". The appellate decision partially granted the Ordinary Appeal, recognizing the grounds of the taxpayer's argument that the assessment in which there is no effective evidence of the use of the incentive or allegedly irregular tax benefit is null.

Enjoy your reading.

ICMS – UNDUE CREDIT – TRANSFER OF CREDIT AND OUTSTANDING BALANCE –NON-PERFORMANCE OF ACCESSORY BOOKKEEPING OBLIGATIONS

"ICMS. UNDUE CREDIT. TRANSFER OF CREDIT AND OUTSTANDING BALANCES CARRIED OUT WITH THE CENTRALIZING ESTABLISHMENT. APPEAL TO BE HEARD, AS THE PARADIGM DECISION IS IDENTICAL TO THE SITUATION IN THE CASE RECORDS. ON THE MERITS, THE APPEAL IS TO BE GRANTED, SINCE THE TRANSFER OF CREDIT BALANCE WITHOUT RECORDING THE OPTION IN THE ACCOUNTING BOOKS OF THE ASSESSED COMPANY CANNOT INVALIDATE THE RECEPTION OF CREDIT. SPECIAL APPEAL HEARD AND GRANTED."

This is an Administrative Tax Proceeding discussing the grounds of the Tax Assessment Notice and Fine Charge ("AIIM") issued due to an event of undue

credit deriving from transfers of credit and outstanding balances made BY the centralizing establishment, without the option for the centralized ascertainment method of the ICMS being recorded in the Book of Records for the Use of Tax Documents and Events (LRFUDFTO) of one of the centralized establishments.

The assessment was taken to the 16th Judgment Court of Tax and Fee Court of São Paulo, and was fully upheld.

Due to this decision, the taxpayer then filed a Special Appeal requesting the appealed decision to be reviewed.

For the Reporting Judge of the case in the Superior Chamber, Ms. Vanessa Pereira Rodrigues Domene, the Special Appeal should be heard and granted, since (i) the paradigm decisions presented intended to demonstrate jurisdiction divergence; and (ii) any non-performance of accessory bookkeeping obligations contained in the option for the centralized ICMS ascertainment method in all establishments involved "*does not have the power to invalidate credit reception*".

In addition, the Reporting Judge also states the following:

"The reason is that, in such cases, I agree with the same position presented by the Reporter of the paradigm decision, that is, that the infraction of the company refers to a mere non-performance of an accessory bookkeeping obligation, which cannot invalidate the reception of credit. In fact, as exposed by the reporter of the paradigm decision and by the administrative first tier court judge who examined the case records, the rejection of the credit in question would imply double collection for the company."

Within this context, it was decided that the taxpayer was entitled to the ICMS credit, and the taxpayer's Special Appeal was fully granted, by unanimous decision, for the cancellation of the assessment.

Due to this decision, the Superior Chamber of TIT/SP then projects the position that the mere non-performance of accessory bookkeeping obligations cannot invalidate the tax credit if its legitimacy was not even objected by the Tax Authorities.

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ICMS – INFRACTIONS RELATED TO TAX CREDIT– TAX COMPETITION – ASSESSMENT DEFICIENCIES

"ICMS.
I. INFRACTIONS RELATED TO TAX CREDIT.
AS DETERMINED BY THE SUPERIOR CHAMBER OF THE CLAIMS OF THE ORDINARY APPEAL THAT HAVE NOT BEEN EXAMINED:
A) NULLITY OF THE ASSESSMENT DUE TO LACK OF REORGANIZATION OF THE ACCOUNTING RECORDS. IN CASE THE ASSESSMENT NOTICE IS MAINTAINED, A NEW CALCULATION OF THE INTEREST SHOULD BE MADE PURSUANT TO 565 ITEM II LETTER "C" OF RICMS.
B) NULLITY OF THE ASSESSMENT DUE TO POOR AUDIT WORK, LACK OF EVIDENCE OF THE USE OF THE TAX BENEFIT. THERE IS ACTUALLY NO EVIDENCE IN THE CASE RECORDS THAT THE

ESTABLISHMENTS LOCATED IN THE STATES IDENTIFIED ON SHEET NO. 61 OF THE RECORDS ARE SIGNATORY OF THE TAX BENEFITS, MAKING ITEM I.1 OF THE RECORDS INCONSISTENT.

C) NULLITY OF THE ASSESSMENT DUE TO ERROR OF CHARGES. IT IS JUST ONE ARGUMENT STATING THE LEGISLATION OF THE STATE OF MATO GROSSO.

D) REVIEW OF THE FINE RELATED TO ITEM I.2. ARGUMENTS LACK GROUNDS.

E) PARTIAL GROUNDS OF ASSESSMENT, RELATIVE TO THE CHARGE OF INTEREST, FOR ITEM I.2. THE SAME POSITION IN ITEM "A" ABOVE IS VALID FOR THIS ITEM.

THEREFORE, I RULE THAT ITEMS "A" – "B" – "E", TO BE VALID AND THAT ITEMS "C" – "D". LACK GROUNDS".

This is the case of an Administrative Tax Proceeding arising from the issue of a Tax Assessment Notice and Fine Charge ("AIIM") containing accusations of an alleged undue ICMS credit within the context of the so-called "Tax Competition", involving the reduction of the tax credit value corresponding to the portion of the tax which was allegedly not collected due to the unilateral concession of the tax benefits related to the ICMS, in violation of the rule contained in article 155, §2, XII, "g", of the Federal Constitution (Complementary Law 24/1975), among other requirements.

Initially, the proceeding was heard by the 9th Tax and Fee Court of São Paulo, which upheld the assessment, failing to examine some preliminary arguments brought by the taxpayer in its Ordinary Appeal.

Due to such, the taxpayer then filed a Special Appeal, claiming that the appealed decision would be null, as it had failed to examine relevant topics, which could alter the conclusion of the case.

The Reporting Judge of the case in the Superior Chamber voted for the records to be remanded to the court of origin for the due complementation of the judgment, since the taxpayer's arguments were relevant and involved factual and evidentiary matters, which could not be heard or reviewed within a special appeal.

Therefore, the case returned to the 10th Judgment Chamber so that the previously determined items could be analyzed, and were so by Reporting Judge Celina Coutinho, item per item, ruling in favor of some topics.

With regard to the result of the case being remanded to complement the decision of the Ordinary Appeal, it is interesting to note the position of the Judgment Chamber as to the nullity of the assessment due to poor tax audit work.

On this matter, the Reporting Judge viewed that there is no evidence in the case records that the establishments sending the goods are signatory of tax incentive or benefit programs, and due to the lack of proof, she then canceled the tax requirement.

In fact, in addition to the copy of normative acts that had created the alleged irregular tax benefits, the assessment was accompanied only by: (i) "copies of DANFE and Statement of the transfers"; (ii) "copy of the Summary of the entries per Units of the Federation"; and (iii) "copies of the book of Entry Records", documentation that was

apparently not sufficient to demonstrate that any tax benefit was enjoyed in the State of origin of the goods.

Due to this decision, the 10th Judgment Chamber indicated its position that assessments in connection with "Tax Competition", in which there is no effective evidence of the enjoyment of the allegedly irregular tax benefit, cannot be accepted.

Thus, the AIIM was reduced, excluding the tax credits arising from the alleged violation relative to the ICMS credit in connection with the "Tax Competition".

SOUZA, SCHNEIDER, PUGLIESE E SZTOKFISZ ADVOGADOS law firm is available to its clients should they have any questions concerning this decision.

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