Tax Bulletin

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The Administrative Council of Tax Appeals

Specific tax report n° 87 • Year VIII • June 2015

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 87th edition of our newsletter, we will comment on a decision in which the Administrative Council of Tax Appeals ("CARF") cancelled the assessment for the collection of Social Security Contributions on amounts paid as a hiring bonus, as it viewed that this sum does not have a remuneration nature, since its payment is not tied to any service rendering relationship, operating only as an attractive element that precedes the hiring.

We also commented on a decision in which the CARF cancelled the assessment for the collection of the IRPJ and CSLL deriving from rejections of exclusions with research and development expenses in the ascertainment of the taxable event, as it viewed that the control of the use of benefits was verified, in compliance with the rules established by the so-termed "Law of Good" (Law of Good), and that the terms for the enjoyment of the tax incentive had been met. The same appellate decision also ruled out the Tax Authorities' intention of rejecting the enjoyment of the tax incentives, as there was legal opinion of the Ministry of Science and Technology (MCT) against the framing of the project as R&D, ruling that, because there was also a favorable position to the mentioned framing from another body of the MCT, the Taxpayer could not be adversely affected by any sorts of doubt.

To directly access the text referring to each of these topics, click on:

Hiring Bonus – Non-Remuneration Nature – Non-Levy of Social Security Contributions

Law no. 11,196/05 ("Law of Good") – Expenditures com R&D in Specific accounts – Form of Accounting Control for the Use of Incentives – Legal Opinions Divergent from the MCT

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

"MATTER: SOCIAL SECURITY CONTRIBUTIONS
Ascertainment Period: July 1, 2006 to Dec. 31, 2007
SOCIAL SECURITY CONTRIBUTION, FOOD VOUCHER AND MEAL VOUCHER. PAYMENT IN KIND. NO ADHESION TO THE PAT. LACK OF SALARY NATURE. NON-LEVY. HIRING BONUS. LACK OF SALARY NATURE. NON-LEVY.
The supply of food is subject to the charge of the social security contribution, since it lacks a salary nature, whether the employer is enrolled with the Workers' Food Program (PAT) or not.
The hiring bonus does not have a legal remuneration nature and does not integrate the contribution salary of the employee, regardless of the nomenclature granted by the taxpayer. (...)"

The decision in questions deals with a Tax Assessment Notice issued for the collection of Social Security Contributions on amounts paid by the Taxpayer on the basis of a hiring bonus, among other sums. Generally speaking, the Tax Authorities concluded that the hiring bonus has a salary nature, since it would supposedly be an advanced remuneration for the services to be rendered in the future.

Dissatisfied, the Taxpayer filed an Opposition, seeking to demonstrate the inexistence of salary nature of the hiring bonus. However, the Opposition was dismissed by the Federal Revenue Judgment Office of Brazil ("DRJ") and, against this decision, the Taxpayer then filed a Voluntary Appeal, which, specifically as to the hiring bonus, was granted by the CARF.

In fact, the Rapporteur Councilor started his Opinion by defining the concept of the hiring bonus as a legal and regular procedure used as an attractive form by the companies to hire highly sought-after professionals in the market. He added that the agents are free to act in the economic scenario guaranteed by the Constitution and that the *"the payment of the amount agreed to by the parties in a legally valid transaction, in accordance with the Civil Law, between capable agents with a legal object and performed under the law, is fully recognized in our legal system, pursuant to article 104 of the Civil Code".*

The Rapporteur Councilor then added that the hiring bonus poses as an attractive element for the future employee, without which he would continue searching in the market for better professional opportunities, or to hire him in detriment to his previous job, even if in the previous one he had greater guarantees, given the time already worked and the conquered trust. Along these lines, the Rapporteur clarified that *"it may be affirmed that this civil adjustment results in a attractive element for the future employee in relation to the hiring, as compensation for the loss of stability obtained in the previous job and for the risk that the professional is exposed to when venturing into a new challenge. Nevertheless, the scope of the hiring bonus includes the compensation for any indemnification sums that this professional will no longer receive when voluntarily departing from the previous company".*

As a conclusion of this thought, the Rapporteur Councilor argues that the payment of this sum does not have a salary nature, since *"a) it is not consideration paid by the employer for services rendered by the employee; b) it is paid a single time, under resolution condition, because if the permanence period is not performed, there may be a partial or total return; c) it is not a regular gain and chiefly, d) there is no legal provision to consider it remuneration and taxable for social security purposes".*

To corroborate his position, the Councilor cited decisions of the Superior Labor Court ("TST") and of the CARF itself, which affirm the position that, upon the verification of no regularity in the payment of the bonus

and that there is no compensation for the developed work, the amounts are not subject to the charge of the social security contributions.

Therefore, in concluding his Opinion, the Rapporteur Councilor granted the Voluntary Appeal in this regard and was followed by the majority of the other Councilors, canceling this portion of the assessment.

"MATTER: ADMINISTRATIVE TAX PROCEEDING
Calendar year: 2007, 2008
TRIAL DECISION. FACING THE PRESENTED ARGUMENTS. VALIDITY.
There is no nullity when a trial decision expressly confronts all the arguments claimed in an opposition. Preliminary arguments dismissed.
TAX INCENTIVE. TECHNOLOGICAL INNOVATION. PREVALENCE OF TAX LAW IN RELATION TO ACCOUNTING STANDARDS. ACCOUNTING RULES DO NOT CHARACTERIZE A CONDITION FOR THE CONCESSION OF FRUITION OF THE TAX INCENTIVE, BUT AIMS AT THE CONTROL OF THE CORRECT USE OF THE BENEFIT.
If the Tax Authorities are furnished with sufficient documents for the control of the use of the benefit, and if the bookkeeping (specific accounts) is made separately from the expenditures and payments dealt with in articles 17 to 20 of Law no. 11,196/05, even if this is done during the audit and/or subsequent to its recording, there is no breach of item I, article 22 of Law no. 11,196/05.
TAX INCENTIVE. TECHNOLOGICAL INNOVATION. INCONCLUSIVE TECHNICAL REPORT. DIVERGENCE OF POSITIONS AMONG BODIES OF THE MCT. MAINTENANCE OF THE INCENTIVE.
The uncertainty generated by opinions issued by bodies of the MCT on the nature of the innovation project presented by the taxpayer, mainly when divergence among them is verified, cannot result in the loss of the incentive."

The decision in question deals with a Tax Assessment Notice issued for the collection of the Corporate Income Tax ("IRPJ") and the Social Contribution on the Net Income ("CSLL") relative to the calendar years of 2007 and 2008, due to the rejection of the exclusions of the tax basis of the mentioned taxes from amounts relative to research and development, which are the tax incentives provided for in Law no. 11,196/05, known as the "Law of Good".

By and large, the Tax Authorities concluded that ***(i)*** requirements provided for in item I, article 22, of Law no. 11,196/05, were not performed, which sets forth the obligation to maintain specific accounting accounts for the control of expenditures with technological research and development of technological innovation ("R&D"); and ***(ii)*** that for 2007,the Ministry of Science and Technology ("MCT") issued an opinion recommending that the projects submitted by the Taxpayer not be classified as R&D.

Upon being notified of the assessment, the Taxpayer then filed an Opposition, dismissed by the Federal Revenue Judgment Office of Brazil ("DRJ"), which led to the filing of a Voluntary Appeal with the CARF.

In an appeal, the Taxpayer claimed that the expenditures with R&D were recorded according to the accrual basis accounting in its respective group of accounts, and were later controlled in specific asset accounts, fully complying with the rules of article 22 of Law no. 11,196/05, which did not establish the form or term to record these expenses. Furthermore, the adopted posture did not affect the company's results in the period.

Thus, the control in specific accounts was subsequent only to the recording of the expenditures, not interfering, however, in the enjoyment of the benefit of the "Law of Good".

He further added that the MCT had no reason for not approving the R&D project relative to 2007, since this project described in detail all the information on the performed research, duly meeting the requirements established by article 17, item I, of Law no. 11,196/05, necessary for the deduction of the taxable event of the operating expenses incurred with R&D. Moreover, he demonstrated that the opinion produced by that body was inconclusive, in that the expenditures did not correspond to the R&D, as there were technical reports of the MCT itself stating otherwise.

In examining the case, the CARF accepted the Taxpayer's argument, recognizing the performance of the requirements established in Law no. 11,196/05 and rejecting the Tax Authorities' claims as to the violation of item I, article 22 of the mentioned law.
When rendering the concurring opinion of the appellate decision, the appointed Rapporteur Councilor addresses the function of incentive to research and technological innovation brought by the "Law of Good", in line with the principles brought by the Federal Constitution, viewing that this incentive is essential for the construction of the Brazilian development project.

As to the procedure of the rejections, Rapporteur Councilor understood that the accounting control of the expenditures with R&D in a specific account would not be a fundamental condition for the concession of incentives to technological innovation, which is only a form of control in order to avoid the undue use of this benefit.

He further added that the Taxpayer provided the Tax Authorities with sufficient documentation proving the control of the utilization of the benefit, highlighting the existence of a separate recording of expenditures with R&D, even if made subsequent to the recording of the incentives, there being, therefore, no violation of item I, article 22, of Law no. 11,196/05. In this sense, he clarified that the terms for the concession of the benefits may not be taken to extremes, so as to create obstacles for the enjoyment of these incentives, adding that CARF's case laws are applicable, by analogy, in relation to the tax incentives of Finor, Finam and Funres.

In addition, he claimed that it is not reasonable to accept the affirmation of supremacy of the accounting standards and principles over the law that grants tax incentives, as the incentives are tools of the State utilized with the purpose of encouraging conducts and ensuring the national development, the accounting rules being solely a means of control, not a requirement for their concession or enjoyment.

Lastly, although the Rapporteur Councilor had understood that the performance of the conditions provided for in item I, of article 22, of Law no. 11,196/05 is sufficient for the full cancellation of the rejections, he also ruled out part of the assessment that was based on the existence of an opinion rendered by the MCT, which did not recommend that the Taxpayer's project be framed as R&D, accepting the reasons presented in the Voluntary Appeal. According to the Rapporteur Councilor, the mentioned opinion seemed inconclusive, since several other technical reports issued by the National Institute of Technology (an institute composing the MCT) confirmed the presence of all the phases deemed necessary for the characterization of a development of innovation prepared by the Taxpayer.

Due to this divergence, which would raise doubts as to the regularity of the R&D project, the Rapporteur

Councilor concluded that the Taxpayer could not be adversely affected, stating as follows: *"the divergence existing among the bodies integrating the Ministry of Science and Technology raises doubt as to the existence or not of irregularity in the development of the technological innovation project submitted and, due to said doubt, the taxpayer may not be affected by the loss of the incentive".*

Therefore, by majority voting, the 1st Ordinary Panel of the 2nd Chamber of the CARF fully granted the Voluntary Appeal, cancelling the rejections made and, consequently, the assessed tax credits.

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