Tax Bulletin

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Dear Readers:

The purpose of this **Tax Bulletin** has as its objective to keep our clients and other interested parties duly up-to-date on the main subjects being discussed and decided by the Judiciary, Legislative, and Executive.

In this 72st issue, we will be discussing eight different issues, within Jurisprudence, Legislation, and Query Resolutions.

To access each of the texts individually, click:

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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.

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JURISPRUDENCE

Federal Supreme Court removes the inclusion of ICMS from the basis of calculation of contributions with PIS and COFINS

On October 8, 2014, the Federal Supreme Court (STF) concluded the judgment of Extraordinary Remedy no. 240.785, which discussed the possibility of exclusion of the value paid as ICMS from the bases of calculation of the contribution with PIS and COFINS.

For seven (7) votes being favorable to the taxpayers and two (2) being contrary, the inclusion of the ICMS in the basis of calculation of the Contribution with PIS and COFINS was declared as unconstitutional.

The STF acknowledged that the application of these Contributions over the amounts necessarily transferred to the States (ICMS) offends the Constitution, since they do not regard to revenue/invoicing by the companies. Although the judgment establishes exclusively on the ICMS, the same reasoning may be applied to ISS, a revenue of Municipalities and not of the companies, reason why it must also be excluded from the basis of Contribution with PIS and COFINS – which has already been occurring in 1st and 2nd instance judgments.

It is important to stress that, in spite of the conclusion of the appreciation of this cause, judgment is still pending on the same issue, with Extraordinary Remedy 574.706 (with General Repercussion known) and the Declaratory Action of Constitutionality no. 18 (ADC-18). In these proceedings, it is possible that the STF will modulate the effects of the acknowledgment of the unconstitutionality, so that only companies that had filed a judicial action until the date of judgment will be entitled to the restitution for what has been paid in the past.

Due to this reason, the immediate ingress with judicial measure pleading not only the exclusion of ICMS and ISS from future payments of PIS/COFINS is recommended, as well as the restitution of values paid within five years prior the filling of the actions.

Superior Court of Justice judges as not possible the requirement of social contribution to FUNRURAL, as a rural employer, individual, levied upon the commercial value of the rural products

On 09/02/2014, the First Class of the Superior Court of Justice (STJ) judged Special Remedy no. 1.070.441/SC, on the social contribution to the Rural Worker Assistance Fund (FUNRURAL), due by the rural employer, individual, and levied upon the trading of rural products.

The conclusion by the STJ originates from the understanding of the Federal Supreme Court (STF) in Extraordinary Remedy no. 596.177/RS, when analyzing the vice of constitutionality of Article 1 of Law 8.540/1992 . This because the same vice analyzed at that time repeated in Law 9.528/97 and in Law 10.256/2001, aiming at reestablishing the social contribution to FUNRURAL, as an employer, individual, over the commercial value of the rural products. As a result, in respect to the orientation by the Supreme Court in identical matter, the STJ also understood as unconstitutional Article 1 of Law 10.256/2001, as to prevail the final extinction of the contribution to FUNRURAL since 07/25/91, with the advent of Law no. 8.212/91.

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Notwithstanding, the STF affected with General Repercussion the Extraordinary Remedy no. 718.874/RS, to evaluate exactly the validity of the social contribution to be paid by the rural employer, individual, over the gross revenue from the trading of its production, under the terms of Article 1 of Law 10.256/2001, eliminating any doubt on the application, to this Law, of the same conclusions adopted regarding 8.540/1992. With the decision of this case, there will be more judicial safety for the rural employer, individual, in not paying the social contribution over the commercial value of rural products, allowing the request for restitution or compensation for values unduly paid.

Regional Federal Court of the 1st Region acknowledged the exemption of PIS and COFINS in operations carried out within the Free Economic Zone of Manaus

On September 26th, 2014, the Eighth Collegiate of the Regional Federal Court of the 1st Region (TRF 1) understood that the exemption of PIS and COFINS in relation to the revenues resulting from the sales of national goods for consumption or industrialization in the Free Economic Zone of Manaus extends to operations carried out within such Zone.

Article 4 of Decree-Law no. 288/1967 compares the shipping of national goods to legal entities headquartered in the Free Economic Zone of Manaus to the exports of Brazilian products to overseas and, for being considered export revenues, are excluded from the basis of calculation of PIS and COFINS, as of Articles 5 of Law 7.714/1988 and 7 of Complementary Law 70/1991.

In this scenario, when interpreting such Decree, the TRF 1 understood that the tax benefit would include the companies headquartered in the Free Economic Zone of Manaus and that sell their products to other companies in the same location, regardless if the raw-material was whether acquired inside or outside the country.

There are bills of remedy against the decision, still pending judgment, even though with reduced changes of success before the TRF1. Thus, in case the National Treasury Department imposes and obstacle to the usufruct of such tax benefit, our advice is to propose a judicial action for the acknowledgment of the exemption related to the contributions of PIS and COFINS.

Regional Federal Court of the 1st Region acknowledges unconstitutionality of the exclusion of taxpayer from REFIS without prior notice

On August 22th, 2014, the Eighth Collegiate of the Regional Federal Court of the 1st Region (TRF 1) have unanimously decided as unconstitutional the exclusion of the taxpayer from the Program of Tax Repercussion ('REFIS'), without the due prior notice, as a clear offense to the principles of the due legal proceeding, of broad defense, and of contradiction.

The Reporter, Judge Maria do Carmo, adopting the binding judgment of the Special Court of the Court[4] , understood that there could be no arbitration in the procedure of exclusion of REFIS, presuming the awareness of the taxpayer, for the awareness must be certain and proven, allowing it to exercise full defense and the contradiction, guarantees established by Article 37 of the Federal Constitution of 1988

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It is important to stress that the issue is still pending appreciation by the Federal Supreme Court, which acknowledged the general repercussion of the issue in Extraordinary Remedy no. 669.196/DF, having Dias Toffoli as Reporter.

Regional Federal Court of the 4th Region acknowledges that a simple error when filling in the REFIS adhesion form does not justify the exclusion of the taxpayer from the debt fragmentation

On October 15th, 2014, the First Collegiate of the Regional Federal Court, 4th Region (TRF 4), validated the appeal by taxpayer to allow its re-inclusion in the debt fragmentation program provided for by Law 11.941/2009, as it understood that the simple error when filling in the adhesion form is not a sufficient reason to justify the exclusion of the taxpayer from the REFIS, for it regards to a formal error.

In the case in screen, the Collegiate prioritized the maintenance of the fragmentation in detriment of the exaggerated technicality of the law, to the extent in which the essential purpose has been achieved, i.e., occurrence of the due tax collection. Thus, it understood as inapplicable the exclusion of REFIS due to merely bureaucratic issues, under the penalty of violating the effectiveness of the public administration.

Regional Federal Court of the 4th Region acknowledges possibility of calculation of the Contribution over payroll and not over Gross Revenue

On September 10th, 2014, the Second Collegiate of the Regional Federal Court of the 4th Region (TRF 4) validated the Appeal of taxpayer requiring the acknowledgment of its right to remain paying the social security contribution over the payroll, instead of over the gross revenue, as of Law no. 12.546/2011.

In the case in screen, the taxpayer suffered a considerable tax burden with the advent of Provisional Remedy (MP) no. 582/2012, with introduced certain industrialized products to the obligatory legal regimen of the so-called “Payroll Discharge”, established by Law no. 12.546/2011.

When judging the case, the Collegiate understood that the main objective of the Provisional Remedy was not achieved for a few concrete cases (reduction of tax burden), so that the wording of the law, even not being considered unconstitutional could not be applied to the case, considering the adequateness with its purpose.

The innovative understanding may have a substantial impact to companies with high invoicing and few employees, with outsources manpower and/or producing with high added value, but submitted to the provisions of Law no. 12.546/2011, for may of these companies suffered a clear increase of the tax burden with the change of bases.

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[4] The Special Court of the TRF 1, in the judgment of INAC 2007.34.00.022211-3/DF, has declared the unconstitutionality of the rule foreseeing the possibility of exclusion from REFIS, regardless of prior notice by the taxpayer adhering to the debt fragmentation progress, for it understood that it implies offense to the principle of the due legal proceeding, of broad defense, and of contradiction, inherent to the judicial or administrative proceeding.

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Legislation

Provisional Remedy no. 656/2014 – amendment to Law no. 9.430/96 – isolated fine over reimbursement/ compensation

Provisional Remedy ("MP") no. 656 was published on October 7th, 2014, which, among other provisions, revoked Article 74, §15, of Law no. 9.430/96, which determined the application of an isolated fine of 50% over the credit value of the request for reimbursement overruled or undue. Even though, §17 of the same Article was amended to foresee that the isolated fine should be applied over the value of the debt object of the statement of compensation not homologated, instead of being applied over the credit, as it occurred before the amendment.

It should be stressed that there is a possibility of application of benign retroactivity, as of Article 106 of the National Tax Code, to the fines already incurred, provided that MP 656/14 is converted into a law.

Resolution of Query no. 240/14 COSIT – IRPJ and CSLL – values received from REINTEGRA

Resolution to Query no. 240, by the General-Coordination on Taxation ("COSIT") was published on September 30th, 2014, applicable on the taxation over Income Tax of Legal Entity ("IRPJ") and Social Contribution over Net Profit ("CSLL") for the amounts reimbursed under the systematic of the Special System of Reintegration of Tax values for Exporting Companies ("REINTEGRA").

According to COSIT, the amounts verified by the exporting company under the REINTEGRA represent a revenue of government subvention for costing or operating, for such ingress represents an aid aiming at increasing competitiveness of national products in the external market, which may be freely used by the exporter and implies in the enrichment of the equity of the beneficiary company, without causing assumption of debt or obligation

Based on this understanding, that Coordination establishes that the values verified by REINTEGRA must be included as revenue in the calculation of the operational profit of the Taxpayer, thus composing the basis of calculation of IRPJ and CSLL.

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