tax bulletin

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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 105th 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!

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Jurisprudence

Superior Court of Justice – REINTEGRA – for Provisional Decree 651/2014 but does not impact past events

On 04/05/2018, the 2nd Panel of the ("STJ"), in trying Appeal ("REsp") # 1.673.424, reinforced the panel's precedent that Law 13.043/14, resulting of the conversion of the Provisional Decree # 651/14, is material and nature and therefore, cannot be retroactively applied.

For the Justices of the Panel, the tax benefit implemented by Provisional Decree 651/2014 does not encompass credits established prior to the enacting of the Provisional Decree. Therefore, the credits accrued in periods prior to July/2014 must be part of the calculation bases of Contributions to PIS/PASEP, COFINS, IRPJ and CSLL

Superior Court of Justice – Non-Application of IRPJ and CSLL on the positive return of investment of corporations abroad

On 04/05/2018, the 2nd Panel of the Superior Court of Justice, when ruling on Resp # 1.649.184, reinforced the Court's precedent to suppress the taxation of IRPJ and CSLL on the positive return of the equity in earnings referring to the investment in a subsidiary or sister-company abroad.

For the Justices of the Panel, art. 7, §1 of SRF Directive 213/2002 expanded, with no legal basis, the calculation base for taxes by taxing the positive return of equity in earnings recorded in the accounting of the Brazilian company, referring to investments in a foreign subsidiary or sister company.

Superior Court of Justice – Expenses with advertisement for purposes of PIS and COFINS credits

On 04/26/2018, Justice Mauro Campbell issued a ruling in Appeal (REsp) # 1.438.025 applying the understanding consolidated in the repeated Appeal (RESP) # 1.221.170, regarding the concept of "input" for the purposes of accruing credits in contributions to PIS and COFINS.

For the Justice, considering the concept of input must be construed at the light of the essential or relevant nature thereof for carrying out the company's business activity, expenses intended by the company for advertisement and marketing are not essential to the productive process of textiles, and the right to accrue credits in connection with these expenses shall be suppressed.

However, although the taxpayer company was depicted as a commercial entity, actually, the company's core activity is the manufacturing of clothing, i.e., it is a typically industrial corporation. Expenses with marketing and advertisement have no specific analysis for the purposes of commercial corporations accruing credits, where the expense is either essential or relevant to their business activity.

Decision # 9202-006.520 – Social Security Contributions – Real Estate Agent – Commission

Was rendered by the 2nd Panel of the Superior Panel for Tax Appeals, on February 27, 2018, a decision that addresses the application of Social Security Contributions on commissions received by real estate agents.

In the aforementioned case, the Panel Members understood, by a majority vote that, regardless of the real estate agent receiving the commission directly from the buyer, the Real Estate Firm benefits from the services provided by the agent for achieving its economic result. Therefore, even if the final services are destined exclusively to the client, the link in the services provided to the real estate firm cannot be suppressed. Therefore, the panel concluded the real estate firm is responsible for paying the Social Security Contributions on commissions received by the agent

Regulations and Consultation Solutions

Declaratory Interpretative Act RFB # 2/18 – Loss deductibility

Was published on 03.23.2018, Declaratory Interpretative Act of the Internal Revenue Service of Brazil # 2 ("ADI RFB # 2/18"), which addresses the deductibility of losses with credits not settled by the debtor.

Through the regulatory directive, the RFB clarified that in the calculation of actual profit and the calculation basis of CSLL, the credits, even if overdue for over 5 years, can only be deducted as expenses if they arise of activities of a corporate entity and so long as met the requirements of art. 9 of Law 9.430/96.

Act # 20 – Closing of the Term of Provisional Decree # 806/2017 – Investment Funds

On April 10, 2018, was published Act # 20/2018 by the Chairman of the National Congress Committee, whereby declared the ending of the term of Provisional Decree 806, of October 30, 2017, which provided for Income Tax on investments in investment funds.

Consultation Solution COSIT # 21/18 – IRPJ, CSLL, PIS and COFINS – Indemnification

Was published on 04.03.2018, Consultation Solution # 21, of the General Taxation Coordination ("COSIT"), which addresses the application of IRPJ, CSLL, PIS and COFINS on amounts received for indemnity.

According to the understanding of COSIT, are exempt from IRPJ and CSLL the gross amounts of indemnities destined to compensate damages, up to the amount effectively corresponding to the financial loss incurred. Any amounts exceeding that limit shall be taxed by Corporate Income Tax and Social Contribution on Net Profit (IRPJ and CSLL).

As for PIS and COFINS, the Internal Revenue Service of Brazil understood that all amounts received in indemnity shall be included in the calculation basis, especially the portion corresponding to reestablishment of equity, considering this is corporate income revenue taxed on the non-cumulative systematics.

Finally, adjustment to inflation attached to the indemnity, on its turn, shall be taxed as financial income, levied taxation of IRPJ, CSLL, PIS and COFINS.

Consultation Solution COSIT # 30/2018 – Distribution of profits and dividends – Debits subject to payment in installment plan – No Prohibition

On 04.02.2018, was published Consultation Solution # 30, of the General Taxation Coordination ("SC COSIT # 30/18"), which addresses the possibility of distribution of profits and distribution, even if there are debits subject to the installment plan in the name of the corporate entity.

In the understanding of the Internal Revenue Service of Brazil, is allowed the distribution of bonuses to shareholders and attribution of profit sharing to partners and shareholders, irrespective of the presentation of a guarantee, since the installment plan provides for the enforceability of tax credit, whereby inapplicable the prohibition set forth in article 32, of Law 4.357/64.

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Consultation Solution COSIT # 12/18 – Application of Social Security Contributions on Sole Offset Payments

On 04.02.2018, was published Consultation Solution # 12, of the General Taxation Coordination ("SC COSIT # 12/2018"), which addresses the applicability of Social Security Contributions on payments regarding sole offset. The Internal Revenue Service argued that contributions do not apply to the sole offset, so long as granted through a Collective Bargaining Agreement, whether in one single payment, non-habitual, unattached from wages and with no consideration for services rendered.

Consultation Solution COSIT # 45/18 – Deduction of Interests on Equity

On 04.03.2018, was published Consultation Solution # 45, of the General Taxation Coordination ("SC COSIT # 45/2018"), which clarifies the requirements for deductibility of Interests on Equity ("JCP").

In the understanding of the Internal Revenue Service of Brazil, the calculation for deducting interests of the calculation basis of the Income Tax, under the systematics for calculation of actual profit, must be considered the prorate variation of the day of application of the Long Term Interest Date ("TJLP") corresponding to the time elapsed from the beginning of the calculation period up to the date of payment or credit of interests. Furthermore, was consolidated the understanding that the deduction of the JCP can only be made in the calendar year referring to its limits, prohibiting the possibility of deduction referring to previous periods.

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