Tax Bulletin

tax report

SOUZA, SCHNEIDER, PUGLIESE E SZTOKFISZ ADVOGADOS

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We are pleased to present the fifty-ninth 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 – Full Court – Constitutionality of the Contribution Intended to SEBRAE

The Full Court of the Federal Supreme Court, in the trial of RE no. 635.682, declared the constitutionality of the contribution intended to SEBRAE, by majority vote.

According to the Rapporteur of the case, Justice Gilmar Mendes, the STF found that it would not be necessary to have the enactment of a complementary law for the creation of the contribution to SEBRAE, since, although this contribution is subject to the general rules established by the complementary legislation in tax matters "(...) *it cannot be expected that they be created through complementary law only.*"

It is worth mentioning that, as the trial of the STF analyzed only the constitutionality of the creation of the mentioned Contribution, we believe that the challenge of the constitutionality of this tax in light of EC no. 33/01 still applies.

The reason is that, as defined by the STF, the nature of this collection is that of a contribution for the intervention in the economic order, created based on article 149 of the Constitution. However, with the creation of EC no. 33/01, there was the inclusion of article § 2, III, letter "a", a rule that establishes that the contributions for the intervention in the economic order may only be charged on the billings, the gross revenues, or the value of the transaction, and in the case of import, on the customs value.

Therefore, within this context, we believe the thesis defended by the taxpayer still remains, in which since 2001, the contribution to SEBRAE on the payroll has been unconstitutional, due to the provisions in article 149, §2, III, a, of the Federal Constitution, given by EC no. 33/01.

STJ – Precautionary action of protest – Interruption of Statute of limitations

The Second Panel of the Superior Tribunal of Justice, in the trial of RESP no. 1329901/RS, recognized the interruption effectivity of precautionary actions of judicial protest, provided for in article 867 of the Code of Civil Procedure (CPC), with regard to the five-year statute of limitations to file an action for the recovery of unduly paid tax debts.

According to the appellate decision, through the historic interpretation of article 165 of the National Tax Code (CTN), it is possible to conclude that the taxpayer is given the option to file the protest, so as to include the effects of the Procedural Law, in this case, article 219, of the CPC, which provides for the interruption of statute of limitations in the case of a valid summoning of the Defendant.

Thus, the Second Panel established its position which has already been adopted by other Federal Tax Courts in Brazil, granting yet another procedural means for taxpayers wishing to interrupt the procedural term in progress for the filing of an action for the recovery of undue payment.

Recognition of the General Repercussion of the IPI charge on vehicle import for one's own use

The Full Online Panel of the Federal Supreme Court (STF) recognized existence of the general repercussion of the matter addressed in Extraordinary Appeal (RE) 723651, which discusses the levy of the Income on Manufactured Products (IPI) on the import of vehicles by individuals, for their own use.

With the recognition of the general repercussion by the STF, the decision of this trial, when rendered, is to be applied to the other courts in all similar proceedings.

Legislation and Response to Inquiries

Zero Tax Rate of PIS/Cofins – Yogurt and Milk Curd

On Mar. 15, 2013, the Regional Superintendence of the Federal Revenue ("SRRF") of the 4th Tax Region published Response to Inquiry no. 09/2013, stating the position that the reduction to zero of the PIS and Cofins' tax rate levied on the import of pasteurized or industrialized milk , in the form of ultra-pasteurized milk, powder milk, whole, semi-skimmed or skimmed milk, fermented milk, milk drinks and infant formulas, as defined in specific legal provisions, intended for human consumption or used in the manufacture of products intended for human consumption, also applies to the sales revenues of yogurt and milk curd, as of Jul. 15, 2007.

It is worth clarifying that the provision in the Response to Inquiry is valid both for taxpayers subject to the cumulative

ascertainment system and for those subject to the non-cumulative system.

REFIS – Gains Abroad – Presumptive Profit

Response to Inquiry no. 24/13 was published on Mar. 5, 2013, issued by the Regional Superintendence of the Federal Revenue of the 8th Tax Region ("SRRF"), stating the position that legal entities subject to taxation by the Presumptive Profit opting for the REFIS (tax recovery program) are not subject to taxation by the Taxable Income in case they earn profits, earnings or capital gains from abroad.

Resale of Scrap – Suspension of PIS/COFINS Levy

On Mar. 5, 2013, the Regional Superintendence of the Federal Revenue ("SRRF") of the 6th Tax Region published Response to Inquiry no. 26/2013, stating the position that legal entities that ascertain the income tax based on the taxable income and acquire residues or snippets of plastic, paper or cardboard, glass, iron or steel, copper, nickel, aluminum, lead, zinc, and pewter for resale, are to do so with the suspension of the PIS/COFINS charge when the acquirer is a legal entity that computes the income tax based on the taxable income; the ascertainment of the credit on the acquisitions in which the charge of these contributions being prohibited.

Taxpayers of IPI –Services Subject to the ISS – Assembly of New Products – Manufacture by Third Parties

On Mar. 5, 2013, the Regional Superintendence of the Federal Revenue ("SRRF") of the 6th Tax Region published Response to Inquiry no. 27/2013, stating the position that even if the manufacture operations characterized by the IPI legislation are misidentified as services subject to the ISS provided for in Complementary law no. 116, of 2003, the IPI will be charged on the products resulting from such manufacture.

The Response to Inquiry further states that the combination of products or parts resulting in new products with their own tax classification constitutes manufacture, in the form of assembly.

Furthermore, it was decided that the commercial establishment of products whose manufacture has been performed by third parties –through the remittance by the establishment of raw materials and intermediary products– is compared to an industrial establishment and, under this condition, it pays the IPI in relation to the taxable events deriving from the exit of the taxed products it manufactures by order, subject to the principal and accessory bookkeeping requirements provided for in the legislation in force.

IRRF – Health Assistance Cooperatives

Response to Inquiry no. 29/13 was published on Mar. 5, 2013, issued by the

Regional Superintendence of the Federal Revenue of the 6th Tax Region ("SRRF"), stating the position that payments made to cooperatives that manage private health plans are not subject to the Withholding Income Tax ("WHT"), provided that they derive from fixed-value health plan contracts that do not depend on the use of services by the contracting party.

As to amounts paid or credited to medical work cooperatives referring to services rendered by their associates, SRRF ruled that they are subject to the WHT at a 1.5% rate.

Social Security Contributions – Long-Term Agreements – Revenues from Exports – Tax Basis

Response to Inquiry no. 174/12 was published on February. 25, 2013, issued by the Regional Superintendence of the Federal Revenue of the 10th Tax Region ("SRRF"), stating the position that the Substitute Social Security Contribution charged on earnings from long-term supply agreements at predetermined prices, related to the assets dealt with in article 8 of Law no. 12.546/2011, will be calculated pursuant to article 407, of the Income Tax Regulation of 1999 (RIR/99). Thus, the gross revenues to be used in the calculation of the Contribution will be determined by applying the percentage of the contract or the production performed in each month on the total price.

Moreover, the SRRF views that the revenues deriving from exports are to be computed on the calculation of the reduction percentage of the Contribution on the payroll mentioned by article 9, § 1, II, of Law no. 12,546/2011, both on the gross revenues of the activities not connected to the manufacture of products dealt with in the heading of article 8 of Law no. 12,546, of 2011, and on the total gross revenues.

Agreement between Brazil and the USA – Interchange of Tax Information

On May 16, 2013, the President issued Decree no. 8.003/2013 enacting the Agreement entered into on Mar. 20, 2007 between the Brazilian and US governments, whose scope is the interchange of information related to tax matters. The Agreement seeks the mutual assistance for the exchange of information that may be pertinent to the administration and to the compliance with the domestic laws of both countries with regard to taxes, and which may be useful for the determination, assessment, and collection of taxes, or otherwise for the investigation and filing of tax proceedings of criminal nature.

The Agreement is focused on federal taxes. For the US, it provides for the provision of information on federal income taxes, earnings obtained from autonomous activities, inheritance, donation, and consumption. For Brazil, on the IRPF (Individual Income Tax), IRPJ (Corporate Income Tax), IPI, IOF (Tax on Financial Transactions), ITR

(Tax on Rural Territory), PIS, COFINS and the CSLL (Social Contribution on the Net Income). The Agreement further determines that its application is also effective in relation to identical or substantially similar taxes, in addition to or substitution of the already existing taxes, after the execution of the Agreement, by mutual agreement of the parties. Furthermore, the Agreement excludes its application concerning taxes levied by the states, municipalities or other political subdivisions, or possessions of one party.

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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