

## # THE ADMINISTRATIVE COUNCIL OF TAX APPEALS

Specific tax report n° 78 • Year VII • September 2014

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 78th edition of the bulletin, the decision by Tax Appeals Administrative Board (“CARF”) is commented on the payments of fringe benefits granted to managers and similar, which are not included on the respective compensations, are subject to the IRRF [Withholding Income Tax] at 35% rate.

The decision is also commented that CARF canceled the tax assessment understanding that the simulation featuring should not be carried out by Tax Inspection due to the absence of regulation of Article 116 of the CTN [National Tax Code].

In order to access directly the text for each theme, click:

[Withholding Income Tax - Indirect Compensation - “Fringe Benefits”](#)

[Income Tax of Legal Entity - Simulation - Article 116 of the CTN](#)

**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!

## # THE ADMINISTRATIVE COUNCIL OF TAX APPEALS

Specific tax report n° 78 • Year VII • September 2014

### **“WITHHOLDING INCOME TAX, BENEFITS AND ADVANTAGES. PAYMENT OF “FRINGE BENEFITS” (INDIRECT SALARIES). FRINGE BENEFITS NOT ADDED TO THE RESPECTIVE COMPENSATIONS.**

All payments of benefits and advantages are subject to 35% rate assessment exclusively at source, as granted by the company to administrators, directors, managers and advisors. The payment is a material condition for the exclusive assessment of withholding income tax pursuant to article 61 of Law No. 8981 of 1995. Therefore, if the company fails to identify and / or add fringe benefits to the respective compensations, the paid amounts are not included in the individual taxable income and the tax will be paid at source by the legal entity, at 35% rate which will be deemed exclusively as withheld tax.

#### **INDIRECT COMPENSATION. ADJUSTMENT OF CALCULATION BASIS.**

The indirect compensation paid to administrators, directors, managers and advisors, whose incomes have not been included into beneficiaries' wages, is subject to the assessment at 35% rate at source with adjustment of the calculation basis. Appeal denied. “

This refers to the judgment on the Tax Deficiency Notice drawn up for the Withholding Income Tax (“IRRF”) required on indirect compensation (the so-called “fringe benefits”) granted to directors, administrators, managers and their advisors, whose values were not added to the respective compensations of those employees, among other issues. In the opinion of the Assessing Authority, the expenses with purchasing cards and gifts as premium and sales incentives are deemed indirect compensation.

According to the Tax Inspection, as provided for in article 358 of the Income Tax Regulation (“RIR”), the Taxpayer should have added such amounts to the beneficiaries' wages. The absence of such procedure results in the exclusive assessment at the source of the respective values at 35% rate, and adjustment of the calculation basis, which payments were deemed net according to article 675 of the RIR. In the course of Opposition, Taxpayer claimed, among other arguments, that: (i) the adjustment of the calculation basis could not be invoked, as the mentioned payments have been made as premium and incentives; (ii) the article 622 of the RIR would not require the inclusion to the wages of benefits paid to coordinators, assistants and analysts; (iii) the Tax Authority has not shown that the beneficiaries of payments were managers, administrators or advisors, as required by article 622 of the RIR.

Judgment Offices of Federal Revenue Office of Brazil (“DRJ”) dismissed the Opposition, on the grounds that the expenses made by the Taxpayer are indirect compensation. Therefore, by express legal provision, the payments would be subject to the exclusive assessment at source and proper adjustment of the calculation basis. Taxpayer filed a Voluntary Appeal, reiterating the same allegations submitted in Opposition.

In view of such allegations, the Tax Appeals Board (“CARF”) has considered that the payment of premiums or other additional benefits and advantages to administrators, directors, managers and advisors, the so-called “fringe benefits” shall be added to the beneficiary compensation. In this event, those benefits are deemed operational costs and expenses for the paying legal entity.

Analyzing the case, CARF understood on the featuring of fact generating the IRRF, as provided for article 675 of the RIR, at 35% rate, as the payment of “fringe benefits” was made actually and such amounts were not included as beneficiaries' compensations. As consequence of the legal classification, the amount received should be deemed net values, and requiring the adjustment of the calculation basis, which tax is

## # THE ADMINISTRATIVE COUNCIL OF TAX APPEALS

Specific tax report n° 78 • Year VII • September 2014

assessed at 35% rate, exclusively at source.

Therefore, the Board rejected Taxpayer argument, by the casting vote, and dismissed the Voluntary Appeal, maintaining the tax notice.

### “SIMULATION. RECLASSIFICATION

The use of a company owned by the group (wholly-owned subsidiary) for the businesses organization and the valid implementation of structure similar to the “banking representatives” (Central Bank Resolution 3.110/2003 and 3.954/2011), although it has no physical structure, it is not enough to presume the occurrence of fraud. The recognition of existing “negotiation purpose” is not linked to the existence of employees, offices or other material elements, but rather, the actual presence and activity in such businesses, which were evidenced actually in the proceedings.

The featuring of “simulation”, in this aspect, without necessarily featuring the events under article 167 of the Brazilian Civil Code, would be possible by applying the provisions of sole paragraph of Article 116 of CTN, which is currently used for lack of specific regulation. “

This judgment of the Voluntary Appeal filed against the decision by Judgment Office of the Federal Revenue Office of Brazil (“DRJ”) that has maintained the Tax Deficiency Notice drawn up requiring to the Income Tax of Legal Entity (“IRPJ”) on the alleged omission of incomes featured by the “simulation” of legal business.

In this case, the Taxpayer, legal entity in the retailer market, intending its customers’ access to credit by, as well as implement credit cards linked to its brand, has reactivated wholly-owned subsidiary, Credit Cards Administrator, to undertake the role of Banking Representative of the economic group.

However, the Tax Authorities understood that as the wholly-owned subsidiary used the Taxpayer’s physical structure, without any facility and / or employees, this would be an operation devoid of business purpose, used with the primary purpose of tax savings. In this respect it would give rise to disregarding the acts of the Bank Representative and the drawn up of Tax Deficiency Notice the year to require the tax “saved” to date, which were offered to taxation by the subsidiary.

Against such decision, the proper Opposition was submitted with main allegation on the existence and legitimacy of acting of the wholly-owned subsidiary (as Banking Representative), therefore, actually, the Tax Inspection shall evidence the supposed simulated act, identifying the concealment and intended illegal outcome. This Opposition was dismissed by the DRJ, under the same grounds used by the tax authorities.

However, while analyzing the filed Voluntary Appeal, the Tax Appeals Administrative Board (“CARF”) disregarded the tax notice, arguing that the use of a company of the economic group for businesses organization purpose is a fully valid operation, although it has no physical structure, similar to the holdings.

The Reporter Board Member understood that there is actual business object the corporate structure adopted by the Taxpayer, as the regulatory provisions of the Central Bank under Central Bank Resolution No. 3.110/03, in force at the time of the events, prohibited adopting the corporate structure as intended by the Tax Inspection, i.e., the Taxpayer could not act, in this case, as Banking Representative.

## # THE ADMINISTRATIVE COUNCIL OF TAX APPEALS

Specific tax report n° 78 • Year VII • September 2014

Finally, the vote states the understanding that the disregard of the facts performed by the Taxpayers without the specific featuring of the hypothesis provided for Article 167 of the Brazilian Civil Code would be possible only in the exact in accordance with sole paragraph of Article 116 of the National Tax Code. Therefore, this disregard depends on the specific regulation of the subject by statutory law, which would not be possible by the absence of regulation. Reporter Board Member affirms that the disregard of inaccurate acts “should not be admitted as appropriate performance by tax inspection agents “, as seen in this case.

Based on this argument, CARF granted the Voluntary Appeal, disregarding the Tax Deficiency Notice.

## # THE ADMINISTRATIVE COUNCIL OF TAX APPEALS

Specific tax report n° 78 • Year VII • September 2014

### Team responsible for preparing The Administrative Council of Tax Appeals Bulletin:

**Igor Nascimento de Souza** (igor.souza@souzaschneider.com.br)

**Henrique Philip Schneider** (philip.schneider@souzaschneider.com.br)

**Eduardo Pugliese Pincelli** (eduardo.pugliese@souzaschneider.com.br)

**Cassio Sztokfisz** (cassio.sztokfisz@souzaschneider.com.br)

**Fernanda Donnabella Camano de Souza** (fernanda.camano@souzaschneider.com.br)

**Diogo de Andrade Figueiredo** (diogo.figueiredo@souzaschneider.com.br)

**Flávio Eduardo Carvalho** (flavio.carvalho@souzaschneider.com.br)

**Rafael Fukuji Watanabe** (rafael.watanabe@souzaschneider.com.br)

**Vitor Martins Flores** (vitor.flores@souzaschneider.com.br)

**Rodrigo Tosto Lascala** (rodrigo.tosto@souzaschneider.com.br)

**Laura Benini Candido** (laura.candido@souzaschneider.com.br)

**Marina Lee** (marina.lee@souzaschneider.com.br)

**Pedro Lucas Alves Brito** (pedro.brito@souzaschneider.com.br)

**Tiago Camargo Thomé Maya Monteiro** (tiago.monteiro@souzaschneider.com.br)

**Viviane Faulhaber Dutra** (viviane.dutra@souzaschneider.com.br)

**Flavia Gehlen Frosi** (flavia.frosi@souzaschneider.com.br)

**Thomas Ampessan Lemos da Silva** (thomas.ampessan@souzaschneider.com.br)

**Maria Carolina Maldonado Kraljevic** (mariacarolina.maldonado@souzaschneider.com.br)

**Gabriela Barroso Gonzaga Ferreira Porto** (gabriela.porto@souzaschneider.com.br)

**Amanda Mateoni Salvestrini** (amanda.mateoni@souzaschneider.com.br)

**Ana Cristina de Paulo Assunção** (anacristina.assuncao@souzaschneider.com.br)

R. CINCINATO BRAGA, 340 • 9º ANDAR • 01333-010 • SÃO PAULO • SP  
TEL 55 11 3201 7550 • FAX 55 11 3201 7558

BRASÍLIA SHOPPING • SCN QUADRA 5, BLOCO A • TORRE SUL • 14º ANDAR • SALA 1406 • BRASÍLIA • DF • 70715-900  
TEL 55 61 3251 9400 • FAX 55 61 3251 9429

[WWW.SOUZASCHNEIDER.COM.BR](http://WWW.SOUZASCHNEIDER.COM.BR)