Tax Bulletin

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The Administrative Council of Tax Appeals

Specific tax report n° 70 • Year VI • January 2014

Dear Sirs:

This publication **Tax Bulletin # The Administrative Council of Tax Appeals** aims to update our clients and others interested about the main subjects that are being discussed and judged in this body.

In this 70th edition of our newsletter, we will comment on a decision in which the Administrative Council of Tax Appeals ("CARF") analyzed the requirements of Law no.10.101/2000 for no charge of the social security contribution on amounts paid to employees on the basis of the company's Profit Sharing Plan ("PLR").

We also examined a decision in which the CARF found that the social security contributions levied on revenues of exports carried out through trading companies lack grounds, based on the constitutional immunity that exempts export revenues.

Click over the topics below to directly access each text:

Souza, Schneider, Pugliese e Sztokfisz Advogados law firm is available to its clients should they have any questions on the above matters.

Enjoy your reading!

Souza, Schneider, Pugliese e Sztokfisz Advogados

"MATTER: SOCIAL SECURITY CONTRIBUTIONS
Ascertainment Period: Feb.1, 2007 to Feb. 28, 2007
PROFIT SHARING
In order to have a tax exemption on the amounts paid to workers as profit or result sharing (PRL), the company must comply with the specific legislation on the matter. In the event Law no. 10.101/2000 is breached, the amounts credited by the company to the employees then have a remuneration nature, and are therefore subject to the charge of the social security contribution.
The PRL paid in disagreement with the mentioned law integrates the contribution salary."

The decision in question deals with Tax Assessment Notices issued for the collection of the company's contribution, the RAT, contribution to Third Parties, INCRA and FNDE levied on sums paid on the basis of Profit and Result Sharing ("PLR") to insured employees of the company merged by the assessed taxpayer, as well as a fine for failing to submit the FGTS Payment and Social Security Information Form ("GFIP"), under the claim that the PLR paid had failed to meet the presuppositions provided for in articles 2 and 3, of Law no. 10.101/2000, due to the (i) lack of reference to the Union of the professional class in the submitted document; (ii) inexistence of clear and objective rules as to the setting of rights; and (iii) to the failure to submit assessment reports of the employees in the performance of the metrics established in the PLR Plan.

In an objection, the assessed taxpayer claimed, in sum: (i) the performance of all the legal requirement relative to the PLR plan; (ii) the impossibility of characterizing such sums as salary, due to the lack of elements that characterize the concept or remuneration, such as habitualness and consideration for services rendered; (iii) the participation of the union of the class in the negotiation of the plan, having its president stamped and signed all of the pages; (iv) the participation of its employees in the preparation and negotiation of the plan, which reinforces the existence of clear and objective rules; (v) the use of an organized system for the individual assessment of its employees, so that their performance would directly influence the amount to be paid as PLR; and (vi) the impossibility of collecting the fine for failure to submit the GFIP, taking into account that the payments made do not fit into the concept of salary.

A decision of the Federal Revenue Judgment Office ("DRJ") was rendered and found that the objection lacked grounds, upholding the tax credit. Dissatisfied, the taxpayer then filed a voluntary appeal to the CARF, which then partially granted the appeal, in order to: (i) *through a casting vote*, dismiss the appeal in relation to not integrating the PLR payments to the contribution salary, due to the union's lack of participation in the negotiations; and (ii) *by majority vote*, reject the appeal in order not to integrate the PLR payments to the contribution salary, due to the lack of substantive rights and clear rules regarding goals, and to partially grant the appeal to that the fine provided for in article 61, of Law no. 9.430/1996 may be applied, if more beneficial to the taxpayer.

In examining the case, the Councilor, rapporteur of the concurring opinion, stated that in case the negotiation does not occur through a convention or collective agreement, the law requires the participation of the union, and in the case under analysis, the negotiation instrument attached to the case records lists the members of the committees composed of representatives of the companies and employees, without any reference to the participation of the union in any of the committees.

Furthermore, pursuant to the concurring opinion, the negotiation document shown by the taxpayer establishes that the PLR corresponds from 2% to 20% of the company's result, but does not clarify the criteria

for choosing such percentages, which evidences the lack of clear and objective rules as to the setting of substantive rights and procedural rules. Moreover, although notified, the taxpayer did not submit the assessment reports of the employees, which rendered the verification of conformity of the amounts paid to the parameters set in the executed document impossible. Due to such, the CARF then concluded that the PLR sum was paid by the company in violation of the provisions set forth in Law no. 10.101/2000, and was therefore subject to the charge of the social security contribution.

The dissenting opinion, in turn, found that the union did participate in the negotiations, taking into account that (i) its president signed the plan and the documents resulting from the meetings, and that (ii) the failure to submit an attendance list of the Special Meeting ("AGE") and the documents that proved minimum quorum for the meeting to be held does not invalidate the plan, since such documents are not provided for in the legislation that governs the matter and the Tax Authorities cannot make changes, by requiring the performance of requirements that are not set in Law no. 10.101/2000, under penalty of violation of the principle of legality. Also, according to the dissenting Councilor, the establishment of minimum and percentages on the taxpayer's results, for purposes of PLR calculation, would be sufficient to meet the provisions in the legislation, therefore the Administrative Authority should not decision whether the rule is fair or not.

Thus, according to the prevailing position in the appellate decision under analysis, in order for the social security contribution not to be charged on amounts paid as PLR, the Taxpayer is to comply with the following requirements (i) negotiation through a convention, collective agreement, or committee chosen by the employees and employers, with the effective participation of a representative of the union, proven not by a mere signature of the plan, but by his/her attendance at the AGE; and (ii) existence of clear and objective rules as to the setting of substantive rights and procedural rules, which is not met by simply setting minimum and maximum percentages on the Taxpayer's results, but through evidencing in the PLR plan the criteria for choosing such percentages, and also by submitting the assessment reports of the employees, in order to verify the conformity of the amounts paid to the set parameters.

"MATTER: SOCIAL SECURITY CONTRIBUTIONS
Ascertainment Period: Jan. 1, 1996 to Aug. 31, 2006
IMMUNITY. ARTICLE. 149 PARAGRAPH 2, I, of the SOCIAL SECURITY CONSTITUTION. EXPORT REVENUES INTERMEDIATED BY "TRADING COMPANIES". POSSIBILITY OF APPLICATION. PRINCIPLE OF LEGALITY. LIMITS OF THE PUBLIC ADMINISTRATION ASSESSMENT POWER. A NORMATIVE RULE IS NOT AN INSTRUMENT FOR THE CREATION OF TAX COLLECTIONS.
There are no legal provisions determining the scope of the term "export" verified in item I, paragraph 2, article 149, of the Federal Constitution (CF). The creation of taxes without the enactment of the corresponding legislation is prohibited. The assessment of the Public Administration must be instructed by what is expressly set under the law. The issue of a normative rule under the pretext of explaining the meaning of the law does not apply when the consequence of such interpretation leads to an undue taxation of the taxpayer."

The decision in question deals with a Tax Assessment Notice issued for the collection of social security contributions levied on revenues from the trade of rural products not stated in the FGTS Payment and Social Security Information Form (GFIP).

In an objection, and to what concerns this newsletter, the assessed claimed it was impossible for social security contributions to be charged on the revenue deriving from products intended for export, pursuant to the immunity stated in item I, § 2, article 149, of the Federal Constitution.

In an administrative first-tier trial, the assessment was found to have grounds, based on article 245, §1 and §2 of Normative Rule of the former Social Security Revenue Office ("SRP") no. 03/05, which established that the immunity would only apply whether the production is traded directly with those domiciled abroad. Therefore, in cases as the one under analysis, when there is trade with a company organized and in operation in the Country – even if it is a trading company with export as its specific purpose – the mentioned non-statutory rules considers the respective revenue as arising from domestic trade and not export, regardless of the future destination to be given to the product.

The assessed company then filed a voluntary appeal to the CARF, claiming the need to recognize the immunity, despite the fact that the exports occurred through a trading company.

When hearing the appeal, the Rapporteur Councilor disregarded the tax position that the immunity would only apply in case of a direct transaction, by the rural producer, as the acquirer domiciled abroad, since the tax intention is not based on the law – but only on a normative rule – thus exceeding the limits of the Public Administration and violating the principle of legality, in addition to going against the very purpose of the constitutional provision, which intends to provide and foster the trade of domestic products abroad and help place Brazil as an economic power in the globalized economy scene.

Furthermore, the Rapporteur stated that to better understand and provide basis for this scene, it is essential to recognize that the trading companies operate as intermediate companies in the agency and trade of products in the international commerce, providing not only speed, but also a greater insertion of the domestic production in the foreign trade, as well as increasing competition and allowing small producers to have access to foreign markets.

Therefore, by strongly believing that there is no distinction in the law as to the type of export that may be comprised by the immunity– that is, that the direct export is not different from the one carried out through trading companies – the Rapporteur then stated that it is not up to the Public Administration to define that the only exports able to enjoy the benefit of the immunity at issue would be those carried out directly with the acquirer domiciled abroad, under penalty of violating the principle of legality. Thus, the Rapporteur found the determination contained in article 245 of SRP Normative Rule no. 03/05 to be clearly invalid.

However, he did rule out the tax argument that the norm in the mentioned Normative Rule would be justified by the fact that it is not possible to precisely affirm that the goods sold to the trading companies will be in fact exported, since such companies are not allowed to carry out trade operations in the domestic market. In fact, the Councilor affirmed that pursuant to article 9 of Law no. 10.833/03, if the trading companies fail to prove, within the legal term of 180 days, the effective export of the goods, it will be subject to the payment of all taxes and conditions not made by the seller company, indicating the lack of losses to the application of the immunity rule in favor of the seller rural producer.

Based on this position, the Administrative Council of Tax Appeals therefore found the collection to lack grounds, recognizing the immunity of the social security contributions on the revenue of exports carried out through trading companies.

Lastly, one of the Councilors who participated in the trial submitted the explanation of his vote, stating Opinion no. 1724/2012, of the Attorney General Office of the National Treasury ("PGFN"), in which such office clearly states their position on the teleological interpretation of the tax immunity, when affirming that *"the interpretation of the immunity rules is to be as favorable as possible to the taxpayer, as this is the intention of the Constitution Lawmaker, explicitly expressed so as to avoid in the taxation amounts particularly containing political, social, or economic the taxation meaning".*

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