

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 97th edition, we address 8 different issues related to Jurisprudence.

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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!



Jurisprudence

STF - The enlargement of the calculation base and increase of COFINS rate is constitutional

On 05/24/2017, the full Bench of Federal Supreme Court (“STF”) concluded the ruling on Extraordinary Appeal (“RE”) 570.122/RS, with general repercussion recognized, discussing the constitutionality of the enlargement of the calculation basis and increase of COFINS rate made by Provisional Measure (“MP”) # 135/2003, later on converted into Law # 10.833/2003.

In short, the rapporteur, minister Marco Aurélio took the position by formal unconstitutionality of the mentioned MP, as it caused a substantial change when including the incomes in the calculation basis of COFINS, therefore, enlarging it significantly. He says it harms the article 246 of Federal Constitution, and also the isonomy principle, in the extent that establishing a higher or lower rate according to the calculation system of COFINS results in fulfillment of the strict requirements imposed by States other than the independent option of taxpayer.

However, such positioning was overcome by the majority of the votes, and the winning was the understanding of minister Edson Fachin on the constitutionality of the provision, as this is a mere increase of rate, in this respect, this does not require a complementary law nor harms the constitutional principles of isonomy, contributive capacity and non-confiscation. Complementing, minister Fachin pointed out that the taxpayer is entitled to choose the notional profit system or taxable profit, and there is no harm of Federal Constitution.

Thus, the Full Bench of STF dismissed the RE of taxpayer to recognize the constitutionality of the enlargement of the calculation basis and increase of rate of COFINS, arising from mentioned provisions, and determined that the thesis of this issue of general repercussion shall be determined later on, which has not taken place.

It is important to point out, the same discussion is on trial in RE 607.642/RJ in respect to PIS contribution, and by logical result, it shall have the same definition of the judgment of COFINS.

STF - Provisional execution against public finance does not attract the judicial bond system

On 05/24/2017, Full Bench of STF, ruling on RE 573.872/RS, with general repercussion recognized, analyzed the possibility to handle the provisional execution of performing against the Public Finance under the need of submission to the judicial bond system.

In the case under analysis, the obligation of performing referred to the payment of alimony to companion of military, in 50% proportion, for the death, which was required by Public Finance by the provisional execution of obligation of performing before the judicial security passed in res judicata and the consequent issue of judicial bond.

In short, the ministers understood the compatibility of the judicial bond system and the provisional execution of obligation of performing, as the purposes of the judiciary bond, as the budgetary schedule and isonomy are preserved.

In this regard, the Full Bench, unanimously, dismissed the RE of Federal Government, to keep the provisional execution of obligation of performing, establishing the thesis, fully applicable, in tax scope, that “The provisional execution of obligation of performing against Public Finance does not attract the constitutional regime of judiciary bond.

STF - Assessment of PIS and COFINS on revenues from real property lease

On 05/02/2017, 1st Bench of Superior Court of Justice (“STJ”) ruling on the internal Appeal filed in the Special Appeal (“REsp”) # 1.630.429/RS, understood on the including of the revenues from real property lease on the calculation basis of Contribution to Social Integration Program (“PIS”), and Contribution to Social Security Financing (“COFINS”) although this was not the purpose of company.

In short, the Ministers understood that contribution to PIS and COFINS shall be assessed on revenue from real property lease owned thereby or integrating the fixed assets, as the invoicing concept defined by law and STF was not strictly commercial.

In this regard, the grounds were denied to the Internal Appeal filed by taxpayer to confirm the assessment of contributions on mentioned revenues from the activities of building, disposing of, purchase, leasing, selling real property and intermediate real property business.

TRF1 - Issuance of order to verification is inapplicable to evidence any irregular dissolution of company

On 05/08/2017, 8th Bench of Federal Regional Court of 1st Region (“TRF1”) ruling on Interlocutory appeal # 0021628-21.2016.4.01.0000 understood that Public Finance (executor creditor) is liable for showing the irregular closing of executor debtor company for the redirection of the tax execution to the members of company, and the issuance of verification order is inapplicable.

In case, Federal Government requested the issuance of verification order to clarify whether the executed company was still operational, as the certificate by bailiff attesting the inactivity of the company would be the necessary proof to redirection by irregular dissolution, provided for in art. 135, III of CTN. Thus, for Federal Government, this being a necessary proof, the judge should grant its production.

However, the 8th Bench, unanimously, determined to be inapplicable the issuance of verification order for this purpose, as Public Finance could not transfer to Judiciary Branch its exclusive burden to demonstrate the eventual irregular closing of company.

TRF1 - Suspension of enforceability of PIS and COFINS after revocation of Digital Inclusion Program

On 05/09/2017, 7th Bench of TRF1, ruling on the Interlocutory appeal#0018081-70.2016.4.01.0000/DF decided on the suspension of enforceability of contributions to PIS and COFINS assessed on gross income of sales in retail of the electric-electronic products after the revocation of Digital Inclusion Program.

Mentioned Program is a tax benefit established by articles 28 to 30 of Law # 11.196/05 “Law of ‘Good’” (that reduced to zero the contribution rates of PIS and COFINS assessed on gross income from sales in retail of electric-electronic products. However, after the effectiveness of the benefit has been extended to 12/31/2018, first by Law # 13.097/2015 and in 2015, was suddenly closed by Provisional Measure (“MP”) # 690/15.

The high court judges making up the Bench understood that the revocation of the Digital Inclusion Program, as it was performed, harms the principle of trust, as the taxpayer has made investments and has been prepared for the expectation to be subject to the zero rate up to 12/31/2018.

In this regard, the appeal of taxpayer was granted to suspend the enforceability of the collection of mentioned taxes, thus removing the assessment of article 9th of MP # 690/2015, and restate the effectiveness of article 5th of Law # 13.097/2015, ensuring the enjoyment of the tax benefit to the final decision of proceeding or up to 12/31/2018, (date of extended validity of provision).

Legislation and Solution

Provisional Measure # 780/2017 - Non-Tax Debits Regularization Program

On May 22, 2017, Provisional Measure # 780 was published establishing the Non-tax Debits Regularization Program before the government independent agencies and federal public foundations and Office of General Prosecutor.

The non-tax debts being included in program, whether definitively established or not, recorded or not in outstanding debit overdue up to March 31, 2017.

COSIT Consultation Solution # 208/2017 -IRRF - Assignment of Rights

COSIT issued the Consultation Solution # 208/2017 establishing the assessment of IRRF on the assignment of rights that are object of federal, state and city judicial bonds.

In the understanding thereof, the assignor is the beneficiary of the revenues to be paid by the federal agencies, and eh shall be included In DIRF of payer other than assignee. Moreover, IRRF shall be assessed at the payment of judiciary bond, in view of the purchase of availability of revenue at that time.

COSIT Consultation Solution # 213/2017 - Credits from Contribution to PIS and COFINS - Mineral Deposits Exploitation Activity

In May 2017, the COSIT Consultation Solution # 213 was published with the understanding of agency on the possibly taken credits of Contribution to PIS and COFINS on taxpayers exploiting the mineral deposits for manufacture of limestone byproducts for sale.

In real case, COSIT recognized the possibly taken credits on the following items: (i) transportation of limestone from deposits to the crushing sector and then to furnaces and transportation of cut wooden from plantation to furnace, provided that the transportation is performed in the same facility of legal entities; and (ii) the quality control/ tests/ tests on raw materials; intermediate product, or product in process, in the last case, only if the products manufacture are subject to tests and controls, as for COSIT, only in this case, the products are deemed finished, therefore, will integrate the productive, control process.

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