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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 89th edition, we address 15 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

STF - Judgment of ADIs no. 4697 and 4762 - Constitutionality of contributions to professionals councils

On 06/30/2016, plenary of the Federal Supreme Court (STF) ruled on Direct Unconstitutionality Actions (ADIs) no. 4697 and 4762, both being reported by Minister Edson Fachin, which question the provisions in Federal Law no. 12.514/2011 to delegate to Professional Councils the establishment of Contribution. In summary, petitioners alleged, in addition to a formal unconstitutionality in the enactment of Law, a substantial unconstitutionality for offense to the principles of contribution capacity, legality and the non-seizure, as that law has delegated to Councils the establishment of Contribution without, however, defining clearly the criteria for assessment.

In summary, Minister Edson Fachin has removed the formal unconstitutionality; in respect to substantial unconstitutionality, he ruled there is no offense to principle contribution capacity and non-seizure, as law has provided on ranges for assess the annual fee and established the ceiling for charging it. In respect to the legality principle, he alleged the law has established all necessary criteria to establish the tax characteristics, however, the practicality and parafiscal aspects of contributions shall be fulfilled. Therefore, he voted on dismissal of suits.

In the end, despite the majority has accompanied the rapporteur on dismissal of ADIs, he requested review to Min. Marco Aurélio. In summary, it is noted the thesis that plenary intends to determined is the constitutionality of delegation to establish the Contribution to Professional Councils, whenever the Law providing on such delegation determines the ceiling and clear criteria to the taxation.

STF - ISS removed on processing operations on packaging order.

On 06/02/2016, Second Panel of Superior Court of Justice (STJ) ruling on the Regulatory Appeal in Special Appeal no. 1.310.728/SP removed the assessment of Service Tax (ISS) on processing operation on packaging order to be integrated or used directly in subsequent processing process or sales tax.

Actually, this is a conflict on assessment of ISS or ICMS on processing services on packaging order. In this event, STJ has a consolidated understanding that rendering of graphic composition service was subject to ISS assessment according to STF's Abstract of Record 156.

However, as the controversy was decided recently by the Federal Supreme Court by judgment of ADI 4389-MC, Panel has understood to align the Courts' positions that there is no ISS assessment on processing on order, because goods returns to circulation and such industrial process represents only one phase in productive cycle of ordering party. Consequently, it concluded that only ICMS shall be assessed.

STJ - IPI on total sale price in cash or installments plan.

On 05/03/2016, Second Panel of Superior Court of Justice (STJ) ruling on the Special Appeal no. 1.586.158/SP decided unanimously that IPI [Excise Tax] calculation basis for sales in installments is the total operation value, therefore, it shall be added by financial charges from sales in installments.

In his vote, Rapporteur Minister Herman Benjamin pointed out there is no difference between sales in installment and cash to define IPI calculation base, therefore, in shipment operations to domestic market, the tax shall be assessed on total operation value, regardless the sale type, according to provisions in article 47, II, "a" of National Tax Code.

In addition, regarding financed sales, when purchaser receives funds from financial institution to purchase the goods, Panel adopted the positioning consolidated by First Section for ICMS [State tax-added value], by Repetitive Appeal no. 1.106.462/SP, and concluded on non-assessment of IPI on financed interest but proper IOF [Financial Operations Tax].

TRF1 - Decree no. 8.393/2015 - Impossibility of assessing IPI on shipment of products from wholesale facilities - breach of article 4th of Law no. 7.798/1989.

On 05/23/2016, Eight Panel of TRF of 1st Region unanimously in records of Interlocutory Appeal no. 0021386-96.2015.4.01.0000 has established that Decree no. 8.393/2015 introducing cosmetics, personal hygiene and perfumery products in scope of IPI assessment to interdependent companies is in conflict with provisions of article 4th of the law no. 7.798/1989 and with understanding of STF on the issue.

Rapporteur of the case, High Court Federal Judge Marcos Augusto De Sousa, understood the Decree no. 8.393/2015 - by including the products listed in Exhibit III to Law 7.798/1989 - has allowed the assessment of domestic products both in shipment from industrial facility and wholesale facility purchasing the products, thus in a breach of the provisions in article 4th of Law no. 7.798/1989.

He recorded also STF has established the guidance that article 4th of Law no. 7.798/1989 is definite and has never enabled the double assessment for interdependent companies; thus Tax Administration is forbidden to create an obligation that is not provided for in law and create the IPI assessment on commercial sale of product and manipulating commercial practices under the excuse to restrain tax evasion.

Therefore, when considering the article 4th of Law no. 7.798/1989 is definite to establish the taxation of processed products is carried out usually once, that is on shipment from industrial facility, Collegiate has position to grant the Interlocutory Appeal, consequently, stay the enforceability of the IPI as established by Decree no. 8.393/2015.

TRF1 - Removed the assessment of COFINS - Import on aircrafts import.

On 06/06/2016, Eight Panel of Federal Regional Court of 1st Region (TRF1) unanimously in case of Interlocutory Appeal no. 0023968-35.2016.4.01.0000, has position to keep the zero rate of PIS and COFINS in aircrafts import, as well as their engines, parts, pieces, components, tools and equipment. This in view of the new generic law that would establish 1% additional for COFINS -Import.

In actual case, airline filed an Interlocutory Appeal against the decision that has dismissed the preliminary injunction to stay the enforceability of 1% addition of COFINS- Import (DI) based on §21st of article 8th of law 10.865/2004, and consequent clearance of two aircrafts' engines kept at customs.

Among its reasons, Appellant alleged the §12th of article 8th of Law 10.865/2004, providing on assessment of zero rate of COFINS to import aircraft and its parts is a specific law. While Law no. 12.844/2013 that has amended the wording of §21st of the same article of Law 10.865/2004 to add 1% of COFINS- import is generic law. In fact, Appellant intends to have the most specific law applied to aircrafts in order to prevail the zero rate.

In view of deadlock. TRF1 concluded the new law providing on general or special provisions along with those existing does not revoke nor amend the prior law. In this line, it kept the zero rate for the mentioned case.

TRF1 - Judgement debtor adhesion to installment plan generates stay of enforceability of tax credit

On 06/13/2016, Eight Panel of Federal Regional Court of 1st Region (TRF1) ruling on Regulatory Appeal in a Bill of Review no. 0052925-80.2015.4.01.0000 unanimously has positioned that the adherence to the installment plan generates the stay of enforceability of tax credit, therefore, it shall make the release of lien values by BACENJUD.

In casu, it referred to the regulatory appeal filed by Federal Government against decision granting the interlocutory appeal in order to reform the decision that has granted the request to release lien values by means of BACENJUD Agreement. In its reasoning, Federal Government alleged the adherence to installment plan was after blocking the values, thus provisions to be complied with are in article 11 of law 6.830/80 articles 655, 655-A, 656 of CPC/1973 and article 151 of National Tax Code

However, Rapporteur of the case, High Court Judge Marcos Augusto de Sousa understood that keeping the blockade of financial assets of debtor, if installment plan is granted to outstanding debt, has pose a risk by double charge to taxpayer, on the feasibility of the installment plan and satisfaction of credit, the primary interest of executor creditor.

TRF3 - Exclusion of ISS from calculation basis of PIS//COFINS -Import

On 07/11/2016, Third Panel of Federal Regional Court 3rd region (TRF3) ruling on the Interlocutory Appeal no. 5000758-10.2016.4.03.0000 has positioned on exclusion of the ISS portion from calculation basis of PIS- Import and COFINS - Import.

In casu, discussion was restricted to composition of calculation basis of PIS and COFINS assessed on imported products. In this context, Appellant requested the recognition of isonomy between taxation of internal and imported services for Contributions to PIS and COFINS or at least exclusion of ISS from value payable on such contributions.

According to ruling of RE 559.937 and governing laws, rapporteur, High Court Federal Judge Antonio Cedenho assumed the calculation basis of Contributions to PIS/COFINS - Import is the customs value (art. 7Th, I, “d” of Law no. 10.865/2004), exempted from ICMS assessed on customs released and value of the Contributions. In this line, by analogy, the understanding was applied to ISS, concluding on impossibility for including it in PIS and COFINS calculation assessed on import operation.

JFPR - Assessment of PIS/COFINS on financial revenues reestablished by Decree no. 8.426/2015 is removed in low court; soon STJ shall rule on the taxation.

On 06/26/2016, 1st Federal Court of Curitiba ruled to ensure to a company a right to use PIS and COFINS credits for financial expenses from the effectiveness of Decree no. 8.426/2015, which has reestablished the rates of such Contributions on financial revenues without taken the credits from expenses.

In summary, Federal Judge Thais Sampaio da Silva Machado determined that assessment of PIS/COFINS on financial revenues without any credit is a clear offense to the constitutional principle of non-accrual. For Judge, this is an unconstitutional prohibition, as "there are two possibilities: revenue is not assessed or credit right is granted", as company is subject to non-accrual regime.

On the same issue, there is a Special Appeal no. 1586950/RS, reported by Min. Napoleão, scheduled for trial in August. In that appeal, a company discusses the legality of PIS/COFINS assessment on financial revenue under the provisions of Decree no. 8.426/2015. Because such taxation should exceed the calculation basis of contributions - gross income - provided for in Laws no. 10.637/02 and 10.833/03 as well as Decree no. 1.598/77. In addition, it is discussed also the breach to article 97 of National Tax Code on the increase of rate by Decree.

Therefore, soon First Panel of Superior Court of Justice will have the opportunity to examine and rule on this controversy, by providing a guide and greater legal certainty for companies and operators of laws.

JFDF and JFSP - Federal Justice stays decisions by tie-breaking vote in CARF.

In July 2016, Eighth Federal Court of Judicial Section of Campinas (JFSP) and Second and Thirteen Federal Court of Judiciary Section of Federal District (JFDF), in preliminary injunction, has annulled the decision by Administrative Council of Appeals for Fiscal Matters (CARF) issued by tie-breaking vote also known as casting vote on the argument it is contrary to the constitutional principles of fairness, isonomy and legality and breaches the article 112, section II of National Tax Code. On this positioning, Higher Courts have not ruled on theme.

Regulations and Consultation Solutions

Law no. 13.313/2016 - Extinction of Tax Credit - Payment in Kind - Real Estate.

On 07/14/2016, Law no. 13.313 was published, among other provisions, amending Law no. 13.259/16 providing on payment in kind of real estate in order to extinct the tax credit recorded in Outstanding Debt of Federal Government.

According to regulatory text, in order to carry out the payment in kind, and consequent extinction of tax credit, the following requirements must be fulfilled: (i) prior appraisal of offered goods, to ensure the clearance from any burden; (ii) payment comprises total credit to be settled including updating, interest, penalty and legal burdens without any discount, ensuring to debtor the possibility to any difference complement in cash between the debt value and offered goods value; and (iii) debtor giving up any lawsuit and waiver of right on grounds of lawsuit, and correspondent payment of court expenses and lawyer's fees.

Law provides that the procedures of extinction of tax credit is not applicable to companies that have opted by 'Simples Nacional".

Law no. 13.315/2016 - Reduction of Rate - IRRF - Remittances abroad

On 07/21/2016, Law no. 13.315 was published, as a result of converting Provisional Measure no. 713/2016, among others provisions, and amendment Law no. 12.249/2010 to reduce from 25% to 6% Withholding Income Tax ("IRRF") rate assessed on values paid, credited, delivered, used or set to individuals or legal entities resident or domiciled abroad, to cover personal expenses abroad of individuals resident in the Country, in tourism, business, service, training or official mission trips, up to overall limit of R$ 20,000.00 (twenty thousand reals) per month, according to provisions, limits and conditions set forth by Executive Authorities.

Moreover, according to new regulations, the monthly limit for remittances abroad made by operators or travel agencies is R$ 10,000.00 (ten thousand reals) by passenger. Moreover, it was established there will be no withholding on remittances abroad for education, scientific or cultural purposes and remittances made by individuals to cover medical- hospital expenses of sender and their dependents.

At last, Law no. 13.315/2016 included the retirement and pension income received abroad in income subject to IRRF at 25% rate.

Solution of Consultation to COSIT no. 59 of May 18, 2016 - PIS /COFINS - Non-Accrual Regime - Certifying Authority.

On 05/18/2016, Solution of consultation no. 59 was issued by General Coordination of Federal Revenue Service of Brazil, establishing the understanding the simple use of software in scope of services rendered by Certifying Authority could not be confused with software development activity.

Because, as contained in text of Solution of Consultation, software is only the means used by Certifying Authority to carry out its activity to issue digital certificates. Moreover, Certifying Authority is hired for target-activity that is development of a software.

Therefore, Tax Authority concluded that these are different activities, and established the Certifying Authorities are subject to PIS and COFINS calculation by non-accrual system, and it does not accept the exception in section XXV of art. 10 combined with section V of art. 15 of Law no. 10.833/2003.]

Solution of consultation COSIT no. 11 of June 24, 2016 - deduction of Medical Expenses.

On 06/24/2016, Solution of Consultation no. 11 was issued by General Coordination of Taxation of Inland Revenue Service of Brazil, establishing the understanding on non-deduction from calculation basis of Income Tax of Individuals ("IRPF") the medical expenses paid in certain calendar year related to individual that was considered dependent in previous calendar year, but he/she is not in calendar year of payment.

According to understanding of the Tax Authority, the possibility of deducting payments made as medical expenses depends on certain rules, they are: (i) deduction must be made in same calendar year of annual Tax Return; and (ii) payments refer to health treatment of taxpayer or his/her dependents in respective calendar year.

Thus, deduction from IRPF calculation basis of medical expenses paid in certain calendar year related to dependent individual in previous calendar year, but for any reason, he/she is not a dependent in the calendar year of payment, has no legal support, therefore, it is not deductible.

Solution of Consultation COSIT no. 89 of June 14, 2016 - Received Amounts - Party in Lawsuit.

On 06/14/2016, Solution of Consultation no. 89 was issued to establish the understanding the value received from lawsuit filed by taxpayer shall be subject to taxation.

According to the Tax Authority's understanding, consulting party was a party in lawsuit, which object was to receive credit rights that had been assigned to third party.

Therefore, it has considered the company holder of current account where values were deposited, and a plaintiff in lawsuit, to be actual beneficiary of the amounts paid, however it is not enough submitting the private instrument with record of transfer of such values to have no responsibility before Tax Administration.

Solution of Consultation COSIT no. 34, of April 11, 2016 – Agroindustry – Social Security Contribution Substitutive – Gross Income

On 07/06/2016, Solution of Consultation no. 34 was published, which was issued by General Coordination of Taxation System of Inland Revenue Service of Brazil, establishing the understanding the rural producer, a legal entity, is an agro-industry for calculation of Social Security Contribution under the provisions of articles 22A of law no. 8.212/1991 (assessed on gross income) if it is classified cumulatively in "rural production" concept, "its rural production" and "processing".

Corroborating such understanding, regulatory text provides the definition of these concepts as follows: (i) "rural production is the products from animal or vegetal origin, in natural condition or subject to processing or rough industrialization as well as byproducts or residues from such processes; (ii) "its rural production" is when holder has means (functional structure) to carry out the specific production process and use them actually, and (iii) "industrialization" is the processing activity, when it is part of main economic activity or stage of production process, and contributes as such in functional connection regime for the performance of company's object.

Therefore, it concluded, the rural producer, a legal entity, is an agro-industry when it uses animal or vegetal origin products in natural condition or subject to processing or rough industrialization process, as well as the byproducts and residues from such processes ("rural production"), generated by using the particular structure to carry out such production process ("its rural production"), in processing activity ("industrialization"), that integrates the main economic activity or stage of production process and contributes as such in functional connection regime for the performance of company's object.

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At last, Solution of Consultation points out the performance of economic activity different from rural or industrial one, could not mischaracterize any classification of a company as agroindustry, and income from such different economic activity, except rendering services to third parties, also integrates the calculation basis of substitutive social security contribution.

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