

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 104th edition, we address 14 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!

Jurisprudence

STJ – Courts accompanies the STF's understanding on monetary adjustments of convictions determined to the Tax Authority

The 1st Section of the Superior Court of Justice (“STJ”), on 02/22/2018, completed the trial of Special Appeals (“REsp”) # 1.492.221/PR, 1.495.144/RS and 1.495.146/MG, under the recurrent appeals rite to decide that the monetary adjustment indexes of sentences applied to Tax Authority should reflect the inflation in the period.

Following the understanding of the Federal Supreme Court (“STF”) ruling unconstitutional the provision of the 1st-F Article of Law # 9.494/97 with the redaction provided by Law # 11.960/09, the Section removed the monetary adjustment based on the saving accounts compensation and applied the National Consumer Price Index (INPC) and Special Broad Consumer Price Index (IPCA-E) which reflect the inflation of the period. With regards to future sentences, such indexes will be applied, if remaining, to assess the inflation.

Finally, the Board understood not to hear the effects modulation by the Superior Court of Justice (STJ).

STJ - Reaffirmed understanding on the assessment of social security contribution on the freight paid to self-employed truck drivers

The Second Chamber of the STJ, on 03.15.2018, ruling the REsp 1.713.866/RS, reiterated the understanding of the validity of the social security contribution on the compensation of self-employed drivers of road vehicle, as a result of the legality of MPAS Ordinance 1.135/01 and Article 201, 4st § of Decree .3048/99.

Considering the previous trial in 2014, the Second Chamber reiterated that such rules are not breach of the principle of legality, as it was published just to clarify the compensation of self-employed worker, on which the social security contribution shall be assessed as provided for in art. 22, III, of Law n. 8.212/1991.

TRF1 - Improper Registration of taxpayers in outstanding debt results for the Federal Government in a duty to indemnify

On 03/05/2018, the 6th Chamber of the Federal Regional Court of the 1st Region (“TRF1”), ruling on the case # 0044256-69.2010.4.01.3700/MA, unanimously considered that the improper record of taxpayer in outstanding debt is on Federal Government’s responsibility and is sufficient to demonstrate the occurrence of pain and suffering, which generates the duty to indemnify.

In this case, the Federal Government claimed to have requested the exclusion of the defendant, however, because of bureaucratic procedure, the request took three months to be answered. It stated that the delay was not excessive and has not generated the embarrassment to the taxpayer to justify the indemnity for pain and suffering.

Notwithstanding these arguments, the Chamber understood for the occurrence of error of administration by failing to write off the debt whose enforceability had been suspended, although being aware of that fact, what caused the plaintiff’s name unduly continuing in CADIN.

Therefore, the presented evidence set was considered sufficient to demonstrate the responsibility of the Federal Government for improper record of taxpayer's name in outstanding debt, therefore, the Chamber considered the indemnity to be due.

TRF1 - No assessment of social security contributions on amounts paid as scholarship to employees and their dependents

On 11/20/2017, 8th Chamber of TRF1 unanimously dismissed the appeal of the Tax Authority thus confirming declaratory judgment of nullity of entries for tax credit of social security contributions on scholarships granted on behalf of employees and their dependents.

The established understanding was that the scholarship is no salary, does not compensate the actual work, for these reasons, do not integrate the employee's compensation for purposes of assessment of social security contributions. Adding, listing of portions are not exhaustive, which do not integrate the contribution salary for the assessment of this tax as contained in 9th§ of art. 28 of law 8.212/1991.

CARF - Need to Rectify the Dacon for use of PIS and Cofins's credits

On 01/27/2018, the Board of Tax Appeals ("CARF") removed the need for Dacon rectification to use the tax credits of PIS and COFINS on non-cumulative regime.

To the CARF's Directors, the Dacon had merely informative nature and does not constitute acknowledgment of debt, and is only a facilitator of monitoring. In addition, it was noted that the appropriation of extemporaneous credits of PIS and Cofins is provided for in article 3rd, 4th § of law # 10.637/2002 and 10.833/2003.

CSRF - PIS/COFINS – Copyright – Adoption of new concept of input (REsp # 1.221.170)

In the case providing on credits of PIS and Cofins for purchasing of copyright, the Higher Chamber of Tax Appeals ("CSRF") considered, for the first time, the definitions established in the new input concept adopted by the Superior Court of Justice in Special Appeal # 1.221.170, which was based on essentiality of the goods or service to the company's activity.

Although CSRF's ruling is not closed, two counselors voted to dismiss the appeal of the taxpayer. The trial should be resumed in April, as one of the judges asked for examination on the proceeding.

Regulations and Consultation Solutions

RFB Interpretative Declaratory Act # 02 - Deductibility of losses in receipt of credits - IRPJ AND CSLL

On 03/23/2018, the Interpretative Declaratory Act # 02 of the Inland Revenue Service of Brazil ("RFB") was published, which determines the conditions for deduction of losses on receipt of credits arising from the corporate activities, for the purposes of identifying the taxable profit and the CSLL calculation basis.

According to RFB, only the credits arising from the legal entity activities should be deducted as expenses, which complies with the provisions on article 9th of Law # 9.430/1996, although overdue for more than five years without being settled by debtor.

COSIT Consultation Solution # 13/2018 - IRPJ - Sales net price as basis for transfer pricing calculation in PRL method

On 03.13.2018, the Consultation Solution # 13 was published by the General Coordination of Taxation ("COSIT"), which provides on the adjustments for transfer pricing purposes in the Resale Price Method added by Profit ("PRL").

The COSIT understood that the adjustments for transfer pricing purposes in the PRL Method should be calculated based on the net sales price, in accordance with Law # 9.430/96, amended by Law # 12.715/2012, which has admitted the exclusion of unconditional discounts granted, taxes and contributions on sales and commissions and brokerage paid on the sales price for the application of the fixed profit margin and subsequent determination of the parameter price.

COSIT Consultation Solution # 03/2018 – Ancillary obligations - Taxpayer of obligation and delivery of e-Financeira (e-Financial)

On 01/03/2018, the Consultation Solution # 03 of General Coordination of Taxation ("COSIT") was published, which clarifies that the open capital company of securitization of securities credits is not in the capacity of responsible for the delivery of e-Financeira, which obligation is on the liability of custody accounts agent of the Securities Receivables certificate.

COSIT Consultation Solution # 7/18 - Non-applicability of the Spontaneous Denouncement

Through the Consultation Solution # 7, the General Coordination of Taxation ("SC COSIT # 7/18") issued the understanding, published on 03.08.2018, to be unenforceable the spontaneous denouncement to remove the assessment of penalty for lack of withholding or payment of taxes by payer.

COSIT Consultation Solution # 552/17 -II and IPI - Simultaneous use of ex-tariff

On 02/27/2018, the Consultation Solution # 552 of General Coordination of Taxation ("SC COSIT # 552/17") was published, which considers the concomitant possibility of use of ex-tariff [the temporary reduction of the import tax rate of capital goods (BK) and computer and telecommunications (BIT)] of import tax ("II") and the Excise Tax ("IPI").

The Justice acknowledged the risking existence of irreparable damages or damages that are hard to redress, since the impossibility of renewing tax regularity certificates impedes the participation in bidding processes, as well as removed the enforcement of Precedents 634 and 635/STF to the case in concern.

COSIT Consultation Solution # 661/17 - IRRF - Remittance for professionals training

On 02.27.2018 the Consultation Solution # 661 of General Coordination of Taxation (“SC COSIT # 661/17”) was published, which provides on the assessment of Withheld Income Tax (“IRRF”) on payments for training overseas to professionals living in Brazil.

In the RFB’s opinion, such payments should not be regarded as scientific or educational expenses, therefore are subject to IRRF at the 15% rate (or 25%, if to tax favored jurisdictions).

Decree # 9.297/2018 - Change of IOF rate

On 03.02.2018 Decree # 9.297 was published to amend Decree # 6.306/2007, which governs the Tax on Credit, Exchange and Insurance Operations, or related to Bonds and Securities - IOF.

The new provision has increased to 1.10% the IOF rate in the settlement of foreign exchange operations carried out as of March 03, 2018, to transfer funds abroad to be available to resident in Brazil.

RFB Normative Instruction # 1.797/18 and PGFN # 36/18 - Rural Tax Compliance Program - PRR

On 03.07.2018, Ordinance # 36 of the General Attorney’s Office for the Department of Treasury and, on 03.09.2018, Normative Instruction # 1.797 of Inland Revenue Office Of Brazil were published which amended the Normative Instrument # 1.784, among others, to extend the adherence to PRR to the day 04.30.2018, with the following changes: (i) the maturity date of the initial installments at least 2.5% of the debt, to the last day of the months of April and May; (ii) the maturity date of the installment plan of the balance of the consolidated debt, which shall fall due as of June 2018; and (iii) the deadline for withdrawal of administrative defense by the day 04.30.2018.

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