Tax Bulletin

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Dear Readers:

The purpose of this **Tax Bulletin** has as its objective to keep our clients and other interested parties duly up-to-date on the main subjects being discussed and decided by the Judiciary, Legislative, and Executive.

In this 77th edition of our newsletter, we will comment on 9 different issues within the Case Law and Consultation Solution.

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Case law

STF – General Repercussion recognized

- Definition of interest on arrears and monetary adjustment applicable to sentences assessed by the Treasury Department.

- Assessment of income tax on interest on arrears received by an individual

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COSIT Consultation solution number 383/2015 – IRRF assessment on investments transferred under causa mortis

SOUZA, SCHNEIDER, PUGLIESE e SZTOKFISZ ADVOGADOS

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.

Case law

STF – General Repercussion recognized

• Definition of interest on arrears and monetary adjustment applicable to sentences assessed by the Treasury Department.

On 04/17/2015, the Virtual Plenary of the Supreme Court (STF) acknowledged the existence of General Repercussion in discussion concerning the regime to be applied for monetary adjustment and interest on arrears on non- tax sentences imposed to Treasury Department. This constitutional issue will be discussed at the Extraordinary Appeal (RE) number 870.947/SE, the Rapporteur is Minister Luiz Fux.

• Assessment of income tax on interest on arrears received by an individual

On 04/17/2015, the Federal Supreme Court (STF) acknowledged the existence of General Repercussion in discussion concerning the constitutionality of collecting the Income Tax on interest on arrears levied on wage and social security allowances paid in arrears the individuals. The Supreme Court will examine specifically the sole paragraph of article 16 of Law No. 4.506/1964, regarding the salary nature of interest. This constitutional issue will be analyzed at the Extraordinary Appeal (RE) number 855.091/RS, the Rapporteur is Minister Dias Toffoli.

STJ - COFINS - Increase the tax rate to 4% - Impossibility of equivalence between "insurance brokers companies", "self-employed insurance agents" and "brokerage companies"

On 4/22/2015, the First Section of the Superior Court of Justice (STJ), settled the understanding on ***(i)*** impossibility of placing the **"insurance brokers companies"** within the context of a larger set of "brokerage companies" (Resp 1.391.092/SC); and **(ii)** equivalence between the terms **"insurance brokers company"** and "self-employed insurance agents" (REsp 1.400.287/RS). In this respect, the treasury arguments are removed that aimed to the application of article 18 of Law number 10.864/2003, this provision increased the COFINS rate from 3% (three percent) to 4% (four percent) for the "brokerage companies" and "self-employed insurance agents".

The Rapporteur of appeals Minister Mauro Campbell Marques, asserted it is not possible to hold equivalent the terms mentioned above, because they deal with distinct institutes. The "insurance brokers companies " should not be confounded with the "brokerage companies" or "self-employed insurance agents.[1]

This understanding has utmost importance to taxpayers, as it limits categorically the main characteristics of each mentioned institutes, in addition to establishing the sole understanding to be applied to all cases with identical or similar controversy.

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[1] The "insurance broker companies ", are agents legally authorized to raise and promote the insurance agreement allowed by current legislation, which agreement with the customer is characterized by the brokerage, in accordance with article 722 of the CC and the article 122 of Decree-Law No 73/66.
The "self-employed insurance agents" are individuals or legal entities representatives of insurance companies and authorized to mediate insurance operations directly with stakeholders, whose relationship with the insurance company is governed by the agency contract, according to the article 710 of CC;
Finally, "brokerage companies", provided for 1st § of article 22nd of Law 8.212/91, has its own meaning in the National Financial System, and is not applicable under the National Private Insurance System as such companies are intended for distribution of securities,

STJ – ICMS – Exclusion from the PIS and COFINS calculation basis.

On 04/07/2015, judgment was published by the Superior Court of Justice (STJ), in which his First Group, by majority vote, determined the unprecedented understanding on the exclusion of installments paid by the taxpayer as ICMS from PIS and COFINS calculation base. In this case, the rapporteur Min. Sérgio Kukina, and Minister Marga Tessler (Federal Judge convened by TRF of the 4th region) were dissenting, who had have otherwise.

According to the winner vote made by the Minister Regina Helena Costa, the ICMS could not compose the basis for PIS and COFINS calculation, as it is an income of States Member of the Federation and the Federal District, and has no invoicing or income nature, but rather financial inflow in the accounts of the taxpayer. The Minister state in her vote that the invoicing concept would be intrinsically related to *"the wealth earned by the taxpayer from the business activity, the inclusion of third-party financial revenues are unacceptable or that cause directly or indirectly financial inflow".*

This precedent is extremely relevant to taxpayers, as it shows clear signaling by Court on amendment of its case-law on the subject, in order to follow the understanding reached by the Federal Supreme Court (STF) at the ruling of the Extraordinary Appeal (RE) 240.785/MG, judged on 10/08/2014.

STJ – IR – Assessment on additional of one third vacations taken

On 04/20/2015, the First Section of the Superior Court of Justice (STJ), when ruling on the REsp 1.459.779/MA, on repetitive appeal decided, by majority vote, on the assessment of the Income Tax ("IR") on the additional one-third vacation taken. Despite the trial has kept the understanding already consolidated in the Collegiate, the vote was tough and President, Minister Humberto Martins had the tie-breaking.

According to the Rapporteur of the case, Minister Mauro Campbell Marques, the aforementioned additional has indemnity nature and is intended to compensate for the natural wear suffered by the employee as a result of the profession during the reference period, thus the money received would be for leisure activities that allow recomposing the physical and mental health condition. For such reasons, the vote was for change in the case law of the Court, in order to recognize the non-assessment of IR on the additional one-third of vacation taken and, thereby, readjust the understanding of the Collegiate settled in the Supreme Court (STF) regarding the nature of an indemnity for the allowance under discussion.

However, the Minister Benedito Gonçalves started the divergence to maintain STJ understanding that the additional on vacations taken causes the additional equity and therefore integrates the IR calculation basis. Furthermore, he has thought through the reasons taking STF to conclude on the non-assessment of social security contributions on the third constitutional vacation taken are not enough for STJ concludes on the indemnity nature of additional vacation and change its case-law on the IR subjection, as he has affirmed to be relevant the differentiation in the debate on the assessment of social security contribution and IR. Such a vote was the winner and was followed by the Ministers Assusete Magalhães, Sérgio Kukina, Napoleão Nunes Maia Filho and Humberto Martins.

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and do not include as a rule insurance brokers companies therefore, there would be no reason to speak in wide interpretation of the term "brokerage company".

Finally, it is highlighted that the judgment does not change the understanding of the First Section of the STJ on the non-assessment of IR on the additional one-third of vacation not taken, as it has indemnity nature, as set out in RE 1.111.223/SP, on repetitive appeal, and on the Abstract of Record 386 of the STJ [3].

STJ - Tax Enforcement - Impossibility of changing bank guarantee by money from dividends to be distributed

On 04/22/2015, the First Section of the Superior Court of Justice (STJ), ruling on Motion for Reconsideration in Special Appeal (REsp) no. 1.163.553/RJ, decided, by a majority, that the bank guarantee, cannot be changed as previously accepted by the Treasury, by blocking values relating to dividends to be distributed to stockholders.

According to the Rapporteur of the case, Minister Arnaldo Esteves Lima, the execution debtor cannot distribute the dividends during the tax enforcement procedure if there is no guarantee of judgment. However, in the case judged, the Tax Enforcement was guaranteed by bank guarantee, and Treasury has agreed. Thus, the Minister concluded that, the distribution of dividends is not forbidden as the execution debtor has guaranteed the debt, thus the replacement of seizure would not be reasonable.

According to the Minister, the adoption of diverse understanding would cause unnecessary lien, as the company offered the guarantee provided for by law. The replacement intended by Treasury would only be possible if the suitability of bank guarantee was removed.

Such precedent is quite relevant to taxpayers, as it brings an important interpretation of the principle of lower costly to executed debtor as well as the terms of the PGFN Ordinance No. 499/2009 is applicable, that has guided the prosecutors not to ask for the replacement of bank guarantees already accepted.

TRF1 - Exclusion of wharfage expenses from calculation of taxes on imports

On 04/28/2015, the Federal High Court Judge Maria do Carmo Cardoso, on analyzing the Interlocutory Appeal Number 15272-44.2015.4.01.0000, reversed the decision by the original court to determine to the National Treasury to refrain from collecting, in the real case, the taxes levied on the import calculated with the inclusion of wharfage charges.

In its decision, the High Court Judge said the Normative Instruction (IN) by Inland Revenue Service (SRF) number 327/2003, including the wharfage charges after the arrival of the ship to the port at the calculation base of import taxes, disrespects the limits imposed by the Customs Valuation Agreement (AVA) of GATT and Decree 6.759/2009, that mentioning the expenses to be included in the customs value, refer to the costs of loading, unloading and handling of goods imported to the Customs port.

We highlight that the importance of that precedent for taxpayers is related to the fact of being the first positioning of TRF of 1st Region favorable to the issue and deals with the import tax (II), as well as other taxes such as the Excise Tax (IPI), the PIS and COFINS on the import.

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[2] In this respect, judgment is pending in the general repercussion, for the RE 593.068, to discuss the assessment of the social security contribution on the additional one-third of vacation.

[3] Abstract of Record 386 of the STJ - prorate vacation indemnities are exempt from income tax as well as the respective additional.

TRF1 - DCTF – need of notice to taxpayer when request for compensation is denied.

On 03/27/2015, the Eighth Group of the Federal Regional Court of the 1st Region (TRF1) decided unanimously that the immediate record in the outstanding federal tax liabilities offset and confessed in DCTF, without notifying the taxpayer for any challenging of the denial of credit, gives rise to the invalidation of registration by formal fault.

In this case, the taxpayer submitted Contributions Statement and Federal Taxes ("DCTF") with the desired offset and the payment of the residual value, however, the National Treasury, without any notice of refusal of offset has carried out the registration of debt in outstanding federal tax liabilities.

According to the Rapporteur, Federal High Court Judge Maria do Carmo Cardoso, the DCTF is debt confession instrument, therefore is suitable and enough only to legitimate debts unduly offset. However, this rule is not absolute, so that, if the taxpayer reports the offset occurrence by means of suitable document (DCTF) and such a procedure is rejected by the Tax Administration, then the immediate registration of the value in the outstanding federal tax liabilities is illegitimate by formal fault in the procedure established as the beginning of term is essential for the taxpayer challenges the denial of credit.

Consultation solution

COSIT Consultation solution number 383/2015 – IRRF assessment on investments transferred under causa mortis

Consultation Solution No. 383 of the General Coordination of Taxation of Inland Revenue Service of Brazil ("COSIT") was published on 04/13/2015, dealing with **(i)** the impossibility of book-entry financial investments that succeeds the causa mortis; **(ii)** the resulting need for redemption or liquidation of the investment when the holder has died; and **(iii)** the assessment of withholding income tax ("IRRF") on the operation value.

The taxpayer making the consultation, a manager of investment funds, questions the situations in which individuals receive quotas of funds from the causa mortis succession whether legitimate or testamentary.

The requesting taxpayer mentions the distinction between "redemption" and "transfer", pursuant to CVM Instruction number 409/2004, and asks what is the treatment that the Inland Revenue Office understands suitable for the IRRF, on the simple transfer of ownership without the settlement of the financial investment.

In the analysis of issue, however, the COSIT adopted the understanding that when the holder of the investment dies and hereditary succession is open a transfer of ownership of the book entry investments is not applicable. On Tax Authority's opinion once started the succession, the fulfillment of apportionment document determines the redemption or liquidation of the investment, therefor IRRF is assessed on the operation value.

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