# Tax Bulletin

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Dear Readers:

The purpose of this **Tax Bulletin** is to inform our clients and interested parties on the main issues discussed and decided in the Judicial, Legislative, and Executive Branches.

In this 71st Edition, we are dealing with 6 different issues in Jurisprudence and Legislation.

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## JURISPRUDENCE

### Supreme Court removes the ICMS assessment on leasing international agreements.

On 09/11/2014, Supreme Court (STF) ruled under the systematic of General Repercussion[1], the Extraordinary Appeal 540.829/SP, which questioned the tax assessment on transactions involving the goods transaction and on interstate and intermunicipal transportation, communication services – ICMS on goods import by leasing agreement.

The case, reported by Minister Gilmar Mendes, returned to judgment with the vote upon further review of Min. Teori Zavascki, who followed the reporter 's understanding and granted the State of São Paulo appeal, to recognize the ICMS assessment on the goods, as the generating fact of tax is featured by the entry of imported goods in Brazil, regardless of the nature of the agreement signed abroad.

However, Minister Luiz Fux position prevailed , who stated there was no ICMS assessment if there is no change in goods ownership as occurs in leasing agreements. Such understanding was followed by other Court Ministers, also reaffirmed in new ruling by the Supreme Court on 10/01/2014 session.

Such precedent settles Supreme Court jurisprudence on the matter, as the application of procedural regime of General Repercussion could be requested by taxpayers in individual, judicial or administrative proceedings.

### Superior Court of Justice rules illegal the increase SAT rate by Decree No. 6.957/2009

On 09/16/2014, the first Chamber of the Superior Court of Justice (STJ) finalized the judgment of the Special Appeal nº 1.425.090/PR on the legality of the increase in the rate of Contribution to The Occupational Accident Insurance (SAT), currently referred to as Degree of Labor Disability resulting from Occupation Environmental Risks (GIIL-RAT), whose increase has resulted from Decree No. 6.957/2009.

In this case, the FTP Powertrain Technologies do Brasil company filed the lawsuit to remove the payment of such contribution as determined by the Decree nº 6.957/2009, which reclassified the main activity from medium risk to serious risk degree when provided on the increase of SAT/RAT from 2% to 3%.

Accordingly, by majority vote, the First Panel of STJ understood to be illegal the increase of the SAT rate by Decree No. 6.957/2009, as statistical data were not submitted by the Executive Authority to show the actual increase in accidents in the activity carried out by the company and thereby justify the reclassification and consequent increase of the rate. Therefore, STJ ruled illegal the reclassification of the company's activity, caused by the said Decree, determining to keep the previous classification.

Although the proceeding referred to a company whose activity is the engines manufacture that decision is applicable to any company that had SAT contribution rate increased by Decree No. 6.957/2009, as the absence of reason is verified for all activities. Therefore, as the Decree reclassified to the highest risk level several economic activities, the filing of lawsuits is recommended to have recognized the unjustifiable and

[1]Article 543-A Of Civil Procedural Code.

illegal increase of the rate, with effects on future payments and how much was unduly paid in the past.

## Superior Court of Justice excludes the wharfage from calculation basis of Import Tax

On 09/04/2014, the Superior Court of Justice (STJ) concluded the judgment of the Special Appeal 1.239.625/SC, which deals with the validity of costs inclusion related to expenses occurred after the ship arrival at Brazilian port (unloading, loading, transportation and handlings), titled "wharfage" or Terminal Handling Charges (THC), on the calculation basis of the import tax (customs value) as provided for in Normative Instruction of the Inland Revenue Office [Secretaria da Receita Federal] (IN SRF) nº 327/2003.

The prevailing understanding was by Reporter Minister Benedito Gonçalves that, after goods arrival in the national territory, internal expenses with handling and transportation could not be included in the customs value **after** the goods arrival in the country, as provided for the Agreement on Customs Value and Decree No. 4.543/2002, replaced by Decree No. 6.759/2009 (Customs Regulation). According to him, the SRF Normative Instruction nº 327/2003, which expressly determines the inclusion of wharfage expenses in tax calculation, unduly broadened the concept of customs value, which only authorizes the inclusion of these expenses **until** the goods arrival in the country.

## Federal Regional Court of the 1st Region recognizes the exclusion of the ISSQN from the calculation basis of the contributions to the PIS and COFINS

On 08/19/2014, the Seventh Panel of the Federal Regional Court of the 1st Region (TRF 1) decided unanimously that the values for Tax on services of any nature – ISSQN, could not be included on the calculation basis of the contributions to the PIS and COFINS.

Based on votes made to date by the Ministers of the Supreme Court, in the judgment of Extraordinary Appeal 240.785/MG, TRF emphasized that the ISSQN, like the ICMS, is not *"under any Prism, the taxpayer's income, but, of the public assessing entity to which it belongs, and is not contained in invoicing concept or gross revenue, therefore, outside the calculation basis of PIS (Law nº 9.715/98)".*

That is, although STF has judged, in that case, the only ICMS exclusion from calculation base of such contributions, the TRF 1 understood that, by analogy, the issue would have the same solution, as ISS is State revenue other than the taxpayers.

Such judgment on Appeal in Injunction nº 0007990-11.2009.4.01.3800, is relevant, because it generated actual " jurisprudence turn", as the very judgment points out in the jurisprudence of the 4th Section of TRF 1, which had not expressed opinion unanimously in order to recognize the taxpayer right to exclude the ISSQN from the calculation basis of the contributions to the PIS and COFINS.

## Federal Regional Court of 3rd region judges for the first time the thesis of internal premium

For the first time, the Federal Regional Court of 3rd region (TRF 3) judged the internal premium, which takes place in corporate transactions between companies in the same economic group in which the acqui-

sition value is higher than the registered in the accounting. The discussion was on validity or not the procedure adopted by the taxpayer on the premium amortization recorded in its accounting for the purpose of determining the Legal Entity Income Tax and Social contribution on net income, from to the incorporation of its affiliate.

According to the Proceeding Reporter, [2] at the time of reorganization there was no legal obstacle to the use of the premium between related companies, subsidiaries or members of the same economic group, which prohibition started with the publication of law nº 11.638/07. Although there is no express legal prohibition at that time still premium deduction was deemed invalid as the taxpayer did not proved the economic basis of the operation. According to the reporter, the premium deduction would be invalid, as such expense would have been created with the sole purpose of reducing the tax burden.

## Laws

### MF Ordinance No. 348/2014 – special procedure for non-cumulative PIS/COFINS credits reimbursement.

On 08/27/2014 the Ordinance by the Ministry of Finance No. 348 was published , which established the special procedure for credits reimbursement from the non-cumulative contribution for the PIS and COFINS provided for article 31 of law nº 12.865, of October 9, 2013, calculated from 10.10.2013. Such a procedure will be used by taxpayers who have not used these credits after the end of each quarter of the calendar year, to calculate PIS/COFINS or who had offset against debts related to taxes administered by the Inland Revenue Office of Brazil ("RFB").

According to the Ordinance, the legal entity to plead the reimbursement shall comply cumulatively with the following criteria: (i) to be in tax compliance status in relation to tax debts administered by the RFB and the Attorney-General of the National Treasury; (ii) not to be subject to the special inspection regime in the 36 months preceding the application; (iii) to be obliged to Digital Tax Bookkeeping and the Digital accounting bookkeeping;(iv) to be enrolled with the national roll of Legal Entities on December 31 of the year preceding the application for more than 24 months;(v) have a net worth equal to or higher than R$ 20,000,000.00;(vi) have earned revenue higher than or equal to R$ 100,000,000 00 and (vii) the sum of reimbursement applications does not exceed 30% the net worth reported in Digital accounting bookkeeping in the year prior to the reimbursement application.

According to the Ordinance, RFB will have up to 60 days, from the application date to carry out the payment of 70% of the claimed value. In applications submitted up to 8/10/2014, the period shall be counted from 8/27/2014. Of such 70%, the amount should be deducted as used in offset statements submitted to date of actual reimbursement, as exceeds 30% (thirty percent) the application value.

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[2] Civil appeal n. 0017237-12.2010.4.03.6100.

[3] 31st Article. The legal entity subject to the noncumulative determination regime of the contribution to the PIS/Pasep and Cofins should deduct presumed credit from such contributions, to be paid in each reference period calculated on the revenue resulting from the products sale on the domestic market or export as classified in codes 1208.10.00, 15.07, 1517.10.00, 2304.00, 2309.10.00 and 3826.00.00 , soy lecithin classified in code 2923.20.00, all of the Tipi.

In addition, the Ordinance provides that the finding of non-compliances in the credits object of reimbursement application shall take the following procedures:

(i) If the non-compliances affect less than 30% of the amount, the recognized credits payment will be made by deducting the offsets and the value corresponding to 70% paid, notwithstanding the assessment of 50% separate fine (provided for §§ 15 and 17 of article 74 of law No. 9.430/96) on the credits value denied our undue;
(ii) If the credits non-compliances exceed 30% , the amount improperly offset should be required notwithstanding the assessment of the aforementioned 50% separate fine.
(iii) If non-compliances exceed 40% of the offset value requested, the RFB should exclude the legal entity from the special procedure.

The Ordinance applies to applications related to the credits determined from October 10, 2013, and being excepted those whose calculation periods are included in tax procedure for identification and verification of reimbursement credits.

**Team responsible for preparing the Tax Bulletin:**

**Igor Nascimento de Souza** (igor.souza@souzaschneider.com.br)

**Henrique Philip Schneider** (philip.schneider@souzaschneider.com.br)

**Eduardo Pugliese Pincelli** (eduardo.pugliese@souzaschneider.com.br)

**Cassio Sztokfisz** (cassio.sztokfisz@souzaschneider.com.br)

**Fernanda Donnabella Camano de Souza** (fernanda.camano@souzaschneider.com.br)

**Diogo de Andrade Figueiredo** (diogo.figueiredo@souzaschneider.com.br)

**Flavio Eduardo Carvalho** (flavio.carvalho@souzaschneider.com.br)

**Rafael Fukuji Watanabe** (rafael.watanabe@souzaschneider.com.br)

**Laura Benini Candido** (laura.candido@souzaschneider.com.br)

**Rodrigo Tosto Lascala** (rodrigo.tosto@souzaschneider.com.br)

**Pedro Lucas Alves Brito** (pedro.brito@souzaschneider.com.br)

**Maria Carolina Maldonado Kraljevic** (mariacarolina.maldonado@souzaschneider.com.br)

**Viviane Faulhaber Dutra** (viviane.dutra@souzaschneider.com.br)

**Tiago Camargo Thomé Maya Monteiro** (tiago.monteiro@souzaschneider.com.br)

**Flavia Gehlen Frosi** (flavia.frosi@souzaschneider.com.br)

**Marina Lee** (marina.lee@souzaschneider.com.br)

**Thomas Ampessan Lemos da Silva** (thomas.ampessan@souzaschneider.com.br)

**Gabriela Barroso Gonzaga Ferreira Porto** (gabriela.porto@souzaschneider.com.br)

**Amanda Mateoni Salvestrini** (amanda.mateoni@souzaschneider.com.br)

**Ana Cristina de Paulo Assunção** (anacristina.assuncao@souzaschneider.com.br)

R. Cincinato Braga, 340 • 9º andar • 01333-010 • São Paulo • SP
tel 55 11 3201 7550 • fax 55 11 3201 7558

Brasília Shopping • SCN quadra 5, Bloco A • Torre Sul • 14º andar • sala 1406 • Brasília • DF • 70715-900
tel 55 61 3251 9400 • fax 55 61 3251 9429

www.souzaschneider.com.br





Souza, Schneider, Pugliese e Sztokfisz Advogados