tax bulletin

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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 91th edition, we address 12 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 - General Repercussion Recognized on the Constitutionality of Supervisory Fee of Towers and Antennas

It was recognized the general repercussion of RE 776.594, which refers to the municipal tax competence for the establishment of supervisory fees in activities related to the telecommunications sector, which legislative power and for exploitation if exclusive of the Union.

The specific case discusses on the establishment of Supervisory Fee of License for Operation of the Towers and Antennas of Transmission and Reception of Data and Voice, established by the Municipality of Estrela Doeste/SP.

The reporting judge of the appeal, Justice Luiz Fux, expressed himself on the existence of general repercussion, establishing that, in addition to the multiplicity of cases, it refers to claim of extreme importance on the economic, political, social and legal point of view that exceeds the subjective interests of the cause.

STF - General Repercussion Recognized on the possibility of municipality establishes criteria for regime of ISS taxation for Law Firms

The general repercussion of RE 940.769, which disposes on the tax competence of the municipality to establish prohibitions to the submission of professional law firms to the regime of fixed or per capita taxation on annual basis set forth in article 9, §§ 1 and 3 of the Decree-Law 406/1968 was recognized.

The Justice Edson Fachin, reporting judge of the appeal, expressed himself for the general repercussion and reaffirmed the consolidated case law, in the sense of the unconstitutionality of municipal law that establishes prohibitions to the submission of professional law firms to the fixed or per capita taxation on annual basis.

However, the justices, by the majority, decided to not reaffirm the existing case law regarding the subject. Thus, the matter shall be judged again by the en banc Federal Supreme Court, being possible the amendment to the understanding.

STF - Constitutionality of ICMS levied on basic subscription charge

On 10/13/2016, the Plenary Session of the Federal Supreme Court (STF) judged RE 912.888, with general repercussion recognized, and decided, by the majority, for the constitutionality of ICMS levied on basic subscription charge collected by the telephone companies.

The appeal was filed by the State of Rio Grande do Sul against decision of the Court of Justice of Rio Grande do Sul (TJ/RS), which decided, in the sense that the services of qualification, installation, availability, execution (whilst synonym of contracting of communication service), registry of user and equipment, among others, that constitute essential activity or additional services, are not levied on with ICMS.

The Justice Teori Zavascki, reporting judge of the appeal, initially established that this case involves ICMS

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levied on the charge for a service placed at the disposal of the final user, that would have natures of core service, to the extent that it involves costs with maintenance and extension of the telecommunication network. For the Justice, regardless of being granted allowance of minutes to consumer, the fact of existing a communication network available already represents, by itself, the service provision.

The divergence was represented by Justice Luiz Fux, in the sense that the costs with infrastructure do not represent communication service, because, despite being incurred to enable such final service, the federal constitution grants state entity jurisdiction to tax only the effective communication.

However, by the majority, the full court granted an appeal to the State, and stated the following thesis: "State Tax on Circulation of Goods and Services - ICMS is levied on the monthly basic subscription charge, collected by the telephone service providers, irrespective of the allowance of minutes granted or not to the user".

STF – Reduction of ISSQN Rate according to article 88 of the ADCT

On 9/19/2016, the Plenary Session of the Federal Supreme Court (STF) decided, through ADPF 190, for the unconstitutionality of articles 190, §2 and 192, §§6 and 7, both of the Municipal Law No. 2.614/1997, of the Municipality of Instância Hidromineral de Poá, that removed taxes from the calculation basis of Tax on Services – ISS, thus reducing the amount to be collected as such tax, aiming at promoting the installation of new service providers in the municipality.

Briefly, Justice Edson Fachin, reporting judge, recognized the existence of formal defect in the municipal legislation, once the definition of the calculation basis of taxes is matter handled by supplementary law, as well as the existence of material defect, since the amendment to the calculation basis represented indirect reduction of the minimum rate.

For such reasons, by the majority of the votes, it has been established the following thesis: "The municipal law that provides on the exclusion of amounts from the ISS calculation basis out of the events set forth in the national supplementary law is unconstitutional, and it is also incompatible with the constitutional text, tax measure that indirectly results in the reduction of the minimum rate set forth in article 88 of the ADCT".

With this sentence, taxpayers that used to withdraw the taxes from the ISS calculation basis, according to provision of Municipal Law No. 2.614/1997, now should collect the tax with the calculation basis without discount. It is pointed out that this decision is ground for declaration of unconstitutionality of the other municipal legislations that contain the same content.

STF - ISSQN levied on the activities exercised by health insurances

On 9/29/2016, the 1st Panel of the Federal Supreme Court, when judging RE No. 651.703, matter 581, submitted to the General Repercussion system, had a position in the sense that the health assistance private plans operators perform service provision subject to the Tax on Services of Any Nature - "ISSQN", set forth in item III, article 156 of the CF/88.

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The specific case provides on the discussion of the legal business nature involved in the health plan agreements: warranty granted by operator and, when medical service is needed, it shall be provided by the network accredited by operator, or refunded to the benefit of the user; or service provision consisting in the intermediation of medical services provided by third-parties.

According to Reporting Judge, Justice Luiz Fux, the assignment of the operator is the obligation to provide fungible thing , related to cover costs through payment, being a service performed by other one. Along this line, the Panel, by the majority, construed the concept of service as broadly, similarly when defined the ISSQN levied on leasing operations in RE 547.245, and concluded for the ISSQN levied on the activities provided by the health plans.

STJ – Income Tax Levied on bonus shares

On 8/29/2016, the second Chamber of the Superior Court of Justice (STJ), when judging the Special Appeal (REsp) 1.443.516/RS, decided that the Tax Personal Income (IRRF) is due on the bonus shares issued after revocation of Decree-Law No 1.510/76 by Law No. 7.713/88.

The aforementioned decree granted the exemption of Tax Personal Income (IRRF) on sale of action that remained at least 5 years under the same ownership. In this sense, is peaceful the jurisprudence of the STJ to grant the right to exemption when the 5 years were completed before the promulgation of law No. 7.713/1988, which revoked the aforementioned exemption.

However, this appeal discussed the exemption on the issuance by the company of new shares for current shareholders, distributed proportionally among those considering the old shares already owned (bonus). It turns out that, in this operation, it is assumed that the new shares issued were acquired at the time of subscription or acquisition of the original shares.

Analyzing the controversy, the chamber, understood that the exemption provided for the Decree-Law No 1.510/1976, does not generate effects on the subsidized actions after the revocation perpetrated by the law. In this sense, it was decided that the IRPF is due in the actions of bonuses issued after the entry into force of law No 7.713/1988.

STJ – Positioning regarding a inicial term, for purposes of application of monetary adjustment in the administrative proceedings of refunding

On 9/28/2016, Justice Og Fernandes, member of the Second Panel of STJ, issued decision in REsp No. 1603270/RS, to reaffirm the change of positioning of the Panel regarding the initial term of delay of the Tax Authority, for purposes of application of monetary adjustment of IPI book-entry credits.

In casu, the Justice emphasized that the term of 360 days provided in article 24 of Law No. 11.457/07, so that Tax Authority concludes the administrative proceeding of use of credits is not confused with the timeframe to give cause to the application of monetary adjustment and interest on arrears, provided that the said credits may be used by taxpayer, even before the administrative proceeding of refunding.

Thus, when the legal term exceeds 360 days, the monetary adjustment and the interest on arrears should

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be applied since the protocol of request for refunding, once it refers to effective manifestation, on the part of taxpayer, of the intention of use the credit, constituting the illegitimate resistance of the Public Treasury.

TRF1 (Federal Regional Court) - Redirection of tax execution, based on the irregular dissolution of the company

On 8/22/2016, the 8th Panel of the Federal Regional Court of the 1st Region, when judging AI No. 0064937-29.2015.4.01.0000/MT, removed the redirection of the tax execution to one of the partners, under the statement that the certificate of the court official was not conclusive, with regard to the irregular dissolution of the company.

In casu, the redirection of the tax execution occurred for supposed irregular dissolution of the company, originally executed, based on the certificate of the court official of failed attempt of summons, in accordance with Precedent 435 of STJ.

However, for Reporting Judge of the case, Appellate Judge Maria do Carmo, the certificate of court official, in the specific case, was inconclusive concerning the companies´whereabouts and, therefore, could not be used as evidence to give cause to the irregular dissolution and, consequently, Tax Authority´s request of redirection of the execution to partners.

Thus, the Collective Body positioned itself for the impossibility of redirecting the tax execution, since it has not been proved in the case records: (i) the irregular dissolution of the company, for purposes of application of responsibility set forth in article 135, item III, of CTN, (ii) the abuse of personality, misuse of personality and patrimonial mistake, pursuant the terms of article 50 of Civil Code.

COSIT Consultation Solution No. 131/2016 – Partial Dissolution of Company - Return of Capital in Cash - Tax levied on Individual´s Income

On 9/13/2016, it was published the Consultation Solution No. 131, issued by the General Coordination of the Taxation System (COSIT), which disposes on the possibility of Individual Income Tax (IRPF), in the event of partial dissolution of company, with return of partner´s capital in cash.

According to the said Consultation Solution, the return of the capital in cash constitutes the refund of capital previously applied, added of a gain. Thus, the income of the partner that withdraws itself from the company shall constitute the amount that exceeds the cost of acquisition of the corporate interest and shall be reflected in the accounts of legal entity´s net equity.

Effectively, the incidence or not of tax on the income shall depend on the nature of each of the accounts of the net equity, according to the progressive table effective in the month of payment / credit of income or with the taxation applicable to the calendar year of composition of the distributed profit, in the case of allocation of profits.

COSIT Consultation Solution No. 67/16 – Simplified Taxation System (Simples Nacional) - Taxation of the capital gain

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the Taxation System (COSIT), which disposes on the taxation of the capital gain, earned by legal entities opting for Simples Nacional, in the disposal of goods of the non-current asset (fixed/permanent).

According to understanding explained by COSIT, and which already was object of expression in the Consultation Solution No. 376/2014, the product of the sale of goods of the non-current asset that are not related to the core activity of the company does not comprise the concept of "gross revenue" of the legal entity taxed in the regime of Simples Nacional.

Thus, these operations should be taxed in an independent form, upon application of the rate, currently at 15% on the positive difference between the amount of disposal of such goods and the respective acquisition costs, reduced by the accrued depreciation, amortization or completeness, even the company does not maintain bookkeeping.

COSIT recalls, even as of January 1, 2017, that the new progressive rates of the Tax on the Income shall become effective, which shall be levied on the capital gain occurred as of this date, varying from 15% to 22.5%.

COSIT Consultation Solution No. 132, of September 1, 2016 - Compensation of credit related to social security contributions declared in GFIP - Rectification

Consultation Solution No. 132, of 9/1/2016 analyzed the necessity or not of rectification of Gfip, in the event of compensation of social security credit resulted from final and unappeallable court decision.

In view of the questioning on the possibility of performing compensation, in the own Payment Form of FGTS and Information to Social Security (Gfip), of contributions that became unenforceable by virtue of final and unappeallable court decision, Consultation Solution established an understanding that the compensation of social security credit, including that resulted from final and unappeallable court decision, meets the provision of articles 56 to 60 of the Normative Instruction RFB No. 1.300, of 2012, and should be preceded of rectification of Gfip in which obligation was declared.

COSIT Consultation Solution No. 128, of August 31, 2016 - Actual Profit - Tax incentive for technology research and development of technology innovation

Consultation Solution No. 128, of 8/31/2016, analyzed the provision inserted in Law No. 11.296, of November 21, 2005, which provides on the tax incentives for technology innovation.

In face of the inquiry on the possibility of deduction of the expenses to be incurred for the execution of activities of technology innovation, of the calculation basis of IRPJ and CSLL, pursuant the terms of article 17, item I, of Law No. 11.196, of 2005, the Consultation Solution established the understanding that the use of tax benefit that Chapter III of Law No. 11.196, of 1995, refers to is not allowed, by legal entity that is not vested with liability, risk, management, and control of the result of the projects with research and development of technology innovations.

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In addition, it provides on the tax benefit that Chapter III of Law No. 11.196, of 2005, refers to is allowed regarding:

a) To the expenses classified as operational expenses by the IRPJ legislation, performed by the legal entity in its own projects of technology research and development of technology innovation executed by itself, provided that in national territory; and
b) To the expenses with technology research and development of technology innovation contracted in the Country with university, institution of research or independent inventor that item IX of article 2, of Law No. 10.973, of December 2, 2004, refers to.

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Team responsible for the preparation of that Tax Bulletin:

Henrique Philip Schneider (philip.schneider@schneiderpugliese.com.br)
Eduardo Pugliese Pincelli (eduardo.pugliese@schneiderpugliese.com.br)
Cassio Sztokfisz (cassio.sztokfisz@schneiderpugliese.com.br)
Diogo de Andrade Figueiredo (diogo.figueiredo@schneiderpugliese.com.br)
Flavio Eduardo Carvalho (flavio.carvalho@schneiderpugliese.com.br)
Rafael Fukuji Watanabe (rafael.watanabe@schneiderpugliese.com.br)
Rodrigo Tosto Lascala (rodrigo.tosto@schneiderpugliese.com.br)
Maria Carolina Maldonado Kraljevic (mariacarolina.maldonado@schneiderpugliese.com.br)
Rodrigo Leal Griz (rodrigo.griz@schneiderpugliese.com.br)
Laura Benini Candido (laura.candido@schneiderpugliese.com.br)
Thomas Ampessan Lemos da Silva (thomas.ampessan@schneiderpugliese.com.br)
Ana Cristina de Paulo Assunção (anacristina.assuncao@schneiderpugliese.com.br)
Vanessa Carrilo do Nascimento (vanessa.nascimento@schneiderpugliese.com.br)
Sergio Grama Lima (sergio.lima@schneiderpugliese.com.br)
Pedro Paulo Bresciani (pedro.bresciani@schneiderpugliese.com.br)
Renata Ferraioli (renata.ferraioli@schneiderpugliese.com.br)
Pedro Guilherme Ferreira Bini (pedro.bini@schneiderpugliese.com.br)
Roberta Marques de Moraes (roberta.moraes@schneiderpugliese.com.br)
Tatiana Ergang Barros (tatiana.barros@schneiderpugliese.com.br)
Henrique Rodrigues e Silva (henrique.silva@schneiderpugliese.com.br)
Igor Fernando Cabral dos Santos (igor.cabral@schneiderpugliese.com.br)
José Filipe Rodrigues Camargo Guimarães (josefilipe.guimaraes@schneiderpugliese.com.br)
Nando Machado Monteiro dos Santos (nando.machado@schneiderpugliese.com.br)
Fernanda Alfonsi Picado (fernanda.picado@schneiderpugliese.com.br)
Guilherme Almeida de Oliveira (guilherme.oliveira@schneiderpugliese.com.br)
Vivian Gomes Ishii (vivian.ishii@schneiderpugliese.com.br)

r. Cincinato Braga 340 , 9º andar
São Paulo , SP , Brasil , 01333-010
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 , Brasil , 70715-900
tel +55 61 3251 9403 , fax +55 61 3251 9429

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