Tax Bulletin

03

Municipal Tax Council of São Paulo

Specific tax report n° 03 • Year I • August 2014

Dear Readers:

The purpose of this **Tax Bulletin of the Municipal Tax Council** is to update our clients and interested parties on the main issues being discussed and decided in relation to administrative litigation matters of the city of São Paulo.

In this edition, we will address four different issues within Case Law and Legislation.

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Souza, Schneider, Pugliese e Sztokfisz Advogados law firm is available to its clients should they have any questions related to this Tax Bulletin

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Regulation of the monitoring activities and of the relationship with Major Taxpayers of the City of São Paulo.

Normative Rule no. 6 of the Municipal Finance Office of São Paulo was enacted on April 25, regulating the monitoring activities and of relationship of the Municipal Government with the Taxpayers of greater potential and actual collection interest.

The monitoring activity, carried out by the Municipal Revenue Suboffice (SUREM), consists of analyzing the tax, accounting, and registration information available at databanks of the Municipal Finance Office. For such, in addition to analyzing the Taxpayers' economic sectors and groups, the municipal body may instruct them as to the performance of their tax liabilities, as well as inform them and request clarifications on any identified divergence.

In turn, the establishment of a permanent relationship with the major Taxpayers aims at offering a distinguished service by the Municipal Administration and facilitating the performance of the requests for information and documents made by the Tax Authorities. Within this context, the activities will be focused on making technical meetings possible between the Taxpayers and several sectors of the Municipal Finance Office, as well as instructing them on issues of greater importance regarding tax matters, such as information related to the Registry of Unsettled Municipal Debts (CADIN), obtaining certificates issued by the Municipal Finance Office, recording debts as collectible, status of administrative proceedings, and clarifications as to tax legislation in general.

Lastly, it should be pointed out that the identification of any divergence regarding the data analyzed through the monitoring actions will not constitute proof of the non-performance of tax liabilities, that is, it will not interfere in the Taxpayers' opportunity to present voluntary admission of legislation violation, pursuant to article 138 of the CTN (in practice, what needs to be verified is whether the Taxpayers will be entitled to this benefit).

The possibility of a partnership formed by engineers having different specialties being considered a professional partnership.

This is an Administrative Tax Proceeding (PTA 2013-0.307.721-0) discussing the collection the service tax (ISS) levied on revenues earned by the Taxpayer after no longer being classified as a professional partnership.

After the assessment notices were objected to, they were upheld in full by the administrative Trial Court and, in the trial of the Appeal filed by the Taxpayer, the 4th Judgment Chamber, by majority decision, found the claim to be valid, therefore canceling the requirement of the ISS on revenues earned by the Appellant, at the time the Taxpayer was classified under a Professional Partnership.

Preliminarily, the 4th Judgment Chamber, decided to hear the Appeal. The reason is that, although articles 79 and 80 of Law no. 14,107/2005 ruled out the CMT's jurisdiction to analyze administrative proceedings related to the Taxpayers' loss of classification as a Professional Partnership, the Judging Councilors found

that as the objected requirement was related to the issue of assessment notices, article 53 of the mentioned law authorizes the hearing of the Appeal.

As to the merits, the 4th Judgment Chamber found that the activities the Tax Authorities view as distinguished, namely: i) assistance to alternatives and development and negotiations with port authorities; ii) the market study and the study of technical and economic feasibility of the implementation of a port terminal; and iii) the prospect of logistic opportunities for the supply of coal, as they can be classified as engineering activities, pursuant to article 7 of Federal Law no. 5,194/66, may not be considered to be distinguished for purposes of having the Taxpayers lose their classification as a Professional Partnership.

Moreover, the Chamber affirmed that the fact that the partners had different specialties within the engineering field does not characterize their skills as being distinguished, since Law no. 13,701/2003 makes no distinction of "engineering" services.

Thus, the 4th Judgment Chamber decided that the Taxpayer, at the time of the assessments, met the requirements established by Law no. 13,701/2003 for the classification as a Professional Partnership, and so considered the collection of the ISS based on fixed tax rates to be sufficient, pursuant to article 15 of the mentioned law, therefore canceling the tax assessments.

The non-levy of the ISS on revenues earned by Airline Companies arising from the withholding of services rendered by INFRAERO, no-show and cancelation fees, interest from sales paid in installments and the sale of airline miles to partner companies abroad.

This is an Administrative Tax Proceeding (PTA 2013-0.341.578-6) discussing the collection the service tax (ISS) levied on revenues earned from different activities carried out by Airline Companies.

After the Assessment Notices were objected to, they were upheld in full by the administrative Trial Court and, in the trial of the Appeal filed by the Taxpayer, the 3rd Judgment Chamber, by unanimous decision, found the claim to be partially valid, canceling the requirement of the ISS on the following revenues: (i) withholding at source of services rendered by INFRAERO; (ii) no-show and cancelation fees; (iii) interest revenues from sales paid in installments; and (iv) the sale of airline miles to partner companies abroad.

With regard to the withholding at source of the services rendered by INFRAERO, this is a requirement for the collection of the ISS relative to the fee that said body charges from airline companies for using airports. The 3rd Judgment Chamber found that due to the tax immunity granted to INFRAERO, the services rendered by that body may not be taxed.

As to the no-show and cancelation fees, the 3rd Judgment Chamber found that such revenues have a compensation fine nature arising from the passenger's breach of contract, and may not be taxed by the ISS.

In the case of revenues of interest with installment sales, the Municipal Tax Authorities considered that such sums derived from the intermediation of the business with a financial institution, classifying the activity under item 10.02 of the Service List contained in Law no. 13,701/2003, demanding the collection of the corresponding ISS. However, based on the contracts presented by the Taxpayer, the 3rd Judgment Chamber found that the analyzed activity was not similar to that of intermediation, since the installment was granted

by the Taxpayer himself, without the help of any financial institution, thus canceling the assessments related to the revenues.

As to the sales revenues of airline miles to partner companies located abroad, the 3rd Judgment Chamber ruled out the charge of the ISS on such sums, since it found that they derive from the same purchase and sale of airline miles between the companies, and is not characterized as service offered to clients.

The possibility of assessment and ascertainment of the tax basis of the ISS due at the import of services from the PIS-Import.

This is an Administrative Tax Proceeding (PTA 2013-0.346.293-8) discussing the collection of the ISS charged on the import of services acquired by the Taxpayer, whose tax basis was ascertained through amounts paid as PIS-Import.

After the assessment notices were objected to, they were upheld in full by the administrative Trial Court and, in the trial of the Appeal filed by the Taxpayer, the 2nd Judgment Chamber, by unanimous decision, found the claim to be groundless, thus upholding the collection of the ISS on the import of services.

Due to insufficient documentation presented by the Taxpayer, the 2nd Judgment Chamber found that the setting of the due ISS basis according to the amount paid by the Taxpayer as PIS-Import was adequate.

The reason for this is that, according to article 7 of Federal Law no. 10,865/2004 and of article 1 of IN SRF no. 572/2005, it is possible to find the amount remitted abroad, with the charge of the due Income Tax, an amount corresponding to the price of the rendered service, which, in turn, is the tax basis of the ISS, pursuant to article 7 of Complementary Law no. 116/2003. In other words, the decision considered the assessment of the ISS-Import based on the calculation of amounts corresponding to the PIS-Import, prior to the deduction of the Income Tax, to be legitimate.

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