Tax Bulletin

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The Sao Paulo Tax Court

Specific tax report n° 28 • Year V • October 2014

Dear Sirs:

The purpose of the publication of **Tax Bulletin # Tax and Fee Court of the State of São Paulo** is to update our clients and interested parties on the main issues being discussed and decided in this court ("TIT/SP").

In this 28th edition of our newsletter, we will comment on topics relative to: (i) the transfer of credit authorized by the Tax Authorities and subsequently challenged under the claim that it was generated fraudulently; (ii) the right to ICMS credits on acquisitions of intermediary products consumed in the manufacture process, and lastly, (iii) to the interpretation divergence of the tax legislation between the State Tax Authorities and the Federal Revenue Office as to the tax classification of the goods traded for ICMS deferral purposes.

Click over the topics below to directly access each text:

ICMS – Transfer Transactions of Previously Accumulated Credit – Subsequent Verification of Fraud, Willful Intent and Simulation of the Seller of Accumulated Credit– Error in the Election of the Tax Debtor

Right to ICMS credits on intermediary material, even if not immediately and fully consumed.

ICMS - Lack of Payment of the Tax for Improper Application of the Deferral of the Tax Assessment.

Souza, Schneider, Pugliese e Sztokfisz Advogados law firm is available to its clients should they have any questions on the above matters.

Enjoy your reading!

SOUZA, SCHNEIDER, PUGLIESE e SZTOKFISZ ADVOGADOS

ICMS – TRANSFER TRANSACTIONS OF PREVIOUSLY ACCUMULATED CREDIT – SUBSEQUENT VERIFICATION OF FRAUD, WILLFUL INTENT AND SIMULATION – ERROR IN THE ELECTION OF THE TAX DEBTOR

This is a Tax Assessment Notice and Fine Charge ("AIIM") issued from the accusation of alleged lack of payment of the ICMS tax, throughout 2003 and 2004, through special collection slip, corresponding to the amount received as accumulated ICMS credit, supported by invoices issued by another company, whose transfer of credit was canceled by the State Treasury Office (SEFAZ) due to its generation and appropriation for having been obtained in a fraudulent manner.

The Taxpayer, in his Defense, claimed error in the identification of the tax debtor, arguing that the State Tax Authorities could not have issued an AIIM against a dissolved legal entity; that the tax statute of limitations and prescriptive periods imposed due to the elapse of the five-year statutory period between the occurrence of the taxable event and the tax assessment; and that the ICMS credits were only appropriated by the company because the Tax Authorities themselves had authorized such an act. Furthermore, he claimed the unconstitutionality of the SELIC interest rate, as it represents remuneration interest. Despite these arguments, the trial court ruled for the validity of the AIIM.

An Appeal was filed by the taxpayer, repeating the defense arguments, which was later granted by the Rapporteur's opinion, who verified an error in the election of the tax debtor, so the other issues discussed in the claim were therefore dismissed.

However, the tax claim requested the case records for examination and dismissed the appeal, since the legal entity responsible for the establishment was liable for its obligations after it had been dissolved. At the end, it was decided that the AIIM would be reduced and only the preliminary arguments of tax prescriptive periods were granted.

Dissatisfied, the taxpayer then filed a Special Appeal in the same sense as that of the previous appeal. The decision was unanimous, granting the claim, in order to cancel the tax requirement. It was affirmed that the appropriation of credits accumulated by the Taxpayer was recognized by the Tax Authorities as a regular operation.

In addition, what was also affirmed was the lack of willful intent, fraud, or simulation by the Appellant Taxpayer, who could not be liable for a violation attributed to third parties (seller of the accumulated credits), especially as there is no evidence of the participation of both in the alleged irregularities.

RIGHT TO ICMS CREDITS ON INTERMEDIARY MATERIAL EVEN IF NOT IMMEDIATELY OR FULLY CONSUMED.

This is a Tax Assessment Notice and Fine Charge ("AIIM") discussing the right to the appropriation of ICMS credits in relation to intermediary products that are not fully and instantly consumed in the manufacture process.

In an Appeal, part of the AIIM was canceled when considering that the acquired material could be equated with an intermediary product, once its consumption in the productive process of the taxpayer was proven.

Disagreeing with the appellate decision of the Judgment Chamber, the State Treasury filed a Special Appeal under the claim that the mere material wearing out does not enable the credit deriving from its acquisition, adding that only the material fully and instantly consumed in the productive process allows the use of credit arising from its acquisition. In turn, the taxpayer claimed for the maintenance of the appealed appellate decision.

In the trial of the Judgment Chamber, the Rapporteur examined the Treasury Appeal and, as to the merits, granted the Treasury's argument that the mere wearing out of the material does not allow one to consider it as secondary or intermediary material, that is, it must necessarily be fully and instantly consumed.

Viewing otherwise, Judge Eduardo Perez Salusse's opinion was that the "the criterion of immediate consumption or wearing out was not even considered by Normative Decision CAT 01/2001, which expressly exemplifies 'files', 'cutting disks' and other items that depend on evidence in the specific case." In this sense, he did not examine the appeal and subsequently dismissed it based on article 100, I of the National Tax Code (CTN) and on Normative Decision CAT no. 1/2001." By majority opinion, the position of Mr. Salusse prevailed for the Treasury's appeal not to be examined.

Due to above and with all due respect, we believe that the decision rendered by the Superior Chamber of Taxes and Fees, although not examining the Special Appeal of the Treasury, already indicated a favorable position that challenges the mandatory obligation of immediate and full consumption of an intermediary product in the industrial process.

ICMS - LACK OF PAYMENT OF LACK DUE TO IMPROPER APPLICATION OF THE DEFERRAL OF THE TAX ASSESSMENT.

This is a Tax Assessment Notice and Fine Charge ("AIIM") issued from the accusation of lack of payment of the ICMS tax as a result of undue application of the deferral of the tax assessment.

The discussion arises from interpretation divergence of the tax legislation, between the State Tax Authorities and the Federal Revenue Office of Brazil – SRFB, on the tax classification of the goods traded by the taxpayer for purposes of application of the ICMS deferral.

In the past, when the TIPI (Levy table of the Tax on Manufactured Products) approved by Decree no. 2.092/96 was still in force, the taxpayer consulted the SRFB on the correct classification of its products, and received a reply that such products should be classified under the position 2208.90.00 of the TIPI table.

However, the State Tax Authorities, interpreting otherwise, disagreed with the tax classification adopted by the taxpayer and claimed the deferred tax, with the payment of a fine. In a trial court trial, the Tax Assessment Notice was upheld on the grounds that a federal administrative decision could not rule out the charge of a state tax.

An Appeal was filed, which was dismissed by the Judgment Chamber through a casting vote of the Chamber's president. The Rapporteur ruled for upholding the case records, with identical arguments to those of the previous trial, while the opinion of other judges was divergent, in the sense that there would be a connection to SRFB's answer.

A Special Appeal was then filed, supporting the connection of the State Treasury to the SRFB. The Rapporteur, however, viewed otherwise, in the sense that there was an alteration to the TIPI table after the inquiry was submitted, and that therefore it should have submitted a new inquiry to demonstrate that there was no significant change.

Again the case records were requested for examination, recognizing the connection to the reply issued by the SRFB's, since, although there was a change to the TIPI table after the inquiry was made by the taxpayer, there was no alteration to the instruments relevant to the case, and that in the inquiry made to the SRFB, it had addressed exactly the same arguments as those brought by the State Treasury, and fundamentally rejecting them, classifying the products otherwise.

The Superior Chamber of the Tax and Fee Court of the State of São Paulo (TIT/SP) examined the taxpayer's Special Appeal and granted it by majority opinion, canceling the Tax Assessment Notice.

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