tax bulletin

109

The Administrative Council of Tax Appeals

Specific tax report nº 109 • Year X • April 2017

Dear Readers:

The purpose of this **Tax Bulletin # Administrative Council of Tax Appeals** is to inform our clients and those interested in the main issues being discussed and decided in this court.

In this 109th issue of our note, we comment a decision in which the Administrative Council of Tax Appeals (Conselho Administrativo de Recursos Fiscais - CARF) decided that, for the purposes of assessing capital gains, the investment cost shall include amounts capitalized after the first purchase.

We also comment a decision in which CARF ruled for the necessity of describing in detail the conducts of third parties listed as jointly liable for tax credits.

To directly access the text referring to each of these topics, click on:

Capitalizations – Investment cost – Capital gains

Third-party liability – Duty of individualization

Schneider, Pugliese, Sztokfisz, Figueiredo e Carvalho Advogados is available to its clients should they have any questions on the decisions commented on in this newsletter.

Enjoy your reading!

The content hereof belongs to Schneider, Pugliese, Sztokfisz, Figueiredo e Carvalho Advogados law firm and is destined to the firm's clients. Total or partial reproduction without prior authorization is forbidden. In case you no longer wish to receive this memorandum or wish to include another person to receive it, please send an e-mail with such request to contato@schneiderpugliese.com.br.

schneider, pugliese,

’tax bulletin 109

The Administrative Council of Tax Appeals

Specific tax report nº 109 • Year X • April 2017

"CAPITALIZATIONS – INVESTMENT COST – CAPITAL GAIN
For the purposes of calculating capital gain, the investment cost shall comprise all amounts the investor incurred to obtain and maintain the shares of the investee, including capitalization after the purchase."

The decision on point deals with the amounts comprised in the calculation of the purchase cost for the computation of capital gain on the transfer of shares.

In the actual case, the taxpayer was successor by merger of an entity that transferred shares valued by equity method and purchased with goodwill. In turn, the investee, of which shares were transferred, had relevant investments in a third entity, and had also booked goodwill related to said investment.

Therefore, when the entity that succeeded the taxpayer purchased the shares whose transfer triggered the charge on point, it booked goodwill related to this direct investment and the goodwill previously booked by the investee, which corresponded to its indirect investment.

When transferring these shares, the entity that succeeded the taxpayer included both the goodwill related to the investee (direct investment) and the goodwill the latter had booked (indirect investment) in the purchase cost for the purposes of computation of capital gain. Since it is subject to real profits regime, it excluded the goodwill from the calculation basis of IRPJ and CSLL.

After examining said transaction, tax agents understood the goodwill generated on the purchase of shares (direct investment) could not have been included as purchase cost, since the investee was merged into the investor. Therefore, the goodwill could only be used for tax purposes for the deduction of the counter entry related to the amortization.

In its defense, the taxpayer argued that the fact that the investee's equity was merged into the investor does not limit the use of goodwill only to the deduction of expense as counter entry of goodwill amortization, since the merged company was a holding whose only asset was the investment held at another entity and said third company was not merged by the investor.

The DRJ did not accept these arguments presented by the taxpayer, since it claimed there was no way to prove the goodwill used as purchase cost (and not amortized for tax purposes) derived from the investment held by the merged company, instead of from said entity directly. In other words, as one may notice, DRJ did not deny the possibility of the goodwill being used as intended by the taxpayer; it only understood there was no way to prove the alleged origin of said goodwill.

The taxpayer then filed a voluntary appeal, presenting a valuation report that demonstrated the origin of goodwill, which was related to the investment held by the merged entity, not to such entity directly. The taxpayer strengthened this report by demonstrating it was a non-operational holding whose only asset was the investments that triggered the goodwill on point.

Considering these arguments, CARF granted relief to the voluntary appeal, having understood there could be no economic reason for the goodwill on point other than the future profitability of the merged entity's investee, so said goodwill could not be amortized for tax purposes, but only be included as purchase cost for the purpose of calculating capital gain.

The content hereof belongs to Schneider, Pugliese, Sztokfisz, Figueiredo e Carvalho Advogados law firm and is destined to the firm's clients. Total or partial reproduction without prior authorization is forbidden. In case you no longer wish to receive this memorandum or wish to include another person to receive it, please send an e-mail with such request to contato@schneiderpugliese.com.br.

schneider, pugliese,

tax bulletin

109

The Administrative Council of Tax Appeals

Specific tax report nº 109 • Year X • April 2017

"THIRD-PARTY LIABILITY. DUTY OF INDIVIDUALIZATION. When there are several taxpayers in an infraction notice, the tax agent that lists them as such must individualize the conducts that triggered the imposition of fines, explaining what actions of each subject led to the practice of the infractions identified."

The case on point concerns Infraction Notices issued to charge Import Duty, IPI-Import, PIS-Import and Cofins-Import related to calendar years 2011 to 2013, added by interest and fines, derived from the accusation of hiding the actual purchaser in foreign trade transactions, underpricing on import, use of incorrect tariff code, import without license and inaccurate description of imported products.

Because of these accusations, the shareholders and managing shareholders of the legal entities were listed as jointly liable, in accordance with sections 124, 128 and 135 of the National Taxation Code ("CTN"). The Tax Agent claimed the shareholders had performed, individually or collectively, acts that led to the situations indicated as taxable events for the taxes evaded, and also that there was common interest in the conducts adopted.

The charge was refuted and the records were sent to the Judgment Office of the Internal Revenue Service, which denied relief to the opposition presented by a managing shareholder and did not accept the other oppositions, which were presented after the deadline.

The interested parties filed Voluntary Appeals and the CARF did not analyze the appeals related to the oppositions that had been filed after the due date, and analyzed only the appeal of the managing shareholder. It decided to cancel his/her tax liability, under the argument that the imputation of liability was based merely on the fact that the individual on point held shares in the entity.

In the winning vote, the Reporting Counselor stated that, although the infraction notice indicated several illegalities, the Tax Agent failed to indicate specifically how the shareholder participated in the shameful acts listed by the infraction notice.

Therefore, the Panel unanimously decided to exclude the taxpayer from the charge, for understanding the liability requirements provided by sections 124, 128 and 135 of the CTN were not met, since the tax report did not indicate the conduct the managing shareholder had practiced that could have led to the practice of the infractions imposed to the company.

The Schneider, Pugliese, Sztokfisz, Figueiredo e Carvalho Advogados Team (contato@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

The content hereof belongs to Schneider, Pugliese, Sztokfisz, Figueiredo e Carvalho Advogados law firm and is destined to the firm's clients. Total or partial reproduction without prior authorization is forbidden. In case you no longer wish to receive this memorandum or wish to include another person to receive it, please send an e-mail with such request to contato@schneiderpugliese.com.br.