tax bulletin

101

The Administrative Council of Tax Appeals

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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 101st edition of our newsletter, we will comment on a decision in which the Administrative Council of Tax Appeals ("CARF") analyzed the rules applicable to the payment of profit sharing and hiring bonuses, and concluded that social security contributions may be levied if said rules are not followed.

We also analyzed an appelate decision in which the Superior Chamber of Tax Appeals ("CSRF") ruled for the attribution of subsidiary tax liability to third parties who were deemed to be de facto executive officers and shareholders of audited legal entities, receiving, in addition, fines for the fraudulent interposition of persons.

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

Social Security Contributions – Profit Sharing and Hiring Bonuses – Payment Rules

Tax Liability – Penalties – Fraudulent Interposition

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!

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"STATUTE OF LIMITATION. CORRECT COUNT. APPLICATION OF THE POSITION ADOPTED BY THE SUPERIOR COURT OF JUSTICE (STJ). CARF BINDING PRECEDENT No. 99.
Section 62, § 2, of CARF's Internal Rulings sets forth that the decisions rendered by the STJ under the regime of section 543-C of the Code of Civil Procedures shall be respected. In Special Appeal No. 973733/SC, that court ruled that the application of the term provided by section 150, § 4 of the CTN is conditioned to the performance of advance payment of the tax subject to assessment by homologation. Otherwise, section 173, I of the CTN applies.
PROFIT SHARING. PLR. LEGAL REQUIREMENTS.
Profit Sharing is not a way for companies to save taxes, that is, this is not a mechanism to replace the possible payment of allowance, awards, bonuses, commission etc., hiding the nature of salary. The regular and legitimate payment of PLR, as provided by section 7, XI of CF/88, is the one that respects simultaneously all the rules set forth by Law No. 10,101/2000.
In this case, the amounts paid as 'PLR' violate legal provisions and are in fact other allowances that supplement the employees' salary. Therefore, they are subject to the contribution charged in these records.
HIRING BONUS.
The analysis of the contractual amendments presented in the records evidences this concerns an advance with the nature of salary for the employee to provide services for at least a specific period and also to respect all the targets set by the company. Hence, the employee only has the right to the payment received in advance if he/she complies with the labor agreement, under the rules established. Otherwise, he/she would have to return the advance payment, which clearly mischaracterizes the nature of indemnification and the lack of labor relation allegedly existent.
FINE FOR NONCOMPLIANCE WITH ANCILLARY OBLIGATION
Since the taxation of PLR and Hiring Bonus is correct, the fine shall be kept as provided by law, due to noncompliance with the ancillary obligation to declare these taxable bases on GFIP, according to section 32, IV of Law No. 8,212/1991.
LATE-PAYMENT INTEREST ON EX OFFICIO FINE.
The fine with punitive nature is comprised in the main tax obligation (section 113) and, thus, in the tax credit (section 139); so it is subject to the application of late-payment interest (section 161, all of the CTN)."

This decision concerns Notices of Infringement issued to charge social security contributions imposed on amounts paid to employees as profit sharing ("PLR") and as hiring bonus. As consequence, a fine was imposed due to the omission of taxable bases from GFIP.

In the notice, the Internal Revenue Service alleged there were irregularities in the payment of PLR by the inspected company (i) because the employees' union did not participate in the elaboration of the Plan; (ii) due to the lack of "clear and objective rules" to grant such benefits, with "incomprehensible" calculation indexes; (iii) because the frequency of such payments was higher than the one allowed by legislation; and (iv) due to the existence of different plans applicable to the same contingent of employees. Therefore, the company failed to meet the criteria provided by Law No. 10,101/00 for the PLR to be excluded from the calculation basis of social security contributions in charge of employers.

Moreover, the notice of infringement also dealt with the payment of hiring bonus. The Tax Agent considered that amounts credited under such title have the characteristics of remuneration, so they should be considered contribution salary, being included in the calculation basis of the taxes in point.

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In its Administrative Defense, the financial institution being charged alleged, as a preliminary argument, that part of the charge was subject to the statute of limitation, adopting the term provided by section 150, § 4 of the National Taxation Code ("CTN"). It also claimed for the nullity of the assessment, since the recalculation of contributions encompassed the amounts paid to all employees, concerning not only the employees that received PLR more frequently than allowed by law. The taxpayer claimed the calculation basis of the contribution was incorrect. Concerning hiring bonus, the company aimed to characterize such amount as having the nature of indemnification, not remuneration, claiming it is not related to the provision of services within the employment relation, being prior to the employment agreement.

The first-instance decision fully kept the charge. The Judgment Office of the Internal Revenue Service ("DRJ") understood that, since there was no advanced payment concerning the PLR and hiring bonus in particular, the provision of section 150, § 4 of the CTN – term of statute of limitation being counted from the occurrence of the triggering event – could not apply. The rule to be adopted was section 173, I – term counted from the first day of the year following the one in which the assessment could have been made.

Concerning the merits, the judges sustained that the amounts paid as PLR in discordance with the applicable legislation are part of the contribution salary. They also understood that the hiring bonus was an advanced type of remuneration, with the nature of a compensation used to attract employees to the company, so such amounts should also be computed in the calculation basis of social contributions and of social security contributions.

Disagreeing with such decision, the taxpayer filed a Voluntary Appeal, repeating the arguments presented in its initial defense. However, the Administrative Council of Tax Appeals ("CARF") partially maintained the infraction notice and the DRJ decision for understanding there was proof of irregularities related to the payments made by the company as PLR and hiring bonus, for considering the fine for noncompliance with ancillary obligations (omission of taxable basis on GFIP) was due and for accepting the argument related to the statute of limitation for part of the charge.

When presenting his arguments, the reporting counselor stated that the payment of PLR should not be used as a "way for the company to save taxes", as a way to reduce the tax burden imposed on the payroll. The participation of entities that represent employees in the creation of the plan and in the definition of the targets related to such payment is essential for it to comply with the deduction requirements provided by Law No. 10,101/00, and this was not present in the actual case. Also according to CARF, the mischaracterization of the plan was confirmed by the fact that it was paid more often than allowed by law.

The decision stated there were two different plans for the payment of amounts not related to the regular remuneration, corresponding to bonuses, which overlapped. Besides that, the payments were made using abstract calculation, not agreed upon prior to the assessment period, but instead during such period.

Concerning the company's argument that the inclusion of all amounts paid as PLR and hiring bonus as calculation basis would be a material fault concerning the quantitative aspect of the assessment and that the recalculation of the taxable basis should at least be limited to the amounts paid more than twice a year, the reporting counselor repelled such argument, claiming that "the payment of PLR either takes place in accordance or against the law; it cannot be 'partially in accordance with law'".

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Regarding the statute of limitation, that administrative court understood that, since there was advance payment of social security contributions concerning the periods assessed (even if not on the amounts of PLR and hiring bonuses in particular), the term of statute of limitation should be counted in accordance with section 150, § 4 of the CTN – immediately from the occurrence of the taxable event.

Finally, since the charge was kept concerning PLR and hiring bonus, the decision also kept the reflex fine due to noncompliance with ancillary obligation, which referred to the omission of taxable bases from GFIP.

"TAX LIABILITY. SECTION 124, I, OF THE CTN. COMMON INTEREST. APPLICATION. Tax liability can be attributed to third parties because of the existence of common interest in the situation that consists of a taxable event of the main obligation, in accordance with section 124, I of the CTN, when it is possible to demonstrate, by an assemble of converging factual elements, that the ones being charged not only were de facto shareholders of the inspected company, but also established joint businesses between such company and other companies they owned.

TAX LIABILITY. SECTION 135, III OF THE CTN. DE FACTO ADMINISTRATOR. FRAUDULENT INTERPOSITION. APPLICATION. Tax liability can be attributed to third parties because of the practice of acts with abuse of powers or infringement of law, articles of incorporation or association provided by section 135, III of the CTN when it is possible to demonstrate, by an assemble of converging factual elements, that the ones being charged held the condition of de facto administrators of the inspected company, as well as there was fraudulent interposition of an individual among its shareholders.

TAX LIABILITY. SIMULTANEOUS APPLICATION OF SECTIONS 124, I AND 135, III OF THE CTN. POSSIBILITY. There is no obstacle to the attribution of tax liability considering simultaneously sections 124, I and 135, III of the CTN.

LATE-PAYMENT INTEREST ON EX OFFICIO FINE. The main tax obligation comprises tax and proportional ex officio fine. Late-payment interest at the Selic rate is imposed on the tax credit formalized, including the ex officio fine."

This decision concerns a Special Appeal in which the 1st Panel of CSRF discussed, among others, the responsibility and joint liability of shareholders ("Shareholders") for taxes and fines due by the company in which they hold shares ("Company").

The Notices of Infringement were motivated by the Company's alleged fraudulent omission of revenues. According to Tax Agents, it transmitted economic-fiscal statements declaring to be "inactive", but it carried out significant financial transactions in the same period and resold goods. Such occurrence triggered the increase of the ex officio fine calculated on taxes charged on the revenue considered omitted.

Concerning the attribution of liability to shareholders for the credits formalized against the Company, Tax Agents understood that the individuals indicated in the Company's Articles of Incorporation were interposed, so the liability for credits being charged was attributed to de facto shareholders and administrators, based on sections 124, I, and 135, II and III of the CTN.

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In other words, Tax Agents considered that the de facto shareholders and administrators: (i) had "common interest" in the situation that triggered the taxable events which resulted in the charge (omission of revenue) – section 124, I of the CTN; and (ii) practiced acts with abuse of powers or infringement of law or articles of incorporation or association – section 135, I and II of the CTN.

The Shareholders refuted the attribution of responsibility for the credits claiming that: (i) "common interest" shall be interpreted as legal interest, not economic interest, that is, only taxpayers can be considered jointly liable under section 124, I of the CTN (for instance, only co-owners of a real estate could be considered jointly liable for IPTU, since both practice its triggering event); (ii) there was no evidence of malicious conduct; and (iii) there was undue disregard of the Company's legal personality, which is not allowed because there is no rule governing the only paragraph of section 116 of the CTN.

The Shareholders' claims were rejected by the DRJ and by CARF, which kept their liability for the same original grounds: the interposition of individuals authorizes the attribution of liability for the credits, based on sections 124, I and 135, II and III of the CTN.

The Shareholders appealed to the CSRF, which accepted the Special Appeal, but unanimously denied relief for understanding the factual and legal requisites to apply sections 124, I and 135, II and III of the CTN were present.

When interpreting specifically the expression "common interest", the CRSF understood, in the vote drafted by the Reporting Counselor, that "such provision cannot refer to the mere economic interest all shareholders have in the company's result; there must be a more direct relation of interest with the facts that trigger the tax charge". Therefore, the CSRF refuted the argument that "common interest" had to be interpreted as "legal interest", since it understood there should be a "more direct relation" with the legal tax event for the application of section 124, I of the CTN, which was not solely economic.

In other words, the CSRF adopted an extremely vague and imprecise criterion to interpret section 124, I of the CTN, which does not contribute to the promotion of legal safety. Such definition results in the possibility to use section 124, I of the CTN as a mechanism to guarantee the payment of the tax credit and mischaracterizes the mechanism of attribution of joint liability that had been created by the CTN and the logic of segregation of the liability of shareholders and companies that should guide business activities.

Concerning section 135, II and III of the CTN, the CSRF considered there was infringement of law able to trigger the attribution of liability, and that there is no incompatibility in considering the Shareholders jointly liable (section 124, I) and responsible (section 135, II and III), since the actual case allows the application of both rules.

Finally, that court understood the Company's legal personality was not illegally disregarded, since the attribution of liability for the credits took place under sections 124, I and 135, II and III of the CTN.

Based on these arguments, the 1st Panel of CSRF kept the Shareholders as defendants in the charge.

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101

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