

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 99th edition, we address 11 different issues related to Jurisprudence, Regulations and Consultation Solutions.

To directly access each text, click

## **Jurisprudence**

**STF - General Repercussion - Removal of presumed ICMS credit from IRPJ and CSLL calculation base**

**STF - General Repercussion - Tariff amounts of TUST and TUSD in the ICMS calculation basis**

**STJ - Repetitive Appeal - IPTU prescriptive period and legal installment as a suspensive cause of prescription**

**STJ – Repetitive Appeal – Redirection of tax enforcement to managing partner in irregular dissolution**

**STJ - CIDE impact on software licensing**

**STJ – Incidence of social security contribution on the distribution of profits agreed without the participation of the labor union**

## **Regulations and Consultation Solutions**

**Brazil and Argentina sign protocol amending agreement to avoid double taxation between countries**

**Interpretative Declaratory Act RFB n. 5/2017**

**Extended the deadline to join the Special Program for Tax Regularization**

**COSIT Consultation Solution n. 378/2017**

**Regulatory acts change taxation on oil exploration, development and production activities**



# tax bulletin

# 99

Tax bulletin nº 99 • year X • August 2017

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 - Removal of presumed ICMS credit from IRPJ and CSLL calculation base**

On 08/19/2017, the Plenary of the Supreme Federal Court (“STF”), examining the Extraordinary Appeal (“RE”) n. 1.052.277/SC, acknowledged by majority that there was no general repercussion of the impact of the inclusion of presumed credit tax on Goods (“ICMS”), arising from state tax incentive in the tax calculation based on Legal Entities income (“IRPJ”) and Social Contribution on Net Income (“CSLL”), because it is not a constitutional matter. Thus, the power to set the matter will be the Superior Court of Justice (“STJ”).

### **STF - General Repercussion - Tariff amounts of TUST and TUSD in the ICMS calculation basis**

On 08/07/2017, the STF Plenary, when analyzing the RE n. 1.041.816/SP, acknowledged by majority that there was no general repercussion on the inclusion of the Transmission System Use Rate (“TUST”) and the Tariff for the Use of the Distribution System (“TUSD”) in the ICMS calculation basis levied on the circulation of electric energy. The plenary session was understood to be an infra-constitutional matter and, therefore, should be defined by the Superior Court of Justice.

### **STJ - Repetitive Appeal - IPTU prescriptive period and legal installment as a suspensive cause of prescription**

On 08/09/2017, the 1st Section of the Superior Court of Justice (“STJ”), when analyzing Especial Appeal (“REsp”) n. 1.658.517/PA and n. 1.641.011/PA, unanimously decided on the allocation of these resources as representative of the controversy to discuss (i) the initial term of the prescriptive period for IPTU collection; and (ii) the possibility of the legal installment of the tax debt being considered as a suspensive cause of the prescription count.

Thus, the resources will be judged together and with erga omnes effect for a final decision from the Superior Court on the issues.

### **STJ – Repetitive Appeal – Redirection of tax enforcement to managing partner in irregular dissolution**

On 08/09/2017, the 1st Section of the STJ, when analyzing REsps n. 1.643.944/SP, n. 1.645.281/SP and n. 1.645.333/SP decided unanimously by the allocation of these resources as representative of the controversy to discuss whether the redirection of Tax Enforcement, when the irregular dissolution, the concurrence is required (i) the office manager occupation, with company’s administration powers, at the time of the irregular dissolution; with (ii) the exercise of management powers on the date on which the event generating the unpaid tax liability occurred.

Accordingly, the appeals will be jointly adjudicated and with erga omnes effect for final decision of the STJ on the requirements for redirecting the tax enforcement to the managing partner in cases of irregular dissolution, in light of art. 135, item III, of the National Tax Code (“CTN”).

### **STJ - CIDE impact on software licensing**

On 08/15/2017, the 2nd Panel of the STJ in judging the REsp n. 1.650.115/SP and n. 1.642.249 / SP, discussed the correct incidence of the Intervention Contribution in the Economic Domain (“CIDE”) on software

licensing before the advent of Law n. 11.452/2007, since it included in Law no. 10.168/2000 the CIDE exemption in this specific case.

Minister Mauro Campbell, rapporteur of the cases, applied the specialty criterion to prevail the concept of technology transfer adopted by article 2 of Law no. 10.168/2000 and not that of Law no. 11.452/2007 (“Software Law”). For him, the most current law can not be understood as merely interpretative, but as a rule of exemption with temporal restraint - a limitation that is valid.

In these lines, the 2nd Panel of the STJ ruled that it was impossible to grant CIDE exemption on software licensing retroactively for periods prior to Law no. 11.452/2007.

## **STJ – Incidence of social security contribution on the distribution of profits agreed without the participation of the labor union**

On 08/08/2017, the 2nd Panel of the STJ, when judging REsp n. 1.350.055/RS, decided on the incidence of Employers’ Social Security Contribution on the amounts passed on to employees in the face of a profit and results distribution agreement drawn up without the participation of the labor union.

Faced with the consolidated understanding of the Panel for the need to observe the limits of the regulatory law to ensure the exemption of the contribution on the distribution of profits and results, the rapporteur, Minister Og Fernandes, understood that the agreement signed for the transfer of funds would not have complied with need for legal intervention of the union, so that would not be possible to recognize the exemption.

Accordingly, the Panel, unanimously, decided on the incidence of Social Security Contribution on the distribution of profits and results defined in agreement without the participation of the labor union, due to non-compliance with a regulatory rule.

## **Regulations and Consultation Solutions**

### **Brazil and Argentina sign protocol amending agreement to avoid double taxation between countries**

On 21/07/2017, the Federative Republic of Brazil and the Argentine Republic signed a Protocol modifying the Convention to Avoid Double Taxation and Prevent Tax Evasion in Matters of Taxes on Income.

The Protocol brings important improvements to the text of the agreement by setting limits, previously non-existent, on the level of taxation at source in specific categories of income, modifying the method for avoiding double taxation on the Argentine side, and include a specific article to deal with capital taxes.

### **Interpretative Declaratory Act RFB n. 5/2017**

On 21/08/2017, the Interpretative Declaratory Act of RFB N. 5 of 2017 was published, which provides for the coverage of debts to be included in the Special Tax Regularization Program (PERT).

Under the RFB’s interpretation, the rectification and cancellation of the Compensation Claims (PER/DCOMP) will be subject to admissibility and approval by the Federal Revenue Service of Brazil.

In addition, the extinct debits, even if under condition of their subsequent approval, can not be included in the PERT.

### **Extended the deadline to join the Special Program for Tax Regularization**

Provisional Measure n. 798 of August 30, 2017, which extends the period of adhesion to PERT for September 29, 2017. Discounts and the number of installments remain unchanged.

According to the Normative Instruction of RFB n. 1.733, dated August 31, 2017, the value of the entry for the adhesions made in September can be paid from September to December, the installment referring to August being cumulated with the installment referring to September.

### **COSIT Consultation Solution n. 378/2017**

It was published, on August 31, 2017, Consultation Solution n. 378 of the General Taxation Coordination ("COSIT"), regarding the treatment of taxes on reimbursement made by a legal entity in Brazil to its parent company or legal entity of the group domiciled abroad in relation to the remuneration of resident member in Brazil of the legal entity domiciled in Brazil.

COSIT understood that such reimbursement would not be subject to Withholding Income Tax, PIS-Import and COFINS-Import on the operations because it is not income of the company domiciled abroad nor of consideration of services rendered by this company.

### **Regulatory acts change taxation on oil exploration, development and production activities**

On 18/08/2017, the Decree n. 9.128/2017, which extended to December 31, 2040 the Special Customs Regime for the Export and Import of Assets Destined for Research and Development of the Oil and Natural Gas Reserves - REPETRO was published.

In addition, Provisional Measure no. 795 of 2017 established the suspension of payment of federal taxes levied on imports and domestic acquisitions of raw materials, intermediate products and packaging materials used in the production process of final products destined for oil exploration, development and production activities, natural gas and other fluid hydrocarbons. Pursuant to legislation, taxation by IPI, PIS, COFINS, PIS-Import and COFINS-Import are suspended.

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