Tax Bulletin

The Administrative Council of Tax Appeals 76

Specific tax report n° 76 • Year VII • July 2014

Dear Readers:

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

In this 76rt edition of our newsletter, we comment on the decision under which the Tax Appeal Board (Conselho Administrativo de Recursos Fiscais, CARF) canceled the issue of a letter related to PIS (Social Integration Program) and COFINS (Social Security Funding Contribution), since it understands that the corporate reorganization undertaken by the company has not occurred solely for tax savings purpose.

Further, we comment on the decision where the Superior Tax Appeal Chamber (Câmara Superior de Recursos Fiscais, CSRF) held that the amounts paid to a corporation with principal place of business in Brazil as fees for the use of the brand of imported foreign goods should not be added to the customs fee.

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

PIS and COFINS – Corporate reorganization – Business Segregation - Business Purpose

Customs Valuation – Adjustments with fees Brand Usage Fees Paid to a Brazilian Company

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

Enjoy your reading!

SOUZA, SCHNEIDER, PUGLIESE e SZTOKFISZ ADVOGADOS

"Subject: SUBJECT: GENERAL TAX LAW STANDARDS
Calculation period: 01/01/2008 to 12/31/2008
ASSESSMENT NOTICE. ABUSE OF LAW. BUSINESS SEGREGATION. REQUIREMENTS.
The segregation of different business operations into two entities is admissible - even if yields tax savings - when performed prior to the taxable events and when it reveals clear extra-fiscal gains arising from the actually segregated performance of such business, under independent structures, and with separate management teams, personnel and facilities."

The final decision in question addresses assessment notices issued for the tax credit requirement related to the Contribution to the Social Integration Program ("PIS") and the Social Security Funding Contribution to ("COFINS"), claiming the existence of abusive tax planning, characterized by artificial reduction of the revenues earned and, consequently, the PIS and COFINS calculation basis.

In general terms, the Authority found that the taxpayer engaged in a corporate reorganization, splitting into two companies and segregating its business and industrial activities, previously carried out as a single unit. After such split, the industrial subsidiary started selling its products on an exclusive basis to the parent trading company, charging insignificant prices, thus artificially reducing its gross revenue and yielding a mismatch between the amounts paid for PIS and COFINS and those expected if the taxes levied had adhered to the one-phase regimen to which the taxpayer would be subject if the aforementioned split had not occurred.

Thus, to determine the calculation basis for the aforementioned contributions, the tax authorities considered the amounts charged by the trading company to the resellers.

The taxpayer's challenge claimed nullity of the notice (i) based on the lack of legal grounds of the assessment notice, breaching the legality principle, and (ii) due to the failure to expressly mention the breached regulation, being based only on alleged breaching of constitutional principles, without any concrete justifications whatsoever. Further, the taxpayer argued that the corporate reorganization had business purpose, in order to reduce costs by allowing the company to focus its business operations, thereby enhancing their competitiveness.

The Judgment Office of the Brazilian Federal Revenue Service upheld the Challenge and canceled the issue of the letter, claiming that corporate reorganization promoted by the company occurred prior to the enactment of Act No. 10.147/2000, which established the one-phase regimen for PIS and COFINS in the production chain, which would disqualify the alleged abusive tax planning related to the split.

When deciding on the appeal on its own motion, CARF has likewise understood that the previous nature of the corporate reorganization undertaken by the taxpayer excludes the tax planning claim referred to by the assessing authorities. It also claims that, between the split and the enactment of Act No. 10.147/2000, the taxpayer was subject to the cumulative regimen of the aforementioned contributions, which is even more burdensome, rendering completely unreasonable any claims of tax savings.

Thus, it has concluded that the corporate reorganization of the company did not have the sole purpose of reducing the one-phase taxation; CARF, by unanimous vote, has dismissed the Mandatory Appeal.

"SUBJECT: ADMINISTRATIVE TAX PROCEEDING
Calculation period: 10/06/1993 to 09/09/1994
CUSTOMS VALUATION. FEES. PRICE SETTING.
The amounts related to the goods subject to valuation, which the buyer is required to pay - either directly or indirectly - on a "Brand Usage Fee" basis should not be added to the price actually paid or payable for the imported goods. The fees are based on the technical support for sales in Brazil, and these are not included in the financial content of the goods upon internalization."

The present decision addresses the Assessment Notice issued to enforce the federal taxes levied on imports, plus a mandatory fine and arrears interest, on the grounds that the amounts paid as fees to the company owning the brand in Brazil should have been added to the calculation basis of the aforementioned taxes.

Indeed, the Taxpayer - an importing trading company - used to import cars on behalf of Company X, which owns the brand of the cars in Brazil, and resold these to the dealers of Company X. The invoices issued by the Taxpayer to such dealers included the price for the vehicles, plus a fee related to "authorization for the use of the brand" against Company X. According to the Tax Agent, the fee should have been added to the customs value of the imported vehicles. Thus, the Tax Agent issued the Assessment Notice against the Taxpayer to enforce the taxes in question, rendering Company X the joint taxable person.

After the Taxpayer obtained a favorable decision with the 3rd Chamber of the former 3rd Taxpayers Board, the Treasury Attorney's Office (Procuradoria-Geral da Fazenda Nacional, PGFN) filed a Special Appeal with CSRF, claiming that the aforementioned fee should be added to the customs value, and that the Taxpayer and Company X were jointly liable entities.

When reviewing the Appeal, the Reporting Board Member understood, in short, that the amounts charged by Company X as a brand usage, advertising and training fee relieved the tax burden of the Exporter of vehicles abroad, to the benefit of its brand and consisting of indirect transfer of amounts. According to him, the expenditures with the brand promotion would be the obligation of the Exporter (parent company), and any expenditure incurred in this connection by Company X in Brazil would represent gain to the Exporter. Thus, he concluded that such amounts should have been added to the customs value for Taxpayer, and voted for acknowledging the Special Appeal filed by the PGFN.

The Council Member reporting the Concurring Opinion has understood otherwise, initially noting that compensation received by Company X concerned its performance related to the provision of services to the dealer network in Brazil and the assignment of the brand usage, not being responsible for the sale of the Exporter's (parent company) products. Thus, as the Board Member sees it, nothing indicated that such amounts consisted of commission fees paid to the Exporter.

He added that COSIT Decisions 14/1997 and 15/1997 stipulate that the amounts paid by dealers to the brand usage owners and for staff training should increase the customs value, thus rendering Article 8, 1, "a" of the AVA inapplicable to the case at hand.

Thus, the rapporteur of the Dissenting Opinion made clear that - similarly to his previous decisions on the matter - the services were rendered after the imports, as well as the brand usage assignment, and all

this has occurred after the goods entered the country and after customs clearance. For these reasons, he concluded that it was not reasonable to claim a close relationship between the Taxpayer and Company X, rendering the joint liability claim and the addition to the customs value inapplicable to the matter.

In view of this, he voted for the dismissal of Special Appeal filed by PGFN, with the concurrence of a majority of the Board Members.

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