

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 97th edition of our newsletter, we will comment on a decision in which the Administrative Council of Tax Appeals (“CARF”) declared the nullity of assessment due to a substantive defect in the assessments of the PIS and COFINS, as it viewed that new calculations and spreadsheets would be required in order to correct the ascertainment of the tax credits.

We also commented on a decision in which the Superior Chamber of Tax Appeals (“CSRF”) recognized the presumptive credit of the agro-industry calculated on the value of manufactured products and not on the value of acquired input.

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

Legal Presumption of Omission of Earnings – PIS/COFINS – Nullity of Tax Assessment Notice – Substantive Defect – Quantitative and Timely Criteria

Agroindustry – Presumptive Credit – Ascertainment – Manufactured Product

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!

“MATTER: CORPORATE INCOME TAX-IRPJ

Fiscal Year: 2007

OMISSION OF INCOME. CASH CREDIT BALANCE. RECOVERY BY THE EXCLUSION OF DEBITS FROM THE CASH ACCOUNT.

For the neutrality of the accounting records, banking transactions of taxpayers, mainly cleared checks and the payment of expenses through bank checking accounts, with debit entry from the Cash account, are to have the corresponding credit record of this account through exit in order to effect the payments. The lack of this record legitimates the exclusion of amounts unduly recorded as entries, with the ensuing recovery of the mentioned account, meaning that the ascertainment of cash credit evidences omission of income.

The reduction of the recorded amounts is also correct, when the result of the investigation, determined by the trial Judge, found that part of the debit entries from the Cash account, challenged by the Tax Authorities, also had credit entries from the same account, at identical amounts. It was then evidenced that such amounts merely moved through the Cash account, without any tax effect.

MATTER: CONTRIBUTION TO PIS/PASEP

Fiscal Year: 2007

ERROR IN THE QUANTITATIVE AND TIMELY ASPECTS. IMPOSSIBILITY OF SEPARATION OF THE CORRECT VALUES. LACK OF GROUNDS OF THE ASSESSMENT.

In the event of error in the quantitative and timely criteria of the assessment, and in case it is impossible, in the case at issue, to separate the correct values without the preparation of new calculations and spreadsheets and the application of new criteria for the assessment, the latter may not prevail.

MATTER: CONTRIBUTION FOR THE FUNDING OF THE SOCIAL SECURITY COFINS

Fiscal Year: 2007

ERROR IN THE QUANTITATIVE AND TIMELY ASPECTS. IMPOSSIBILITY OF SEPARATION OF CORRECT VALUES. LACK OF GROUNDS OF THE ASSESSMENT.

In the event of error in the quantitative and timely criteria of the assessment, and in case it is impossible, in the case at issue, to separate the correct values without the preparation of new calculations and spreadsheets and the application of new criteria for the assessment, the latter may not prevail.”

The decision in question deals with Tax Assessment Notices issued for the collection of the Corporate Income Tax (“IRPJ”), the Social Contribution on the Net Income (“CSLL”), the Social Contributions on Gross Revenue, composed of Contribution to the Employee Profit Distribution Program (“PIS”) and of the Contribution for the Funding of the Social Security (“COFINS”), plus late payment interest and ex-officio fine.

The Tax Authorities verified the recording of several debit entries from the Taxpayer’s Cash account, mainly cleared checks that were issued by the Taxpayer himself, without the corresponding Credit record of the same amounts, meaning that it was not demonstrated that it was a mere bookkeeping movement of such amounts by the Cash.

Therefore, the Tax Authorities recalculated the balance of the Cash account, carrying out the assessment of IRPJ and CSLL, as well as of the PIS and COFINS on the ascertained cash credit balance. Said conduct allegedly resulted in the presumption of omission of income, provided for in article 12, §2, of Law-Decree no. 1,589/77.

In an objection, the assessed Company claimed the following, in sum, (i) limitation to the right of defense, given the impossibility of identifying the mentioned checks, which had been rejected; (ii) violation of articles 823 and 924 of Decree no. 3,000/99 (Income Tax Regulation-“RIR/99”), since the Tax Authorities rejected

all the entries made in the Cash account which referred to the bank movement, indiscriminately, and without considering the Company's bookkeeping; (iii) the Cash account conforms to its bank statements; and, lastly, (iv) requested the performance of an investigation.

The Federal Revenue Judgment Office ("DRJ") converted the trial into an investigation in order to verify the possibility of each accounting entry subject of the rejection having its respective credit entry. According to the outcome of that investigation, 154 values in which it was possible to identify accounting credit entries of the Cash account were excluded from the recovery of the Cash account.

When hearing the objection, the DRJ reduced the IRPJ and CSLL assessments in accordance with the result of the investigation, and the PIS and COFINS assessments were completely ruled out by the DRJ due to error in the quantitative and timely criteria of the ascertainment of such contributions.

The CARF, when examining the matter, corroborated the interpretation of the Tax Authorities and determined the maintenance of the rejected amounts, with the IRPJ and CSLL already reduced. In relation to the PIS and COFINS, the CARF upheld the position that, given the substantive defect in the timely and quantitative criteria of the ascertainment of the contributions, such assessments are to be fully ruled out.

The Rapporteur Councilor noted in his vote that although the PIS and COFINS' periodicity is monthly, the periodicity considered by the assessment was quarterly, similar to the assessment of the IRPJ and CSLL. The separation of the amounts would imply new calculations and new spreadsheets, as well as the application of other criteria, which would constitute innovation in the assessment. Furthermore, the ascertainment methodology of the cash credit balance should start from the initial balance plus debits, less credits in said account. Thus, it was considered that the PIS and COFINS ascertainment incurred an irreparable defect, due to substantive defect in the timely criteria and to quantitative criteria. Therefore, the DRJ's decision was upheld, in which the PIS and COFINS' assessments were fully canceled and the IRPJ and CSLL assessments were partially upheld.



“MATTER: CONTRIBUTION FOR THE FUNDING OF THE SOCIAL SECURITY – COFINS

Ascertainment period: April 1, 2006 to June 30, 2006

AGROINDUSTRY. PRESUMPTIVE CREDIT. ASCERTAINMENT. MANUFACTURED PRODUCT.

The presumptive credit dealt with in article 8 of Law no. 10,925/2004 corresponds to 60% or 35% of its tax basis due to the nature of the product which the agroindustry released and not the origin of the input it applied to obtain it. Special Appeal of the Taxpayer Granted”

The decision in question refers to the Special Appeal filed with the purpose of overturning the decision rendered by the CARF, which dismisses the taxpayer’s Voluntary Appeal, in order to confirm the rejection of COFINS’ credits at the acquisition of cattle.

In an appeal, the taxpayer claimed, based on the indicated paradigms, that the tax rate applicable on the presumptive credit of PIS and COFINS is to be determined in relation to the manufactured product and not to the acquired product, as unduly recognized in the appealed decision.

When hearing the matter, the Third Panel of the Superior Chamber of Tax Appeals (“CSRF”) claimed that, with the enactment of article 33 of Law no. 12,865/2013, the lawmaker stated the interpretative nature of §10, of article 8, of Law no. 10,925/2004, recognizing the right to presumptive credit on production, as established in article 8, § 3, item I, of Law no. 10,925/2004.

Therefore, by unanimous decision, the taxpayer’s Special Appeal was fully granted in order to recognize the right to presumptive credit equivalent to 60% of the basic tax bases provided for in the heading of article 2 of Law no. 10, 637/2002 and in the heading of article 2 of Law no. 10.833/2003.



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