

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 107th edition, we address 13 different issues related to Jurisprudence, Regulations and Consultation Solutions.

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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!

Jurisprudence

STJ – Unenforceability of the limitation imposed to the compensation of social security contributions

On 6/11/2018, the 2nd Panel of the Superior Court of Justice (“STJ”), when judging the Special Appeal (“Resp”) No. 1.223.317, reaffirmed its case law in the sense that the law applicable in the compensation of taxes is that effective at the moment of the filing of the demand, not being acceptable the application of supervening law.

For Ministers composing the Panel, as the suit was filed on 12/26/2008, it would not be longer applicable the limitation contained in article 89, § 3 of Law No. 8.212/91, according to which compensation cannot exceed the amount equivalent to 30% of that to be collected in each competence.

This is because, having the provision been revoked by the Provisional Measure (“MP”) No. 449, further converted into Law No. 11.941/09, which effectiveness started on 12/4/2008, the compensation of social security contribution is no longer subject to the mentioned limitation.

TRF1 – Illegality of the application of the confiscation in the event of under-billing of the value of the product in the import declaration

On 3/27/2018, the 7th Panel of the TRF of the 1st Region (“TRF1”) when judging the Appeal No. 0014926-54.2010.4.01.3400, understood by the nullity of the administrative act that applied the confiscation of the good imported by the taxpayer, by virtue of under-billing of the value of the product in the import declaration.

For the Rapporteur, Appellate Judge Ângela Catão, followed by the other Appellate Judges composing the Panel, the sanction resulted from the conduct practiced by the taxpayer should be the fine of 100% set forth in article 108, sole paragraph, of the Decree Law No. 37/66, and not the withholding of the imported goods, in attention to the principle of the specialization of the rule and application of the construction more favorable to accused.

Thus, before the illegality of the application of confiscation by the Administration, it is possible taxpayer to seek for the reimbursement of the expenses with storage of the goods, due by virtue of the remaining by operation of the undue attachment, as authorized by article 927 of the CC.

JFSP – Preliminary injunction entitles to the maintenance in Reintegra until December

On 6/21/2018, the Judge of the 10th Federal Court of São Paulo, when appreciating the preliminary injunction in the Writ of Mandamus (“MS”) No. 2014721-50.2018.4.03.6100, ensured with the right of taxpayer to assess the credits related to the tax benefit of REINTEGRA, at the percentage of 2% on the export revenues until December of 2018.

On 5/30/2018, the Federal Government edited the Decree No. 9.393/18 to reduce the rate of the tax incentive from 2% to 0.1%. However, such abrupt revocation of the benefit constitutes indirect surcharge of the

tax charge without complying with the rights and warranties of the taxpayers, especially the principles of the previous year or 90-day holding period.

For the judge, there was indirect increase of the tax charge by the Executive Power, once the expiry of the minimum term established by the Constitution of the Republic is not fulfilled.

The said action is sponsored by the law firm **Schneider, Pugliese**, which is available to resolve any doubts related to the maintenance of the benefit during the year of 2018.

JFSP – Preliminary injunction ensures the right to compensation of monthly estimate of IRPJ and CSLL during the calendar year of 2018

On 6/22/2018, the Judge of the 1st Federal Court of Piracicaba/SP, when appreciating the preliminary injunction in the MS No. 5003957-75.2018.4.03.6109, removed the prohibition of article 74, § 3, item IX, of Law No. 9.430/96, with wording given by Law No. 13,670/18, in order to ensure the regular processing of the PER/DCOMPs presented by the taxpayer for the compensation of debts of estimates of IRPJ/CSLL assessed in the year of 2018.

On 5/30/2018, Law No. 13.670/18 was published, when introducing item IX in article 74, § 3, of Law No. 9.430/96, prohibited the compensation of IRPJ and CSLL with tax credits for companies that collect by the regime of actual profit by modality of monthly advances.

For the judge, Law No. 13.670/18 established the change of understanding in the half of the calendar year, which affects the principle of the legal security. Still, affirmed that article 3 of Law No. 9.430/96, when establishing that the payment form would be irreversible, created, for taxpayer, fair expectation that the tax regime would remain until the end of 2018. For this reason, the tax regime cannot be amended by the Union, unilaterally, as intended with law edited in May to reach the debits of IRPJ and CSLL estimates assessed during the whole calendar year of 2018.

The law firm Schneider, Pugliese is also sponsoring cases to question the said invalidity, being available to resolve all doubts related to the possibility of compensation of the estimates during the year of 2018.

The law firm **Schneider, Pugliese**, is also sponsoring cases to question the said invalidity, being available to clarify all doubts related to the possibility of compensation of the estimates throughout the 2018.

CSRF – Goodwill and vehicle company – Evidence of the necessity of use of the “vehicle company” in the intended operation

On 6/5/2018, the Superior Chamber of Tax Appeal (“CSRF”) rejected the Special Appeals of the Office of the General Counsel for the Federal Treasury (“PGFN”), in related cases, for understanding as legal the amortization of the goodwill by “vehicle company” (in the case, a holding), for having been established by virtue of corporate and regulatory impediments.

Still, the evidence through a report influenced on the said decision, that the operation, as performed, result in a higher tax encumbrance to taxpayer.

CSRF – PLR – established criteria cannot be generic

CSRF, by quality vote, rendered understanding for the maintenance of the requirement of social security contributions on the Profit Share Program (“PLR”), for understanding that the program established criterion particularly generic, which did not result in bonus for employees, for the individual compliance with the goals, but equally and regardless of the result observed by the company within the period. Criterion used by the company was related to the percentage of profitability, added of a fixed individual installment per employee.

Still, the Members observed the necessity of prior signature of the agreements by the company, for fruition of the benefit, and not in the end of each fiscal year.

CSRF – IRPJ and CSLL – deduction of expenses with samples, catalogs, incentives and events

Unanimously, CSRF recognized the possibility of a cosmetics company deducting the calculation basis of the IRPJ and of the CSLL expenses with samples of products, catalogs for disclosure, awards program to resellers and annual events to encourage sales, for referring to expenses required to the business activity of the company, which does not have physical stores.

CSRF – Profits abroad – profit availability in the assessment of the balance sheet

By quality vote, CSRF determined the maintenance of the collection of IRPJ and of CSLL, resulted from profits earned by controlled companies located abroad, because accepted the arguments of the PGFN, in the sense that the Provisional Measure No. 2.158/2001 authorizes the Federal Revenue of Brazil (“RFB”) to tax the profit earned abroad, made available to the controller residing in Brazil, in the assessment of the balance sheet (i.e., should there be or not distribution of dividends), which would be completely compatible with the Treaties to Avoid Double Taxation (“TDT”).

However, according to taxpayer’s arguments, the profits would only be available in Brazil in the distribution of dividends, in order to RFB would end to tax the asset increase of the controlled companies located abroad, which is prohibited by the TDTs.

Regulations and Consultation Solutions

Normative Instruction RFB No. 1.808/2018 - Special Program of Tax Regulation of Micro-Companies and Small Companies Opting for Simplified Taxation System - PERT-SN

On 6/4/2018, Normative Instruction RFB No. 1.808/2018 was published, which regulated the PERT-SN (established by the Complementary Law No. 162/2018), in which can be settled debts expired until 12/29/2017

and assessed in the form of the Simplified Taxation System or of the Collection System at Monthly Fixed Amounts of the Taxes covered by the Simplified Taxation System (“SimeI”) by the Individual Microentrepreneur (“MEI”).

Reductions vary from 90% to 50% of the interests on arrears and from 70% to 25% of the fines on arrears, ex officio or isolated, depending on the modality chosen by taxpayer. The adhesion to installment shall occur within the period between 6/4/2018 and 7/9/2018.

Normative Instruction RFB No. 1.810/2018 – Amendments to the restitution, compensation, refunding and reimbursement rules of taxes

By the Normative Instruction No. 1.810/2018, RFB amended the Normative Instruction No. 971/2009, which refers to the general rules of social security taxation, and the Normative Instruction No. 1.717/2017, which establishes the rules related to the restitution, compensation, refunding and reimbursement of taxes.

In relation to the Normative Instruction No. 971/2009, amendment consists of allowing that the withholding at source by the contracting company of services provided upon assignment of labor or contract, wither object of deduction, restitution, or compensation, through PER/DCOMP.

In turn, with regard to the Normative Instruction No. 1.717/2017, the following amendments are pointed out: (i) the prohibition to compensation of debts of monthly estimate of IRPJ and CSLL; (ii) possibility of the taxable person that assesses credit related to the social security contributions, use it in the compensation of social security contributions of subsequent periods, provided that such credit is liable to restitution or reimbursement and the taxable person uses the e-Social for assessment of the said contributions; (iii) possibility of the contracted company that uses the e-Social to assess the contributions of its employees, and which has balances of withholding on its behalf, to seek for its restitution, provided that the withholding is highlighted in the invoice, in the billing document or in the receipt of service provision and declared in the EFD-Reinf; and (iv) possibility of restitution of undue payment or higher of AFRMM or TUM, upon specific requirement available at RFB’s website.

Normative Instruction RFB No. 1.811/18 and Ordinance PGFN No. 43/18 - Rural Tax regulation Program - PRR.

On 6/20/2018, the Normative Instruction RFB No. 1.811/2018 was published, which along with the Ordinance PGFN No. 43/2018, published on 6/4/2018, extended the term for adhesion to PRR until 10/30/2018.

Interpretative Declaratory Act RFB No. 3/2018 - PIS and COFINS Credits

On 6/4/2018, the Interpretative Declaratory Act RFB No. 3/2018 was published, according to which the option of calculating PIS and COFINS credits, due to the depreciation of the good, at the rate of 1/48 per month on the acquisition value (Law No. 10.833/03), is applied only to the goods composing the fixed asset. Thus, it is defined that the credit cannot be appropriated by the legal entity after disposition of the good.



Ordinance MF No. 277/2018 - Binding effect Precedent CARF

On 6/8/2018, Ordinance MF No. 277/2018 was published, which attributed binding effect, related to the federal tax administration, the 65 Precedents of the Administrative Council of Tax Appeals (“CARF”).

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