Tax Bulletin

The Administrative Council of Tax Appeals 74

Specific tax report n° 74 • Year VII • May 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 74rt edition of our newsletter, we will comment on a decision in which the Administrative Council of Tax Appeals ("CARF") recognized that compensation through the DCOMP (Offsetting Statement), in which an unduly collected debt is informed and recognized by the Tax Authorities, characterizes the request for refund, for purposes of establishing the moment the statute of limitations on the refund/offsetting of the unduly collected debt starts.

We also analyzed a decision in which the CARF cancelled the assessment of IRPJ and CSLL relative to capital gain at the disposal of equity ownership, as it found that the tax planning, consisting of capital reduction through the return, by the book value, of the Company's assets and rights to individual shareholders, is lawful.

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

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.

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SOUZA, SCHNEIDER, PUGLIESE e SZTOKFISZ ADVOGADOS

THE ADMINISTRATIVE COUNCIL OF TAX APPEALS

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"MATTER: GENERAL TAX LAW RULES
Calendar year: 2002
PERDCOMP. RECOGNIZED UNDULY COLLECTED DEBT. UTILIZATION. STATUTE OF LIMITATIONS. INAPPLICABILITY
The five-year statute of limitations provided for in article 168 of the National Tax Code applies to the taxpayer's right to seek a refund or reimbursement. If the taxpayer filed the PERDCOMP (Request for Federal Tax Recovery, Refund or Offset) within the legal term and the unduly collected debt stated therein was recognized by the Tax Authorities, the new statute of limitations should not be applied to the PERDCOMP filed subsequently for the use of the credit right balance already recognized previously. The tax debtor may file the Offsetting Statement whose object is the credit ascertained or deriving from the payment made more than 5 (five) years ago, provided that this credit has been object of a request for refund or reimbursement filed with the RFB prior to the elapse of the mentioned term (IN SRF no. 1,300, of 2012, article 41, § 10)".

This decision refers to a Voluntary Appeal filed against a decision rendered by the Federal Revenue Judgment Office of Brazil ("DRJ"), which upheld a decision that did not ratify the offsetting made by the Taxpayer, on the grounds that the five-year term provided for in article 168 of the National Tax Code ("CTN") for the offsetting of taxes was not complied with.

In this case, the Taxpayer filed a PER/DCOMP in 2007 to offset part of the negative balance of the Corporate Income Tax ("IRPJ") computed in 2002 against other debts, and in such PER/DCOMP, the Taxpayer stated the totality of the IRPJ negative balance computed in 2002. Later, in 2009, the Taxpayer filed a new PER/DCOMP in order to offset other specific taxes by using the remainder of such negative balance.

In examining the case records, the Tax Authorities recognized the Taxpayer's credit right relative to the IRPJ negative balance computed in 2002, however, they opted for not ratifying the offsetting carried out in 2009, viewing that such offsetting did not occur within the five-year term provided for in article 168 of the CTN. According to the Tax Authorities, the unduly collected debt occurred on Dec. 31, 2002, and the statute of limitations started to count on Jan. 1, 2003, meaning therefore that the right to offset was lost in 2009. The Taxpayer then filed a Voluntary Appeal against this decision.

The Administrative Council of Tax Appeals ("CARF") found, based on article 41 of Normative Rule of the RFB no. 1.300/12, that the request for refund of the unduly collected debt may have been considered as performed with the offsetting made in 2007, since in such offsetting the Taxpayer informed the IRPJ negative balance computed in 2002 in full, and this balance was recognized by the Tax Authorities.

Therefore, the statute of limitations for using the unduly collected debt (article 168 of the CTN) was complied with and the Taxpayer may then use the IRPJ negative balance for future offsetting, even if this offsetting is made after the five-term following the payment of the tax has elapsed, as in the present case, in which the offsetting occurred only in 2009.

Based on this argument, the CARF granted the Voluntary Appeal, ratifying all the offsetting performed.

"Matter: Corporate Income Tax - IRPJ Date of taxable event: Aug. 31, 2007 CAPITAL REDUCTION. DELIVERY OF ASSETS AND RIGHTS TO THE PARTNERS AND SHAREHOLDERS BY THE BOOK VALUE. SITUATION AUTHORIZED UNDER ARTICLE 22 OF LAW NO. 9,430 OF 1996. LAWFUL PROCEDURE. Articles 22 and 23 of Law no. 9,249, of 1995, adopt the same criteria, both for business capital pay in and for the return thereof to the partners or shareholders, providing consistency to the legal system. Article 23 provides the possibility of individuals transferring to legal entities, as capital pay in, assets and rights for the value stated in the respective statement or by market value. Article 22, in turn, provides that assets and rights of the legal entity's assets delivered to the holder or to partners or shareholders as return of their equity in the business capital may be assessed by the book value of value market. Moreover, the fact that the shareholders have planned a reduction of the capital, entering into preliminary agreements dealt with in articles 462 and 463 of the Brazilian Civil Code, seeking the subsequent disposal of their shares to third parties, taxing capital gain on individuals, constitutes a procedure expressly provided for in the Brazilian law."

The decision in question deals with a Tax Assessment Notice issued for the collection of Corporate Income Tax ("IRPJ") and of Contribution on the Net Income ("CSLL"), relative to the calendar year of 2007, due to the capital gain computed at the disposal of shares.

In this case, the shareholders, individuals who indirectly held the control of a petrochemical company, entered into a share purchase and sale agreement, whose purpose consisted in the transfer of shares representing the share control of this company to another company of the same sector. The disposal under analysis was carried out through a Corporate Restructuring of the group, which may be summarized as follows:

Firstly, the shareholders decided to reduce the capital of companies of the group that held direct ownership interest in the mentioned petrochemical company, through the return of shares of such company to the individual shareholders, by the book value, pursuant to article 22 of Law no. 9,249/1995.

Thereafter, the shareholders fully paid in the shares received in company "A", solely organized for this purpose. Later, the shareholders paid in the shares of Company "A" in Company "B", whose sole asset was then formed by shares of Company "A". The shareholders then disposed of the ownership interest held in Company "B", meaning the acquiring company then held the indirect share control of the petrochemical company.

When performing the audit, the Tax Agent understood that the corporate restructuring described above consisted of a simulated act, seeking tax economy only. The reason is that if the disposal of the petrochemical company's control had been made directly by its holding company, the capital gain in this disposal would be taxed at 34%, and not 15%, as it in fact occurred, considering that the disposal of the equity ownership was performed by the individual shareholders.

Due to such, the Tax Agent disregarded, for tax purposes, the corporate operations and assessed the IRPJ and CSLL on the capital gain in the legal entity. Additionally, he included the individual shareholders as debtors of the tax liability, jointly liable for the all assessed taxes.

In an Opposition, the Taxpayer claimed that the initial purpose was to transfer the shares representing the share control directly to the acquiring company. However, the acquirer did not agree with this proposal and conditioned the completion of the transfer to the performance of a corporate restructuring, seeking to avoid possible legal risks with contingencies.

Furthermore, the Taxpayers defended that the capital return occurred in accordance with article 22 of Law no. 9,249/1995, which provides the possibility of this return of assets and rights be performed by the book value.

The Federal Revenue Judgment Office of Brazil ("DRJ") granted the Opposition, as it found that, in sum, operations carried out without any business purpose, aimed solely at reducing the payment of taxes, do not produce any effects with the Tax Authorities. The appellate decision rendered was subject of a Voluntary Appeal filed by the Taxpayers, who defended the legality of the tax planning and the need to cancel the assessment.

When examining these arguments, the Administrative Council of Tax Appeals ("CARF") recognized the legitimacy of the performed tax planning, as it found that "the Taxpayer may use any legal means in order to save taxes", when there is a legal cause and consistency with the content and form used, which in fact occurred in the case at issue.

Furthermore, the Councilors found that pursuant to article 22, heading, of Law no. 9,249/1995, the procedure carried out by the companies and their shareholders, whereby the assets and rights of the legal entity's assets are returned to the shareholders by the book value, is legally protected.

Therefore, the CARF, by unanimous vote, granted the Voluntary Appeal in order to cancel the assessment of the tax credit against the assessed petrochemical company and rule out the joint liability attributed to the shareholders.

Tax Bulletin

74

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