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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 90th edition, we address 15 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!

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Jurisprudence

Supreme Federal Court (STF) – Acknowledgment of General Impact on the CIDE (Contribution for Intervention in the Economic Order) applicable to remittances to foreign countries

On 07/05/2016, Justice Luiz Fux, of the Supreme Federal Court (STF), when reviewing the Special Appeal (RE) 928,943/SP, voted for the existence of General Impact regarding the delimitation of the constitutional profile of the Contribution for Intervention in the Economic Order (CIDE) applied to foreign countries.

In the case at hand, the discussion is limited to determining whether the aforementioned tax applies to amounts paid, credited, delivered, used or remitted to persons residing or with registered address abroad, as compensation arising from agreements related to technology usage and transfer licenses, technical and administrative assistance services and the like, as well as royalties of any kind.

The Justice decided for the nationwide relevance of the discussion and submitted it to the General Impact system, given these are aspects not yet reviewed by the Supreme Court, such as the potential requirement of the government action to legitimize the applicability of such Contribution.

STF – Order for suspension of the lawsuits related to the res judicata delimitation within the scope of the CSLL (Social Contribution on Net Earnings)

On 08/29/2016, Justice Edson Fachin, of the Supreme Federal Court (STF), when reviewing the dispute contained in the Special Appeal (RE) 949,297/CE, ordered the suspension of the processing of pending facts related to the delimitation of the res judicata in favor the Taxpayer, within the scope of the Social Contribution on Net Income – “CSLL”.

Thus, all pending lawsuits, either individual or collective, being processed in Brazil on the subject shall remain suspended until the matter submitted to the General Impact system at the Supreme Court level is reviewed.

STJ (Superior Court of Justice) – Impossibility of attachment of investment fund shares

On 08/03/2016 the Special Court of the Superior Court of Justice (STJ), by unanimous vote, in a repetitive appeal basis, decided for the the impossibility of attachment of Investmemt Fund shares. In this case, the Financial Institution filed the Special Appeal to ensure the possibility of attachment of fund shares for compliance with court orders.

The rapporteur of the appeal, Justice Marco Belizze, dismissed the Special Appeal, since he believes that the investment fund shares have the legal nature of securities (Art. 2 of Act No. 6,385/76), and may not be equated to cash.

Finally, the rapporteur also dismissed the Financial Institution’s claim that the requirement of depositing the amount due in cash is harmful to the investments due to the return loss. This is because he understands that the profits that the Financial Institution would fail to earn have no connection with the creditor, who may legally require a cash deposit.

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Thus, the case for the impossibility of attaching investment fund shares was established. There is no specific precedent on the subject under the tax law, but the aforementioned decision may guide future decisions on the matter within the tax context.

STJ (Superior Court of Justice) – Possibility of splitting and enforcing of portions of final administrative decisions

On 08/02/2016, the Second Panel of the STJ decided that an administrative decision may be split and the portion of a final decision may be included in the active debt and collected, since such amounts would no longer be subject to modification, at least at the administrative level.

In the case at hand, the splitting is related to the segregation of interest-on-arrears portion, whose applicability has been only partially upheld during in decision awarded by the Federal Tax Appeals Board ("CARF").

In short, the Justices decided that Article 42, sole paragraph, of Decree No. 70,235/1972 in provides that trial court decisions are final for the portion not subject to challenge. Thus, the uncontroversial portion should be subject to entry and collection, since such amounts would be subject to estoppel, at least at the administrative level.
In this vein, under Art. 21, § 1 of Decree No. 70,235/1972, which provides for the formation of segregated records in case of partial challenge, they have defined that splitting the collection by the National Treasury Department was not illegal.

Thus, based on this understanding, the procedure of the Treasury Department to split decisions in order to expedite the undisputed portion is now supported by jurisprudence. However, since this is the first panel discussion on the subject, there is still room to change the understanding and deepen the theory.

Further, it is important to point out that such understanding impacts the time limitation counting for the Treasury Department to collect undisputed credits, and taxpayers should be aware of this matter.

Query Solution Cosit #70, dated May 24, 2016 – Reimbursment, Transfers and Discounts – Advertising Agency – Simples Nacional

On 07/28/2016, the Query Solution #70, from the General Tax Coordination Office ("Cosit") was published, stating the understanding that the amounts received by an advertising agency for mere transfer to the media and suppliers on account of expenses incurred by account and order of advertisers and on behalf thereof constitute the result of a transaction with a third-party's account, therefore being excluded from the Simples Nacional calculation basis. However, any results from such transactions are deemed gross revenue of the advertising agency for the purposes of Simples Nacional.

The Query Solution also makes clear that the amounts charged to the advertiser for direct payments to media outlets and suppliers, made by the agency in its own behalf, constitute own transactions, being therefore included in the Simples Nacional calculation basis.

Moreover, the understanding that a discount for potential advance payments does not constitute an unconditional discount, but rather a financial discount, was established. Based on this premise, discounts for

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advance payments granted by an agency to an advertiser are included in the Simples Nacional calculation base determined by the agency, while discounts based on advance payments obtained by an agency from media outlets and suppliers are not included in the Simples Nacional calculation basis, since these do not integrate the concept of gross revenue.

Finally, Cosit made clear that the "self-withholding" of the Withholding Income ("IRRF") on publicity and advertising services is unenforceable, due to the impossibility of offsetting it with the Corporate Income tax ("IRPJ") payable by the agency.

Query Solution Cosit #120, dated August 17, 2016 – Pro-Labore and Profit Distribution – Services Provided to the Company – Social Security Contributions

Query Solution #120, dated 08/17/2016, reviewed the applicability of the Social Security Contribution to amounts paid to members that provide services to companies of whose shareholding structure they are members.

In view of the question of whether compensation exclusively on a profit distribution basis would be possible the Query Solution confirmed the understanding that a member providing services to the company is required to receive a portion of the proceeds in consideration for the services rendered to the company. Such proceeds are subject to the Social Security Contributions on the month on which these are paid or credited.

Furthermore, Cosit made clear that the itemization between the installments corresponding to profit distribution and installments paid for the work is mandatory, pointing out that any amounts paid as advance profit not yet recorded on the fiscal year's income statement shall be deemed pro labore.

CARF Ordinance No. 107, dated August 4, 2016 – Rapporteur Removal – Replacement Criteria

On 08/04/2016, Ordinance No. 107 was issued by the Federal Tax Appeals Board ("CARF"), which governs the continuation of a started trial in case of removal of the rapporteur Member, as well as the criterion from his/her replacement.

Per the Ordinance, in case of final removal of the rapporteur Member and the appeal trial has not been completed, the trial shall be resumed from the current stage, and the chairperson of the Trial Panel shall appoint an ad hoc rapporteur, who should preferably be one of the members that followed the vote issued by the removed rapporteur.

Internal Query Solution Cosit #19, dated July 18, 2016 – Insurance Indemnity – Capital Gains upon Property Divestiture

On August 5, 2016, the Internal Query Solution #19 was issued by Cosit, addressing the property acquisition cost when determining the calculation basis for the Individual Income Tax ("IRPF") applicable to the capital gains determined.

Cosit reviewed the query made by the Brazilian Federal Revenue Office ("DRF") about the procedure applicable to individual owners of a shed destroyed in a fire. The insurer paid an indemnity above the property purchase cost, and the proceeds were used to build a new shed. Subsequently, the taxpayer included the

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property in the books of a legal entity at an amount exceeding the book value.

Given this scenario, the DRF questioned (i) whether the building value should be computed at the property purchase cost, and (ii) since the amount received by the taxpayer as indemnity exceeds the property purchase cost, whether the purchase cost for purposes of determining the capital gain upon entering the property in the the corporate capital should be deemed zero.

When reviewing the issue, Cosit noted that the fire has not affected the property value. According to the Administrative Authority, the law does not provide for any changes to the property value due to the destruction of the improvements incorporated to the land. In turn, upon the construction of the new shed, the property value covered both the previous purchase cost and the value of the works done, as provided for in law.

Given this scenario, Cosit concluded that, if the amount for the company's shares in which the property has been entered correctly reflects the sum of the land purchase cost and the improvements embedded thereto, taxation based on capital gains would not be reasonable.

Normative Instruction No. 1,654, dated July 29, 2016 – BCB Circular Letter No. 3,805, dated August 1, 2016 - RERCT – Changes to the Funds Repatriation Regulations

Two normative amendments to the rules of the Special Foreign Exchange and Tax Regularization Regime ("RERCT") have been made, finally ending the discussion about the possibility of using repatriated funds to pay the tax and the regularization fine.

On July 29, the Normative Instruction No. 1,654 from the Brazilian Revenue Service ("IN RFB No. 1,654/16") was published, amending the IN RFB No. 1,627/16. It provides that the financial assets reported in the Foreign Exchange and tax Regularization Statement ("DERCAT") may be repatriated before the payment of the appropriate fines, provided that the taxpayer pays all amounts due as the funds become available in the country.

In addition, on August 1, Circular Letter No. 3,805 was issued by the Brazilian Central Bank ("BCB Circular Letter No. 3,805/16"). This act amended BCB Circular Letter No. 3,787/16 to determine that, in case of early repatriation, the financial institution in charge should make sure that the requirements stated in IN RFB No. 1,627/16 were met before releasing to the taxpayer the remainder of the amount received.

It should be noted that the RERCT was established by Act No. 13,254/16 in order to enable the regularization of assets remitted to a foreign country or held abroad in violation of the tax and exchange regulations, upon payment of 30 percent of the value to the Federal Government on December 31, 2014, of which 15 percent are related to income tax, and 15 percent constitute the fine. The accession deadline expires on October 31, 2016.

Normative Instruction RFB No. 1,656, dated July 29 2016 – Exchange Variation – Cash Basis and Accrual Basis

On 08/02/2016, the Federal Revenue Service issued the Normative Instruction No. 1,656 ("IN RFB No.

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1,656/16") amending IN RFB No. 1,079/2010, to regulate the changes introduced by Decree No. 8,451/15, in relation to the tax treatment applicable in case of broad fluctuations in the exchange rate.

Per Decree No. 8,451/15 and IN RFB No. 1,656/16, the exchange rate is deemed high in the event that, within one calendar month (first and last day of the calendar month), the sale price of the U.S. dollar undergoes positive or negative variation in excess of ten (10) percent.

In this case, a taxpayer may, beginning on the calendar month following the "high fluctuation" month, change the recognition of the monetary variation of credit-related rights and obligations from the accrual basis to the cash basis, in order to determine the Corporate Income Tax (IRPJ), Social Contribution on Net Earnings (CSLL), Social Integration Program (PIS) and Social Security Funding Contribution (COFINS) calculation basis, upon reporting in the DCTF (Statement of Federal Tax Debts and Credits) of the month when the high fluctuation occurred, as well as the correction of the ancillary obligations from the previous months, whose information is affected by the basis change.

In addition, IN RFB No. 1,656/16 provides that the basis change shall apply to the entire calendar year, and, from January to May 2015, the basis change can be made in the month of June 2015.

Query Solution Cosit No. 102, dated June 30, 2016 – Imports to Order

On 08/11/2016, the Query Solution No. 102, issued by Cosit was published, addressing the legal regime applicable to imports to order.

In summary, imports by order consist of a transaction where a company purchases with own resources, arranges the import customs clearance; and resells the imported goods to an ordering company previously defined, based on an agreement entered into between the importer and the ordering party.

In this regard, the Query Solution makes clear that the core business of the ordered company is not required to be foreign trade, e.g., trading companies. The importer is required only to be qualified to operate in the Integrated Foreign Trade System ("SISCOMEX"), pursuant to Normative Instruction RFB No. 1,603 of 2015, and all other requirements applicable to imports to order should be met.

Interpretative Declaratory Act No. 7, dated August 23, 2016 – Withholding Tax (IRRF) and Contribution for Intervention in the Economic Order (CIDE) for Capital Payment with Assignment of Rights by an Individual Residing Abroad

On 08/24/2016, Interpretative Declaratory Act No. 7 ("ADI No. 7/2016") was issued, through which the Brazilian Revenue Service stated that the payment of capital with the assignment of rights by a foreign resident is subject to Withholding Tax at the rate of fifteen (15) percent of the amount for the credit.

In turn, should the assignment of rights involve the acquisition of technology skills or transfer, it shall also be subject to the impact of the Contribution for Intervention in the Economic Order ("CIDE") at the rate of ten (10) percent on the amount for the assigned right.

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Interpretative Declaratory Act No. 8, dated August 24, 2016 – Separate Fine on Applications for Reimbursement – Benign Non-Retroaction

On 08/26/2016, the Interpretative Declaratory Act No. 8 (“ADI No. 8/2016”) was issued, stating that the separate fine on denied or undue requests for reimbursement of federal taxes does not apply to requests pending decision or denied, but still pending entry of the separate fine.

The non-application of the separate fine stems from benign retroaction of the revocation of paragraphs 15 and 16 of Article 74 of Act No. 9,430, dated 12/27/1996, which provided for such requirement under Provisional Measure No. 656, dated October 7, 2014 and Provisional Measure No. 668, dated January 30, 2015, converted into Act No. 13,137 of June 19, 2015.

Again, according to the ADI, the benign retroaction applies to the separate fines not extinguished under Article 156 of the CTN (National Tax Code) and to the unpaid installments of fines subject to installment agreements, but does not entail the reimbursement of amounts for separate fines already extinct in any way.

Decree No. 8,842 dated August 29, 2016 – Enactment of the Convention on Mutual Administrative Assistance for Tax-Related Matters

On 08/30/2016, Decree No. 8,842 (“Decree No. 8,842/2016”) was issued, enacting the text of the Convention on Mutual Administrative Assistance for Tax-Related Matters, as amended by the Compact of June 1st, 2010 signed by Brazil in Cannes on 11/03/2011.

Importantly, on 06/1/2016, upon filing of the ratification instrument with the Organization for Economic Cooperation and Development (“OECD”), Brazil had expressed its commitment to the terms of the Convention as of 10/1/2016.

Articles 1 and 2 of the Decree No. 8,426/2016 list the Brazilian caveats regarding the terms of the Convention, as well as the Brazilian taxes covered thereby.

Normative Opinion Cosit No. 2, dated August 23, 2016 – Decision Settlement – Preparatory Questions

On 08/24/2016, the Normative Opinion Cosit No. 2 was issued, addressing the possibility of filing an appeal against the settlement of a final decision in a tax/administrative lawsuit judging the entry partially appropriate.

In short, Cosit unified the understanding that an appeal cannot be filed against the settlement by the unit drafting the final decision in a tax/administrative lawsuit, judging the entry partially appropriate. However, an exception was defined, so that, in case of a material error in the settlement of the decision, filing a motion for the ex-officio review of debts is appropriate. Such appeal is not intended to amend the administrative decision and, as a rule, does not have the power to suspend the enforceability of any tax credits.

Finally, Cosit defined that, should the Credit Right subject to the request for reimbursement or compensation be rejected due to preparatory questions that could be dismissed during the course of the administrative lawsuit, the tax authority is required to review the substantive issues relating to actual existence of the

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credit, which have ceased to be considered as a result of the preparatory question.

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