Tax Bulletin

Tax report n° 68 • Year VI • April 2014

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Dear Readers:

The purpose of this **Tax Bulletin** is to inform our clients and interested parties on the main issues discussed and decided in the Judicial, Legislative, and Executive Branches.

In this 68th edition, we will address11 different issues concerning Case Laws, Legislation, and Response to Inquiries.

To access each text directly, click on:

Case Laws

Legislation and Response to Inquiries

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Case Laws

STF – Unconstitutionality– social security contribution – labor cooperative services

On April 23, 2014, the Full Court of the Federal Supreme Court (STF), in the trial of Extraordinary Appeal no. 595.838/SP, declared by unanimous decision the unconstitutionality of item IV of article 22 of Law no. 8.212/1991, with wording by Law no. 9.876/1999, which provides for the social security contribution of 15% charged on the value of services rendered through labor cooperatives.

According to the Reporting Justice, Dias Toffoli, Law no. 9.876/1999 transferred the tax liability of the taxation of the cooperative to the companies that acquire services, disregarding the cooperative's legal identity, and resulted in the undue extension of the tax basis of the collection, since the amount paid by the hiring company is not the same as that effectively transferred by the cooperative to the cooperative member.

Therefore, for the Justice, the taxation exceeds the economic basis set by article 195, item I, letter "a", of the Federal Constitution, which provides for the charge of social security contribution on the payroll. It also violates the principle of contribution capacity and represents a new way of funding social security, which could only be created by complementary law.

STF – General repercussion recognition

- Contribution to FUNRURAL – workers under family economy system

On April 25, 2014, the Federal Supreme Court (STF), by unanimous decision, recognized the existence of general repercussion of the constitutional issue raised in Extraordinary Appeal no. 761.263/SC, which deals with the constitutionality of the contribution to the Rural Workers' Social Security and Assistance Fund (FUNRURAL) required from special insured workers (workers under a family economy system without permanent employees) by article 25 of Law no. 8.212/1991, which, from its original wording, provided for the collection of the tax based on the gross revenue arising from the trade of its production, while the constitutional provision establishes the result of the trade of the production as the tax basis.

STJ – Profits abroad – taxation of subsidiaries located in countries with which Brazil has entered into treaties to avoid double taxation

The First Panel of the Superior Court of Justice (STJ), on April 24, 2014, concluded the trial of Special Appeal no. 1.325.709/RJ, which deals with the taxation of profits of subsidiaries located in countries with which Brazil has international treaties for the avoidance of double taxation.

Rapporteur and Justices, Napoleão Nunes Maia Filho, Ari Pargendler, and Arnaldo Esteves Lima, pursuant to the position of the Federal Supreme Court, found that the Taxpayer is not subject, by force of the international agreements, to add thereto, for purposes of taxation in Brazil, the profits earned by the subsidiaries in Belgium, Denmark, and Luxemburg. As to the profits earned in Bermuda, though, they found that they are considered to be available to the company on the date of the balance sheet in which they were reported

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(subject to taxation in Brazil, albeit not distributed). However, the mere positive variation of the currency value should not be a part of such profits, given the illegality of article 7, heading, §1 of IN no. 213/2012.

Justice Sérgio Kukina, who had upheld the full taxation on the Brazilian company, dissented.

It is important to point out that, despite the favorable position in this recent case of the STJ, the Administrative Council of Tax Appeals (CARF), in examining the taxation of the income earned abroad by a subsidiary, under the Brazil-Chile Treaty, dismissed the Taxpayer's Appeal. The Council affirmed that the taxation would be possible through equity pick-up, as this is practiced not only in Brazil but in other countries, and because what is being taxed is the effect of income earned abroad only, which would be reached by the Brazilian rule, according to the concurring opinion.

STJ – Selected Repetitive Appeals

• PIS and COFINS – Concept of input for purposes of right to the tax credit

On April 14, 2014, Justice Napoleão Nunes Maia Filho rendered an order within Special Appeal no. 1.221.170/PR to submit the case to the repetitive appeal procedure. In this case, the dispute refers to the concept of input, as used in Laws no. 10.637/02 and 10.833/03, in order to grant the right or not to the PIS and COFINS credit of the amounts incurred in its acquisition.

• IPI stamps – Tax nature

On April 14, 2014, Justice Napoleão Nunes Maia Filho rendered an order within Special Appeal no. 1.405.244/SP to submit the case to the repetitive appeal procedure. In this case, the dispute lies on defining whether the costs of Standard Quality of the IPI stamps, created by article 3 of Decree no. 1.437/75, have a tax nature and was not supported by article 25 of the Act of the Transitory Constitutional Provisions - ADCT.

TRF1 – IRRF – remittance abroad – country with which Brazil has entered a treaty to avoid double taxation

The Seventh Panel of the Federal Regional Court of the 1st Region (TRF1), in the trial of Civil Appeal no. 0058303-05.2011.4.01.3800/MG, by unanimous decision, found pursuant to article 7 of the International Treaty to Avoid Double Taxation (OECD Model), that the profits of a company of a contracting State may only be taxed in this State, unless the company performs its activities in the other contracting State through a stable establishment located therein. If the company executes its activities in such a way, the profits may be taxed in the other State, but only to the extent they are attributed to such stable establishment.

To consolidate this position, Rapporteur Luciano Tolentino Amaral, in examining the treaty between Brazil and Portugal, found that the word "profit" does not refer to a strict domestic legal/accounting concept, but instead to remittances/dispatches from the Brazilian company to the Portuguese company, since the latter does not have a stable establishment in Brazil, and must be subject to the tax laws only of the Portuguese State, due to the earned income.

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Furthermore, the Rapporteur stressed that this position is not a new one, and is found in an important precedent of the Second Panel of the Superior Court of Justice (STJ), namely Special Appeal no. 1.161.467/RS.

Legislation and Response to inquiries

Normative Rule RFB no. 1.463/14 – DIPJ – instructions for filling out the Corporate Income Tax Return

On April 25, 2014, Normative Rule of the Federal Revenue of Brazil ("IN RFB") no. 1.463 was published, which approves the software and instructions for filling out the Corporate Income Tax Return ("DIPJ"), relative to the calendar year of 2013, fiscal year 2014, and is to be filed between May 2, 2014 and June 30, 2014.

Normative Rule of the RFB no. 5/14 – IRPJ, PIS and COFINS – credit rights purchase activities

On April 11, 2014, Normative Opinion of the Federal Revenue of Brazil no. 5/2014 ("PN RFB") was published, stating the position establishing that the legal entities engaged in the purchase of credit rights are subject to the taxable income system, even if they are intended for the formation of guarantee for securities (securitization), under article 14, items VI and VII, of Law no. 9.718/1998, which deal with factoring and securitization transactions, respectively.

Pursuant to PN RFB, both the securitization and factoring activities are engaged in the purchase of credit rights, and distinguish from each other by the destination of the securities acquired, since the former is defined by the formation of guarantees, while the latter by the formation of its own portfolio.

Thus, the companies that perform securitization of trade credits must be subject to the same tax system of the factoring companies, which are aimed at the purchase of credit rights from the forward sale of goods and services.

In addition, according to PN RFB, for the ascertainment of the Contributions to the PIS and COFINS, the gross revenue of legal entities engaged in the securitization of corporate assets is the "discount, meaning the difference between the face value of the securities and their respective cost of acquisition".

Response to Inquiry no. 70/14 COSIT – IRPF – capital gain – construction of real estate

Response to Inquiry no. 70, issued by General Tax Coordination ("COSIT"), was published on April 4, 2014, establishing the position that there is no exemption of the Individual Income Tax with regard to Capital Gain earned in the sale of residential real estate, when the proceeds of the sale are invested in the construction of residential real estate.

According to COSIT's position, the mentioned exemption only applies to the acquisition of residential real estate already built or under construction, and does not comprise expenses (i) for the construction of real

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estate; (ii) for the continuity of construction work in real estate under construction; and (iii) with improvements or reforms in real estate owned by the taxpayer.

Response to Inquiry no. 104/14 COSIT – CIDE – Social Contribution Tax for Intervention in the Economic Order

Response to Inquiry no. 104/14, issued by General Tax Coordination ("Cosit"), was published on April 7, 2014, establishing the position that the amounts paid, credited, delivered, employed, or remitted to beneficiaries resident or domiciled abroad, due to the participation of employees and/or officers in "Startup" events, are subject to the payment of the Social Contribution Tax for Intervention in the Economic Order ("CIDE"), as of January 1, 2002.

In the case under analysis, it was determined that these remittances may be extended as remuneration for technical services, pursuant to the concept contained in letter "a", item II, article 17, of Normative Rule no. 1.455 of the Federal Revenue of Brazil, and are thus subject to the levy of the CIDE.

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