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Brazil Tax Round-Up

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Law No. 8,502/2019: Installment of State Liabilities for Companies in Judicial Reorganization

On September 2, 2019, Law No. 8,502/2019 was published establishing the possibility for companies under judicial recovery to pay their state debts in up to 120 installments.

The payment installments are applicable to debts triggered by events that occured before the date of filing of the judicial recovery request.

Ordinance No. 1,507/2019 and No. 1,508/2019: Establishes Advisory Councils on Tax Reform Matters

On September 4, 2019, Ordinances No. 1,507 and No. 1,508 were published establishing advisory councils on tax matters within the Ministry of Economy and the Special Secretariat of the Brazilian IRS. The former will provide opinions regarding the tax reform matters submitted by the Special Secretary of the Brazilian IRS, while the latter will have the following purposes: (i) promotion of tax compliance policy; (ii) combat to the regular debtor; (iii) improvement of tax litigation; (iv) possibility of tax transactions; (v) reduction of litigation cases and enrolled tax credits.

Law No. 8,520/2019: Data Disclosure of the Largest Tax Debtors of the State of Rio de Janeiro

On September 12, 2019, Law No. 8,520/2019 was published establishing the transparency of data of the largest debtors in the State of Rio de Janeiro, which are the legal entities with more than R$2 million as enrolled debts or individuals with more than R$200,000 as enrolled debts. In the case of economic groups, this amount will be determined by the sum of the active debts of all CNPJs in the group.

The bill becomes effective within 90 days of its publication.

Law No. 6,640/19 and Decree No. 46,507/19: Reopening of the So-Called "Concilia Rio"Amensty Program

On September 19, 2019, Law No. 6,640/19 was published, which reopened the so-called "Concilia Rio" amnesty program, created in 2015. The program allows the negotiation and installment of tax and non-tax debts, enrolled or not as liable at the Attorney General's Office of the City of Rio de Janeiro, related to taxable events that occurred up to December 31, 2018.

Its regulation is provided by Decree No. 46,507/2019, published on the same date.

BRAZILIAN IRS'S ANSWERS TO ADVANCE TAX RULING REQUESTS

SC Cosit No. 240/2019: WHT on FGTS from a non-resident taxpayer

On September 13, 2019, the Cosit Answer to Advance Tax Ruling Request No. 240/2019 was published with the understanding that the receipt of amounts deposited in the Severance Indemnity Fund ("FGTS")-linked accounts is exempt from the Withholding Income Tax ("WHT"), even if the beneficiary is resident abroad. Thus, the WHT does not levy on such amounts, either at the time of payment by deposit in a bank account in Brazil or in its subsequent remittance to the beneficiary abroad.

SC Cosit No. 248/2019: PIS/COFINS credits on expenses with the acquisition of inputs in trading activities

On September 17, 2019, the Cosit Answer to Advance Tax Ruling Request No. 248/2019 was published, with the understanding that, for purposes of calculating credits from contributions to PIS and COFINS, there are no inputs in the activity of resale of assets. Thus, credit-generating inputs of non-cumulative contributions would be associated only with the production of goods for trading purposes and the provision of services to third parties.

SC Cosit No. 250/2019: Manaus Free Trade Zone — Deviation of Purpose

On September 25, 2019, the Cosit Answer to Advance Tax Ruling Request No. 250/2019 was published, in the sense that acquisitions of goods benefiting from a zero PIS/COFINS tax rate, pursuant to article 2 of Law No. 10,996/2004, are conditioned to consumption or industrialization in the Manaus Free Trade Zone.

The deviation in its destination will imply liability for the payment of the applicable contributions and penalties, according to article 22 of Law No. 11,945/2009, regardless of the period between the acquisition of the goods and the deviation of purpose.

SC Cosit No. 264/2019: Income Tax on Capital Gain on Disposal of Foreign Currency Assets and Rights

On September 27, 2019, the Cosit Answer to Advance Tax Ruling Request No. 264/2019 was published stating that the Individual Income Tax ("IRPF") is levied on capital gain determined on the disposal of assets or rights and the settlement or redemption of financial investments, acquired in foreign currency, in accordance with article 24 of Provisional Measure No. 2,158-35/01.

The capital gain from the joint sale of Exchange Traded Funds ("ETFs") and Real Estate Investment Trusts (REITs) held abroad in the month up to the limit of R$35,000 is exempt from tax.

CASE LAW

TJRJ decides on the constitutionality of DIFAL

On September 2, 2019, the decision of the Case Law No. 0180015-44.2009.8.19.0001 was published, in which the Court of Justice of Rio de Janeiro ("TJRJ") analyzed the constitutionality of the requirement of differential State VAT ("ICMS") tax rates on interstate operations ("DIFAL"), as regulated by the State of Rio de Janeiro by article 3, VI, of State Law No. 2,657/96.

CARF edits 33 new precedents

On September 3, 2019, the Administrative Council of Tax Appeals ("CARF") issued 33 new precedents, which will bind the administrative authorities in their decisions. We list some of the most relevant:

Precedents about procedural issues:

- Precedent 133: "Failure to comply with the subpoena to clarify does not, in itself, justify the aggravation of the fine, when this conduct led to presumption of income or earnings omission";
- Precedent 143: "Proof of Withholding Income Tax (IRRF) deducted by the Beneficiary in the calculation of income tax due is not made exclusively by means of withholding report issued on its behalf by the income payment source";
- Precedent 152: "Credits related to taxes administered by the Brazilian IRS, recognized by a final court decision that allowed only offsetting with tax debts of the same type, may be offset against own debts related to any taxes managed by the Brazilian IRS, in compliance with the legislation in force at the time of its occurance"; and
- Precedent 154: "Once the illegitimate opposition to the IPI presumed credit reimbursement is found, the monetary restatement, by the SELIC rate, shall be counted from the end of the 360-day period for the analysis of the taxpayer's request, pursuant to article 24 of Law 11.457/2007."

Precedents about statute of limitations:

- Precedent 135: "The anticipation of the payment of IRPJ and CSLL, through monthly estimatives, characterizes payment capable of attracting the application of the statute of limitations rule provided for in article 150, 4th paragraph of Tax Code";
- Precedent 138: "Withholding income tax levied on income earned by a legal entity, subject to quarterly or annual calculation, characterizes payment capable of attracting the application of the statute of limitations rule provided for in article 150, paragraph 4 of CTN"; and
- Precedent 156: "In the drawback regime, suspension mode, the initial term for counting the statute of limitations of five year to assess suspended taxes is the first day of the following financial year of the end of the thirty day period after the deadline for the exports agreed, pursuant to article 173, I, of CTN."

Precedents about customs matters:

- Precedent 160: "The application of the fine to replace the loss referred to in the 3rd paragraph of article 23 of DL 1.455/1976 is independent of evidence of prejudice to the payment of taxes or contributions"; and
- Precedent 161: "The error in indicating, in the Import Statement, the classification of the goods in the Mercosur Common Nomenclature, by itself, is subject to the application of a 1% fine, provided for in article 84, I of MP No. 2.158-35, 2001, even if the adjudicating body concludes that the classification indicated in the tax assessment would be equally incorrect."

CASE LAW

Precedent about individuals:

- Precedent 147: "Only with the issuance of MP No. 351/2007, converted into Law No. 11,488/2007, which changed the wording of article 44 of Law 9,430/1996, there was a specific legal provision for the application of isolated fines in hypothesis of non-payment of the so-called "carnê-leão" tax submissions (50%), notwithstanding to the simultaneous penalty for the official release of the respective income in the annual adjustment (75%)."

Precedent about CSLL and international treaties:

- Precedent 140: "The provisions of article 11 of Law 13,202/2015 apply retroactively to the effect that international agreements and conventions entered into by the Government of the Federative Republic of Brazil to avoid double taxation of income includes the CSLL."

Predecent about Manaus Free Trade Zone:

- Precedent 153: "Revenues from product sales to establishments in the Manaus Free-Trade Zone (ZFM) are equivalent to export revenues and therefore are not subject to the levy of PIS/PASEP and Cofins."

Precedents about IRPJ and CSLL:

- Precedent 136: "Adjustments due to supervenience and depreciation insufficiency, accounted by the leasing institutions in accordance with Brazilian Central Bank rules, do not trigger any tax effects to CSLL and must be unaccountably neutralized through exclusion of income or adding the corresponding expenses in the calculation of the tax basis";
- Precedent 137: "Positive results due to the valuation of investments by the equity method are not included in the IRPJ or CSLL calculation basis in the presumed profit system";
- Precedent 139: "The discounts and rebates granted by a financial institution in the renegotiation of credits with its customers constitute operating expenses deductible from the actual profit and the CSLL calculation base, and the provisions of Articles 9 to 12 of Law 9,430/1996 are not aplicable"; and
- Precedent 144: "The legal presumption of revenues omission based on the maintenance, in liabilities, of obligations that are not proven ("unproven liability") is characterized at the time the liability is recorded, taxing the irregularity in the corresponding accounting period."

Precedent about Cide:

- Summary 158: "Withholding Income Tax (IRRF) on amounts paid, credited, delivered, employed or remitted, each month, to residents or domiciled abroad, as compensation for contracted obligations, is included in the calculation basis of the Intervention Contribution in the Economic Domain (Cide) introduced by Law 10.168/2000, even if the source pays the financial burden of withholding tax."

CASE LAW

STJ understands that Reintegra credits should not be included in the calculation basis of IRPJ and CSLL

On September 19, 2019, the Second Panel of the Superior Court of Justice ("STJ") concluded that the credits of the Special Regime of Reintegration of Taxes for Exporting Companies ("Reintegra") should not be included in the calculation basis of the Corporate Income Tax ("IRPJ") and CSLL (Special Appeal No. 1,571,354).

STJ decides that PIS/COFINS levy on back-to-back transactions

On June 24, 2019, the First Panel of the STJ unanimously decided that the revenue related to "back to black" transactions is subject to the contribution of PIS and COFINS, since it is not considered as an export revenue.

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