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Brazil Tax Round-Up

#9 - January 2020



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First notice of federal tax transaction agreement released

On December 4, 2019, the National Treasury Attorney's Office published the notice of Transaction Agreement No. 01/2019, which states the conditions for the transaction of federal tax or social security debts enrolled as overdue liability of up to BRL 15 million. The notice covers the following debts:

- Federal debts enrolled as overdue liability of legal entities written off, marked as irregular or suspended in the CNPJ register and that are not being addressed with the installment payment option, are not considered guaranteed or have had their enforceability suspended by a court.
- Federal debts enrolled as overdue liability for more than 15 years and that are not being addressed with the installment payment option, are not considered guaranteed or have had their enforceability suspended by a court for more than 10 years.
- Federal debts enrolled as overdue liability on behalf of individuals whose registration status in the CPF register is "deceased holder."

Payments can be made in cash with a discount of up to 50% or in installments in up to 84 months. If the debtor is an individual, micro or small company, payment can be made in cash with a discount of up to 70% or in installments within 100 months. Regarding social security debts, the maximum term for payment in installments is 60 months due to constitutional restrictions.

FECF rule changes by Rio de Janeiro State

On December 5, 2019, Law No. 8,643/2019 was published, which amends provisions of Laws No. 4,056/2002 and 4,962/2002 related to the Fund for Combating Poverty and Social Inequalities ("FECF").

A few changes worth noting:

- FECF is now authorized to be in force until December 31, 2023, by means of the amendment of the main section of article 1 of Law No. 4,056/2002.
- Transactions with power consumption from 300 to 450 or above 450 kilowatt-hours per month (as provided for in sub-items "b" and "c," respectively, of item VI of article 14 of Law No. 2657/97) or for the provision of communication services (provided for in item VIII of the same article) are subject to having 2% added to the ICMS rate, in addition to the regular 2% already levied by virtue of item I of article 2 of Law No. 4,056/2002. These changes will become effective after 90 days from the new law's publication.
- Personnel expenditures on actions using FECF resources are limited to 50% of the fund's estimated total revenue.
- The situations in which the State Executive Power is authorized to allocate the revenues of the fund, provided for in article 3 of Law No. 4,056/2002, were extended.
- Article 7-A was added to Law No. 4,056/2002, stating that the minimum percentages of FECF allocations must be established annually in the Budget Guidelines Law ("LDO").

Measures to increase the collection of debts enrolled as overdue liability in State of Rio de Janeiro

On December 10, 2019, Law No. 8,646 was published, amending Law No. 5,351/2008, which established measures to increase the collection of debts enrolled as overdue liability in the State of Rio de Janeiro.

Among the changes, it should be noted that the installment term has been reduced from 120 to 60 months. The law also reduced the waiting period required to request a new special installment, from 8 to 4 years from the date of the granting of the previous installment.

Termination of 10% contribution to FGTS upon dismissal without cause

On December 11, 2019, Law No. 13,932/2019 was published, with important labor and tax implications. The most significant is the termination of the 10% contribution to the Severance Indemnity Fund (“FGTS”) by employers in the event of a dismissal without cause.

Article 12 of the law establishes the termination of this social contribution, which had been created by Complementary Law No. 110 /2001.

However, this change does not impact ongoing lawsuits, as the new law is only applicable to terminations from January 1, 2020, onward.

Temporary Budgetary Fund created in Rio de Janeiro State

On December 12, 2019, Law No. 8,645/2019 was published by the State of Rio de Janeiro creating the Temporary Budgetary Fund, pursuant to ICMS Agreement No. 42/2016 and Federal Law No. 4,320/1964.

This new law revokes Law No. 7,428/2016, which created the State Fund of Fiscal Balance (“FEEF”), which had similar rules to the Temporary Budgetary Fund’s.

The main aspects of the Temporary Budgetary Fund, which is a new version of the FEEF, are the following:

- The new law states that the use of tax benefits or incentives already granted or that may be granted are subject to a deposit equivalent to 10% of the difference between the value of the tax calculated with and without the use of the benefit or to 10% of the tax incentive granted to ICMS taxpayers.
- If the taxpayer fails to make the deposit for three months—consecutive or not— the benefit/incentive will be terminated.

It is worth noting that certain taxpayers that were not subject to payment to the FEEF will be subject to payment to the Temporary

Budgetary Fund. This includes those that benefited from the Special Tax Treatment of Law No. 6,979/2015 and those subject to Decree No. 36,453/2004 (“Riolog”).

The new law will be effective as of January 01, 2020 and in force during the Fiscal Recovery Regime (“RRF”). For all legal entities benefiting from the Special Tax Treatment provided by Law 6,979/2015, as per item XIV, article 14 of Law No. 7,428/2016, the new law will be effective as of 90 days from the date of its publication.

Changes to exemption and reduction of ICMS calculation basis in transactions related to exploration or production of oil and natural gas

On December 17, 2019, ICMS Agreement No. 220/2019 was published, amending ICMS Agreement No. 03/2018, which authorized the Brazilian states and the Federal District to reduce the ICMS calculation basis or to exempt ICMS on the importation and on the local acquisition of goods used in the exploration and production of oil and natural gas under the special customs regimes of Repetro, Repetro-Sped and Repetro-Industrialização.

Summary of the Main Changes

- ICMS Agreement No. 220/2019 (the “Agreement”) introduced several changes, the main ones being the following:
- §3 was added in the first clause in order to set forth that in the importation of and in the intrastate or interstate acquisition of permanent goods, the purchasers are responsible for collecting the ICMS due on the transaction subject to Repetro-Sped with the reduction of the calculation basis so that the tax burden is equivalent to 3%, without the corresponding credit.
- Clause 1-A was added, giving the states additional authority to regulate the transactions under Repetro-Industrialização. With Clause 1-A, states now have the authority to:
 - (i) Defer or suspend the ICMS levied on intrastate transactions performed by final manufacturers, subject

to the benefits of the Agreement and duly enrolled, with goods used in the research activities, exploration and production of oil and natural gas;

(ii) Exempt the ICMS levied on interstate operations carried out by final manufacturers, subject to the benefits of the Agreement and duly enrolled, with goods intended for the exploration operation, development and production of oil and natural gas;

(iii) Defer or suspend the ICMS levied on intrastate operations performed by the intermediate manufacturers, subject to the benefits of the Agreement and duly enrolled, with goods to be directly supplied to the final manufacturer; and

(iv) Exempt the ICMS levied on interstate operations performed by the intermediate manufacturer, subject to the benefits of the Agreement and duly enrolled, with goods to be directly supplied to the final manufacturer.

- Clause 5 was amended so that the manufacturers of final goods and intermediate goods are included as beneficiaries of ICMS Agreement No. 03/2018 as long as they were previously qualified under the Repetro-Industrialização regime.

Beneficiaries and Effective Date

The list of the beneficiaries of the Agreement will be published by means of a COTEPE ACT. The Agreement will be effective on the date of its publication, but it is not applicable to the State of Minas Gerais and to the Federal District.

Supplementary bill amending rules on ISS collection approved

On December 17, 2019, the plenary of the Federal Chamber of Deputies concluded the vote on Supplementary Law No. 461/2017, which creates a transfer of the receipt of the ISS from the municipality providing the service to the municipality where it is effectively rendered.

Credit or debit card payment for tax debts not enrolled

as overdue liability

On December 20, 2019, Sefaz Resolution No. 100/2019 was published, implementing the possibility of credit card or debit card payment of tax debts not enrolled as overdue liability. The resolution also provides for the registration of companies that may operate such payment.

TIPI table adjusted to NCM

On December 30, 2019, Brazilian IRS Executive Declaratory Act No. 1/2019 was published, promoting the adjustment of the Table of Incidence of the Tax on Manufactured Goods ("TIPI") to the Mercosur Common Nomenclature ("NCM"). The measure will be in force from January 1, 2020.

Extension of initial deadline for appropriation of ICMS credits

On December 30, 2019, Supplementary Law No. 171/2019 was published, with amendments to Supplementary Law No. 87/96 (Kandir Law), to extend the period until January 1, 2033, for the beginning of the appropriation of ICMS credits on goods intended for use and consumption and on communication services used by the establishment.

Bill extending RECINE vetoed

On December 30, 2019, Message No. 747/2019 of the president of the Republic was published, communicating the veto of Bill No. 5.815 / 2019, which would extend the deadline for taking advantage of the Special Taxation Regime for Development of the Cinematographic Exhibition Activity ("Recine").

Changes in calculation regime and restriction to fixed assets

On December 20, 2019, COSIT Answer to Advance Tax Ruling Request No. 309/2019 was published, stating that a legal entity that changes the cumulative system of PIS and COFINS to non-cumulative due to the change of Presumed Profit to Profit Real may not opt for the immediate discount of credits in relation to machinery and equipment (fixed assets) intended for the production of goods and services whose acquisition in the domestic market or importation occurred prior to said migration due to lack of legal authorization.

IRRF non-levy on day care allowance values

On December 20, 2019, Cosit Answer to Advance Tax Ruling Request No. 294/2019 was published, providing that the amount paid as a daycare allowance for children five years or age or younger is not subject to IRRF levy, according to the pre-schooling care program within the framework of the corresponding judiciary body, which is governed by Joint Act TST/CSJT No. 3 of March 1, 2013. This allowance is only granted for those who maintain custody of the dependent or, even if they do not have custody, are required, by court decision, to pay all school expenses.

Brazilian IRS's position on social security contributions

On December 24, 2019, Disit/SRRF Answer to Advance Tax Ruling Request No. 4043/2019 was published, distinguishing the definitions of the company's main economic activity, which determines its National Code of Economic Activity ("CNAE") code to be recorded in the Corporate Entity Registry ("CNPJ"), and the main activity of the company's establishment (head office or branch), which is used to determine the degree of incidence of work disability due to environmental risks at work ("GILRAT/SAT").

According to the Answer to Advance Tax Ruling Request, the activities actually performed by the insured employees and independent contractors are those that must be observed, regardless of the corporate purpose of the legal entity or the activities described in its registration with the CNPJ for the purposes of article 72, § 1 of IN RFB No. 971, of 2009.

Inclusion of revenues from non-performance on behalf of third parties in the concept of gross revenue

On December 24, 2019, the Cosit Answer to Advance Tax Ruling Request No. 295/2019 was published, stating that—for purposes of IRPJ, CSLL, PIS and COFINS calculation—gross revenue does not include the following: revenue that a legal entity earns for performing activities it was hired to do on behalf of another entity; the price of the provision of services in general; the income earned on the transactions made for another entity; and other income from the activity or main object of the legal entity

Also according to the Answer to Advance Tax Ruling Request, a hospital entity is responsible for collecting the social security contributions related to the individuals who are suppliers of the hospital's services. Thus, in cases where a hospital is hired by a health insurance company to provide services to its clients, the hospital cannot be considered to be merely passing on fees.

Non-levy of social security contribution on amounts paid as fuel vouchers

On December 26, 2019, Cosit Answer to Advance Tax Ruling Request No. 313/2019 was published, providing for the non-levy of social security contributions on amounts paid as transportation vouchers, such as fuel vouchers. It should be noted that the non-levy is limited to the amount corresponding to the public transportation cost of traveling directly from a residence to work, and vice versa.

Also according to the consultation, the employer can only discount the portion that exceeds 6% of the employee's basic salary. If the employer does not discount this percentage of the employee's salary, or discounts a lower percentage, the difference will be considered indirect salary, on which social security contributions and other taxes will be drawn.

Tax withholding on payments to public bodies

On December 26, 2019 Cosit Answer to Advance Tax Ruling Request No. 317/2019 was published, providing for the withholding of taxes on payments made by public bodies to legal entities for the supply of goods or services, even if the parties classify the expense as a reimbursement.

Taxation of compensation for lost profits

On December 30, 2019, COSIT Answer to Advance Tax Ruling Request No. 311/2019 was published, providing for the levy of IRPJ and CSLL on the indemnity arising from the termination of a contract between legal entities when intended to offset loss of future profits. According to the Answer to Advance Tax Ruling Request, the compensation is taxable because it would be intended to offset the equity increase that would occur if there were no contractual termination.



STJ: Property Tax levy on rented property used by consulate representative

On December 2, 2019, the First Chamber of the Superior Court of Justice ("STJ"). when analyzing AREsp No. 1.065.190, ruled that the tax exemption provided for in the Vienna Convention on Consular Relations is not applicable to rented property used to serve as the consulate representative's official residence.

STF: ADI on joint liability of the accountant for tax infraction

On December 11, 2019, the National Progressives Directory ("PP") filed Direct Unconstitutionality Action ("ADI") No. 6,284 in the Supreme Court ("STF") against Law No. 11,651/1991 of the State of Goiás, which imputes joint liability to the accountant for the payment of taxes or penalties in cases where the accountant would have contributed to the practice of violation of tax legislation. The ADI was distributed to the rapporteur of Minister Luis Roberto Barroso.

STF: States's access to FPE information

On December 17, 2019, a preliminary injunction in the Original Civil Action ("ACO") No. 3.151 was partially granted to require the Federal Union to provide states and the Federal District access to information from the State Participation Fund ("FPE").

STF: Expedited processing for ADI 6277 on destination of Oil Royalty

On December 17, 2019, ADI No. 6,277, which deals with the allocation of revenues from oil and natural gas royalties to education and health, was submitted to expedited processing as foreseen in Article 12 of Law No. 9,868/99.

STF: STF: Judgment agenda of first semester of 2020 released

On December 17, 2019, the STF's judgment agenda and calendar of sessions of the first semester of the year 2020 were published. Notable cases include:

- March 18, 2020 - **RE No 688223, ADI No 1945, ADI No 4623**

and ADI No 5659: lawsuits related to the levy of ISS/ICMS on the licensing or cession of use software.

- April 1, 2020 - **RE No. 574,706:** judgment of the motion for clarification filed by the federal government against the court decision that recognized the unconstitutionality of the inclusion of ICMS in the PIS and COFINS calculation basis.
- April 1, 2020 - **RE No. 460,320:** continuation of the judgment that refers to the levy of income tax on profits and dividends distributed to shareholders resident or domiciled abroad.
- April 29, 2020 - **ADIS 4,917, 4,916, 4,918, 5,038, 4,920 and 5,038:** lawsuits dealing with the distribution of royalties arising from the exploration and production of oil and natural gas.

STF: Unconstitutionality of standard that requires fiscal and labor regularity of soccer teams to participate in championships

On December 18, 2019, the STF plenary, in its judgment on ADI No. 5,450, unanimously declared the unconstitutionality of the provisions of Law No. 10.671/2003 ("Fan Statute") that conditioned participation in championships on proof of a team's compliance with tax and labor regulations.

STF: Criminalization of intentional non-payment of ICMS

On December 18, 2019, in the Ordinary Appeal in Habeas Corpus No. 163,334, the STF plenary, by majority, concluded that the intentional non-payment of ICMS is a criminal offense. To characterize the infraction as criminal, it is necessary to prove illicit intention.

STF: Only supplementary law can establish counterparties for entities to enjoy tax immunity

On December 18, 2019, the STF plenary, by majority, ruled that only supplementary law can establish counterparties for philanthropic entities to enjoy tax immunity during the judgment of the motion for clarification in RE No. 566,622, with recognized general repercussion, and in ADIs 2028, 2036, 2228 and 2621.

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