TAUIL | CHEQUER
MAYER | BROWN

Brazil Tax Round-Up

#4 - August 2019

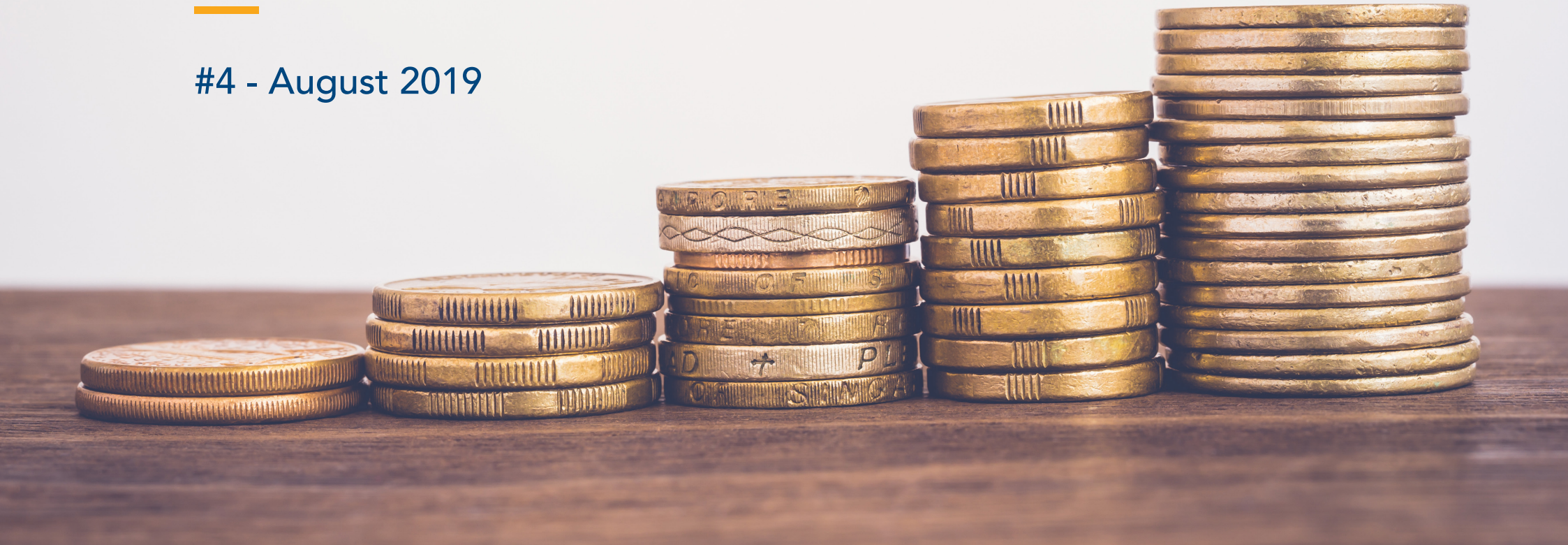

TABLE OF CONTENTS

IPI tax rate for ingredient used in soft drink manufacturing modified

On July 1, 2019, Decree No. 9.897/2019 was published, amending the Supplementary Note NC (21-2) in Chapter 21 of the IPI Tax Table ("TIPI"). The tax rate for the product classified under NCM code 2106.90.10—which refers to compound non-alcoholic preparations (concentrated extracts or concentrated flavors), used to manufacture of soft drinks listed in Chapter 22, with a dilution capacity of up to 10 parts of the beverage for each part of the concentrate—has been changed.

Dates	Applicable Rates
January 1, 2019 to June 30, 2019	12%
July 1, 2019 to September 30, 2019	8%
October 1, 2019 to December 31, 2019	10%

Senate bill intends to change administrative proceedings deadline count

On July 4, 2019, the Constitution and Justice Commission ("CCJ") approved Senate Bill ("PLS") No. 35/2018, which proposes that administrative proceedings should be counted only in business days, as is the case with judicial lawsuits. This would extend deadlines, skipping weekend days and government-observed holidays.

The bill is now under consideration by the House of Representatives.

OECD and Brazilian IRS issue joint report on tax matters

On July 11, 2019, the Brazilian IRS and the OECD issued a joint report following a series of discussions with shareholders, lawyers and tax authorities that began in February 2018 to analyze Brazil's administrative and legal treatment of transfer pricing and compare it with the practice adopted by OECD member countries.

The report concluded that in order to be aligned with OECD rules, Brazil would need to adopt the arm's length principle by taking steps including simplifying bureaucratic processes to facilitate compliance, increasing the effectiveness of tax administration and assuring tax legal certainty in international transactions.

Resolution No. 83/2019/CAT/PGACTP/PGFN-ME: Criterion for zero rate on IOF

On July 14, 2019 PGFN Resolution No. 83/2019/CAT/PGACTP/PGFN-ME was published, establishing that the zero rate of the Tax on Financial Transactions in the Currency Exchange ("IOF-Câmbio") must be applied in the settlement of export exchange contracts, in accordance with the terms set forth by National Monetary Council ("CMN") and the Central Bank of Brazil's ("BACEN") regulations.

Note: The zero rate will be levied regardless of whether the funds were initially received in an account held abroad.

LEGISLATIVE DEVELOPMENTS

Normative Instruction No. 1,901/19: Repetro-Industrialização regulation

On July 19, 2019, Normative Instruction No. 1901 was published, establishing a special regime for the manufacturing of goods destined to be used for the exploration and production of oil, natural gas and other fluid hydrocarbons (the "Repetro-Industrialização" regulation). According to the regulation, federal taxes will be suspended on the importation or local purchase of raw materials, intermediate products and packaging materials to be used to manufacture goods later destined to entities legally qualified in Repetro and Repetro-SPED.

The following entities can be legally qualified to the regime: (i) the manufacturers of final goods to be directly supplied to other companies qualified in the Repetro and Repetro-SPED regimes and (ii) intermediate manufacturers whose goods will be used in the manufacture of the final product.

Rio de Janeiro State Law No 8,481/2019: The granting of tax benefits

On July 29, 2019, State Law No 8,481/2019 was published, regulating the validation of the tax benefits granted by the State of Rio de Janeiro that had not been approved by the National Finance Policy Council ("Confaz") until August 2017. After fulfilling all federal requirements, Rio de Janeiro finally completed the validation of the tax benefits process.

BRAZILIAN IRS'S ANSWERS TO ADVANCE TAX RULING REQUESTS

Contributions on Revenues credits on cargo and vehicle tracking and toll voucher

On July 1, 2019, COSIT Answer to Advance Tax Ruling Request No. 228/2019 was published, establishing that the amounts of cargo and vehicle tracking payments generate the right to non-cumulative Contributions on Revenues credits. Furthermore, if spent by the carrier and not excluded from taxable income, the mandatory toll voucher for cargo transportation generates non-cumulative PIS and COFINS credits.

Application of the Double Taxation Agreement between Brazil and Israel

On July 1, 2019, COSIT Answer to Advance Tax Ruling Request No. 216/2019 was published, establishing that the rules of the Double Taxation Agreement between Brazil and Israelprevail over Brazilian tax legislation. In summary, payments made by a legal entity domiciled in Brazil to a legal entity in Israel for the purpose of remunerating the use of industrial equipment are subject to a 10% WHT levy provided that the beneficiary has no permanent establishment in Brazil, according to article 5 of the tax treaty.

Non-levy of IOF tax on resources held abroad from export

On July 24, 2019, Cosit Answer to Advance Tax Ruling Request No. 231/2019 was published, establishing an understanding of the Brazilian IRS on the levy of IOF tax. Regarding foreign currency resources held abroad from exportation, there is no levy of the tax, as there is no effective exchange settlement, which is the IOF tax triggering event.

CASE LAW

Exclusion of ICMS's presumed credit from IRPJ and CSLL calculation basis

On June 28, 2019, the Second Chamber of the Superior Court of Justice ("STJ") ruled for the exclusion of the presumed ICMS credit from the Corporate Income Tax ("IRPJ") and Social Contribution on Net Income calculation basis ("CSLL"), regardless of the book classification of the credit as a cost or investment grant (Appeal to STJ No. 1.605.245).

The Federal Regional Court of the 5th Region rules for the unconstitutionality of payroll-related contributions

The Federal Regional Court of the 5th Region ("TRF5"), located in Recife, PE, recently adopted case law favorable to taxpayers by ruling in two judgments for the unconstitutionality of contributions to the S System (Sebrae, Sesc, Senae, etc.). According to the decisions, these contributions are in breach of Constitutional Amendment ("EC") No. 33/2001, which establishes that contributions can only have an "ad valorem" rate—that is, a levy on the total amount—in cases where the tax base is either invoicing, gross revenue, or the amount of the transaction. This would not be the case, therefore, for contributions to S System, which are payroll-related. In the Federal Supreme Court, the matter is under discussion in Appeals to the STF Nos. 603,624 and 630,898 (Process Nos. 0803468-86.2018.4.05.8000 and 0815788-96.2017.4.05.8100).

CSRF uses evidence obtained illegally to maintain assessment

On July 19, 2019, the Superior Chamber of Tax Appeals ("CSRF") published a decision regarding a fiscalization process in which pieces of evidence of tax and customs offenses, sub-invoicing, and Tax on Manufactured Products ("IPI") breach were illegally obtained by the Brazilian IRS. Although the assessed company obtained habeas corpus in the STJ because the telephone interceptions were obtained illegally and, under the Fruit of the Poisonous Tree doctrine, that would have led to the evidence being disregarded, CSRF decided not to apply the doctrine because this evidence could have been obtained independently and its discovery by the tax authorities would have been inevitable (Process No. 9303008.694 - CSRF).

Spontaneous tax debts reporting through offset proceeding

On July 22, 2019, the Administrative Council of Tax Appeals ("CARF") published a decision guaranteeing the taxpayer's right to spontaneously report tax debts through an offset proceeding. The court took a wide interpretation of article 138 of the Tax Code by listing offset as a form of payment of debts spontaneously, in which case the late payment fine will not apply. However, because the offset is considered a payment under resolutive condition, if the procedure is not approved, the tax plus the late payment fine would be required. This understanding, which has been ratified in the 1st CARF Class, was also adopted in the STJ through Appeals Nos. 1.122.131 and 1.136.372 (Process No. 1401-003.535).

CONTACTS

Ivan Tauil Rodrigues
itauil@mayerbrown.com
+55 21 2127 4213

Eduardo Maccari Telles
etelles@mayerbrown.com
+55 21 2127 4229

Guido Vinci
gvinci@mayerbrown.com
+55 21 2127 4230

Ana Luiza Martins
amartins@mayerbrown.com
+55 11 2504 4626

Celso Grisi
cgrisi@mayerbrown.com
+55 11 2504 4671

Carolina Bottino
cbottino@mayerbrown.com
+55 21 2127 4217

Thais Rezende Bandeira de Rodrigues
trodrigues@mayerbrown.com
+55 21 2127 4236

Diana Castro
dcastro@mayerbrown.com
+55 21 2127 4252

Rachel Delvecchio
rdelvecchio@mayerbrown.com
+55 21 2127 1624