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Brazil Tax Round-Up

#7 - November 2019

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LEGISLATIVE DEVELOPMENTS

Rio de Janeiro State Decree No. 46,781: Deferral of ICMS on imported goods

On October 1st, 2019, Decree No. 46,781 was issued by the State of Rio de Janeiro regulating the total or partial deferral of ICMS on imported goods destined for trading purposes or use as raw material, intermediate material or secondary material in the manufacturing process in Rio de Janeiro State.

The transactions must take place within 60 days o f clearing customs for goods destined for trade and within 120 days for goods to be used as inputs in the manufacturing process. If these deadlines are not met, the regular ICMS tax rate will be levied and penalties and fines will be imposed. This deadline may be extended for up to 60 additional days in cases in which goods have been delayed at customs due to regulatory agents' procedures.

For benefiting from the deferral, it is necessary to prove i) the existence of a facility located in Rio de Janeiro with capacity for importing, acquiring or ordering; ii) the tax clerance certificate between State Treasury Office and Overdue Tax Liability of Rio de Janeiro' State; iii) the habilitation in the RADAR program of Brazilian IRS; and iv) that the clearing through customs occurred in the State of Rio de Janeiro.

The Decree will be effective as of December 1st, 2019.

SEFAZ/RJ Resolution No. 65/2019: Extension of deadline for initiating the procedures related to ICMS exemption in electronic documents

On October 4th, 2019, SEFAZ Resolution No. 65/2019 was published extending to September 1st, 2019 the term for beginning the procedures applicable to ICMS tax exemption in electronic fiscal documents and digital tax bookkeeping ("EFD ICMS-IPI") foreseed in Annex XVIII, Part II of SEFAZ Resolution No. 720/2014.

Brazilian IRS Normative Instruction No. 1,911/2019: Compilation of PIS/COFINS Legislation

On October 15th, 2019, Brazilian IRS Normative Ruling No. 1,911/2019 ("NR No. 1.911/2019") was published compiling the federal tax legislation related to the Social Integration Program ("PIS"), the Public Servant Heritage Formation Program ("PASEP"), the Contribution to Social Security Financing ("COFINS"), as well as to PIS-Import and COFINS-Import.

NR No. 1.911/2019 revoked more than 50 normative rulings in force up to now, compiling in one single regulation the rules applicable to the aforementioned contributions, including the potential differentiated tax treatments, such as sales in the Manaus Free Trade Zone, REIDI, REINTEGRA, RECAP, Export Processing Zones, as well as the trading of alcohol, paper, biodiesel and cigarettes, among others.

The normative rulings that have been revoked include Normative Rulings No. 404/04 and No. 247/02, being defined in article 176 of NR No. 1,911/2019, the concept of inputs for the purpose of calculating PIS and COFINS non-cumulative credits. This definition took into consideration the criteria of essentiality and relevance adopted by the Superior Court of Judgment ("STJ") in the judgment of Special Appeal No. 1,221,170, although under the perspective of the Brazilian IRS pursuant to Normative Opinion COSIT No. 05/2018.

Additionally, in regards to the exclusion of the ICMS from PIS and COFINS calculation basis, resulting from the decision issued in Extraordinary Appeal No. 574.706, the sole paragraph of article 27 provided that the exclusion can only be carried out by taxpayers that have final judicial decision. In the same sense, the amount to be deducted from these contributions is the ICMS effectively collected and not the one informed in the fiscal invoice, which is in line with the position adopted by the IRS in the Answer to Advance Tax Ruling Request No. 13/2018.

LEGISLATIVE DEVELOPMENTS

Provisional Measure No. 899/2019: Regulation of Tax Transaction

On October 17th, 2019, Provisional Measure No. 899/2019 (the so-called "MP do Contribuinte Legal") was published creating the possibility of being celebrated a transaction of tax debits between Federal Government and taxpayers as authorized by Article 171 of the Brazilian Tax Code.

MP No. 899/2019 foresees 3 (three) transaction modalities: i) an individual proposal or inidividual adhesion related to tax debits enrolled as Overdue Tax Liability; ii) an adhesion in other cases that are part of a tax litigation or administrative proceeedings; and iii) adhesion in cases of low value debits that are part of administrative proceedings.

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Brazilian IRS Ordinance No. 834/2019: Admission of goods on areas managed by Suframa

On October 18th, 2019, Brazilian IRS Ordinance No. 834/2019 was published regulating the admission of national or nationalized goods to companies registered in the incentived areas managed by Manaus Free Zone Superintendence ('Suframa") for purposes of controling and using the tax incentives.

The following innovations of the regulation should be highlighted: i) the creation of a procedure for the admission of national or nationalized goods benefited by tax incentives; ii) the regulation of the electronic, documentary and physical inspection channels of the goods by Suframa, as well as the extemporaneous inspection; and iii) the criteria for enrolling in the Register of Legal Entities of the Manaus Free Zone Superintendence ("the so-called CADSUF") for qualification in the National Merchandise Entry System (the so-called "SIMNAC").

SEFAZ/RJ Resolution No. 75/2019: Administrative notice for self- regularization of tax debts

On October 24th, 2019, SEFAZ Resolution No. 75/2019 was published foreseeing the send of an administrative notice for self-regularization, before the begin of any tax procedure, for solving an omission or inconsistency in the fulfillment of ancillary obligations and in the payment of tax debts.

The administrative notice to self-regularization will be electronically sent to the Taxpayer's Electronic Home (the so-called "DeC") or other forms of communication may be used with a period of 30 (thirty) days for self-regularization or providing information.

BRAZILIAN IRS'S ANSWERS TO ADVANCE TAX RULING REQUESTS

Taxation on cost sharing agreements

On October 2nd, 2019, Answer to Advance Tax Ruling Request Cosit No. 276/2019 was published, stating that WHT, CIDE-royalties, PIS and COFINS-Imports will levy on amounts paid, credited, delivered, employed or remitted abroad as counter-payments to technical services rendered between companies of the same economic group based on cost sharing agreements that do not fill the requirements established by the Brazilian IRS for its characterization.

IRPJ and CSLL Presumed Profit rates on the sale of customized softwares

On October 2nd, 2019, Answer to Advance Tax Ruling Request Cosit No. 269/2019 was published, stating the percentage for determining the IRPJ and CSLL calculation basis for taxpayers submitted to Presumed Profit Method in the case of sale of customized software.

In summary, the profit assumption percentage of i) 8% (eight percent) will be applied for the determination of the IRPJ calculation basis and 12% (twelve percent) of the CSLL in cases where the customatization made in the product represent mere adjustments so that it can meet the needs of a particular customer; ii) 32% (thirty two percent) for the determination of the IRPJ and CSLL calculation basis will be applied in the cases where the customization represents an actual program development, resulting in a new version of the product, or the customization is significant to the point of cannot being considered as mere adjustments; and iii) 32% (thirty two percent) for determining the IRPJ and CSLL calculation basis will be applied on revenues from the technical support service offered to computer program users.

If more than one activity is performed simultaneously, the presumption percentage shall be applied to the amount of gross revenue accrued in each activity.

Prohibition of offsetting monthly prepayments of IRPJ and CSLL

On October 2nd, 2019, Answer to Advance Tax Ruling Request Cosit No. 99,013 / 2019 was published, stating that, as of May 31, 2018, monthly prepayment of IRPJ and CSLL calculated under the Actual Profit Method cannot be offset, even in cases where the monthly prepayments are reduced through balances or balance sheets.

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.

PIS and COFINS levied on royalties paid to technology licensing

On October 11th, 2019, the Answer to Advance Tax Ruling Request Disit/SRRF07 No. 7,063 /2019 was published, stating that revenues received from abroad as royalties paid to technology licensing are subject to PIS and COFINS taxation, as they do not represent revenue from the sale of goods or provision of services.

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BRAZILIAN IRS'S ANSWERS TO ADVANCE TAX RULING REQUESTS

PIS and COFINS credits on resale

On October 11th, 2019, the Answer to Advance Tax Ruling Request DISIT/SSRF07 No. 7,055 / 2019 was published, stating that only goods and services used in the provision of services and in the manufacture of goods destined to sale can be considered as input for the accrual of non-cumulative PIS and COFINS credits, excepting those items that are used in other areas of activity of the legal entity, such as administrative, legal and accounting, as well as those related to the resale of goods.

Regarding the advertising expenses incurred by legal entities that carry out activities of resale of goods, the Answer to Advance Tax Ruling Request stated that they cannot be considered as inputs for purposes of accruing credits of PIS and COFINS nor in any other case of offsetting provided for in the legislation in force.

Deduction of maternity pay derived from unhealthy activity

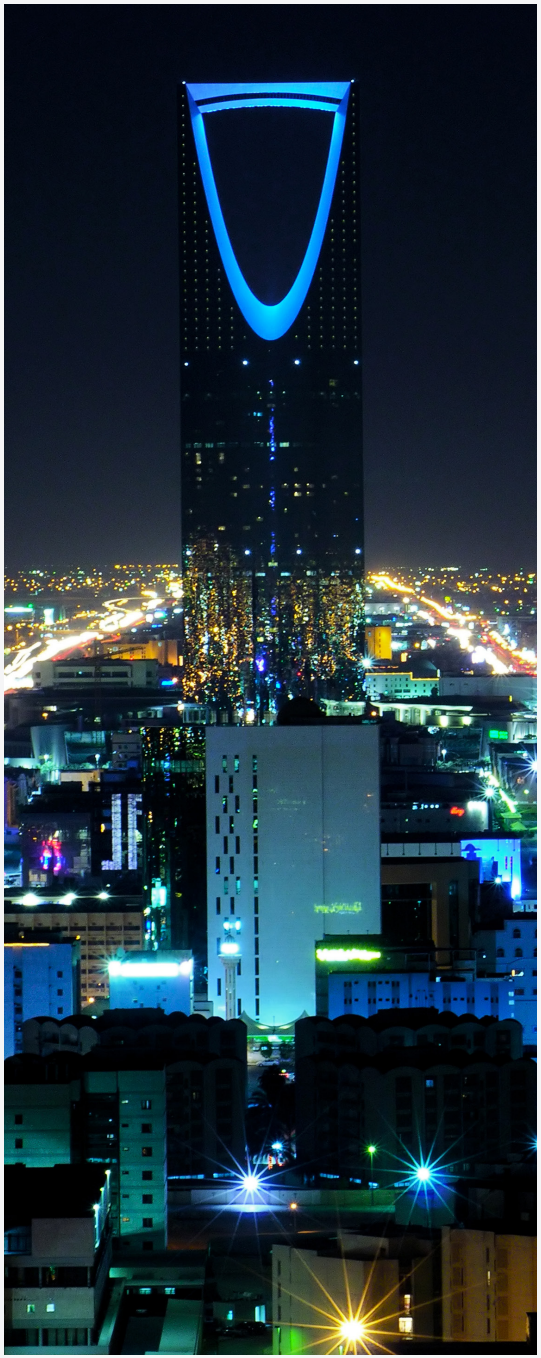
On October 21st, 2019, the Answer to Advance Tax Ruling Request Cosit No. 287/2019 was published stating that full deduction of maternity pay is allowed during the entire period of the employee's leave in cases its absence is due to the fact that the place of the work is considered unhealthy.

In cases of outsourcing, for benefiting from the deduction, the employer shall prove that it is impossible to perform the function in a healthy environment or in another contractor's location, and not only in the establishment of the company in which the pregnant employee was allocated.

PIS and COFINS credits on retail sale of gasoline and diesel

On October 21st, 2019, Answer to Advance Tax Ruling Request Disit/SRRF04 No. 4,038 / 2019 was published, stating that the retail seller of gasoline and diesel oil (except the aviation gasoline) that calculates PIS and COFINS under the non-cumulative method may accrue credits based on the provisions of Article 3rd of Laws No. 10,833/2003 and No. 10,637/2002, while the accrual of credits on the gasoline and diesel destined to retail is not allowed.

The Answer to Advance Tax Ruling Request also states that i) it is not possible to accrue credits on freight and storage expenses incurred by the retail seller since they are products subject to concentrated taxation; ii) it is possible to accrue credits on expenses of electricity consumed in its establishments and also in relation to the expense of renting buildings, machines and equipment used in the company's activity; iii) it is not possible to accrue credits on depreciation expenses of machinery, equipment and other assets incorporated to property, plant and equipment since they are not leased to third parties, neither used in the production of goods intended for sale or the rendering of services; and iv) it is not possible to accrue credits on royalties expenses and evaporation expenses due to lack of legal provision.



CASE LAW

STF: Request for information regarding the omission in the criation of the Wealth Tax

On October 09th, 2019, the Minister Marco Aurélio Mello requested information from the National Congress regarding the legislative omission to create the Wealth Tax foreseed in article 153, VII of the Federal Constitution. This omission is addressed in the Direct Action for Unconstitutionality by Omission (ADO) No. 55.

STJ: Inclusion of ICMS-ST in the calculation of PIS and Cofins' credits

On October 15th, 2019, the First Panel of the STJ considered that the ICMS collected by the tax substitution system ("ICMS-ST") entitles to the accrue of PIS and COFINS credits during the judgment of the Special Appeal No. 1,428,247. In summary, it was understood that the amount of ICMS-ST is part of the acquisition cost, which results in the right to accrue credits. The matter should be defined by the 1st Section of the STJ, since the Second Panel has decisions in the opposite direction.

CARF: Rejected the accrual of IPI credits on purchase of inputs, raw materials and packaging in Manaus Free Zone

On October 17th, 2019, during the judgment of Special Appeal filed by the taxpayer in the Administrative Proceeding No. 10480.723970/2010-65, the 3rd Panel of the Superior Chamber of CARF decided, by the casting vote, to deny the accrue of IPI credits on the purchase of inputs, raw materials and packaging from the Manaus Free Zone. Among the arguments, it was mentioned that the STF's decision under the general repercussion system issued in the Extraordinary Appeal (RE) No. 592.891 has not yet become final.

STF: General repercussion declared in the inclusion of PIS and COFINS in their own calculation basis

On October 18th, 2019, the Federal Supreme Court recognized the existence of general repercussion in Extraordinary Appeal No. 1,233,096, which discusses the constitutionality of including PIS and COFINS in their own calculation basis.

Credits accrued in REINTEGRA are not included in IRPJ and CSLL calculation basis

On October 28th, 2019, the STJ First Panel decided that the credits accrued in REINTEGRA should not be included in the IRPJ and CSLL calculation basis considering the purpose of the tax benefit during the judgment of Special Appeal (REsp) No. 1,571,354.

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