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Brazil Tax Round-Up

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Public consultation on tax transaction for federal debts enrolled as overdue liability is launched

The National Treasury Attorney's Office ("PGFN") has launched a public consultation on Ordinance PGFN No. 11,956/2019, which has regulated the tax transaction for federal debts enrolled as overdue liability established by Provisional Measure No. 899/2019.

The consultation will be available until March 25, 2020.

Municipality of São Paulo creates Code of Taxpayer's Rights, Guarantees and Obligations

On January 13, 2020, Law No. 17,262/2020 was published, creating the Code of Taxpayer's Rights, Guarantees and Obligations from the Municipality of São Paulo. The code aims to support the constitutional principles of legality, tax equality, tax ability to pay, legal security, full defense, due process, reasonableness and proportionality.

Among the innovation are:

i) the creation of the Municipal Taxpayer Defense Council ("CMDM"), an advisory body with a role in defending the interests of taxpayers

ii) the obligation of the Municipal Secretary of Treasury and the Municipal Attorney General's Office to disclose the average time it will take for taxpayers' service requests to be completed

iii) the release of information of general interest regarding first and second administrative level decisions, responses to taxpayers' formal consultations and interpretive acts in general

iv) the obligation of the executive power to enact an decree to consolidate the municipal tax laws in force every two years or when a substantial amendment of one of the tax laws is made

Average exchange rate for the US dollar between 2015 to 2019 in Siscomex

On January 13, 2020, Coana Ordinance No. 2/2020 was published, establishing the BRL 3.52423 as the average exchange rate for the US dollar for calendar years 2015 to 2019 and for the purpose of calculating the financial capacity estimated of a legal entity that requests permission for Siscomex. It should be noted that this rate is applicable only to the requirements filed until December 31, 2020.

Access to bank data of financial institutions' users by Rio de Janeiro State Treasury Office

On January 15, 2020, Decree n° 46.902/20 was published, regulating the Rio de Janeiro' State Treasury Office's requisition of, access to or use of of financial institutions' user data based on article 6 of Federal Supplementary Law No. 105/2001, as well as stating the procedures for preserving the confidentiality of this information. Worth noting:

i) The request for information can only be made when there is a tax administrative proceeding or inspection procedure in progress;

ii) The information request proceeding will be independent and the State Treasury Office must control access toand register the person who will be responsible for receiving the information. The request for information will be kept confidential;

iii) The information request process will be coordinated with any related, existing tax administrative proceeding or inspection;

iv) If the tax credit is enrolled as overdue liability, the autonomous process will be filed together with the process of constitution of the tax credit. If the tax credit is cancelled or paid by the taxpayer before being enrolled in Active Debt, the autonomous process will be terminated;

v) Information may be requested from the taxable person of the tax liability subject to the tax administrative proceedings or the ongoing inspection procedure, as well as from its partners, administrators and third parties linked, even if indirectly, to the facts or to the taxable person when necessary to verify the violation of tax law;

vi) The decree regulates the cases in which financial information will be considered necessary—for example, when there is an indication or justified suspicion of evasion and

vii) The tax Aauditor of the State Finance Department may summon the taxable person, partner, administrator or third party to present the necessary information without delay.

This decree comes into force 60 days after its publication.

Public consultation for changes to the CARF Internal Regulations

On January 22, 2020, Ordinance ME/CARF No. 1,744 was published, announcing a public consultation regarding the draft of the Tax Administrative Council's ("CARF") new Internal Regulations.

Noteworthy among the intended changes is an amendment to paragraph 2 of article 62 requiring that final judgment of decisions on the merits be rendered by both the Superior Court of Justice ("STJ") and the Supreme Court ("STF") in the systematic of repetitive appeals that are recognized as having general repercussion. This is so that these decisions can be reproduced by CARF counselors in matters under CARF's jurisdiction. The previous wording of this article provided for the need for a definitive decision on the merits without expressly providing for the need for a final decision.

In the event of an extraordinary appeal recognized as having general repercussion and pending judgment by STF, on a matter already decided by STJ, the board members are authorized not to apply the STJ's decision in the judgment of appeals under the CARF.

In addition, there is an intention to add paragraph 4 to article 62, in order to provide that the decision to allocate the case to the systematic of repetitive appeals or general repercussions does not allow the interruption of judgment in the tax administrative proceedings under CARF except in cases where there is a merit judgment issued by the STF or STJ and in which a final decision has not been rendered yet.

The consultation will be available from January 22 to March 6, 2020 on the CARF website.

Sharing of tax information between the Ministry of Economy and the Federal Union General Controller

On January 23, 2020, Decree No. 10,209/2020 was published, authorizing and regulating the provision of data by the Federal Union General Controller, including data that had previously been protected by tax confidentiality law. The decree provides for the Controller to share data with the Ministry of Economy, with the exception of data protected by bank confidentiality laws or economic-tax data related to an international cooperation agreement that prohibits the transfer of information to public bodies other than the tax and customs administrations.

Decree No. 46,917/2020 and SEFAZ Resolution No. 112/2020: Regulation of the rules related to the deferral of ICMS on imported goods

On January 29 and 31, 2020, Decree No. 46,917/2020 and SEFAZ Resolution No. 112/2020 were published, respectively, promoting changes to Decree No. 46,781/2019 and regulating the procedures applicable to the use of the deferral of ICMS on imports made in the State of Rio de Janeiro.

Decree No. 46,917/2020

The Main Changes

i. Decree No. 46,917/2020 clarified that the deadline for carrying out transactions with imported goods or the product resulting from their manufacturing must be counted from the date of customs clearance or delivery of imported goods, whichever comes first.

ii. In relation to partial deferral of ICMS, the decree mentions that the ICMS to be paid must use the rate of 4%, including the portion allocated to the State Fund for Combating Poverty and Social Inequalities ("FECP").

iii. In the event of import on behalf of third parties destined for entities located in other states, the deferred ICMS will be collected by the foreign trade company that performs the transaction.

iv. The offset of the deferred ICMS with ICMS recoverable balance recorded in the tax books is not allowed under the terms of this decree.

Deferral Restrictions

The deferral cannot be used on certain imports, such as:

i. Imports of goods for use and consumption or for fixed assets of the importer, purchaser or orderer. (This prohibition does not apply to imports on behalf of third parties destined to entities located in other states.)

ii. Imports of goods made by individuals or legal entities that are not ICMS taxpayers.

iii. Imports of goods indicated in the Sole Attachment to Decree No. 46,781/2019 (such as fuel oils, diesel, lubricants, alcohol, gasoline, LPG, LNG, organic and inorganic chemicals, among others).

Requirements

The decree introduced the following requirements for obtaining this tax treatment:

i. The express provision that the importer, the buyer or the ordering party must apply for the tax treatment provided for in Decree No. 46.781 / 2019.

ii. The existence of an importing or acquiring establishment located in Rio de Janeiro territory. (However, the ordering establishment doesn´t need to be located in Rio de Janeiro territory.)

iii. Proof that the entity is registered with and regularly pays taxes to SEFAZ and owes no debt to the State of Rio de Janeiro, nor does any other company in Rio de Janeiro in which the applicant, or its shareholders, have shares owe any debt to the State.

iv. Establishment of foreign trade companies located in the State of Rio de Janeiro if any import transactions will be carried out on behalf of third parties or by order.

ICMS Due for Non-Compliance

Regarding the non compliance with the deadlines related to the sale of the manufacturing of the imported goods established in Decree No. 46,781/2019, Decree No. 46,917/2020 specified that the ICMS due, considering the monetary restatements and fine, should be calculated as follows:

(i) In relation to the partial deferral, the ICMS due will correspond to the difference between the ICMS already paid using the 4% rate and the ICMS due on imports.

(ii) In relation to the full deferral, the ICMS due will be collected considering the calculation basis on imports, by applying the rate provided for the imported goods.

Using Other Differentiated Treatments of ICMS

The enrollment to the tax treatment referred to in Decree No. 46.781/2019 implies the impossibility of using another differentiated treatment of ICMS in the import of goods. Such prohibition, however, does not apply to foreign trade companies that import on behalf of third parties.

Important Dates

The beginning of the effects of article 14 of Decree No. 46,781/2019 (which revokes SEFAZ Resolution No. 726/2014) was extended to March 1, 2020.

Decree No. 46,917/2020 came into force on January 30, 2020, with retroactive effects to December 1, 2019.

SEFAZ Resolution No. 112/2020

The resolution includes the provisions that:

i. The enrollment request must be submitted to the the tax office of the state in which the taxpayer is based.

ii. If the enrollment request is denied, an appeal may be filed within 30 days to the State Revenue Undersecretary.

iii. The importer, buyer or ordering party that benefits from the tax treatment must issue tax documents for the transactions with the imported goods with the deferral, providing the number and date of the import invoice and a copy of the DANFE, which must accompany the transit of the goods.

iv. A monthly report must be issued, containing, at minimum: (i) the reference month and year; (ii) the value of imports carried out in the period, separately indicating those with ICMS deferral and the number of the respective import statements; and (iii) the value of transactions performed and the tax charged, indicating, separately, those related to imported goods.

v. If the beneficiary fails to comply with any of the requirements provided for in regulatory legislation, the beneficiary will be summoned to correct the situation within 30 days, under penalty of cancellation of the tax treatment. If the tax treatment is cancelled, the beneficiary has to wait 12 months before requesting a new ICMS deferral.

Public consultation on the regulation of the drawback special customs regime

On January 30, 2020, Ordinance No. 12/2020 of the Special Secretariat for Foreign Trade and International Affairs of the Ministry of Economy was published, submitting to public consultation a draft ordinance regulating the drawback special customs regime.

The main changes proposed:

(i) The possibility of manufacturing by order for a commercial company in the suspension drawback;

(ii) The possibility that imports carried out under the drawback-suspension regime are carried out on an account and order basis;

(iii) The possibility of transferring items between concession acts;

(iv) Nationalization, re-exportation or destruction of goods imported or purchased on the domestic market that were not used in the production process of the exported goods, even though the company has exported the total quantity of products provided for in the concession act.

The proposed regulation can be accessed through the website www.siscomex.gov.br, and suggestions and comments must be sent by March 30 to the e-mail address decoe@mdic.gov.br

BRAZILIAN IRS'S ANSWERS TO ADVANCE TAX RULING REQUESTS

Contribution of legal entity part of the CCEE

On January 15, 2020, Answer to Advance Tax Ruling Request Cosit No. 4/2020 was published, stating that revenues from agents of the Electric Energy Trading Chamber ("CCEE"), which are not included in the optional tax regime of the extinct Wholesale Electricity Market ("MAE"), will be submitted to PIS and COFINS under the non-cumulative system.

In addition, the Answer to Advance Tax Ruling Request states that i) the credits will only be accrued from the costs and expenses related to the non-cumulative system and ii) the legal entity will not accrue credits from the costs and expenses related to the optional tax regime of MAE.

Transfer of goods between branches does not constitute a beneficiary substitution on temporary admission or Repetro regime

On January 27, 2020, Disit/SRRF Answer to Advance Tax Ruling Request No. 6001/2020 was published, stating that is not possible to suspend the levy of IPI on components, chassis, car bodies, accessories, and parts and pieces classified on NCM/SH 84.29, 84.33, 87.01 until 87.06, and 87.11 TIPI (article 5 of Law No. 9,826/1999) when the goods leaves establishments that are equivalent to industrial establishments. The exception is the situation for which the equivalence was set forth in article 4 of Normative Instruction No. 948/2009.

PIS and COFINS credits on expenses with the acquisition of individual protection equipment

On January 27, 2020, COSIT Answer to Advance Tax Ruling Request No. 2/2020 was published, stating that expenses for the acquisition of individual protection equipment are considered inputs for purposes of calculating credits from contributions to PIS and COFINS when provided to workers for the provision of activities for the legal entity.

In addition, the Answer to Advance Tax Ruling Request acknowledged that it also would be possible to accrue these credits from hiring a labor-supply company whose workers are directly used in the productions of goods and services.

However, the Answer to Advance Tax Ruling Request said that it would not be possible to accrue these credits for medical expense-related payments to workers unless required by law.

PIS and COFINS ad valorem rate on imports of liquid mixture called "condensate"

On January 30, 2020, COSIT Answer to Advance Tax Ruling Request No. 319/2019 was published stating that PIS' and COFINS' ad valorem rates are applicable as set forth in article 8, I, of Law 10,865/2004 on imports of "condensate," a liquid hydrocarbon mixture lighter than crude oil, which is used as an input in oil refineries.

PIS and COFINS ad valorem rate on imports of liquid mixture called "aromatic"

On January 30, 2020, COSIT Answer to Advance Tax Ruling Request No. 320/2019 was published, stating that PIS' and COFINS' ad valorem rates are applicable as set forth in article 8, I, of Law 10,865/2004 on imports of "aromatic," a mixture of liquid hydrocarbons, used as an input in oil refineries.

CASE LAW

STF: Lawsuit filed for declaration of unconstitutionality of judgments and interpretation of CARF and RFB to recognize employment relationship

On January 22, 2020, the Brazilian Association of the Industry of Medical, Dental, Hospital and Laboratories Articles and Equipment ("Abimo") filed a Motion for Non-Compliance of Fundamental Precept (ADPF) 647, by in STF against decisions of CARF and the Federal Revenue Departments ("DRFs") that recognized the competence of the Federal Revenue Tax Auditors to declare the existence of an employment relationship without a prior pronouncement of the Labor Court. Carmen Lúcia is the Reporting Minister assigned to the action.

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