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HIGHLIGHTS

Judicial discussions regarding the PIS/COFINS – Import

Law No. 10,865/04 created the Contribution to the Social Integration Program and the Contribution for Social Security Financing due by the importer of foreign goods or services (“PIS/COFINS- Import”). Several legal entities have questioned the levy of those contributions, based on different arguments and aspects of the legislation.

One of the arguments raised for questioning those contributions is based on Article 149 of the Federal Constitution (“CF”) and the concept of “customs value”, which is determined by treaties as the General Agreement on Tariffs and Trade (“GATT”). As provided by Article 149 of the CF, in case of import, social contributions shall have *ad valorem* rates whose tax basis shall be the customs value. The customs value concept is determined and widely accepted by international regulations as the price effectively paid for the goods in import/export transactions.

Law No. 10,865/04, however, provided that the tax basis of the PIS/COFINS – Import should be the customs value plus the State Value-Added Tax (“ICMS”) and the PIS and COFINS. Contrary to Law No. 10,865/04, preliminary injunctions were granted excluding the ICMS and PIS/COFINS from the tax basis of those contributions.

Another argument raised for questioning PIS/COFINS – Import relates to the confiscatory aspect of the contributions and the non-compliance with the principle of isonomy, establishing a non-isonomic treatment between domestic and foreign products.

At least in one case, based on these arguments, a preliminary injunction was granted allowing the customs clearance of products without PIS/COFINS – Import payment. In this specific case the products were imported under a temporary basis through an international leasing.

FEDERAL REGULATIONS

Law No. 10,892 of July 14, 2004

Reduces to zero the Provisional Tax on Banking Transfers (“CPMF”) applicable rate regarding investment accounts and provides for the possibility of directly transferring the investors’ financial investments to other investment accounts (reinvestment), as of October 1, 2006. Law No. 10,892/04 resulted from the conversion of Provisional Measure 179/04 into Law.

Law No. 10,925 of July 26, 2004

Reduces to zero the PIS and COFINS tax rates levied on imports and local sales of fertilizers, agribusiness defensives and also amends Laws Nos. 10,637/02, 10,833/03 and 10,865/04 regarding PIS and COFINS. Among the amendments introduced by the referred law we emphasize the maintenance of the zero Withholding Income Tax (“IRRF”) tax rate applicable to the renegotiation of the term of the agreements that were effective on December 31, 1999 related to interests, commissions, expenses and discounts deriving from loans contracted abroad, according to items VIII and IX of Law No. 9,481/97. Law No. 10,925/04 resulted from the conversion of Provisional Measure 183/04 into Law.

Provisional Measure No. 202 of July 26, 2004

Reduces to zero the PIS and COFINS tax rates levied on gross revenues derived from the sale of goods destined to the Manaus Free Trade Zone (“ZFM”) by legal entity located outside the ZFM. In addition, the referred Provisional Measure exempts from the IRRF part of the income derived from salaries paid from August to December 2004.

Decree No. 5,106 of June 16, 2004

Provides for the Mercosur list of preferential tariffs included in the Agreement on the Global System of Trade Preferences Among Developing Countries (“GSTP”).

Decree No. 5,127 of July 6, 2004

Reduces to zero the PIS and COFINS rates levied on import and local sales of certain chemical and pharmaceutical products.

Decree No. 5,138 of July 13, 2004

Extends, until December 31, 2020, the Import Duty (“II”) and Federal Excise Tax (“IPI”) exemption applicable to goods destined to research and exploitation of mineral deposits (*i.e.*, crude oil and natural gas), temporarily admitted in the country (“REPETRO”).

Decree No. 5,164 of July 30, 2004

Reduces to zero the PIS and COFINS tax rates levied on financial revenues of legal entities subject to the non-cumulative system, except revenues from interest on net equity or hedge transactions.

Resolution of the Foreign Trade Chamber (“CAMEX”) No. 16 of June 18, 2004

Reduces to 2%, until June 30, 2006, the II rate applicable to capital, information and telecommunication goods, previously approved as “Ex-Tarifários”.

Resolution CAMEX No. 18 of July 1, 2004

Extends, until December 31, 2004, the reduction to 0% of the II rate applicable to certain chemical products.

Resolution CAMEX No. 20 of July 7, 2004

Amends the Mercosur Tariff Nomenclature (“NCM”) and the II rate applicable to certain machinery, automotive vehicles and chemical products.

Resolution CAMEX No. 21 of July 22, 2004

Reduces to 2%, until June 30, 2006, the II rate applicable to capital goods, previously approved as “Ex-Tarifários”.

Normative Ruling of the Federal Revenue Department No. 429 of June 24, 2004

Clarifies the IPI suspension regime applicable to the manufacturers of machines, vehicles and related parts.

Normative Ruling of the Federal Revenue Department No. 432 of July 23, 2004

Approves the Electronic Request of Reimbursement or Restitution and Offsetting Statement Program (“PER/DCOMP 1.4”) and establishes rules for its application with respect to reimbursement, offsetting or restitution request to the Federal Revenue Department.

Normative Ruling of the Federal Revenue Department No. 433 of July 29, 2004

Provides for PIS/COFINS – Import calculation rules and approves the formula to calculate these contributions upon imports of goods or services.

Normative Ruling of the Federal Revenue Department No. 436 of July 29, 2004

Provides for the cooperatives and vehicle parts manufacturers’ PIS and COFINS non-cumulative system option and also the option applicable to water bottler entities regarding a collection and payment special regime in which the amount of the contributions are calculated per liter of product.

Normative Ruling of the Joint Committee of the National Agency of Cinema (“ANCINE”) No. 26 of June 28, 2004

Regulates the payment of the Contribution for Development of Brazilian Cinematographic Industry (“CONDECINE”) and the registry of titles of audiovisual, cinematographic and video phonographic productions.

Normative Ruling ANCINE No. 30 of July 23, 2004

Regulates the administrative procedure to verify wrongdoings and the application of penalties resulting from cinematographic and video phonographic activities.

Executive Declaratory Act of the Federal Revenue Department No. 32 of July 22, 2004

Amends the IPI Tariff Schedule (“TIPI”) wording of certain products while maintaining the tax rates and creating new tariff classification codes to certain machinery and chemical products.

Interpretative Declaratory Act of the Federal Revenue Department No. 21 of July 29, 2004

Provides for the exemption and suspension of PIS/COFINS – Import payment, as well as for the non-applicability of penalties for the incorrect tariff classification of goods.

Interstate Agreement (“Convênio ICMS”) No. 45 of June 24, 2004

Authorizes that the ICMS presumed credit be limited to the debit balance amount in the respective month.

Interstate Agreement (“Convênio ICMS”) No. 53 of June 24, 2004

Authorizes that the benefits of ICMS basis reduction be conditional to the reversal of credits deriving from the inflow of goods whose respective outflow is benefited with this reduction.

Memorandum Brazil/United Kingdom of Great Britain and Northern Ireland June 24, 2004

Declares that air transportation companies from the United Kingdom operating in Brazil are exempted from PIS and COFINS, from the Corporate Income Tax (“IRPJ”) and the Social Contribution on Net Income (“CSLL”).

Memorandum Brazil/Netherlands of June 24, 2004

Declares that the air transportation companies from the Netherlands operating in Brazil are exempted from PIS and COFINS.

Interpretation of the Brazilian Independent Auditors Institute (“IBRACON”) No. 1, of June 22, 2004

Provides for the procedure applicable to account PIS and COFINS credits according to the non-cumulative system.

DECISIONS

ICMS on imports – Federal Supreme Court (“STF”)

The STF denied an Extraordinary Appeal, which discussed the ICMS tax jurisdiction, in case of goods imported by an establishment located in determined State, which enter in the country in a State different from the State where the resale occurs. The court understands that the competent authority to collect the ICMS is the State in which the establishment that imported the good is located, regardless of the State where the customs clearance occurred. **(RE 299079)**

CPMF exemption on “symbolic” exchange transactions

The 6th District of the Federal Justice of Rio de Janeiro granted a preliminary injunction exempting the “symbolic” exchange transactions from the CPMF. According to the decision, in the conversion of receivables into foreign investment, there is no banking transfers of currency, neither wire transfers. Therefore, the CPMF triggering event does not occur. **(MS n° 5101490312-9)**

Decision on Request for Ruling of the Federal Revenue Department No. 16, of June 14, 2004 – 3rd Tax Region (Subject: PIS/COFINS)

The acquisition of fuel consumed by the company’s vehicles utilized in the transportation of employees as well as the supply of uniforms, meal and transportation tickets may be considered as “raw-materials” (“*insumos*”) utilized in the rendering of services and, therefore, the legal entity may take PIS and COFINS credits for those expenses.

NEWS

Discounts excluded from the ISS tax basis – STJ

The Superior Court of Justice (“STJ”) decided that to determine the Municipal Tax on Service (“ISS”) tax basis, the price of the service rendered should be the effective price received by the services provider, excluding from the tax basis discounts granted to the customers. Unconditional discounts granted in the rendering of service are a liberality of the service provider. Therefore, if discounts were to be included in the ISS tax basis, such tax would be levied on an amount not received by the taxpayer. **(Resp 622.807-BA)**

The Court of Justice of São Paulo (“TJ/SP”) exempts ISS on franchising

The TJ-SP granted a preliminary injunction exempting franchising activities from the ISS. Even after the publication of Complementary Law No. 116/03, which lists franchising as a service subject to ISS, the Court understood that franchising activities should not be considered rendering of services, but rather trademark license use and transfer of technology. **(Source: Gazeta Mercantil, 03.11.04)**

Exclusion of freight from IPI tax basis

Contrary to Article 14 of Law No. 4,502/64, as amended, a decision from the Federal Regional Court of the 4th Tax Region determined that the amount corresponding to the freight should be excluded from the IPI tax basis. The main argument was that Law No. 4,502/64 violated Article 47 of the National Tax Code (“CTN”), which determines that IPI tax basis must correspond to the price (“the operation value”) established in the sale agreement. **(Source: Informativo TRF - 4^a Região, No. 203)**

Administrative State Court of Appeals (“TIT”) dismisses the application of Selic rate

The 2nd Temporary Chamber of the Administrative State Court of Appeals (“TIT”) of the State of São Paulo understood that interest rates applicable to taxpayer’s debts could not be based on the Selic rate variation, but should be based on the monetary adjustment and interest of 1% per month. The referred decision was based on the understanding that the Selic rate has a remunerative nature, instead of a compensatory nature which interest rates must have. **(Source: Jornal Valor Econômico, 07.08.04, page E2)**

Tax Newsletter

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Most comments above are based upon recently published regulations or information obtained from the regulatory agencies themselves. Some issues may still be in discussion at the time of the publication of this newsletter. Some of the rules mentioned above may be amended, replaced or revoked. This publication is only a general review of the subject matter hereof and under no circumstances constitutes a legal opinion or advice.

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