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New Rules for Foreclosure Procedure of Fiduciary Assignment Agreements

On July 12th 2017, Law No. 13,465 entered into effect amending Law nº 9,514 of November 20th 1997.

The new rules fill gaps in relation to foreclosure of fiduciary assignment agreements. These gaps had been noticed and criticized by the market during the last few years. The gaps existed in particular in relation to the methods which were used to give notice to the debtor and/or grantor of the collateral and the right of first refusal on the property to be auctioned. Furthermore, with respect to the definition of the value for the first statutory auction, the new rules also seek to resolve the issue about the value established in the contract and the different value used by the Brazilian tax authorities as the base amount for the calculation of the transfer taxes (ITBI).

Key points to note are:

- **Minimum Value at First Statutory Auction.**

  The highest value between (i) established in the collateral agreements or (ii) used as basis by the competent authority to calculate the transfer tax (ITBI) has now to be used for consolidation of the property title of the creditor.

- **Notice to the Debtor and/or Grantor of the Collateral at a Pre-Determined Time and Date.**

  If there is suspicion that the debtor and/or grantor of a collateral might be intentionally avoiding service of process, the registration office's officer will from now on – after two failed attempts - inform any relative, neighbor or warden (in case of condominium buildings or other property with access control), that he/she will return on the next business day to properly deliver the notice at a Pre-Determined Time and Date, in the same form as provided in the Code of Civil Procedure.

- **Right of First Refusal to the Grantor of the Collateral.**

  The grantor of collateral will have the right of first refusal to re-acquire the property granted as collateral any-time after consolidation of title and before the second statutory auction by paying the full amount of the debt plus (a) the charges and expenses listed in Law 9,514/97, (b) the transfer taxes (ITBI) and laudêmio, if applicable, paid for the consolidation of title, (c) the costs of the foreclosure and auctioning procedures and (d) the tax charges and expenses required for the new acquisition of the property by the grant or of the collateral, including costs and fees.

- **Communication the Grantor of the Collateral regarding the Statutory Auctions.**

  The grantor of the collateral has to be informed about the dates, times and locations of the statutory auctions pursuant to Law 9,514/97. For that purpose, the addresses shown in the collateral agreements, including email address, will serve as notification address of the grantor.

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Die Regelung des Erbrechts bei einer Lebensgemeinschaft (*união estável*)

In Brasilien genießt eine rechtlich anerkannte Lebensgemeinschaft (*união estável*) weitgehend den gleichen Schutz vor dem Gesetz wie eine formell geschlossene Ehe. Dabei besteht kein Unterschied zwischen verschieden- und gleichgeschlechtlichen Lebenspartnerschaften, genau gleich wie bei einer formellen Ehe, wo diese ebenfalls von Personen gleichen Geschlechts geschlossen werden kann.

In vielen Fällen sind sich Personen, welche formell nicht verheiratet sind, nicht bewusst, dass zwischen ihnen nach brasilianischem Recht eine Lebensgemeinschaft (*união estável*) besteht. Der Grund dafür liegt darin, dass im Gegensatz zu vielen anderen Staaten nach brasilianischem Recht eine Lebensgemeinschaft (*união estável*) formlos begründet werden kann. Mit anderen Worten ist für deren Gültigkeit kein schriftlicher Vertrag erforderlich. Aus diesem Grund ist ebenfalls unerheblich, ob darüber ein durch einen Notar öffentlich beurkundetes Dokument errichtet oder ob sie in ein amtliches Register eingetragen worden ist.

Es ist in diesem Zusammenhang ebenfalls noch zu erwähnen, dass für die Annahme einer rechtlich anerkannten Lebensgemeinschaft (*união estável*) nicht erforderlich ist, dass beide Lebenspartner „unter dem gleichen Dach“ wohnen. Ferner ist keine gesetzliche Mindestdauer dafür vorgeschrieben.

Weil der Gesetzgeber keine formellen Gültigkeitsvoraussetzungen für die Annahme einer rechtlich anerkannten Lebensgemeinschaft (*união estável*) verlangt, ist diese Lebensform in Brasilien stark verbreitet.

Ist das Bestehen einer Lebensgemeinschaft (*união estável*) zwischen den Lebenspartnern streitig, kann derjenige, der daraus Rechte ableiten möchte, vor dem zuständigen Gericht Klage erheben. Dieses stellt dann fest, ob eine solche zwischen ihnen besteht oder bestanden hat, wenn auf deren Auflösung geklagt wird. Dabei wird auch entschieden, ab welchem und bis zu welchem Zeitpunkt sie gedauert hat. Ferner müssen ihre weiteren Folgen geregelt werden, wie Namensführung, das Verhältnis zwischen Eltern und Kindern, Unterhaltsbeiträge und die güterrechtlichen Verhältnisse nach der Auflösung der Lebenspartnerschaft (*união estável*). Ist eine solche formlos begründet worden, leben die Lebenspartner stets gemäß dem gesetzlichen Güterstand, der bei einer formell geschlossenen Ehe gilt. Bei diesem handelt es sich um die beschränkte Gütergemeinschaft (*comunhão parcial de bens*). Möchten sie eine davon abweichende Regelung vereinbaren, genügt ein privatschriftlicher Vertrag. Eine öffentliche Beurkundung durch einen Notar ist nicht erforderlich.

In einem streitigen gerichtlichen Verfahren über das Bestehen oder die Auflösung einer Lebenspartnerschaft (*união estável*) kann mit allen rechtlich zulässigen Beweismitteln Beweis geführt werden. In der Gerichtspraxis kommt dabei dem Zeugenbeweis eine erhebliche Bedeutung zu. Deshalb ist ein Prozessausgang in solchen Fällen häufig nicht voraussehbar. Langwierige und kostspielige Gerichtsverfahren sind die Folgen.

Lange war die erbrechtliche Regelung bei Bestehen einer Lebensgemeinschaft (*união estável*) umstritten. Das brasilianische Zivilgesetzbuch sieht für diese eine Sonderregelung vor, welche von den erbrechtlichen Bestimmungen bei Bestehen einer formell geschlossenen Ehe abweichen. Das Höchste Brasilianische Bundesgericht (*Supremo Tribunal Federal – STF*) hat nun aber kürzlich entschieden, dass eine abweichende Sonderregelung für rechtlich anerkannte Lebensgemeinschaften verfassungswidrig sei. Auf diese seien ebenfalls nur die gesetzlichen Vorschriften anwendbar, welche bei Bestehen einer formell geschlossenen Ehe gelten. Diese Rechtsprechung sei unmittelbar auf alle gerichtlichen und außergerichtlichen Nachlassverfahren, welche noch nicht abgeschlossen seien, anzuwenden. Im Hinblick darauf liegen bereits veröffentlichte Entscheidungen des Höheren Brasilianischen Bundesgerichts (*Superior Tribunal de Justiça – STJ*) vor, welche die Rechtsprechung des Höchsten Gerichtes des Landes befolgen. Im Weiteren sind alle Gerichte des Landes verpflichtet, diese Rechtsprechung in ihrer Praxis anzuwenden.

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Brazil clarifies obligation to file Country-by-Country Report when there is no effective Competent Authority Agreement in place for its automatic exchange

On July 27 2017, the Brazilian tax authorities published Normative Instruction 1.722/2017, clarifying that Brazilian affiliates of non-Brazilian multinational enterprises may be required to file the Country-by-Country Report in Brazil, in relation to the fiscal year 2016, even if a CbCR has been filed by either the Ultimate Parent Entity or a Surrogate Entity in another jurisdiction.

According to Normative Instruction RFB 1681/2016, a Brazilian affiliate of a non-Brazilian multinational enterprise (MNE) meeting certain revenue thresholds is required to file, with its 2016 Brazilian income tax return, a 2016 Country-by-Country Report (CbCR) for the MNE group, if:

1. The Ultimate Parent Entity (UPE) of the MNE is not obliged to file a CbCR in its jurisdiction of residence for tax purposes;
2. An eligible Surrogate Entity (SE) is not appointed;
3. There is no Competent Authority Agreement (CAA) authorizing the automatic exchange of CbCR; or
4. A systemic failure has occurred.

Under the framework of the Multilateral Convention on Mutual Administrative Assistance (MCMAA), which has been in force for Brazil since October 2016, and in effect for fiscal years starting at 1st January 2017, Brazil signed the Multilateral Competent Authority Agreement (MCAA), allowing Tax Authorities to automatically exchange the CbCR.

Although the MCAA for the exchange of the CbCR is only effective for fiscal years starting at 1st January 2017, and the Brazilian legislation requires an effective MCAA as of 1st January 2016, Brazil will accept that Brazilian affiliates of non-Brazilian MNEs appoint their UPE as the filing entity for the CbCR (for fiscal year 2016), provided all the other conditions in the legislation are satisfied.

Note, however, that such Brazilian affiliates may be required, in the future and upon request only, to file a CbCR in Brazil within 60 days if:

- Before 31st December 2017, the UPE's jurisdiction of residence, for tax purposes, has not taken actions to retroactively introduce an automatic exchange of CbCR with Brazil for the fiscal year 2016; and
- Such jurisdiction requires local affiliates of Brazilian MNEs to file a CbCR for fiscal year 2016 due to the MCAA not being in place.

Multinationals are encouraged to monitor the development of this situation as it may result in the need of filing CbCR in more than one jurisdiction.

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Brazilian Immigration Law

On May, 25th, 2017, the Brazilian government published the Federal Law N.º 13,445, which foresees the Immigration Law. This law replaces the so called "Foreign National Statute" which has been regulating the immigration matters in Brazil for more than 35 years. The new law repeated in its articles a number of constitutional principles which were already in effect as they were incorporated to the Brazilian legal system in 1988, through the advent of the Federal Constitution.

The new law has explicitly excluded the protection to Brazilian manpower. This aspect is very important due to the fact that this protection has been used by the Brazilian authorities to deny work visas whenever they concluded that the foreign workers could jeopardize hiring Brazilians. The effects of this new law are still unclear because it still requires further regulation through an administrative act from the Executive Department.

It has also opened the possibility that professionals who have graduation course completed may be eligible for a work visa under a simpler and faster procedure. This procedure and the graduation courses that will be selected for this benefit still depend on the regulation of the federal government.

In addition to this, the Federal Law N.º 13.445/2017 has also demonstrated some concern regarding the electronic work permit application. There is a provision that allows the Brazilian government to grant the visas by electronic process.

It is definitely a law with humanitarian aspects considering its concern with the non-criminalization of migration and with the guarantee of equal rights in favor of foreign nationals granting access to social services, programs and benefits as well as education, among a number of other rights. From a labor perspective, it is important to point out that the article 14 and its paragraphs foresees the possibility that foreign workers perform professional activities with or without employment in Brazil and it also opens the possibility that foreign workers obtain a temporary work visas even without a formal job offer from a Brazilian company.

Despite a huge expectation that this new law would contemplate an amnesty for those who do not hold a regular legal status in Brazil, this fact did not happen, considering that President Michel Temer excluded this benefit from the final text of the law.

The Law N.º 13.445 will only be in effect on November 24, 2017, within 180 days from its publication date.

At this moment, at least 3 Brazilian public bodies are working together on the text of the Federal Decree that will regulate the new legislation. In addition to this, these public bodies have been doing some public hearings in order to get suggestions and opinions from different sectors of the Brazilian society to formulate the bases of the new immigration policy.

This new legislation is an important paradigm to the country, because it may be a possibility that Brazil becomes much more attractive to foreign nationals who intend to live, work and invest in the country.

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Software Compliance and Corporate Policies in Brazil

Compliance is becoming quite the big word among corporate players in Brazil. Many say this is due to the ongoing crusade public authorities are determined to pursue towards integrity and transparency, since the internationally known scandals unearthed a few years ago, which have brought down several top businessmen, politicians and even the former president, others say it's simply a naturally followed path all emerging countries will end up traversing sooner or later.

The entire opera undoubtedly encouraged the entire market and most of the population - including all ranks of workers – to review and pay more attention to the rules they have always been submitted to, but were sometimes overlooked or simply disregarded as not thoroughly enforced, and if there is one place where impunity would fit best, it would be the internet and personal computers.

A Background of Software Usage in Brazil

Brazil is the 4th largest country in terms of internet users, whose numbers grew a whopping 2,6 thousand percent since the year 2000[1]. It's GDP per capita, however, never grew faster than 6.5%, and it actually shrunk since aforementioned opera's first act, which took place in 2013, only now showing signs of recovery.

The increasing usage of personal computers and the internet back in the 1990's, together with a crawling economy at the time, and a general sense of cyber impunity, fuelled an inevitable rise of piracy. Unlicensed and cracked copies of software, songs, films and the like were very easily obtainable.

Recent studies show that a staggering half of all software used in the country is unlicensed[2]. It has become clear that unlicensed software usage takes place not only in personal computers and households, but also within companies of all sizes, where licenses are purchased only for a few computers, while the majority of others contain unlicensed copies.

Such attitude is not necessarily caused by formal corporate decisions, not even a need to cut expenses, but mostly by the general sense of impunity mentioned above. Until recent years, few people had ever heard of someone who got in actual trouble in Brazil for using unlicensed copies of software easily found online and elsewhere.

This scenario, however, is changing rapidly. The piracy pandemic is being slowed by much cheaper SaaS models and on demand content providers. Music and film are now easily available via streaming websites and applications, for a fraction of the shelf price.

Professional software, however, is still expensive, and while old habits and constructions make on demand, open sourced and SaaS solutions difficult to penetrate corporate practices, unlicensed software usage and unauthorized copies still thrive, sometimes even where integrity and legal compliance is well structured, practiced and enforced. Software copying, as said, was rarely thought to get you into any trouble.

Software protection regulation and its enforcement

Software protection in Brazil is regulated by a 1998 law, which followed the signing of the 1995 international Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The regulation establishes a set of rules that raises computer programmes up to the same status as other intellectual property, such as literary works, granting due protection for their authors for 50 years from their creation or publishing. Developers can claim their rights of authorship, avoiding unauthorized changes and unfair use. The regulation also defines the standards for licensing contracts and international technology transfers, which are registered by the National Industrial Property authority.

Moreover, the regulation defines the acts of violation of the author's rights, as well as unauthorized copying, selling and owning of copyrighted software, as offenses punishable by fines and/or imprisonment. Despite criminal offenses being tied to the individual who practice them, the software and copyright regulation also provides the tools for civil disputes and compensation. Therefore, legal liability may not only affect individuals, but also other persons involved in their activity.

This is where companies must tread carefully. Not only will they be held responsible whenever managers and directors - therefore the company as a legal entity - decide to allow or overlook software licensing and usage within their operation, but they can also be liable for decisions taken by their employees of any ranks, even if taken silently or against company policies.

The most common situation, and also the riskier, is when the company deliberately accepts the usage of illegally acquired software, with a false perspective that there is no risk of being discovered and that if it is eventually discovered, the penalties would be light.

1 http://www.internetworldstats.com/top20.htm
2 BSA - The Software Alliance. Global Software Survey - May 2016 http://www.bsa.org/studies

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Another risky, yet common situation is when the company legally acquires its software, but does not pay enough attention to the license set by the manufacturer. For instance, when a "home user" license is bought, but several copies are made, or when the license only covers a different, older or limited version of the software, or when it forbids commercial use.

And one of the most serious situations is when the company, due to a lack of security policies, allows the employee to deliberately install unlicensed software on his business computer.

In any of the situations explained above, the company most likely will be liable for the infringement, and will consequently need to compensate the software licensors for the unauthorized use.

Liability: Civil Compensation for Worker Offenses

The Brazilian civil code determines that employers can be liable for repairing and compensating offended parties (such as licensors and authors) due to their workers' actions, whenever such actions are performed while on duty, or somehow related to their jobs.

This means that if one of the company's workers downloads or installs an unauthorized copy of certain software, the company itself will be liable for any damages caused to the software publisher and/or other third parties. Likewise, even if the software is used by the same worker at other times (while off duty), but the usage is somehow related to the company (such as an IT worker who designs a logo for the company's website), it won't matter whether the company didn't mean for the software to be illegally used, or even if the company thoroughly enforced "legal software only" policies and the worker ignored them - the company will still be liable for such damages.

Of course it is technically possible for a company which was persecuted by a software publisher, to pursue its right to redress the situation against the worker. However, due to the fact workers are strongly protected in Brazil, such action would be very unlikely to prosper. The ideal thing to do is to mitigate all risks related to software license and usage within the company.

Software compliance audits, thoroughly planned asset management and, most importantly, a solid software usage policy, can be very important tools to manage the risks related to software usage in the company's operations. In a nutshell, several activities are recommended to mitigate this kind of risk, such as:

- adopting written policies that prohibit unlicensed software;
- educating the employees, explaining them the risks to the company and being clear that the use of illegal software is a fault that the company will not tolerate;
- having a well-prepared IT team (or even, a CIO - chief innovation officer) focused in applying those policies;
- using blocking tools to prevent the employees from installing software on the business computer without the authorization of the IT team;
- keeping an active inventory of software (asset management) purchased by the company and executing regular audits on the computers in order to to detect illegal software usage; and
- promptly removing any unlicensed software, or any software not included on the aforementioned inventory.

Since there are no risk-free corporate IT policies, and as long as thoroughly thought and applied, this kind of compliance measures must be used to mitigate possible risks and liabilities, as well as enforce its own rules, since noncompliance can be a path to disciplinary action and/or contract termination.

Considering this kind of compliance education must reach all employees, it is also important that managers and directors are the ones to start and develop the change. These simple steps may prevent the risks of being involved in illegal software usage, and therefore, can save a reasonable amount of money and resources spent on disputes and litigation.

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Bitcoin and other Cryptocurrencie LEGAL PERSPECTIVE

Bitcoin is a virtual money that is not controlled nor issued by a government or a company. For that reason, it is decentralized, or peer-to-peer. Bitcoin is not minted as the traditional money we know, but rather created through a process called mining. Miners are computer programmers who validate the transactions of Bitcoins captured in the web via mathematical formulations.

Confirmed transactions are inputted into the Blockchain, a ledger where all operations of trade of Bitcoins are registered. The system works on its own, in an intricate cryptographed environment. After Bitcoin, literally hundreds of other cryptocurrencies came to life.

If you are a mortal like me, this whole explanation seemed way too complicated. Do not worry, though. There are easier ways to come across a Bitcoin. You can simply buy one with hard cold cash, and store in your e-wallet. If you had done it a couple of months ago, you could have doubled your investment today.

Uses for Cryptocurrencies

Bitcoin was originally used in transactions within the boundaries of the electronic environment: exchanges between gamers and geeks in general. It was born in 2009 and traded for zero dollar until 2013, and then took-off, when it started being accepted by “real life” businesses. In December 2013 one Bitcoin was worth US$1,060.00. The Bitcoin traded recently for more than US$ 4,400.00, an all-time high.

Cryptocurrencies can be used for exchanges online, but also to buy goods outside of the internet. They are also convertible into government issued currencies such as Brazilian Reais. One collateral usage of Bitcoin is speculation, given that they are available in a market with equivalent real money value.

Bitcoin and the Law

Is it legal? Bitcoin is legal in most parts of the world but it is forbidden in some countries, such as Bolivia and Saudi Arabia.

How is it taxed? The Brazilian tax authority (RFB - Receita Federal do Brasil) has published in the Q&A for income tax filings for individuals (Declaração de Imposto de Renda Pessoa Física) its opinion about virtual currencies: the RFB treats virtual currencies not as money but as property/goods. As such, they shall be declared by their acquisition price. The sale of cryptocurrencies (see question 607 of the Q&A) will be taxed as capital gain, when above 35,000 Reais/month - at a 15% rate.

The tax collection finds a limitation here, because Bitcoins are anonymous, or pseudonymous. Thus, they only manner for the RFB to have access to the volumes negotiated by users is through spontaneous declarations.

Notwithstanding scarce manifestations from the government, namely an unsophisticated bill (Projeto de Lei 2303/15), by congressman Aureo Lidio Moreira Ribeiro (SD/RJ), cryptocurrencies are far from being regulated in Brazil.

As means of exchange, virtual currencies are starting to be the object of legal dispute. There are currently 11 rulings registered at the Tribunal of Justice of São Paulo (TJ/SP), dealing mainly with the payment or delivery of bitcoins, i.e., the property aspects of the bitcoin. To our knowledge, Brazilian judges have not yet been confronted with the essential definition of the bitcoin: is it money, property, a type of security, other?

Conclusion

Cryptocurrencies are a new phenomenon. Although they were born in 2009, with Bitcoin, it wasn’t before 2011 that they acquired some monetary value and thus became the object of disagreement. As real and virtual worlds continue to intersect, legal interpretations will have to be fabricated for situations of bankruptcy, inheritance, and many others. The enthusiasts of Bitcoin will hate to see it regulated by the government, but a guess is that the tendency, as for anything, is that the State will regulate virtual currencies in the following years.

Luckily, as we saw happen time and time again, every time a market is disrupted, it hardly goes back to what it was originally. Cryptocurrencies have revolutionized the way to think money, hence we shall see more cryptocurrencies being launched, via ICOs – Initial Coin Offerings – and we shall see Blockchain used to organize markets in a way we had never imagined.

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Brazilian Federal Revenue Service enacts Normative Instruction # 1,717/2017 regarding rules of restitution, refunds and compensation of federal tax credits

Enacted on July 17th, 2017, the Normative Instruction ("NI") #1,717 regulates procedures for restitution, refund and compensation ("PER/DCOMP") of taxes managed by the Brazilian Federal Revenue Service ("RFB"). It also brought special guidance on the compensation and restitution of several tax credits, namely Federal VAT (IPI), PIS/COFINS and REINTEGRA (Special Regime for Reintegration of Tax Amounts of Export Companies).

In order to be entitled to the procedures of refund, compensation or restitution, the amounts should be comprised in the following categories:

- Levy on spontaneous payment of amounts undue or higher than due;
- Error on the identification of taxable person, on the applicable tax rate, on the calculation of the debt amount or on the preparation or on the inspection of whichever document related to the payment.

Also, late-payment interest and penalties could be subject to restitution when such amounts were related to principal and ancillary taxes managed by RFB.

In addition, the NI established new forms in its Annexes I to V, dealing with the following items:

- Request for restitution or refund;
- Request for restitution of credit right related to the cancelation or rectification of import declaration;
- Request for reimbursement of family-salary quotas and mother leave-salary;
- Declaration of compensation;
- Request for habilitation of credit related to final court decision.

The most important claims for restitution, refund and compensation can be described in the following situations:

- *Amounts withheld* – The taxpayer can claim the restitution when he/she withheld undue or greater than due amount of tax managed by the Brazilian Federal Revenue Service on the payment or credit to an individual or a legal entity, and that returned to the beneficiary the undue amount.
- *DARF / GPS / Ex Officio Compensation* – The file for restitution of amounts of the Federal Government collected through the Federal Bill of Collection (DARF) or through the Bill of Social Security Collection (GPS), both managed by the RFB, shall be sent to the body or responsible entity engaged with the administration of such revenue, who will analyze whether the taxpayer shall be entitled to the restitution or not.

Please note that there is a walk-through procedure in which the other party (who administrates the revenue above mentioned) approves the restitution process, and before taxpayer has the right to withdraw the amount collected, Federal authorities must comply with the ex-officio compensation, whereby any open amount with Federal Tax administration shall be offset against the balance of restitution.

Also, if there is an existing debt, even if it is consolidated in an installment program (including debts already sent to the Federal Executable Tax Debts), of tax nature or not, the amount of restitution or reimbursement shall be used to pay the balance amount, through the ex-officio compensation procedure.

The ex-officio compensation of debt in installments is restricted to non-warranted installments and shall be carried out consecutively:

- Ascending order of the due date of due installments; or
- Descending order of the due date of the becoming due installments.

Federal VAT – The Federal VAT (IPI) credits booked shall be used by the facility that booked them to offset IPI debits of exit of taxed goods. Such credits can be transferred to other facilities of the same legal entity whenever they are related to:

- Presumed IPI credits determined by the head office as a reimbursement of PIS/COFINS;
- Credits related to tax incentives for IPI purposes; and
- Presumed IPI credits determined by the head office enrolled at the INOVAR-Auto tax program (related to incentives of the automotive industry).

PIS/COFINS – The offsetting of PIS/COFINS credits are only applicable for the non-cumulative regime. Such credits that could not be used on the discount of debts of PIS/COFINS due in the period can be subject to refund or compensation, whenever they are related to costs, expenses and charges associated to the following items:

- Revenue resulting from export of goods and services to abroad, whose payment implies on the inflow of amounts, as well as sales to an export company whose specific activity is the exportation;
- Sales with suspension, exemption, zero tax rate or non-taxation;

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- Revenue from the production and sale of alcohol, including for fuels; and
- Revenue from the production and sale of pharmaceutic products listed on article 3 of Law # 10.147/2000.

Besides, the PIS/COFINS tax credits from the acquisition of packages for resale determined between April 1st, 2005 and April 20th, 2015 that were not used to discount debts of PIS/COFINS shall be only compensated (that is, not refunded or restituted).

The taxpayer that has credit, including those arising from final non-appealable court decision under management of RFB that can be either refunded or reimbursed, can use this amount to compensate their own debts due and becoming due related to taxes managed by the RFB, excepting the social security contribution and those for other entities and funds.

Restrictions – Credit compensation before issuance of the final non-appealable court decision is forbidden. In the case where the credit risen from final non-appealable court decision, the compensation declaration shall be received by Brazilian Federal Revenue Service only after previous permission of the Federal Revenue Station. Also, credits related to judicial deeds already executed in the Judiciary cannot be compensated.

It is forbidden and regarded as non-declared the compensation in the situations whereby the credit:

- Has third party involved;
- Relates to premium credit;
- Relates to public title;
- Derives from non-appealable court decision;
- Does not relate to taxes managed by Brazilian Internal Revenue Services;
- Is based on the allegation of unconstitutionality of the law.

It shall be required isolated fine over the total debt amount whose compensation was regarded as non-declared on the situations above, applying the ratios of:

- 75%; or
- 150% when proved the false representation of the disclosed information by the taxpayer.

Failure to comply with the rules may lead taxpayers to be subject to fine and interest on the amounts considered unpaid.

Non-Homologated Requests – The taxpayer shall be notified of the non-homologation of the compensation and required to make the payment of unduly compensated debts within a 30-day period, counted from the day of the decision of non-homologation. Take into consideration that legal adjustments foreseen in the legislation will apply to the tax whose compensation was not homologated.

The taxes under the process of compensation, refund, or restitution, whose homologation was not approved by tax administration, will be charged with addition of an isolated penalty, according to the following situation:

- 50% over the debt amount;
- 150% over the total debt amount that was unduly compensated, whenever is proved the false representation of the declaration presented by the taxpayer; or
- 225% over the total debt amount if taxpayer does not attend tax authorities requests to provide clarification or deliver documentation.

Filing Procedure – The request for refund, compensation or restitution should be filed with the electronic certificate before the RFB.

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Angel Investoren: die Regelung Nr. 1719/2017 von dem brasilianischen Finanzamt

Die Figur der Angel Investoren wurde zum ersten Mal im Oktober 2016 in Brasilien von dem ergänzenden Gesetz Nr. 155/2016 im Rahmen der Mikro- und Kleinunternehmen geregelt.

Angel Investoren sind Personen, die meist eigenes Kapital an Start-up Unternehmen bereitstellen und dazu noch ihre Geschäftserfahrung und Verbindungen zu möglichen Geschäftspartnern anbieten.

Laut dem ergänzenden Gesetz dürfen Mikro- und Kleinunternehmen zur Förderung von produktiven Investitionen und Innovation Geldmittel erhalten, die nicht als Unternehmenskapital, sondern als Beteiligungsrechte anerkannt werden. Diese Form ist weder ein typisches Darlehen noch ein richtiger Kapitalanteil und gilt nur für die Mikro- und Kleinunternehmen.

Obwohl das ergänzende Gesetz schon fast seit einem Jahr gilt, wurden die entsprechenden steuerrechtlichen Effekte erst neulich durch die am 21. Juli 2017 von dem Finanzamt veröffentlichte Regelung Nr. 1719/2017 geregelt.

Der Zweck der Regelung ist die Besteuerung des Einkommens der Angel Investoren im Zusammenhang mit den Investitionen in Mikro- und Kleinunternehmen gemäß des ergänzenden Gesetzes Nr. 155/2016. Dafür ist es gleichgütig, ob diese Mikro- und Kleinunternehmen dem Steuerregime des *Simples Nacional* unterliegen oder nicht. Es ist auch zu erwähnen, dass die Regelung Nr. 1719/2017 nicht von möglichen Angel Investitionen in größeren Unternehmen handelt.

Grundsätzlich kann das Einkommen der Angel Investoren in Mikro- und Kleinunternehmen durch verschiedene im Beteiligungsvertrag vereinbarte Geschäfte entstehen: (i) die Beteiligung an den Gesellschaftsgewinnen; (ii) die an die Inflation angepasste Rücknahme des investierten Kapitals und (iii) die Veräußerung der Beteiligungsrechte an andere Partner oder dritte Parteien.

Die Beteiligung an den Gesellschaftsgewinnen darf nicht länger als 5 Jahre dauern und nicht höher als 50% der Gesellschaftsgewinne sein. Die Rückzahlung des investierten Kapitals ist erst nach 2 Jahren gestattet.

Für das Einkommen aus Gesellschaftsgewinnen oder Rückzahlung des investierten Kapitals hat die Regelung Nr. 1719/2017 die Anwendung der Regel für die Besteuerung der festen finanziellen Einnahmen bestimmt.

Deswegen gelten für die Einkommensteuer bzw. Körperschaftsteuer die folgenden nach der Frist des Beteiligungsvertrags festgelegten Steuersätze: (i) 22,5% für eine Vertragsdauer bis zu 180 Tagen, (ii) 20% für eine Vertragsdauer von 181 bis zu 360 Tagen, (iii) 17,5% für eine Vertragsdauer von 361 bis zu 720 Tagen und (iv) 15% für eine 720 Tage übersteigende Vertragsdauer. Man könnte so verstehen, dass eine längere Dauer der Investitionen dadurch gefördert wird.

Als Grundlage für die Besteuerung wird das Einkommen in jeder Situation anders bestimmt, nämlich der Wert der Beteiligung an den Gesellschaftsgewinnen und die positive Differenz zwischen der Rückzahlung und dem investierten Betrag.

Die Steuer wird zum Zeitpunkt der Zahlung an der Quelle einbehalten. Bei der Beteiligung an den Gesellschaftsgewinnen und der Rückzahlung wird die einbehaltene Steuer je nach Person und Steuersystem als definitive Besteuerung oder als Vorauszahlung anerkannt.

Die Besteuerung ist definitiv, wenn der Angel Investor eine Einzelperson oder eine steuerbefreite bzw. eine dem Steuerregime des *Simples Nacional* unterworfene juristische Person ist.

Andererseits wird die einbehaltene Steuer als Vorauszahlung der am Ende des Zeitraums fälligen Steuer angesehen, wenn der Angel Investor eine juristische Person ist, die anderen Steuerregimen unterliegt. Somit kann man verstehen, dass die finanziellen Einkommen dieser juristischen Personen nach der allgemeinen Regel besteuern werden und, obwohl es nicht klar in der Regelung steht, nicht nur Körperschaftsteuer, sondern auch Sozialabgaben (PIS und COFINS) zu bezahlen sind.

Für Kapitalgewinne aus der Veräußerung der Beteiligungsrechte gelten zwei Regeln: (i) die oben beschriebenen Steuersätzen gelten für die Einzelpersonen oder die dem Steuerregime des *Simples Nacional* unterliegenden juristischen Personen und (ii) die regelmäßige Körperschaftsteuer gilt für die anderen juristischen Personen.

Die Grundlage für die Besteuerung ist die positive Differenz zwischen dem Veräußerungspreis und dem investierten Betrag.

Wenn Investmentfonds als Angel Investoren investieren, wird schließlich die Steuer auf deren Einkommen oder Kapitalgewinne nicht von der Quelle einbehalten. Sonst gelten für sie alle allgemeine Regeln für die Besteuerung der Investmentfonds.

Wie man merkt, hat das brasilianische Finanzamt trotz der vorherigen Hoffnung auf eine mögliche Steuerbefreiung der Angel Investitionen entschieden, deren Einkommen zu besteuern. In diesem Zusammenhang sollen beide, die Angel Investoren und die Start-Ups, die Investitionen sorgfältig planen und strukturieren, damit nicht nur die geschäftlichen, sondern auch die finanziellen und steuerrechtlichen Aspekte berücksichtigt werden.

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Brazilian tax authorities' new Ruling on taxation of technology transfer: lack of legal certainty

1. Introduction: new Binding Ruling rendered by tax authorities

The Brazilian Tax Revenue Service (RFB) has recently enacted a new binding ruling by means of Consultation COSIT No. 340/17 on the taxation of agreements providing for the transfer of technology. RFB decided for the specific case subject to the Consultation that the transfer of technology should be taxed for PIS and COFINS ("PIS and COFINS-Importação") as a service.

Up to now, tax authorities had rendered other rulings and decisions denying the contributions' levy in any transfer of technology scenario. This ruling might be deemed as a new understanding adopted by the RFB – even so, it is necessary to evaluate the binding ruling with caution, since it is based on the specific scenario of a single company which asked for the ruling, and its application shall be verified on a case by case basis.

Other taxes levied on the importation of technology – such as withholding tax, contribution on technology and technical services (CIDE) – are not relevant to the present analysis.

PIS and COFINS-Importação are both social contributions charged, among other cases, on the importation of goods and services which produce results verified in Brazil. Law No. 10,865/04 establishes the charge of the contributions at a rate of 1,65% for PIS and 7,6% for COFINS (i.e. combined rate of 9.25%). The taxable basis is the service price. Thus, as it can be noticed, the contributions are a heavy burden imposed on the importation of services.

Diversely is the tax treatment of royalties and other rights' remuneration, which are not included in the taxable base of PIS/COFINS due to the lack of a service as a counterpart for the payment made from Brazil. This is because royalties are payments received for the use of, or the right to use intellectual property, such as a copyright, patent, trade mark, design or model, plan, secret formula or process. This definition is aligned with that adopted by the OECD and is also found in Brazilian tax laws such as Law No. 4,506/64. Due to this lower taxation, it is usually advisable that agreements involving licenses and services provide for a separate price for each of them, in order to avoid that the whole agreement price is treated as services for tax purposes.

However, when it comes to taxation of licensing agreements and technology transfer, it is not always crystal clear what is service and what is right to use intellectual property. This is the context analyzed in the new ruling rendered by tax authorities.

As an effort to clarify this uncertainty, tax authorities have established some classifications in ruling No. 340/17 that allow taxpayers to have a more precise reference for defining the amount of tax due in each technology transfer operation with a company in Brazil.

The main driver adopted by the new ruling is whether there is a customization of the technology to meet with acquirer needs. Should be the case, the transfer of technology should be considered as a service and not only as a disclosure of formulas, drawings or technical documentation.

2. Potential Consequences of the new ruling

As mentioned before, the mainly criterion used by RFB in the new ruling to define if some licensing transaction should be charged by PIS/COFINS was its potential service character. In this way, and considering the standard of technology transfer agreements, the payment for a transaction that involves an exploitation of a right (patent, brand, secret formulas) is classified as royalties and, as such, not subject to contributions.

Transfer of technology itself – technical documentation, know-how, blueprints etc. were previously understood by the RFB as comprised in the same gender of rights being transferred, not subject to the contributions. Based on binding ruling No. 340/17, though, the RFB has established that these transfers usually require the expenditure of time, rather than a simple, automatic delivery of technical data; moreover, the technology is normally worked on so as to reflect specific requirements made by the acquirer, or depends on a prior, customized study to be properly developed; based on these items, it was understood that the supply of technology shall be deemed as services, subject to PIS/COFINS contributions.

The potential new understanding adopted by the RFB contrasts with the previous rationale set forth in past rulings. It shall be noted that it may be considerably hard to define which transfer of technology involves a service character or not. In practice, it seems tax authorities are trying to force the characterization of the transfer of technology as a service, which is not a precise relation in several cases. Thus, each case shall be analyzed by comparing its elements with the criteria raised by the RFB in Ruling No. 340/17.

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In this sense, the adoption of fluid, complex conceptual relations may imply that tax authorities are searching for ways to interpret legislation and tax concepts in a way that grants higher revenues for the government, even though by creating legal uncertainty – both for the change of understanding with no modification in the applicable legislation or courts' understanding; and for the use of broad concepts and creation of a 'grey area' of interpretation that makes international investment harder in Brazil, as well as considerably more expensive. In view of this new ruling of the RFB, taxpayers shall review all agreements involving the international transfer of technology so as to verify its content in light of the criteria raised by tax authorities and evaluate whether the tax treatment currently granted to them should be changed.

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Rechtliche Aspekte der Versetzung von Arbeitnehmern

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Gegenstand des Gesetzes

Das im Jahr 1982 verabschiedete Gesetz 7064 regelt die Anstellung oder Versetzung von Arbeitnehmern für die Arbeit im Ausland.

Zweck dieses Gesetzes war zunächst die Regelung der Situation von Arbeitern, die in Brasilien von Unternehmen eingestellt oder versetzt wurden, um im Ausland Ingenieursleistungen zu erbringen, inklusive Beratungs-, Projekt-, Werk-, Montage-, Managementleistungen und ähnliche.

Aufgrund der Änderungen dieses Gesetzes durch das Gesetz 11962 wird nun sowohl die Situation einiger Arbeitnehmer geregelt, die in Brasilien eingestellt werden, um im Ausland zu arbeiten als auch derer, die von Brasilien ins Ausland versetzt werden. Damit wird die bereits von Arbeitsgerichten und Steuerprüfern angenommene Reichweite der Anwendung des Gesetzes bestätigt.

Laut Gesetz sind von seinem Schutz Arbeitnehmer ausgenommen, die für einen Zeitraum von nicht mehr als 90 (neunzig) Tagen im Ausland arbeiten, wenn i) diesem bekannt ist, dass es sich um einen vorübergehenden Auslandsaufenthalt handelt; ii) und er außer dem Hin- und Rückflugticket für die Dauer der Arbeit im Ausland Tagessätze erhält, die unabhängig von ihrer Höhe, kein Gehalt darstellen.

Definition der Versetzung

Als Versetzung sieht das Gesetz an: i) die Verbringung eines Arbeitnehmers ins Ausland, dessen Arbeitsort sich laut Vertrag in Brasilien befand; ii) Überlassung eines Arbeitnehmers an ein Unternehmen mit Sitz im Ausland für die Arbeit im Ausland zu arbeiten, solange das unselbständige Arbeitsverhältnis mit dem brasilianischen Arbeitgeber fortdauert; iii) Anstellung des Arbeitnehmers durch ein Unternehmen mit Sitz in Brasilien, um für dieses im Ausland zu arbeiten.

Laut Art. 3, "... muss das für den Arbeitsvertrag des versetzten Arbeitnehmers verantwortliche Unternehmen diesem neben der Beachtung der am Arbeitsort geltenden Gesetze folgendes garantieren: I – die Einhaltung der in diesem Gesetz vorgesehenen Rechte; II – die Anwendung der brasilianischen Gesetze zum Schutz der Arbeit, soweit die gesetzlichen Vorschriften vor Ort mit diesem Gesetz nicht vereinbar und die brasilianischen Gesetze für den Arbeitnehmer vorteilhafter sind als die gesetzlichen Vorschriften am Arbeitsort, was sowohl für die Gesamtheit der Vorschriften als auch für jede Materie gilt. Einziger Absatz. Unter Beachtung der Sonderbestimmungen dieses Gesetzes ist die brasilianische Gesetzgebung über die Sozialversicherung, den Arbeitslosenfonds (FGTS) und das Programm der soziale Integration - PIS/PASEP anwendbar".

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Der versetzte Arbeitnehmer hat daher, wie im vorletzten Absatz erwähnt, Anspruch auf die Zahlungen auf das FGTS-Konto in seinem Namen und auf die Abführung der Sozialversicherungsbeiträge während der Periode, in der er im Ausland arbeitet. Während der Arbeit im Ausland brauchen die Sozialabgaben betreffend Erziehungsgeld, Sozialdienste der Industrie, Sozialdienste des Handels, Bundeshandelsausbildungsdienste, Bundesausbildungsdienste, etc. nicht abgeführt werden.

Es ist Aufgabe von Arbeitnehmer und Arbeitgeber, schriftlich die Höhe des Grundgehalts und des Versetzungszuschlags für den Zeitraum der Versetzung festzulegen. Das (in nationaler Währung festgelegte) Grundgehalt unterliegt den in der brasilianischen Gesetzgebung zwingend vorgeschriebenen Anpassungen und Erhöhungen.

Das Grundgehalt des Vertrages ist in nationaler Währung festzulegen, die während der Versetzung des Arbeitnehmers in geltender Währung geschuldete Vergütung kann im Ausland unter Berücksichtigung des Versetzungszuschlags jedoch ganz oder teilweise in ausländischer Währung ausgezahlt werden. Der Arbeitnehmer kann schriftlich dafür optieren, den in nationaler Währung gezahlten Teil der Vergütung auf ein Bankkonto einzahlen zu lassen. Der Umtausch und die Überweisung werden dem Arbeitnehmer für den Zeitraum zugesichert, den er im Ausland arbeitet.

Nach diesem Gesetz ist der versetzte Arbeitnehmer ferner dazu berechtigt, nach 2 (zwei) Jahren Auslandsaufenthalts seinen Jahresurlaub in Brasilien zu verbringen, wobei die Reisekosten einschließlich Ehepartner und vom Arbeitnehmer abhängigen Personen, die bei ihm wohnen, in diesem Fall vom Arbeitgeberunternehmen oder dem Unternehmen zu tragen sind, in das er versetzt wurde. Diese Verpflichtung ist auf den Fall der definitiven Rückkehr des Arbeitnehmers vor dem Zeitraum der Nutzung des Urlaubs nicht anwendbar.

In folgenden Fällen kann das Unternehmen die Rückkehr des Arbeitnehmers verlangen: i) die Erbringung der Dienstleistungen im Ausland ist nicht mehr erforderlich oder angemessen; ii) Kündigung des Vertrages aufgrund schweren Fehlverhaltens des Arbeitnehmers.

Der Arbeitnehmer hat das Recht, bei Ende der Versetzungsfrist nach Brasilien zurückzukehren bzw. in folgenden Fällen vor deren Ende: i) nach 3 (drei) Jahren kontinuierlicher Arbeit; ii) um sich um nachweislich schwerwiegende familiäre Fälle zu kümmern; iii) aus gesundheitlichen Gründen gemäß Empfehlung durch ein ärztliches Attest; iv) bei Vorliegen eines wichtigen Grundes beim Arbeitgeber, der den Arbeitnehmer zur Kündigung berechtigt.

Das Unternehmen muss die Kosten für die Rückreise des Arbeitnehmers in voller Höhe übernehmen. Das gilt nicht, wenn die Initiative für die Rückkehr vom Arbeitnehmer ausgeht. In diesem Fall ist der Arbeitnehmer dem Unternehmen zur Erstattung der dadurch entstandenen Aufwendungen verpflichtet.

Die Dauer der Versetzung wird für alle Zwecke der brasilianischen Gesetzgebung bei der Beschäftigungszeit des Arbeitnehmers berücksichtigt, selbst wenn das Gesetz des Arbeitsortes die Erbringung der Dienstleistung als autonom ansieht und die Begleichung der Rechte aus der Überlassung des Arbeitnehmers vorschreibt.

Im Fall der im Gesetz vorgesehenen Begleichung der Rechte ist das Arbeitgeberunternehmen berechtigt, diese Zahlung der Beiträge zum Arbeitslosenfonds (FGTS) auf das Konto im Namen des Arbeitnehmers abzuziehen. Es muss dafür eine beglaubigte, vereidigt übersetzte, gerichtlich homologierte Kopie des Belegs der Begleichung der Ansprüche im Ausland einreichen. Ist der Saldo auf dem FGTS- Konto nicht hoch genug, um den vorstehenden Abzug vorzunehmen, kann die Differenz vom Saldo dieses Kontos bei Beendigung des betreffenden Arbeitsvertrages in Brasilien abgezogen werden.

Versetzungszuschlag, Sachleistungen und alle sonstigen Vorteile, auf die der Arbeitnehmer aufgrund seines Auslandsaufenthalts Anspruch hat, werden nach seiner Rückkehr nach Brasilien nicht mehr geschuldet.

Anstellung durch ein ausländisches Unternehmen

Die Anstellung des Arbeitnehmers durch ein ausländisches Unternehmen für die Arbeit im Ausland bedarf der vorherigen Genehmigung des Arbeits- und Sozialministeriums. Das ausländische Unternehmen muss seine rechtliche Existenz nach den Gesetzen des Landes, in dem es gegründet wurde, seine Beteiligung am Gesellschaftskapital der juristischen Person mit Sitz in Brasilien in Höhe von mindestens 5%, sowie die Existenz eines ordnungsgemäß bestellten Bevollmächtigten in Brasilien mit besonderen Befugnissen zum Empfang von Zustellungen nachweisen. Die juristische Person mit Sitz in Brasilien haftet zusammen mit dem ausländischen Unternehmen gesamtschuldnerisch für alle Verpflichtungen aus der Anstellung des Arbeitnehmers.

In diesem Fall ist angesichts der neuen These über das Thema nach der Aufhebung der Leitsatzentscheidung 207 des TST (bras. BAG) unbeschadet der Anwendung des in den brasilianischen Arbeitsgesetzen vorgesehenen Grundsatzes der günstigsten Norm, das Gesetz des Arbeitsortes auf die arbeits- und sozialrechtlichen Rechte, Vorteile und Garantien anwendbar.

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Der Aufenthalt des Arbeiters im Ausland kann nicht für einen Zeitraum von mehr als 3 (drei) Jahren vereinbart werden, außer wenn das Recht des Arbeiters und der von ihm abhängigen Personen, den Jahresurlaub in Brasilien zu nutzen, sichergestellt ist und die diesbezüglichen Reisekosten vom ausländischen Unternehmen gezahlt werden.

In folgenden Fällen garantiert das ausländische Unternehmen die endgültige Rückkehr des Arbeiters nach Brasilien: i) bei Ablauf der Laufzeit des Vertrages oder bei dessen Kündigung; ii) aus gesundheitlichen Gründen, die durch ein offizielles ärztliches Attest, das diese Rückkehr empfiehlt, ordnungsgemäß nachzuweisen ist.

Das Unternehmen ist verpflichtet, eine Lebensversicherung und eine Unfallversicherung für den Arbeiter abzuschließen, die den Zeitraum von Beginn der Reise ins Ausland bis zur Rückkehr nach Brasilien abdeckt. Der Wert der Versicherung darf nicht niedriger als das 12 (zwölf)fache des monatlichen Lohns des Arbeiters sein. Das Unternehmen muss dem Arbeitnehmer ferner die unentgeltliche und angemessene medizinische und soziale Versorgung am Arbeitsort im Ausland oder in dessen Nähe garantieren.

In diesem Fall muss das ausländische Unternehmen auch die Kosten für die Hin- und Rückreise des Arbeitnehmers ins Ausland, einschließlich der von diesem abhängigen Personen, die bei ihm wohnen, übernehmen.

Der Arbeitnehmer kann in diesem Fall, wenn er Interesse daran hat, seine Bindung an die brasilianische Sozialversicherung beibehalten und die betreffenden Sozialversicherungsbeiträge als freiwillig Versicherter einzahlen.

*Autor der Publikationen ***So geht's Ihr Einstieg in Brasilien***
und ***So geht's Arbeitsrecht in Brasilien***

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I. Background

In times of increasingly reduced profit margins, all legal alternatives aimed at saving costs and expenses and improvements from the rational management of resources must be taken into consideration.

In the current economic scenario, it is critical to optimize the flow of funds used to pay taxes.

One cost saving and rationalization alternative is the so-called special regimes involving the State Goods and Services Tax ("ICMS").

As this is a very long and complex matter that involves countless possibilities set forth in the applicable laws of all 27 states of the Federation, we will only briefly discuss some general aspects relating to the grant of special regimes set forth in the ICMS law of the State of São Paulo, with no intention of exhausting the issue, but rather provide a more practical and objective view.

Although some mentions and examples we will provide here are focused on the law of the State of São Paulo, it should be noted that also regarding the other States and the Federal District there are legal standards in the respective tax laws that enable the adoption of special regimes of an identical nature as to benefits.

II. Legal Security of the Special Regimes

By making tax planning many decisions relating to the assessment and payment of taxes are subject in the other cases to situations that may pose more or less risk of tax contingencies.

However, when we talk about special regimes we consider the possibility of relatively simple, but very safe, tax alternatives. For instance, with regards to the State of São Paulo, we have:

1. The specific ICMS/SP law that in general provides for the grant of special regimes for the benefit of taxpayers, in addition to a number of provisions for specific economic activities or industries;

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2. The implementation and operation of a fully transparent special regime to be effective only after review and approval by the tax authority, which significantly reduces the existence of tax inquiries and contingencies; and

3. The taxpayer may request term extensions or ask to be removed from the special regime, unilaterally and at any time, as it deems convenient.

Considering the complexity of the Brazilian tax system, we must observe that the rationalization of routines with the agreement of Tax Authorities surely results in reduced controls and the respective related costs. In this context, we provide below some examples of special regimes set forth in the law of the State of São Paulo:

III. Legal Security of the Special Regimes

1. Special Regime of Suspension of the ICMS on Imports

Such special regime is governed by CAT Ordinance No. 108/2013. In order to understand the scenario in which CAT Ordinance No. 108/2013 is inserted in, and the special regime set forth therein, we provide a brief explanation on Resolution No. 13/2012 of the Federal Senate.

Such Resolution No. 13/2012 was enacted for the purpose of mitigating the so-called "tax war" involving the states of the Federation, imposing a uniform tax rate of four percent (4%) for operations involving interstate outgoing of imported products.

However, this eventually caused a distortion: companies from the State of São Paulo usually pay an ICMS tax rate of eighteen percent (18%) on ingoing/purchase transactions of imported products, and 4% (Federal Senate Resolution No. 13/2012) on interstate outgoing operations involving the same products. As there is a difference between the "purchase" (18%) and the "sale" (4%) interstate operations of imported products, the system results in continued, accrued ICMS balance for importers, in addition to an increased financial inconsistency to pay the tax at the time of import.

In other words, in general, although the ICMS due in the end of the manufacturing or commercialization cycle of imported goods sold to another State is 4%, an ICMS tax rate of 18% has already been paid.

In order to rectify the distortion arising from the differences in tax rates and prevent ICMS credits, which are difficult to recover, from accruing, that such CAT Resolution No. 108/13 was enacted. The special regime set forth therein allows taxpayers to postpone ICMS percentages applicable to imports (suspend portions of the ICMS applicable to ingoing goods/purchases) at the time the sale/outgoing of the imported goods or the manufactured product occurs.

The resulting benefit is a reduced financial unbalance arising from the reduced disbursement at the time of the import. Thus, in addition to cash relief for the importing company at the time it purchases the imported goods, usually in much appreciable amounts, the tax load is also best fit.

2. Special Regime of ICMS Suspension upon Manufacturing on Demand – Decree No. 62.311/2016

Decree No. 62.311, dated December 16, 2016, introduced article 327-J to the RICMS/SP (ICMS Regulations of the State of São Paulo), which, in addition to incorporating to the ICMS/SP Regulations such provisions of the aforementioned CAT Resolution No. 108/2013, also has a new provision, which is the possibility that companies of the industries of car spare parts, perfume and personal care may apply for the special regime of suspension or grant of the ICMS in order for the tax applicable to the outgoing of goods by manufacturers located in the State of São Paulo, intended to be shipped to the establishment granted the special regime is imposed at or delayed to, in whole or in part, the time the goods or products resulting from such manufacturing leave the establishment that has ordered the manufacturing.

It is worth stressing that the especial regime of suspension or grant of the ICMS under manufacturing on demand, as set forth in section 327-J, is specifically designed for companies of the industries of car spare parts, perfume and personal care.

However, based on such provision, especially considering the principle of equality – tax isonomy, companies of industries other than those expressly set forth in article 327-J or the Regulation have also been granted special regimes in the same manner.

3. Other Specific Special Regimes

There are also other types of special regimes for specific activities or industries. Let us mention only three of them, the most comprehensive ones:

- Possibility of assigning the status of tax substitute to retail companies performing transactions with goods by means of distribution centers located in the State of São Paulo, for purposes of withholding and paying the ICMS applicable to subsequent outgoings (Decree No. 57.608/2011);
- Special procedure for the sale of goods subject to the tax substitution regime by means of vending machines (CAT Ordinance No. 38/2002); and
- Procedures relating to substitution of defective parts by technical assistance because of guarantee, repair or maintenance (CAT Ordinance No. 92/2001).

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IV. Final Considerations

Obviously, we did not intend to exhaust such a huge and complex subject.

As mentioned above, there are many other special regimes provided for by the law of the State of São Paulo. Such as special regimes for the following industries: Chemical (Decree No. 59.302/2013 and CAT Ordinance No. 16/2012), Beverages (CAT Ordinance No. 53/2017), Pharmaceuticals (CAT Ordinance No. 34/2007 and 89/2007), etc.

We also have the fact that we cannot forget that other or similar special regimes exist under the laws of other States, such as the rules and examples briefly mentioned here only to illustrate the situation.

In addition to all other situations set forth in such ICMS/SP regulations, taxpayers may also claim a non-specific special regime fitted to their needs.

The conclusion then is that when it comes to such a sensitive matter as tax planning, there may exist relatively simple, but not less effective, cost saving alternatives.

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