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Criminal Law Risks in the Corporate Context

Risk, from a pragmatic perspective, may be defined as the possibility that a given event might occur. Thus, risk may represent both a threat, in a negative scenario, and an opportunity, in a positive one. In this context, the risk inherent in penal liability for the practice of a crime is the sentence, the sanction, to be imposed in necessary and sufficient measure to punish and prevent the offence. However, though the sentence is the ineluctable consequence of penal liability and clearly a risk, there is a galaxy of other coercive measure that orbit the gravitational center of the offence which also threaten the accused or those merely under investigation. These may include such preliminary measures as asset freezes and seizures and provisional arrest and imprisonment, which, as the name suggests, occurs before any final judgment conviction.

In principle, criminal law risks are not any greater or lesser in degree as a function of the context in which the offence takes place. Generally speaking, the field of work of the subject of a criminal complaint is a neutral factor in the process to establish penal liability. This is because, under the general rules of the Brazilian legal system, liability for a criminal offence may only be attributed (imputed) to a natural person. Exception is naturally made for crimes against the environment in which there is an express legal provision allowing for liability for legal entities, in conjunction or not with the natural persons identified as having practiced the offence.

Stated differently, under the general rule, only an expression of human will (conduct) is relevant from a criminal law perspective. That is, from the purely theoretical perspective of legal scholarship, criminal law risks in the corporate context should elicit no greater concern because a legal entity may not be held criminally liable, except in the highly-restricted context of environmental crimes. This being the case, one might conclude that there are no grounds for any greater apprehension with criminal law risks in the corporate context.

It happens that, though from a purely technical perspective there are no grounds for a greater degree of criminal law risk in the corporate sphere, in practice the scenario is quite different. In fact, in such cases it is easy to see how the investigative process takes on particular characteristics.

In practice, what one sees in concrete business cases in which several persons are involved in the same decision are quite complex impediments to the investigation which must be overcome in order to ascertain the proper penal liability. In such cases, it becomes difficult to identify the agent directly involved in the criminal conduct – the one who in fact had the decision-making power to practice the crime. In other words, currently company organizations are marked by decentralization of command and control and by the dilution of attributions and responsibilities, such that decisions are often taken by a collegiate body, or, at a minimum, must be validated along a hierarchical chain of authority before being realized, a fact which inevitably raises the degree of difficulty of the investigation, especially as it relates to the authorship of the offence.

By way of example, let us imagine a police investigation which seeks to solve a crime of tax evasion allegedly engaged in by a corporation's executive committee. The scheme was present in each State in Brazil but lead to the insertion of inaccurate information in the company's books in only two States. Given the chain of suspect individuals involved in decisions related to taxation, how can those who in fact had the power to decide about the illicit conduct engaged in be identified, or how may those who had the power to persuade the employees to execute the fraud be determined?

In order to be able to impute an illicit act to a certain individual or group of persons, who may have in fact collaborated individually through their conduct with the carrying out of the crime, it is necessary to overcome the impediment created by the modern characteristics of the division of labor. As a practical consequence, coercive measures, especially those of a preliminary nature, have become useful tools in criminal investigations whose use has progressively increased in the corporate sphere. It should also be noted that asset freezes, the placing of holds on bank accounts, and provisional arrest and imprisonment have become ever more utilized as instruments to guarantee the success of complex criminal investigations.

It is true that precedents of the Brazilian Federal Supreme Court may clear that the objective fact of an individual holding a management or high-administrative position is not enough, in and of itself, to authorize a presumption of culpability: in the criminal sphere, the presumption remains that of innocence and the burden of proof lies with the accuser. On the other hand, it is not unknown in day to day court practice for many accusations to impute the practice of an offence to an individual not for what he or she has done, but rather due to the position he or she holds. The accused becomes a target for the accusation not for having effectively contributed with his or her conduct to the commission of the offence but, rather, on account of being a partner, manager, compliance officer, or accountant of the company involved in the facts supporting the criminal charge.

In general, the criminal law risks in the corporate context have become ever more real, as illustrated by the recent excesses of the Brazilian judicial author-

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ities. This has been seen both in the use of temporary injunctions in an indiscriminate manner – thus affecting and harming the rights of those who would have been spared by a more careful judicial analysis – and through the use of such measures when they are not warranted, as forms of prior punishment for offences still under investigation. In short, it seems to us that these excesses must be combated when they limit the rights and guarantees enshrined in the Brazilian Constitution and cause irreparable harm to the accused or investigated individuals involved.

The Value of Imported Goods: Price, Customs Value and Transfer Price

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The uniqueness and complexity of customs control in Brazil is one of the obstructions to its participation in the global value chains and, consequently, in Current International Trade. Although having escalated 33 positions in the foreign trade ranking of the "Doing Business 2019" report of the World Bank (from 139th to 106th place) – which is due to recently implemented trade facilitation measures -, the country's barrier is far from being overcome.In this scenario, the theme chosen and hereby explored is intended to identify and score importer's concerns about the value of imported goods, having in mind the collection and inspection functions of Brazilian Customs and Federal Revenue. The purpose of this article is to give a pragmatic approach to the matter, analysing the suggested concepts and clarifying them, regarding our national customs and tax regulation.

Import Price (Transaction Value)

The transaction value is the price of the goods as agreed between seller-exporter and buyer-importer and represents the total amount actually paid or payable for the imported goods. It is the value that must be considered from the exchange point of view, which is generally shown on the commercial invoice. The importation of some products into Brazil is subject to permission issued by Brazilian authorities. The import price is also the value presented to obtain the import license ("LI") in the case of non-automatic licensing when the government monitores the prices charged on certain imports. Until last year, the approval of the value for exchange purposes was responsibility of the Foreign Trade Secretariat (SECEX) of Ministry of Development, Industry, Commerce and Services, by its Foreign Trade Operations (DECEX). In such cases, it is important to explain that DECEX had the authority and competence to request information on the commercial aspects of the import operations, requiring the importer to present documentation proving that the price declared in LI is compatible with the prices charged on the international market. It turns out that this preventive function through the control of LI prices, justified by the importance of avoiding commercial distortions, may represent a desguised protection mesure to the national industry.

Customs Value

Brazilian customs laws require that all imported merchandise be submitted to customs value control. Such control consists on verifying the conformity of the customs value declared by the importer with the rules established by

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the World Trade Organization (WTO) Agreement on Customs Valuation (AVA-GATT) . This Agreement ensures that determinations of the customs value for the application of duty rates to imported goods are conducted in a neutral and uniform manner precluding the use of arbitrary or ficticius customs values. The AVA-GATT sets out six different hierarchical methods for determining the customs value of imported goods: transaction value, transaction value of identical merchandise, transaction value of similar merchandise, deductive value, computed value and derivative method. In most cases, the customs value of the merchandise is its FOB (Free on Board) value, plus international freight and insurance values, converted into Reais, by means of the exchange rate of the register day of import declaration. If there are reasons to doubt the truth or accuracy of the declared value, Brazilian Customs may ask the importer to provide further explanation that the declared value represents the total amount actually paid or payable for the imported goods. If the reasonable doubt still exists after reception of further information (or in absence of a response), customs may decide that the value cannot be determined according to the transaction value method, in which case it should use one of the other methods provided for in the agreement. The Import Tax is calculated by applying the aliquots set in the Mercosur Common External Tariff (TEC) on the customs value; that is why it must be identified in the import Declaration, along with the transaction amount and the adjustments to justify the difference between both values, if applicable.

Transfer Price

The transfer price is the price that related company sell to each other. Transfer pricing rules are a mechanism that countries have created to prevent companies from developing tax planning that results in the export of taxes. They are applicable to import transactions carried out between a Brazilian company and one of the following: a related party domiciled abroad, a third party domiciled in a favourable tax jurisdiction (FTJ) and a party benefiting from a privileged tax regime (PTR). The main purpose of these rules is to determine the criteria for evaluating international transactions, by assessing whether the prices agreed between the relevant parties are higher or lower than legal parameters and establishing a maximum price deductable in imports: the parameter price. Under the transfer price scheme, when the importation transfer price is too expensive, it will require the company to adjust its result by adding to the profit an amount relating to the difference between the purchase (import) price and the transfer price. Brazilian Federal Revenue will tax the fictitiously calculated profit, which would have been expected, if prices had not been manipulated.

Conclusion

In brief summary, the customs value and transfer pricing rules - as procedures for measuring the basis of calculation of taxes (import taxes and corporate income tax, respectively)- , regards the requirements and implications of the prices charged on imports by related parties. These mechanisms do not prevent the company from buying or selling at the price it fully understands: they only seek to neutralize the related parties interference in the practiced price so that, for tax and customs purposes, the market value always prevails. The idea behind the price control before authorizing an importation should be to prevent the entry of foreign goods that are the subject of fraudulent operations or that represent unfair competition to domestic companies and it should not analyze whether there was an actual under-invoicing or dumping practice, but only verify if there were inconsistencies between the declared values for the operation and those practiced in foreign trade. But in practice, this prior control can create a political barrier to the import of specific product; condemned practice in the international market when arbitrarily applied.

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The IOF levied on Brazilian export revenues maintained abroad – Ruling no. 246/2018

The IOF is a Brazilian federal tax on financial transactions levied on credit, exchange, insurance and securities transactions pursuant to Decree no. 6.306/2007.

With expect to exchange transactions, the IOF-Exchange taxable event occurs when there is the delivery or availability of national or foreign currency in the amount equivalent to the foreign or national currency delivered or made available by the interested party. In other words, the IOF-Exchange is due when the exchange transaction is liquidated.

The taxpayer of the IOF-Exchange is the person who buys or sell foreign currency to remit abroad or receive payments from abroad. The banks and entities authorized to operate in the exchange market are the parties responsible for the collection of the IOF-Exchange to the authorities.

The taxable basis of the IOF-Exchange is the amount in Brazilian currency received, delivered or made available, corresponding to the amount in foreign currency, resulting from the exchange transaction.

The general rate is 0.38%, except for specific transactions described therein, which are subject to other specific rates.

Among such other cases, item I of article 15-B of Decree no. 6.306/2007 expressly refers to the exchange transactions relating to the entry in Brazil of revenues from the export of goods and services, which are subject to a zero[1] IOF-Exchange rate.

At this point it is necessary to review the development of the Brazilian currency exchange rules to have a clear picture of the matter involving the IOF-Exchange on export revenues.

Before the enactment of Law no. 11.371/2006, it was mandatory that Brazilian exporters received in Brazil all the amounts resulting from their exports. Consequently, they had to close exchange transactions to receive the payment from abroad arising from each export they made. There was a maximum term to close such exchange transactions.

As from November 28, 2006 an express authorization entered into force to keep the funds arising from Brazilian exports of goods and services in a bank account of the exporter abroad (article 1 of Law no. 11.371/2006), subject to the limitations established by the National Monetary Council[2]. Such amounts maintained abroad could only be used to make investments or payments due by the exporter.

Law no. 11.371/2006 also provided that the National Monetary Council could create simplified forms of simultaneous exchange transactions related to amounts resulting from exports.

At that time there were doubts about the need to close simultaneous exchange transactions to formalize a symbolic receipt of the funds in Brazil and simultaneous remittance abroad to comply with the provisions of Law no. 11.371/2006.

However, it became clear that the authorization to keep the export revenues abroad was not subject to the obligation to close exchange transactions in Brazil. The Federal Revenue Service created in 2007 a declaration named DEREX[3], which had to be filed annually by the exporters to declare the funds held abroad and their use. With this mechanism the authorities had information about the funds maintained abroad.

Based on the scenario described above, since the end of 2006 Brazilian exporters have been using the possibility to keep funds in bank accounts held abroad bringing them to Brazil at their convenience.

In practical terms, when a Brazilian exporter receives the payment from the importer in Brazil, a payment order is sent to a Brazilian bank and the exporter closes the exchange transaction in Brazil using a code applicable to exports of goods or a code applicable to services.

When the exporter decides to keep the funds in a bank account abroad, it does not close any exchange transaction in Brazil, as the payment order is addressed to a foreign bank. However, at any time when the exporter wishes to bring amounts to Brazil, it must wire them from its foreign bank account to its local bank in Brazil and close the corresponding exchange transaction. In this case, as the wire transfer involves amounts held by the exporter, it is common that the exchange transaction is closed as a return of available funds.

Considering the two alternatives above, the closing of exchange contracts under codes applicable to exports is clearly subject to IOF-Exchange zero rate, as they evidently refer to revenues arising from exports pursuant to item I of article 15-B of Decree no. 6.306/2007. However, when the exchange transaction

[1] The zero rate has been provided for since 2010 (Decree no. 7.412/2010).

[2] Although the National Monetary Council initially established the maximum amount of 30% of the export revenues to be maintained abroad, this cap has been within a short period of time extended to reach 100% of the export revenues (Resolution no. 3548, as of March 12, 2008).

[3] This declaration was discontinued on March 27, 2018 as per Normative Instruction no. 1.801/2018.

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results from the transfer of funds by the exporter itself, the discussion about the levy of the IOF-Exchange arises.

This was the subject matter of the request for ruling filed by a Brazilian exporter, in which it was raised the question about the levy of the IOF-Exchange on exchange transactions carried out for the remittance to Brazil of funds already held by the exporter abroad (previously received from the importer as a payment for the export transactions).

Ruling 246 issued by COSIT as of December 11, 2018 stated that the export transaction is finished when the payment is made by the importer to a Brazilian or to a foreign bank account of the exporter. Any transfer of funds made by the exporter after such event no longer refers to export transactions and shall not benefit from the IOF-Exchange zero rate. The general 0.38% rate shall apply instead.

Ruling 246 is currently effective and establishes the official interpretation of the rules, binding the tax authorities. Consequently, it is expected to be a parameter to be used by the banks when closing exchange transactions, as the banks are the parties responsible for collecting the IOF-Exchange.

On the other hand, as the zero rate applies to export revenues and the IOF-Exchange taxable event occurs when the exchange transaction is liquidated, if the Brazilian exporter is able to evidence that the wired funds directly result from exports and represent export revenues, there would still be arguments to discuss with the banks about the IOF-Exchange rate. However, the lapse of time and the fact that funds are not individualized make it difficult to control and have sufficient evidences to present.

From the economic perspective the export revenues are the same whether held in Brazil or abroad and should not be differently taxed. Nevertheless, it is worth mentioning that the tax authorities have a similar understanding in other situations involving contributions on revenues and, in the past, there have been discussions and judicial lawsuits, based on constitutional immunity arguments, involving certain contributions indirectly charged over exports revenues that had a negative outcome to the taxpayers and represent unfavorable precedents in the present matter.

Startups and the Incentives Brought to Angel Investment by Supplementary Law 155/16

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In the Brazilian context of development of Startups, angel investment is the main form of propulsion of the venture, representing the biggest part of the amount invested in Startups in the country. Keeping in mind that the types of investment are directly related to the stage of maturity of the business, the prominence of angel investment makes a lot of sense, considering that most Startups do not go beyond the stage of market entry, and that the investment in question is intended especially for early-stage companies.

As a result of the changes implemented to Supplementary Law 123/06 (National Statute of Micro-enterprise and Small Business) by Supplementary Law 155/16, angel investments began to receive differential treatment, with the introduction of important innovations regarding the legal nature of these investments and the responsibilities – possible contingencies – that may be attributed to the investor.

Prior to these changes, angel investments were recorded in the share capital of the company or as a loan agreement convertible into equity interest, should the investor not want to join as a partner from the beginning of the business. However, with the introduction of Art. 61-A, SL 123/06, companies classified as micro-enterprises or small businesses are now able to receive capital contributions that do not form part of the company's capital stock, and that are not characterized as loan agreement.

Consequently, it is worth noting that by not forming part of the shareholders' composition, the investor will not be liable for any debts or contingencies of the company[1], including in cases of judicial recovery or disregard of corporate entity. However, the investor will be able to participate in the profits of the company, which would not occur in the form of loan agreement cases.

Considering that investments can be made by individuals or legal entities – including investment funds – and that the value of the investment will not be treated as revenue of the company, the rules to frame the company as a micro-enterprise or small business were eased, such that the investment shall not interfere with the possibility of adoption of the Simples Nacional[2] by the company – a tax regime unique to smaller companies.

1 Art. 61-A, § 3 and § 4, I and II, SL 123/06.
2 Simples Nacional is a simplified system of taxation covering several taxes, whose purpose is to decrease the tax burden of micro- and small enterprises.

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The angel investment contract will have a maximum term of 7 (seven) years, and the remuneration of the investor can be carried out during a maximum period of 5 (five) years[3]. At the same time that the legislation aims to foster the development of Startups, bringing greater security to investors, it is equally concerned about the needs of Startups, given that early-stage companies naturally require operation time until they be able to generate some financial return for their partners and investors.

In line with the protection afforded to the entrepreneur as well as to the development of the business through the legislation, the investment amount cannot be redeemed before at least 2 (two) years have elapsed. If the angel investor wishes to redeem the amount of the paid-up capital made, the assets will be paid according to the rules of calculation established in the civil code (the same rules used in case of resolution between partners). However, at any time, the entitlement of the contribution may be transferred to a third party (onerously or not), depending on the waiver of the other party of the contract (the regular partners of the Startup).

Although the legislation establishes a maximum term for the angel investment contract, there is nothing preventing the parties from entering into a (contractual) agreement that provides for the future purchase option of participation in the company equity. As such, should an investor continue to show interest in the company following expiration of the investment contract, he will be able to join the business as a partner. In general, there are different ways to maintain the link between the parties after the expiry of the contract, provided that the such parties align their interests beforehand.

In keeping with the link between the parties, but excluding the need for prior alignment, the Law expressly provides for the right of first refusal and Tag Along (right of joint sale) rights to the investor. The right of first refusal ensures the investor the right of preemption in the acquisition of quotas or shares of the Startup, i.e. if the partners wish to sell their participation, they shall offer their equity to the investor first, on the same terms and conditions offered to third parties. With respect to Tag Along rights, if the investor has no interest in acquiring the participation of the regular partners, he may jointly sell his capital contribution with the partner's equity, in proportion to its representation as compared to the share capital and on the same terms and conditions offered by third parties to the regular partners.

[3] The investor's remuneration may not exceed the limit of 50% of the profits of the company.

It is important to note that, despite the opportunities brought by the new legislation, it is still essential to be careful when making an investment contract, and to pay attention to its legal implications and restrictions. The legal text established by SL 155/16 demonstrates an advantage for both entrepreneurs and investors, however, the particularities of its application will only become clear in practice. We will continue to follow this matter.

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Cryptocurrencies Taxation: Challenges and Opportunities

Brazil, following trend of other countries, have been monitoring the increasing cryptocurrencies trading and intends to bring a very strict regulation for this market. In worldwide terms, according to a survey run by Morgan Stanley, with the reduction of volatility of the "Crypto market", such brought stability and confidence for investors to bet on its positive outcome, bringing more investment in this area.

While the crypto market is not exactly new – the most common 'currency', Bitcoins, is approximately 10 years old – the current increasing popularity could be explained not only by the growing 'how to invest manuals' on internet for new investors to be informed on how should they deal within the 'crypto market' but also to the increasing regulations that countries have been enacting, aiming more security, control, and to one extent, tax collection for this still unexplored market.

The International Monetary Fund and European Central Bank defined cryptocurrencies as several virtual currencies that use the technique of protecting information by encryption and thus, it can only be decrypted by those who have a specific key connected with the mentioned transaction. The Organisation for Economic Co-operation Development understood that cryptocurrency could be thought as a money role, since it attends its fundamental functions: store of value, unit of account and medium of exchange.

The European Central Bank (ECB) recognized cryptocurrencies as an "unofficial" digital money (unregulated) generally issued and ruled by its developers, and used and accepted amongst a particular virtual association. Whereas there are several categories for such, the so-called and most famous Bitcoin is a virtual currency that has conversion rates for the transactions, which can be either within the virtual or on the real world (i.e. goods or services).

As mentioned above, cryptocurrencies are being closely observed and scrutinized by countries. The popularity of crypto trade could be explained by several reasons: the (former) lack of regulation; relatively anonymity – that could also cover the sponsoring of crimes such as terrorism, tax evasion, child pornography, among others; fast investment return; among others.

In Brazil, the National Securities and Exchange Commission (CVM) forbade on 2018 direct trading of Brazilian investment funds that traded exclusively with cryptocurrencies. After the market turmoil, CVM released a regulation that aimed to give more security to traders and investors, allowing indirect investments on foreign markets, provided that in such jurisdiction the cryptocurrency market is properly regulated. The compliance is the greatest concern, to the extent that the destination and traceability of the transactions are ensured, avoiding crime sponsorship covered by cryptocurrency deals.

In this context, Brazilian tax authorities started giving attention to potentials of increasing its collection abilities, whereas an accurate definition and legal aspects remain open. On 2018, the Brazilian Federal Revenue service released a Public Consultation # 06/2018 after keeping track of transactions traded with cryptocurrencies handling approximately BRL 8 billion. In this sense, for income tax purposes, since cryptocurrencies would be considered a currency, such would be regarded as a financial asset and thus, subject to capital gains taxation.

According to current rules, financial assets that generate gains greater than BRL 35 thousand is subject to capital gains taxation. Moreover, these assets should be disclosed at the individuals' income tax return. However, the proposed regulation intends to reduce the taxation threshold to BRL 10 thousand and brings strong requirements for the trading. For instance, the brokers would have to disclose sensitive information to Tax Authorities on a monthly basis (i.e. purchases with national and international traders, client data, details of the transaction, among others).

For instance, the great dispute is the difficulty of traceability of transactions that facilitate tax evasion. The absence of identification of the holders obstructs the traceability of the operations. Also, due to the lack of proper regulation by Brazilian Central Bank and financial institutions, the taxation of such and record of the transactions is also jeopardized.

On the other hand, those who criticize the proposal of regulation fear that the Normative Instruction as it is structured could jeopardize the transactions. Firstly because it applies a monthly obligation to disclose operations, a requirement that not even financial institutions are obliged to (rather, the latter should disclose information on a yearly basis). Also, the limit of BRL 10 thousand is lower than the regular capital gains taxation, which could mean broadening of tax basis without proper law.

Further, the expected penalties for non-compliance are quite heavy – 3% per operation if a legal entity or 1,5% per operation if an individual, for omitted, inaccurate or incomplete disclosure of information. Since the future exchange brokers would be mostly startup companies, the concern is that they need a high compliance investment that jeopardize the trading business per se.

The current treatment given by the Brazilian Federal Revenue Service (regular asset subject to regular capital gains) does not seem to be sufficient to allow a fair taxation. It is still unregulated (and thus in a "tax gray zone") the situation of

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"bitcoin miners", when virtual currency is not purchased, but received as a payment for the "availability" of its equipment, being more similar to a service rendering. In this context, with all criticism surrounding the topic, the expectation is that with the enactment of the regulation, taxpayers at least have material to question tax authorities about their understanding and practical effects of such on the daily operations. Moreover, it brings to spotlight the so-needed compliance for a market that is growing regardless of challenges that surrounds it.

Although the Normative Instruction has not been enacted so far, it is expected that this year the Brazilian Revenue Service gives great attention to this topic, especially after the numbers disclosed in the Public Consultation and in the context of sensitive reforms in the tax scenario. Whereas the digital market has a pace that usually is hard for the tax regulation to follow, it is important to mention that countries are investing heavily on technology to try to overcome this gap. For the taxpayers, the main message would be to follow closely the enacting of regulations and be prepared, by collecting evidence of destination of transactions covered by cryptocurrencies to avoid questioning from tax authorities to the extent as possible.

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Brazilian Federal Revenue Service (RFB) clarifies social security treatment over certain payments to employees

Brazilian Federal Revenue Service ("RFB") has recently published normative acts to clarify the social security treatment of certain payments to employees, following modifications introduced by the 2017 Labor Reform, namely (i) Normative Instruction No. 1,867/2019 and (ii) Tax Ruling ("Solução de Consulta") No. 35/2019.

Law No. 13,467/2017 promoted the so-called Labor Reform, but significant modifications were introduced not only at the labor level, but also in relation to tax/social security aspects.

Among such modifications, the new wording of article 457, second paragraph of the Consolidated Labor Law Act – "CLT" (Decree No. 5,452/1943) stands out, establishing the following: "The amounts paid, even if on a habitual basis, as cost allowances, meal-allowances not paid in cash, travel allowances, rewards and bonuses do not form part of the employee remuneration, do not form part of the employment contract and shall not be computed in the calculation basis of any labor or social security charges." (Emphasis added).

Another important change promoted by Law No. 13,467/2017 was the inclusion of paragraph 5 in article 458 of the CLT, which excludes from the concept of salary and from the calculation basis of social security contributions the amounts referring to health or dental care services, provided by the employer itself or not, including the reimbursement of expenses with medicine, glasses, orthopedic appliances, prostheses, orthoses, medical and hospital expenses and similar expenses, even if granted under different categories of plans and coverage.

Law No. 13,467/2017 also amended paragraph 9 of article 28 of Law No. 8,212/1991 to reflect part of the above changes, excluding expressly from the calculation basis of the social security contributions (the so-called "salary-contribution"): (i) travel allowances, (ii) rewards and bonuses; and (iii) the value of the health or dental care services provided by the employer itself or contracted by it, including the reimbursement of expenses with medicine, glasses, orthopedic appliances, prostheses, orthoses, medical and hospital expenses and similar expenses.

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Nonetheless, until recently, Normative Instruction No. 971/2009, which consolidates the social security taxation rules at the level of the RFB, had not been modified to include these changes.

On 28 January 2019, RFB published Normative Instruction No. 1,867/2019, which, among other aspects, incorporated the changes promoted by Law No. 13,467/2017 in relation to social security contributions, clarifying that the following amounts paid to employees should not be computed in the salary-contribution:

(i) meal-allowances, unless paid in cash;

(ii) rewards, defined as payments made by the employer, at its sole discretion, in the form of goods, services or cash to an employee or group of employees, due to performance that exceeds what is ordinarily expected.

(iii) cost allowances;

(iv) travel allowances;

(v) health or dental care benefits even when granted under different categories of plans and coverage.

The collection of social security contributions on some of these earnings has been the subject of controversy between the tax authorities and taxpayers both at the administrative and judicial court levels. For instance, health and dental care granted under different categories of plans and coverage for different group of employees have been challenged by tax authorities in the past in order to consider them as part of the salary-contribution for purposes of social security contributions due by employee and the employer.

Therefore, the changes promoted by Normative Instruction No. 1,867/2019 are welcome to avoid litigation over these payments going forward.

Specifically with regard to meal-allowances, two aspects have been under discussion at the judicial courts: (i) the need for registration in the Workers Meal Program ("PAT") as a condition fir the exemption and (ii) the possibility of carrying out the payment of the meal-allowances through vouchers or benefit cards.

In relation to the need for registration in PAT, the prevailing understanding of the Superior Court of Justice ("STJ") is that food provided to the employee by the employer does not have salary nature, and therefore the mere lack of PAT registration would not be sufficient to characterize it as such (see Special Appeal No. 1,196,748 / RJ, ruled on 19 August 2014).

Furthermore, with the amendment of article 58, item III of Normative Instruction No. 971/2009, promoted by Normative Instruction No. 1,867/2019, it becomes clear that the only condition established by the legislation for meal-allowance not to be considered as salary is that it is not provided in cash. There is no restriction for payment through vouchers or benefit cards (see Tax Ruling No. 35, published on 25 January 2019).

Finally, paragraph second of article 58 of Normative Instruction No. 971/2009, introduced by Normative Instruction No. 1,867/2019, provides that the above changes are only applicable as of 11 November 2017, date on which Law No.13,467/2017 entered into force. The solution for controversial cases in relation to previous periods will depend on the evolution of the litigation at the administrative and judicial levels.

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Associative Agreements Under the Brazilian Antitrust Law

Introduction:

The so-called "associative agreements" have increased in number and type in the last years, and, as a consequence, have also been object of concern not only from the Brazilian Antitrust Authority ("CADE"), given the potential harmful impacts to competition that some of them may raise, but also from the parties themselves, in view of the penalties to which they may be subject if the agreement is characterized as a violation of the economic order.

Unlike other commercial contracts in which the parties' interests are different, in the associative agreements, the parties' needs are the same or, at least, very close, reason why they are united around the same goal. That is why they are also called collaboration agreements, which can be vertical (ex. between suppliers and distributors) or horizontal (ex. between competitors).

These agreements have been made with several purposes, such as, for the research, development and technological innovation, marketing and commercialization of goods and services, sharing of structures, among others.

If they are executed under appropriate competition conditions, besides bringing more synergy between the companies, they allow their partners to act with a more efficient production scale, with costs reduction, investment increase, improvement of products' and services' quality, which, ultimately, reverts favorably to the market and to the final consumer.

Antitrust regulation of the associative agreements:

Even though they are not "pure" act of economic concentration in the sense of affecting structures (ex. mergers), the associative agreements are treated likewise by the Brazilian Antitrust Law ("Law N. 12,529/11[1]), in light of their potential harmful effects to competition. For this reason, their submission to CADE's review and approval **prior** to their completion is legally required.

Law N. 12,529/11 alone, on its turn, was not sufficient to rule the matter and brought so many questions and doubts as to what would be considered as associative agreement that several contracts were submitted to CADE *ad cautelam* even though they had no impact in competition.

For this reason, CADE's challenge to consolidate its understanding, precedents and case law has culminated with the issuance of Resolution N. 10/2014 and, later, of Resolution N. 17/2016, which revoked the first one and established more objective and clear criteria as to whether or not a certain contract is an associative agreement for antitrust purposes and, as such, subject to notification to CADE.

Pursuant to Resolution CADE N. 17/2016, to be considered an associative agreement for antitrust purposes, it is necessary the cumulative fulfillment of four (4) requirements:

(i) To have duration of two (2) years or more;

(ii) To establish common undertaking for the exploitation of economic activity;

(iii) To have a provision of sharing the risks and results of the economic activity that constitutes its object; and

(iv) To involve competitors in the relevant market object of the contract.

In the lack of any of these requirements, the obligation to notify the associative agreement to CADE is dismissed.

It is important to point out that, whenever the notification is mandatory, the contract cannot be concluded before it is analyzed and cleared by CADE ("gun jumping"), under pain of nullity and the application of a pecuniary fine that may range from sixty thousand Brazilian Reais (BRL60,000.00) to sixty million Brazilian Reais (BRL60,000,000.00), regardless of the opening of an administrative proceeding to investigate the potential practice of an anticompetitive conduct. Besides, until the final decision about the transaction, the competition conditions among the relevant parties must be preserved.

On the other hand, even if the associative agreement does not meet the requirements for its prior notification to CADE, in case it has as object an unlawful conduct and harmful to competition, it will be subject to repression by CADE, grounded on the provisions of Article 36, Paragraph 3 of Law N. 12,529/11, which contains a non-exhaustive list of conducts that may be characterized as violation of the economic order, provided that they produce or can potentially produce the following effects:

[1] Art. 90. For the purposes of Article 88 of this Law, a concentration act shall be carried out when:
I - two (2) or more previously independent companies merge;
II - one (1) or more companies acquire, directly or indirectly, by purchase or exchange of stocks, shares, bonds or securities convertible into stocks or assets, whether tangible or intangible, by contract or by any other means or way, the control or parts of one or more companies;
III – one (1) or more companies incorporate one or more companies, or
IV - two (2) or more companies enter into an associative contract, consortium or joint venture.
Sole paragraph. What is described in item IV of the caput, when used for bids promoted by direct and indirect public administration and for contracts arising there from, shall not be considered concentration acts, for the purposes of Article 88 of this Law.

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I - To limit, restrain or in any way injure free competition or free initiative;

II - To control the relevant market of goods or services;

III - To arbitrarily increase profits; and

IV - To exercise a dominant position abusively.

It is worth emphasizing that, once the violation of the economic order is characterized, the ones responsible will be subject to several penalties, among which one can mention the application of fine that can achieve twenty percent (20%) of the gross sales of the company, group or conglomerate, in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred, which will never be less than the advantage obtained, whenever the estimation thereof is possible.

In addition, it may be imposed the penalty of the publication, in half a page and at the perpetrator's expense, in a newspaper indicated by the judgment, of the extract from the conviction, for a period of two (2) consecutive days for one (1) to three (3) consecutive weeks, which would cause a very negative exposure to the company.

Finally, the company may be prevented from participating in biddings for not less than five (5) years, among others.

To the administrator, if he/she is directly or indirectly responsible for the violation, when negligence or willful misconduct is proven, he/she will be subject to a fine of one percent (1%) to twenty percent (20%) of that applied to the company.

Conclusion:

Given the heavy penalties that may be applied if an associative agreement is not notified in case it is mandatory, if the parties involved in the transaction have any doubt as to whether or not they must submit the notification to CADE, it is advisable to proceed with the submission.

Besides, under no circumstance the agreement may cause (or potentially cause) the harmful effects defined in Article 36, caput of Law N. 12,529/11. In this case, the unlawful conduct would be characterized and, as such, might become object of investigation by CADE and application of penalties.

This is why, in either case, caution is always highly recommendable.

*Author of the publication ***So geht's M&A in Brasilien***

Brazilian accounting rules regarding uncertainty over income tax treatments

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At the eleventh hour of 2018, the Brazilian Securities Exchange Commission (*Comissão de Valores Mobiliários*) released the Rule no. 804. This rule ratified the ICPC (*Interpretação Técnica do Comitê de Pronunciamentos Contábeis*) no. 22, an accounting interpretation regarding the acceptance over income to tax treatments. Such deliberation is in line with IFRIC 23 and other accounting rules (CPC 26/24/32) in respect to the interpretation to be applied on the determination of taxable profit and tax base in cases in which there is any uncertainty over income tax treatment.

These rules came into effect on the 01st of January 2019 and since that all Brazilian listed companies must comply with the accounting records procedures provided by these deliberations regarding the treatment of tax uncertainties. IBRACON ratified ICPC 22 as well which means that all tax auditors must observe it. In the end of the day all companies submitted to tax audit of their accounting records are supposed to observe the ICPC 22 rules.

The expression "uncertainties over income tax treatment" has been adopted in order to standardise some specific terms between IFRS and US GAAP. The uncertainties may occur because several facts, such as the existence of different interpretation among taxpayers and fiscal authorities, the adoption of a tax planning, tax benefits enjoyed by different methods or without proper documentation, or transfer pricing without proper documentation adopted by companies mentioned above.

In accordance with ICPC 22, the above mentioned companies shall analyze each uncertainty tax treatments separately or together with other uncertainty tax treatments, taking in mind the interpretation that can possibly better solve the uncertainty on the case, also considering that the authority will accept the judgment of the entity on the tax treatment. After establishing the best approach the entity shall consider how to calculate taxes over income and follow the tax treatment in the accounting records.

Insofar the rule requires interpretation regarding the measure of the uncertainty amounts to be accepted on the company's accounting records. Since ICPC 22 there is some pressure on lawyers to be more accurate on their analysis regarding the chance of loss in judicial discussions and tax planning strategies.

It is important to point out that the entity may follow this interpretation in the acknowledgment of the taxes, during the process of measure of the uncertain-

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ty amounts, in the disclosure of the nature of the uncertainty in accounting records, profit and loss statement explanatory notes, and the provision to the uncertainty in the income tax return.

In case the company's tax consultants understand the tax treatment will not be accepted by the tax authorities, the accounting records must adopt one of two options to reflect the uncertainty: expected amount or most likely value. In such cases the lawyers should be consulted to accurate the chances of loss.

Due to ICPC 22 some companies shall revalue the judgment or estimation under their accounting records, considering the new interpretation issued, and adopt new accounting structured procedures, by resorting fiscal positions and documents and reviewing the understandings on the tax consequences that, in certain cases, may affect even the net equity account.

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