



### **STF's trial related to the inclusion of the ICMS on the PIS/COFINS taxable basis**

On the trial of Extraordinary Appeal No. 574706 by the Full Bench of the Brazilian Federal Supreme Court, which began yesterday, it was discussed the **non-inclusion of the ICMS on the PIS/COFINS taxable basis**.

Of the current ten Justices, eight rendered votes and the **score shows 5 x 3 in favor of the taxpayers' thesis**. It is highly likely that, on the session of March 15, 2017, the trial is concluded favorably to the merits, despite a possible discussion regarding the setting up of a date for the decision to take effect.

After both parties presented their oral arguments, the voting commenced with Justice Rapporteur Carmen Lúcia, who voted to grant the taxpayer's appeal to not include the ICMS on the PIS/COFINS taxable basis, stating, in summary, that amounts that will be transferred should not fall within the concept of revenue.

Subsequently, Justice Edson Fachin voted in the sense that the ICMS should be included in the PIS/COFINS taxable basis, denying the extraordinary appeal, which vote was followed by Justices Luis Roberto Barroso and Dias Toffoli.

Following the vote of the Justice Rapporteur, Justice Rosa Weber, Justice Luiz Fux, Justice Ricardo Lewandowski, and Justice Marco Aurélio voted to grant the taxpayer's appeal, establishing that the ICMS should not be included on the PIS/COFINS taxable basis.

However, when only Justices Gilmar Mendes and Celso de Mello were left to take their votes, the trial was suspended and will be resumed on the session to be held on March 15.

As Justice Celso de Mello has already stated that he is favorable to the taxpayers' arguments, we deem it **highly likely that the taxpayers' thesis will be accepted**.

Moreover, after the trial of the merits is concluded, **the request to set up a date for the decision to take effect will be examined**. The National Treasury, for example, required in its oral arguments that any decision favorable to taxpayers starts to produce effects only from January 1, 2018, due to the economic impacts of the decision. Such request has already been

---

rejected at least by Justice Marco Aurélio. It is quite difficult to estimate a scenario for the discussion regarding the setting up of a date for the decision to take effect but, in our opinion, even in the case of a decision in favor of the Federal Government, in some measure taxpayers ought to be protected in relation to past periods.

This newsletter contains information and general comments on legal matters that may interest our clients and friends. It does not represent the legal opinion of our firm on the subjects addressed herein. In specific cases, readers should rely on proper legal assistance before adopting any concrete action relating to the matters addressed herein.

---

For more information on the matter,  
please contact:

Daniel Lacasa Maya – [dmaya@machadoassociados.com.br](mailto:dmaya@machadoassociados.com.br)

[www.machadoassociados.com.br](http://www.machadoassociados.com.br)

São Paulo | Rio de Janeiro | Brasília

Phone: + 55 11 3819-4855

