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Brazilian Supreme Court concludes the discussion about the inclusion of ICMS in the PIS/COFINS taxable basis

Mauri Bornia and Gabriel Caldiron Rezende of Machado Associados discuss the final decision of the Brazilian Federal Supreme Court, which settles, once and for all, the discussion about the inclusion of ICMS in the PIS/COFINS taxable basis.

On March 15 2017, the Full Bench of the Brazilian Federal Supreme Court (STF) ruled that the inclusion of the state VAT (ICMS) on the social contributions on gross revenue (PIS and COFINS) taxable basis is unconstitutional (Extraordinary Appeal 574706).

To this effect, the STF concluded that, although the ICMS is charged by the seller as part of the sales price, such amounts will be transferred to the state treasury department and, therefore, will not be added to the legal entity's assets, thus not falling within the legal concept of gross revenue, which is the taxable basis for the PIS/COFINS.

Despite such decision on the merits, the Federal Revenue Service (RFB) did not peacefully accept the outcome and tried to reduce the financial impact of the decision. To this effect, it issued Internal Ruling 13/2018, in which it stated that the STF would have understood that the ICMS amount which does not compose the PIS/COFINS taxable basis is the ICMS monthly paid in cash after netting credits and debts.

Note that the ICMS is a non-cumulative tax, and thus the tax levied on taxed acquisitions may be booked as credit to offset against the debts calculated on the taxpayers taxed transactions. Accordingly, although the taxpayer indicates the ICMS debts in its invoices, it must net the monthly debts with the credits, so that:

- If the credits surpass the debts, no ICMS payment in cash is due, and credit amounts in excess may be accrued for offsetting in the following months; or
- If the debts surpass the credits, the taxpayer must pay in cash the surpassed debt amounts.

Based on this, Internal Ruling 13/2018 aims to reduce the financial impact of the STF decision, as only ICMS will be excluded from the PIS/COFINS taxable basis when there is ICMS to be paid in cash, which amount is smaller than the ICMS levied on each transaction (indicated in the invoice).

Furthermore, if the taxpayer has more ICMS credits than debts (which is a common situation), there will be no amount to be excluded from the contributions' taxable basis.

Although the STF was clear that the ICMS indicated in each invoice – regardless of the payment in cash after netting credits and debts – should not be included in the PIS/COFINS taxable basis, in October 2017, the Attorney General of the National Treasury (PGFN) filed a motion for clarification to discuss this matter, among others.

Finally, after four years of waiting, on March 13 2021, the STF judged the motion for clarification, establishing that:

- The ICMS that is not included in the PIS/COFINS taxable basis is the one levied in each transaction, indicated in the relevant invoice, regardless of the credit and debt netting result; and
- The decision on the merits is effective as of March 15 2017, except for lawsuits filed before this date. As a result, the recovery of PIS/COFINS paid in excess (with the ICMS in its taxable basis) regarding taxable events before March 15 2017, has been limited to taxpayers that file lawsuits before that date.

In view on this, the PGFN issued Opinion SEI 7698/2021/ME, accepting the outcome of the judgment, and provided the following guidance for the RFB to comply with the decision:

- All procedures, routines and regulations relating to the collection of the PIS/COFINS as of March 15 2017, must be adjusted, in relation to all taxpayers, considering the unconstitutionality recognised by the STF;
- Tax assessment notices should no longer be issued contrary to the aforementioned thesis established by the STF; and
- The necessary measures must be taken for the purpose of reviewing the tax assessment notices and requests for recovery of payments made in excess at the administrative level, regardless of the filing of judicial measures.

Although, technically, this is not a necessary measure for the application of the STF decision, this guidance is especially relevant so that the RFB can begin to observe the decision's guidelines, including for the purposes of request for recovery of payments made in excess.

With this decision and the PGFN Opinion, the discussion at hand is finally concluded in favour of all taxpayers, who are legally able to not include the ICMS indicated in their invoices in the PIS/COFINS taxable basis from March 15 2017.

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