

## BRAZIL

Machado Associados



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## Brazilian Superior Court of Justice defines drawback terms

**Júlio de Oliveira and Gabriel Caldiron Rezende of Machado Associados discuss the recent decision of the Superior Court of Justice on the calculation of interest and penalty on the drawback customs regime.**

**D**rawback is a special customs regime which aims to boost exports by exempting the taxes levied on imports and local acquisitions of inputs to be applied in the manufacturing of products to be exported, reducing the manufacturing costs in Brazil.

To this effect, drawback is most commonly applied in the ‘drawback suspension’ modality, under which inputs are acquired with the suspension of the relevant taxes levied on the transaction, conditioned to the export of the manufactured products within one year.

To use such a customs regime, the interested party must submit a request to the federal government, and agree on the quantity of inputs to be acquired and products to be manufactured and exported within the one-year period, formalised by a concession decision.

Once the export commitment has been complied with, the tax suspension will be converted into a tax exemption. However, if the beneficiary fails to comply with the commitment, the suspended taxes could be charged, with interest and penalties.

If part of the imported inputs was not fully used on the manufacturing of goods that should have been exported, the beneficiary may adopt the following procedures regarding these remaining inputs up to 30 days from the deadline set by the Concession Decision:

- Return unused imported goods;
- Destroy unused imported goods under customs control;
- Nationalise the remaining inputs for consumption, with the payment of the suspended taxes and interest; or
- Hand them to the Federal Revenue Service.

If none of these measures are taken in a timely way, the tax due may be charged along with interest and a late payment penalty. Regarding the penalty, if the taxpayer pays the taxes with delay, a late pay-

ment penalty of 0.33% per day (limited to 20%) over the unpaid taxes will apply; however, if the Federal Revenue Service issues a tax assessment notice, a 75% penalty will apply.

### Controversies arise

In view of the above, several controversies arose, because taxpayers understood that interest and late payment penalties could only be charged when the taxpayer is in default, that is from the 31st day after the deadline set by the Concession Decision.

This is because, since the acquisition of the inputs, up to the 30th day after the end of the concession decision, the taxpayer can adopt measures to prevent the charge of the taxes/interest suspended (except if nationalised) and the penalty, and is not in default.

Hence, in the taxpayer’s view, due to the tax suspension, the payment date should be postponed to the 30th day after the end of the Concession Decision. If the inputs are nationalised and the payment is not made by this date, the taxpayer would be in default and subject to penalties and interest.

However, tax authorities understand that, although the drawback grants tax suspension, it does not change the fact that the tax triggering event occurred upon the customs clearance on the imports and thus the non-payment of the taxes will be conditioned to the exports.

To this effect, the nationalisation of the goods not used in the manufacturing will be a breach of the drawback; therefore, aside from the tax itself, interest and a penalty should be charged, calculated based on the customs clearance date.

### STJ provides clarification

In a very important decision, the Superior Court of Justice (STJ) ruled in motion of divergence EREsp 1.580.304 that the nationalisation of goods imported under the drawback regime should be subject to interest, regardless of when it is carried out. This motion was filed to address the divergence regarding the legal interpretation of the matter within this court.

The STJ agreed with the tax authorities, stating that the payment of the taxes should be postponed, but only if the relevant export is not carried out. Thus the breach of the benefit with the payment of the taxes allows the levying of interest from the date of customs clearance.

Nevertheless, the STJ decided that the late payment penalty should only be levied from the 31st day after the deadline set by the concession decision, as until such time the payment is not late. This is because customs law establishes that the beneficiary may nationalise the goods and pay the

suspended taxes up to 30 days from the deadline set by the concession decision and thus may not be penalised if it takes such measures in a timely manner.

This is a very important decision as it sheds some light on a controversy which threatens the benefit of the drawback. Furthermore, although it only discusses the drawback, it may also grant some legal guidance regarding penalty and interest in other special customs regimes that grant tax suspension.

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