

Brazil's Superior Court denies PIS and COFINS credits under one-time charge system

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Gabriel Caldiron Rezende and Thiago Nunes Faulin of Machado Associados discuss the consequences of the ruling that denies PIS and COFINS credits related to products subject to the one-time charge system.

On April 27 2022, the Brazilian Superior Court of Justice (STJ) ruled in Special App against the booking of PIS and COFINS credits on the acquisition of goods for resale

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one-time charge system (*incidência monofásica*). The case was judged under the repetitive appeals system, and its conclusions bind the lower courts.

PIS and COFINS are contributions levied on the revenues earned by legal entities, calculated with a total rate of 9.26% under the non-cumulative system, and 3.65% under the cumulative system.

Background to the case

Although under the non-cumulative system PIS and COFINS are calculated with a higher rate, the law provides for the right to book credits in regard to some expenses incurred by the legal entity, such as the acquisition of goods for resale.

Nevertheless, some goods are subject to a PIS and COFINS one-time charge system, under which the revenues earned by manufacturers and importers of such goods are taxed at higher rates, while other taxpayers in the commercial chain (wholesalers and retailers) enjoy a zero rate on their revenues from the same goods. This is the case with fuels, pharmaceutical and cosmetic products, beer, water and soft drinks, auto vehicles, agricultural machinery, and auto parts.

Taxpayers are denied the right to book credits

Although the resales carried out by wholesalers and retailers are zero-rated, some taxpayers argue that they have the right to book credits regarding acquisitions from manufacturers, because these are regularly taxed and the costs are passed on to the taxpayer. This is because Law 11033/2004 establishes that transactions subject to a PIS and COFINS zero rate do not impair taxpayers keeping the credits related to the transaction.

However, when judging Special Appeal 1.894.741, the STJ ruled out any possibility of booking PIS and COFINS credits under the non-cumulative system related to the acquisition of goods for resale, when the contributions are levied under the one-time charge system.

The STJ's decision was based on the argument that the non-cumulative taxation principle may only be invoked when the same tax is levied sequentially in the economic chain, directly affecting more than one taxpayer.

From this standpoint, if there are no new charges, there is no need for offsetting since it is not possible to levy tax on tax, also known as a cumulative tax levy.

Furthermore, the Court also stated that the rules provided for by Law 11033/2004 do not apply to the PIS and COFINS one-time charge system. This is because the general PIS and COFINS non-cumulative system laws (10637/2002 and 10833/2003) expressly disallow the credits under discussion. The Court stated that, as this is a more specific rule, it should prevail over the general one.

The Justices reaffirmed the compatibility between the non-cumulative and the one-time charge taxation systems, since the latter is linked to the goods and not to the legal entity that sells them. This legal entity may still acquire and resell goods subject to non-cumulative taxation under a multi-phase system, which may generate credits that may be booked.

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