

_ Brazilian Federal Supreme Court (STF) rules that ICMS must be excluded from PIS/COFINS taxable basis

After almost twenty years of discussion between State and taxpayers, the Brazilian Federal Supreme Court (STF) ruled that the state VAT (ICMS) must be excluded from the social contributions (PIS and Cofins) taxable basis because it does not fall within the concept of company's turnover or gross revenue.

In its decision, the STF analyzed the appeal filed by a soybean oil company against a decision by the 4th Federal Court of Appeals that ruled as valid the inclusion of the ICMS in the PIS and Cofins taxable basis.

In the STF ruling, the prevailing understanding is that the collection of ICMS is not included among the sources for financing federal social contributions set forth in the Federal Constitution, since it cannot be considered as a share of the total sales or gross revenue of a company but only as a cash flow or accounting transit to be fully transferred to the State treasury.

IN THIS SENSE, IT WAS APPROVED AND RECOGNIZED BY THE JUSTICES THE "THESIS OF GENERAL REPERCUSSION" (TESE DE REPERCUSSÃO GERAL) THAT THE ICMS SHALL NOT BE INCLUDED IN THE CALCULATION OF THE PIS AND COFINS TAXABLE BASIS, WHICH MEANS THAT ALL BRAZILIAN COURTS HAVE THE DUTY TO ABIDE BY THIS PRECEDENT PURSUANT TO APPLICABLE LAW.

It is worth noting that the STF does not ruled ON the decision's effective date, in other words, it is uncertain whether the taxpayer would be limited or not in time to reclaim the PIS and Cofins paid in excess before STF's ruling. This discussion depends on a specific request being filed by either party which has not been done yet. Thus, up to now, any company can file a lawsuit to claim back PIS and Cofins amounts unduly paid during the past 5 years.

STF'S DECISION IS AVAILABLE IN PORTUGUESE AT:

<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=527689>

_ Extension of the Concept of Related Person in Public Tender Offers (OPA)

In a recent decision, the Board of Commissioners of the Brazilian Securities and Exchange Commission (CVM) expanded its understanding of the concept of related party for the purpose of public tender offer (OPA). In this sense, in order to correctly interpret and apply the related person's concept, some elements should be considered, such as the interests involved and the actions of the shareholder in the preparatory procedures and in the context of the OPA.

The decision analyzed an appeal filed by a bank against a requirement of the Superintendence of Securities Registry (SRE) regarding the acceptance of registration of an OPA for cancellation of registration, with the adoption of special procedure, pursuant to CVM Instruction 361/2002 ("Instruction 361").

PURSUANT TO CVM BOARD, WHEN A SHAREHOLDER IS DEFINED AS A RELATED PERSON FOR PURPOSES OF CALCULATING PRESENCE AND VOTING QUORUM IN AN OPA, IT DOES NOT NECESSARILY MEAN THAT THIS SHAREHOLDER SHOULD BE CONSIDERED AS A RELATED PERSON TO THE CONTROLLING SHAREHOLDER FOR OTHER PURPOSES.

In this sense, CVM Board, based on SRE opinion, considered the following elements and circumstances as parameters to define the shareholders in this specific case as **related persons**:

(i) **the degree of kinship** between the individual shareholder and the controlling shareholder (a) reinforcing the application of the rule of relative presumption and (b) clarifying that this relationship in itself is not sufficient basis to characterize them as a related person set forth in article 3, item VI, of Instruction 361, which is contrary to the SRE preliminary understanding;

(ii) **the actions being aligned with the interests of the controlling shareholder**, considering the joint decision between the individual shareholder and the controlling shareholder to propose the cancellation of the company's registration after the shareholders' waiver of the shareholders' agreement clause regarding the maintenance of the company's registry as a publicly-held company;

(iii) **the execution of a shareholders' agreement with the controlling shareholders**;

(iv) **being in favor of canceling the registration of the company as a publicly-held company, without knowing the terms of the offer, subsequently disclosed**;

(v) **being appointed to the board of directors of the company; and**

(vi) **being the partner of an affiliate of the company is not, in itself, sufficient to define as a related person, which is contrary to SRE's understanding.**

THE MINUTES OF CVM BOARD'S DECISION IS AVAILABLE AT THE CVM'S WEBSITE BELOW:

http://www.cvm.gov.br/decisoes/2017/20170215_R1.html

_ BM&FBovespa started the Closed Hearing for Amendments to the regiments for Level 2 and Novo Mercado trading segments

The Brazilian Stock Exchange - BM&FBovespa - has presented the final proposals for the amendment to the Regulations for the BM&FBovespa special corporate governance segments (Level 2 and Novo Mercado) which will be submitted before a Closed Hearing (i.e., only for the companies listed in these segments). The first phase, which has begun on March 15th, 2017 and will continue until May 31st, 2017, is the period within which the listed companies can assess and clarify any doubts regarding the new proposals on their respective listing segment.

The second phase will take place from June 1st to June 23rd, 2017 and it is called the voting period, i.e., when each of the companies listed at BM&FBovespa's Level 2 and Novo Mercado segments – 131 in Novo Mercado and 19 in Level 2 - will cast its vote on the matter. It should be noted that the quorum for approval is two-thirds of the listed companies on each segment

THE OUTCOME OF THE VOTE SHALL BE ANNOUNCED IN JULY AND THE EXPECTATION IS THAT THE NEW RULES WILL BE IN FORCE AT THE BEGINNING OF 2018, WITH A TRANSITION PERIOD EXTENDING UNTIL 2020.

Among all the proposed amendments to the Novo Mercado Regulation, we highlight the following points:

_ Supervision and control: the companies will have the option either to have a statutory or non-statutory auditing committee. There were no changes on the attributions of these two committees.

_ Delisting: it must be preceded by a tender offer at a fair price with approval by 1/3 of the free float shareholders,

except when the company's bylaws establish a higher quorum; the voluntary delisting must comply with CVM Instruction 361.

_ Free Float: the company must keep the **minimum free float of 25% or 15%**, depending on its average daily trading volume. The period to restore the free float was increased from 6 to 18 months.

_ Compensation: the company must disclose on its Reference Form the minimum, **average and maximum individual compensation of the members of the board of directors and statutory officers.**

_ Documents: **the definition of policies** regarding compensation, appointment of the board of directors and statutory officers, related party transactions, **risk management and socio-environmental report.**

_ Acquisition of significant share interest: **compulsory tender offer if a 20% to 30%** share interest is reached, based on the highest price paid by the acquirer within the past 6 to 12 months. This rule will be exempted if the company already addressed, in its bylaws, protective measures against share dilution or poison pill provision.

_ Independent Board: the company must establish that its **Board of Directors is formed by at least 20% or 2 (two) – whichever is higher – independent members**, always adopting the roundup method, and also a process to check the independence level of the nominees to become independent members.

_ Dispersed capital on tender offers: the obligation to endeavor efforts to increase dispersed capital remains, **except in the case of public offering of shares with restricted efforts.**

BM&FBovespa's presentation on the amendments proposal, as well as the drafts of the regiments can be accessed, respectively, in English and Portuguese at:

https://www.amecbrasil.org.br/wpcontent/uploads/2017/03/AudienciaRestrita_NM_N2_ApresentacaoColetivadeImprensa.pdf

http://www.bmfbovespa.com.br/en_us/news/novo-mercado-and-level-2-regulations.htm

http://www.bmfbovespa.com.br/pt_br/listagem/acoes/segmentos-de-listagem/sobre-segmentos-de-listagem/evolucao-dos-segmentos-especiais/

_ Founding Partner Gyedre Carneiro de Oliveira has been ranked in Chambers Global/2017 and in Chambers Latin America/2017

Managing Partner Gyedre Carneiro de Oliveira has been ranked in 2017 edition of the Chambers and Partners Global and Latin America guides. The renowned British publication is one of the most prestigious legal directories which identifies and ranks the most outstanding lawyers in the world and in Latin America based on research and client interviews.



MORE INFORMATION REGARDING THE CHAMBERS AND PARTNERS CAN BE ACCESSED AT:
www.chambersandpartners.com