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NEWSLETTER
oct 2018

_ São Paulo Court of Justice decides on the removal of a partner from a limited liability company due to serious misconduct

On August 22nd, 2018, the 1st Reserved Chamber of Corporate Law of São Paulo's Court of Justice, by unanimous decision, granted the appeal ("Appeal") filed by a limited company and its majority quotaholder to remove the minority quotaholder due to his serious misconduct practices.

The Appeal intended to reform an award enacted within a limited liability company's partial dissolution claim, which was dismissed and kept the minority quotaholder – who was also the company's manager – as a quotaholder of the company based on the following grounds: (i) the serious misconduct practices attributed to the minority quotaholder were not proved; and (ii) the breach of the *affection societatis* is not sufficient motive to judicially remove a quotaholder from a limited liability company corporate structure.

At the decision on the Appeal, the reporting judge acknowledged that it was not possible to remove a quotaholder from a limited liability company solely based on a mere lack of *affectio societatis*. However, the reporting judge reformed the award enacted by the ordinary courts, as it was proved that: (i) the minority quotaholder disposed of the company's assets to pay personal expenses, regardless of the necessary independence between his personal belongings and the company's assets; and (ii) the conflicts between the quotaholders prevented the management and the operation of the company, compromising the regular course of the corporate business.

The reporting judge understood that the acts undertaken by the minority quotaholder consists not only in the breach of the *affectio societatis* – an essential element for the incorporation of limited liability companies, but also represented a serious misconduct, therefore there was sufficient reason to determine the company's partial liquidation, with the removal of the quotaholder who incurred in the aforementioned misconduct and later calculation of his compensation in view of such a removal.

MORE INFORMATION ON THE APPEAL CAN BE ACCESSED IN PORTUGUESE AT:

https://esaj.tjsp.jus.br/cjsg/getArquivo.do/conversationId=&cdAcordao=11745292&cdForo=0&uuidCaptcha=sajcaptcha_3e3e7b0c37594949960ecd3e0a6494e4&vlCaptcha=XQf&novoVlCaptcha

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_ Brazilian Federal Revenue Counsel acknowledges the regularity of a corporate reorganization structure involving the sale of corporate stakes by an investment fund (FIP)

On June 15th, 2018, the 1st Ordinary Panel of the 2nd Chamber of the Brazilian Federal Revenue Counsel ("CARF") ruled upon an administrative proceeding ("Administrative Proceeding") in which it acknowledged the regularity of a corporate reorganization structure involving the transfer of corporate interest to an investment fund ("FIP") followed by the sale of such corporate interest to a third party, which resulted on the reduction of capital gains taxes ("Corporate Reorganization").

The Administrative Proceeding was originated from a tax assessment notice issued by the Brazilian Federal Revenue Services regarding the collection of corporate income tax ("IRPJ") and social contribution on net profits ("CSLL") on the sale of shares by a FIP because the FIP had only been incorporated as an instrument for tax evasion.

Within the Corporate Reorganization, a holding company controlled by the FIP had its capital stock reduced, with the payment of the amount due to the FIP made with the transfer of the shares then held by such holding company in its subsidiaries. As a result, the FIP became the direct quotaholder of the subsidiaries and, in the following steps of the Corporate Reorganization, was able to sell these shares in a more tax efficient way.

The Brazilian Federal Revenue Services argued that the FIP was incorporated as an instrument for tax evasion, once the taxation of capital gains arising from the sale of its assets, such as the shares issued by the subsidiaries, is different and results in the reduction of the IRPJ and CSLL that would be due in case the holding company had sold these shares and recorded said capital gain.

Therefore, Brazilian tax authorities asked that the sale of the shares directly by the FIP not be enforceable for tax purposes, as it was deemed to be a simulated transaction, in order to levy the IRPJ and CSLL on capital gains as if the holding company had sold the shares of its subsidiaries held by it before the capital stock reduction.

The reporting judge, followed by the majority of the judges, sustained that, in the Corporate reorganization structure: (i) the FIP was not incorporated only as an instrument to allow the reduction of taxes on capital gains; (ii) the FIP's role was to consolidate the management of assets, which may cause some assets to be sold for the acquisition of more profitable ones; and (iii) the funds obtained with the sale of the shares did not return to the holding company; instead, they were used by the FIP to acquire other assets, which, between 2009 and 2015, resulted in the increase of the FIP's net worth in more than R$300 million, which emphasizes the negotiation purpose of the FIP's incorporation.

It is important to mention that in October 2017, the Brazilian Federal Revenue Services enacted Provisional Measure No. 806, which caused the taxation of capital gains arising from the sale of assets by a FIP to be the same as the taxation of capital gains arising from the sale of assets by a company. The aforementioned Provisional Measure was not converted into law and has lost its validity in April 2018.

MORE INFORMATION ON THE ADMINISTRATIVE PROCEEDING CAN BE ACCESSED IN PORTUGUESE AT:
https://carf.fazenda.gov.br/sincon/public/pages/ConsultarJurisprudencia/listaJurisprudenciaCarf.jsf

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_ Brazilian Superior Court of Justice decides on the prescriptive period applicable to the breach of contractual obligations

On June 27th, 2018, the 2nd Section of the Superior Court of Justice ("STJ"), by majority of votes, denied the Divergence Appeal filed on a Special Appeal ("Divergence Appeal") in order to maintain the decision that fixed the prescriptive period of 10 years to file a motion for indemnification in case of breach of contractual obligations.

On the Divergence Appeal it was discussed whether, in case of breach of contractual obligations, the limitation period for the creditor to charge the debtor for the nonperformance of a contractual obligation would be decennial, pursuant to the Article 205 of the Brazilian Civil Code, or triennial, pursuant to Article 206, paragraph 3th, subparagraph V of the aforementioned code.

In the Divergence Appeal judgement, Justice Nancy Andrighi, followed by the majority of STJ justices, clarified that:

(i) The expression "civil repair" in Article 206, paragraph 3th, subparagraph V, of the Brazilian Civil Code does not include the indemnification of any and all negative, patrimonial or extra patrimonial, consequences arising from the breach of legal duties, but only the civil liability arising from illegal extra-contractual acts;

(ii) In case of contractual civil liability, i. e., the liability arising from the breach of a contracted duty, whatever the creditor claim may be – specific performance of the contracted obligations, reimbursement of damages and losses or contractual resolution, the prescriptive period is always decennial; and

(iii) The different treatment given to the contractual civil liability, which prescriptive period is decennial, and the extra-contractual civil liability, which prescriptive period is triennial, does not violate the equality principle, since the circumstances that generate them are absolutely distinct.

MORE INFORMATION ON THE DIVERGENCE APPEAL CAN BE ACCESSED IN PORTUGUESE AT:
https://ww2.stj.jus.br/processo/revista/inteiroteor/?num_registro=201101903977&dt_publicacao=02/08/2018

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