

_ Brazilian Superior Court of Justice decides that former partners shall not be responsible for obligation incurred after leaving the company

On February 5th, 2019, the Third Panel of the Superior Court of Justice decided on the Special Appeal No. 1.537.521 – RJ (“Appeal”), acknowledging, by unanimity, that **former partners of limited-liability companies shall not be responsible for debts incurred by such company** after the transfer of the quotas held by them and, consequently, leaving the company. In the Appeal, a former partner requested to be excluded as one of the defendants from a motion filed against the company, which intended to charge amounts owed by the company within the scope of a court agreement.

The ordinary courts decided that the former partner should continue as one of the defendants, pursuant to article 1.003, single paragraph, of the Brazilian Civil Code, which sets forth the following *“within two years after the registry of the agreement’s amendment, the transferor [former partner] and the transferee are jointly liable before the company and third parties, for the obligations incurred while being partner”*, regardless of the moment when such obligation was incurred.

THE REPORTING JUDGE OF THE APPEAL, IN TURN, CLARIFIED THAT IN THE EVENT OF TRANSFER OF QUOTAS, **THE FORMER PARTNER’S RESPONSIBILITY REGARDING LOSSES INCURRED UP TO TWO YEARS AFTER THE REGISTRATION OF THE AMENDMENT TO THE ARTICLE OF ASSOCIATION, IS LIMITED TO THE LOSSES ARISEN FROM ACTS OCURRED WITHIN THE PERIOD IN WHICH THE FORMER PARTNER HELD ITS POSITION, WHICH MEANS BEFORE LEAVING THE COMPANY.**

In conclusion, according to the vote of the Reporting Judge, the Third Panel of the Superior Court of Justice decided that the obligations presented in the motion were incurred after the former partner left the company, therefore the former partner **shall not be responsible for such debt** and shall be excluded from the proceeding.

ADDITIONAL INFORMATION REGARDING THE APPEAL CAN BE ACCESSED IN PORTUGUESE AT:

http://www.stj.jus.br/sites/STJ/default/pt_BR/Comunicação/noticias/Not%C3%ADcias/Ex-sócio-não-é-responsável-por-obrigação-contra%C3%ADda-após-sua-sa%C3%ADda-da-empresa

_ State of São Paulo Court of Justice decides on the charge of ITCMD tax in case of forgiven loans between family members

In recent decisions, the State of São Paulo Court of Justice (“TJSP”) has decided on the **charge of Death Transfer and Donation (*inter-vivos*) Tax (“ITCMD”) in case of loans between family members which ended up being forgiven.**

In most cases, since there were not enough documents and elements to justify the execution of such loans, the judges understood that **the transactions made were, in fact, a non-remunerated assets transfer, therefore the ITCMD shall be charged.**

The Ninth Chamber was the only one that decided in favor of tax payers, as it considered that “donations” (article 538 of the Brazilian Civil Code) and “forgiveness of debt” (article 385 of the Brazilian Civil Code) are different concepts and shall not be held equivalent, since the first one is an agreement and the second one is an arrangement to extinguish an obligation. The court also acknowledged that the intention to hold equivalent an agreement to a plain arrangement to extinguish an obligation represents a violation of the lawfulness principle of the tax system.

ADDITIONAL INFORMATION CAN BE ACCESSED IN PORTUGUESE AT:

https://esaj.tjsp.jus.br/cjsg/getArquivo.do?conversationId=&cdAcordao=10820839&cdForo=0&uuidCap-tcha=sajcaptcha_9b470be59fe445c89ffaa1dbb86c64a0&vlCaptcha=imfx&novoVICaptcha=

<https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=7584854&cdForo=0>

<https://esaj.tjsp.jus.br/cjsg/getArquivo.do?cdAcordao=10014451&cdForo=0>

_ State of Minas Gerais Court of Justice decides on the possibility of voting by controlling shareholders whose partners occupy positions in the management of controlled companies

On December 5th, 2018, the Twelfth Chamber of State of Minas Gerais Court of Justice (“TJMG”) decided on **the possibility to approve a company’s management accounts by controlling shareholders, although some of its partners had management positions in the controlled company.**

This case concerns a request of a preliminary injunction to prevent the controlling company to vote at the Ordinary Shareholders’ Meeting of the controlled company to approve its management accounts, pursuant to article 115, paragraph 1, of the Brazilian Corporation Law, which prevents shareholders from approving their own accounts as a member of the management.

It is important to clarify that, in such case, the controlling company’s capital stock was held by 69 partners, of which 6 were part of the Board of Directors, 4 were part of the Audit Committee and 3 were part of the Board of Officers of the controlled company. The controlling company, in turn, held approximately 51.57% of the controlled company’s capital stock.

JUDGE OCTÁVIO DE ALMEIDA NEVES DECLARED IN HIS VOTE THAT **IT WAS NOT POSSIBLE TO STATE THE EXISTENCE OF A CONFLICTING VOTE**, SINCE THE CORPORATE COMPOSITION WAS BROADER THAN THE PARTNERS WHO PARTICIPATE IN THE COMPANY’S MANAGEMENT.

HE ALSO POINTED OUT THAT **IT WOULD BE ABUSIVE FOR A COMPANY TO DEPEND ON THE VOTE OF A SINGLE SHAREHOLDER TO REJECT ITS ACCOUNTS, WHICH WOULD BE SIMILAR TO A PURE POTESTATIVE CONDITION**, CONSIDERING THE PLAINTIFFS HELD APPROXIMATELY 35% OF THE COMPANY’S CAPITAL STOCK.

Also regarding this matter, recently the Brazilian Securities and Exchange Commission (“CVM”) manifested in 2 different occasions against the approval of the accounts by shareholders (legal entity) whose partners/shareholders belong to the controlled company’s management, within the scope of the Administrative Proceedings RJ2014/10060 (Óleo e Gás Participações S.A.) and RJ2014/1186 (Forjas Taurus S.A.). **However, it is important to highlight that the cases aforementioned were different than the one addressed by TJMG, because in both proceedings judged by CVM the preponderant influence that the accused managers exercised over the shareholder (legal entity) was clear.**

In line with the position adopted by TJMG, CVM’s director Gustavo Tavares Borba, in his vote within the scope of Administrative Proceedings RJ2014/10060, clarified that, despite his position against the approval of the accounts by the controlling shareholder, there are situations in which a company, even with a clear

controlling shareholder, designs administrative bodies, with managers who are really independent and autonomous, in a way that the company's acts would not be servant to the positions of its controlling shareholder

(...). In these cases, unlike the situation under analysis, the controlling shareholder's impediment might not extend to the company, but this would only be ascertainable in the examination of each case.

THE AFOREMENTIONED DECISIONS CAN BE ACCESSED IN PORTUGUESE AT:

<https://tinyurl.com/yx8hvp5r>

http://www.cvm.gov.br/sancionadores/sancionador/2015/20151110_PAS_RJ201410060.html

http://www.cvm.gov.br/decisooes/2014/20141104_R1/20141104_D18.html

_ Once again, the founding partner Gyedre Carneiro de Oliveira has been ranked in Chambers Latin America and Chambers Global

Founding partner Gyedre Carneiro de Oliveira has been once again ranked in 2019 edition of the Chambers and Partners Global and Latin America guides. The renowned British publication is one of the most prestigious 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:

<https://www.chambersandpartners.com/>