

Brazilian Securities and Exchange Commission accepts Term of Commitment with Officer that traded shares during the blackout period

On November 10th, 2020, the Board of the Brazilian Securities and Exchange Commission (“CVM”) accepted the Term of Commitment Committee’ opinion (“CTC”) in the Administrative Proceeding CVM SEI 19957.006799/2019-95 to enter into the term of commitment presented by an officer of a publicly-held company. The officer agreed to pay in a single installment BRL120,000.00 (one hundred and twenty thousand reais) in benefit of the securities market as a result of the negotiation of preferred shares issued by the company in possession of relevant information not yet disclosed to the market.

This proceeding was initiated after CVM’s Superintendence of Relations with Companies (“SEP”) verified the sale of preferred shares by such officer in a period immediately prior to the disclosure of the company’s third quarter information of 2018, in violation of art. 13 of CVM Instruction 358/2002 (“ICVM 358”).

In his defense, the officer informed that he traded such preferred shares according to the blackout period informed by the company’s compliance area, with the sole purpose of obtaining liquidity. He also claimed that there was no capital gain from the operation.

However, SEP pointed out that the officer carried out said trade of shares on the first day of the blackout period applicable to the disclosure of its quarterly financial statements, as set forth in the company’s corporate events calendar. In addition, SEP also mentioned that regardless of the objective term of the blackout period set forth in paragraph 4 of art. 13 of ICVM 358 (15-day period prior to the disclosure of quarterly and annual financial statements), in which share trading is prohibited by those who are aware of the content of the company’s financial statements prior to its disclosure, which, according to the company, occurred with the officer in question.

Prior to drawing up the officers’ indictment, he presented a proposal to enter into a Term of Commitment with the payment of BRL15,000.00 (fifteen thousand reais), considering that such amount would exceed the triple of the benefit he earned with said transaction, in his accounts. The CTC, considering the minimum amount in other terms of commitment, the phase in which the proceeding was at and the fact it was the officers’ first infraction, presented a counterproposal in the amount of BRL120,000.00 (one hundred and twenty thousand reais), to be paid in a single installment. Although the officer first proposed to pay such amount in four installments, he later agreed with the CTC counterproposal, which was accepted by CVM’s Board.

MORE INFORMATION ON THE CASE, MAY BE ACCESSED THROUGH THE LINK BELOW (IN PORTUGUESE ONLY):

<https://tinyurl.com/yctwov3l>

Administrative Tax Appeals Council decides that Corporate Income Tax does not apply to property exchange transactions

On November 10th, 2020, the last instance of the Administrative Tax Appeals Council ("Carf"), Superior Chamber on Tax Revenue ("CSRE"), decided on proceeding No. 11080.001020/2005-94, stating the corporate income tax ("IRPJ") should not be imposed on real estate exchange transactions between companies in the taxation system of the presumed profit.

According to the Brazilian Federal Revenue, exchange transactions shall be totally taxed, since they are part of the gross revenue of legal entities. The reporting counselor of the proceeding, Edeli Pereira Bessa, agreed with said understanding, however she had a losing vote. The reporting counselor understands that the exchange may be compared to a purchase and sale transaction, which means the entire revenue shall be subject to taxation by the IRPJ.

On the other hand, according to counselor Caio Cesar Nader Quintella, who cast the winning vote, the exchange and purchase and sale transactions cannot be compared, since they have different natures, so that the values of said transaction are not part of real estate revenue. Quintella pointed out that **exchange transactions create mobility for players and take place within the scope of exchanging assets of the same value. By taxing an exchange transaction and afterwards selling the property, there is a double taxation for the taxpayer, since it will also be taxed when selling the property.**

Finally, the Superior Court of Justice (STJ) has also expressed its opinion on the matter when judging REsp No. 1733560/SC, in which the reporting Minister Herman Benjamin understood that the concept of sales revenue does not include the exchange transaction.

MORE INFORMATION ON THE CARF PROCEEDING NO. 11080.001020/2005-94 AND JUDGMENT OF RESP NO. 1733560/SC, MAY BE ACCESSED IN PORTUGUESE AT:

<https://tinyurl.com/y8vkohtn>

<https://tinyurl.com/y88hzvjj>

Brazilian National Department of Business Registration and Integration opens public consultation on corporate and accounting books exclusively in digital form

The Brazilian National Department of Business Registration and Integration (“DREI”) opened a public consultation on November 27th, 2020 regarding the authentication of the terms of opening and closing of accounting books and others books of individual businessmen, individual limited liability companies (“EIRELLIs”), companies and auxiliary agents of commerce (DREI 03/2020).

According to the normative instruction’s draft presented for discussion, bookkeeping instruments, corporate books and books of auxiliary agents of commerce must be exclusively digital, being produced or launched on electronic platforms, stored or not on the servers of the boards of trade. Their opening and closing terms shall be signed by the entrepreneur or its attorney-in-fact, if applicable, and the accountant, via digital certificate or any other means of proof of authorship and integrity of documents in electronic form.

In this sense, the normative instruction’s draft points out that the boards of trade shall only verify the extrinsic formalities of the data presented in the opening and closing terms, being the companies and the accountants responsible for the content of such books. Moreover, the authentication of these terms must be granted automatically when the interested party (i) signs a declaration that it has fulfilled all legal formalities and (ii) presents to the board of trade the receipt of the payment form. Furthermore, such draft reinforces that it is not within the competence of the boards of trade to verify the sequence of the books’ order number and its period of bookkeeping - thus, it is possible to authenticate a book regardless of the presentation of the previously authenticated books to the board. In addition, the books and financial statements for previous periods may be signed by those responsible for the period to which the bookkeeping refers to or by those currently responsible.

THE PUBLIC CONSULTATION DREI 03/2020 WILL BE OPEN UNTIL DECEMBER 14TH, 2020 FOR COMMENTS AND SUGGESTIONS. MORE INFORMATION MAY BE ACCESSED THROUGH THE LINK BELOW (IN PORTUGUESE ONLY):

<https://www.gov.br/economia/pt-br/assuntos/drei/consultas-publicas/consultas-abertas>