TAX

CONSULTATION SOLUTION 183/21 AND THE TIMING OF TAXATION BY IRPJ AND CSLL OF JUDICIALLY RECOGNIZED ILLIQUID CLAIMS

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AUTHORS

DIANA PIATTI LOBO
PARTNER / BRASÍLIA

MAIA ALEXIA MARTINOVICH
LAWYER / BRASÍLIA

What is the time of taxation, for the purposes of Corporate Income Tax (IRPJ) and the Social Contribution on Net Income (CSLL), of the tax credit recognized in court and subject to compensation? Answer to Advance Ruling Request183/21, published at the end of last year, was a late response to this recurring question from taxpayers, but did not completely address the divergence.

The previous understanding of the Federal Revenue Service of Brazil (RFB), expressed through the Interpretative Declaratory Act SRF 25/03, was that, when the court decision already defines the amount to be paid, it is enough to make the final judgment that recognizes the amount to be refunded to attract the incidence of IRPJ and CSLL. The premise is that, in such situations, already from the final transit, the taxpayer acquires legal availability on the amounts with the configuration of an increase in assets, a fact that generates irpj and CSLL, as provided for in article 43 of the National Tax Code (CTN). But in cases where decisions only recognize a right to repayment claim there was no clear manifestation of the IRS.

This was precisely the situation dealt with in Answer to Advance Ruling Request183/21. The Irs has defined that the date of submission of the first statement of compensation (mother statement) will be the time frame to attract the incidence of IRPJ and CSLL of the recognized credits. As shown in SC 183/21, it is at this time that one has a "right right, which arises from the final judgment of the decision – and quantifiable, by reason of the identification of the full amount to which it is entitled".

The answer already represents a small advance, because the Irs expressly ruled out the possibility of incidence of IRPJ and CSLL when:

- of the final judgment of an inliquid decision, which declared only the right of claim liable to compensation;
- accounting recognition of credits; and
- application for the qualification of the claim in the administrative context (formality necessary for the purposes of credit compensation arising from legal proceedings).

In this respect, the response of the Irs was late, but welcome, since these three moments, in fact, do not matter in the acquisition of legal availability and, therefore, do not justify the incidence of IRPJ and CSLL.

However, the fact that the Irs defines as a time frame the date of sending the first statement of compensation for the taxation of all credit arising from the lawsuit, regardless of the actual use, is questionable.

If the understanding of the Answer to Advance Ruling Requestprevails – and is effectively practiced – the financial impact on taxpayers' cash will be drastic and contemporary to the delivery of the first DCOMP, since the incidence of IRPJ and CSLL will fall on the total value of the credit arising from the final lawsuit, regardless of confirmation of the amounts by the Internal Revenue Service (approval of the declaration) or even the use of the other portions of the credit, transmission of the other compensations.

In our view, the position of the Internal Revenue Service in relation to taxation at the time of the first statement of compensation, in which the full amount to be compensated is declared, does not represent the actual moment of the equity increase and economic and legal availability. There is no sign of wealth or contributory capacity, and an attempt by the Tax Authorities to tax the values at this time should be rejected by the judiciary.

Far from being a purely theoretical situation, this positioning of the Irs represents a potential risk for several taxpayers who, after long years of battle with the Tax Office, finally obtained in court the recognition of a higher amount collected, and that could be compensated. In this group, there are taxpayers who guaranteed their right to recover the value of ICMS unduly included in the calculation base of PIS and Cofins and those who had the recognition of non-taxation by IRPJ and CSLL of selic values on undue payment. These discussions moved great values and, with this understanding exposed in the Consultation Solution, the Irs seems to intend to mitigate its defeat, reaching precisely part of the undue payment recognized by the Judiciary.

In the same Consultation Solution, the Irs provides that the interest on late payment due on the tax undue payment must comprise the calculation bases of IRPJ, CSLL, Cofins and PIS/Pasep in the period in which the main debt is recognized.

This position of the Internal Revenue Service is in direct confrontation with the recent position of the Supreme Federal Court (STF) in Extraordinary Appeal 1.063.187, submitted to the regime of general repercussion, in which was fixed the thesis that "it is unconstitutional the incidence of IRPJ and CSLL on the amounts related to the Selic rate received due to the repetition of tax undue payment".

The Supreme Court thus expressed itself, recognizing the legal nature of interest on late payment, which aim to

remake effective losses, decreases, not characterizing the increase in equity. Consequently, they are outside the field of incidence of IR and CSLL. The trial is not closed. The analysis of the opposing declaration embargoes by the Union in Extraordinary Appeal 1,063,187 requiring the modulation of the effects of the judgment remain pending, leaving the issue partially open.

Anyway, all this movement of the IRS seems to want to demonstrate an absolute irresignation with the limits of the legal relationship in the way it was delimited by the judiciary and an attempt, hopefully frustrated, to decrease the taxpayer's earnings.

It is important to follow the consequences of ongoing lawsuits that discuss the issue and anticipate any restrictive measure imposed by the Internal Revenue Service, seeking, for this, the protection of the Judiciary.