NEWSLETTER

Analysis of proposals for Carf Precedents

On June 20 and 21, 2024, the Superior Chamber of Tax Appeals (CSRF) approved 14 of the 15 Precedents proposed by the President of the Administrative Council of Tax Appeals (Carf), in order to standardize and consolidate the Council's understanding of certain matters.

SOUZA OKAWA
ADVOGADOS

Considering the breadth of the topics to be analyzed, below we highlight some of the new precedents approved and our brief comments:

Statements approved by the **1st Panel** of the CSRF

1st proposal for a precedent statement

It is possible to use the withholdings corresponding to financial income whose taxation has been deferred because the legal entity is in a pre-operational phase to form a negative **Corporate Income Tax (IRPJ)** balance.

The **1st proposal for a Precedent** approved provides for the possibility of using, to form a negative **IRPJ** balance, withholdings corresponding to financial income whose taxation has been deferred because the legal entity is in a pre-operational phase, in accordance with the understanding handed down in the **Precedent Judgments n° 9101-006.716; 9101-006.582; 9101-006.079; 9101-005.748.**

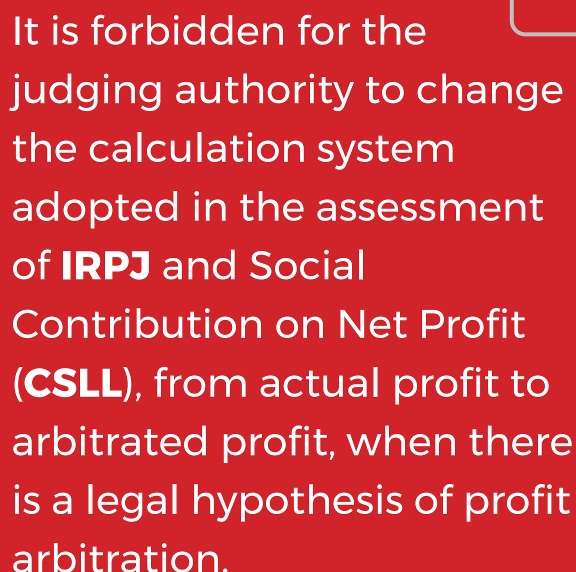
According to the Court's position, in the case of a legal entity taxed on a real profit basis, the financial income earned during the pre-operational phase must be deducted from the financial expenses incurred during the same period, and the **net negative balance** must be recorded in the company's deferred assets. Since the expenses are greater than the financial income earned, the income will only be taxed once the taxpayer starts operating, which does not prevent the taxpayer from deducting the Withholding Income Tax (**IRRF**) levied on this income in the period in which the tax was withheld.

SOUZA OKAWA ADVOGADOS

1st proposal for a precedent statement

This is because Carf believes that the deductibility of withholding tax on financial income earned in the pre-operational phase would not offend the provisions of article 2, paragraph 4, item III, of **Law nº 9430/1996**, given that the provision does not require the IRRF to be deductible in the same period in which the financial income has been computed in the calculation of taxable income. Furthermore, this rule would not be applicable in an exceptional situation such as that which occurs in the pre-operational phase, in which there is a mismatch between expenses and income, so much so that there is a need, in respect of the principle of comparing income and expenses, for expenses to be activated for future amortization when income begins to be generated.

2nd proposal for a precedent statement



The 2nd proposal for a Precedent approved consolidates Carf's understanding of the prohibition of changing the calculation regime adopted in the assessment of **IRPJ** and **CSLL** by the judging authority, from actual profit to arbitrated profit, when there is a legal hypothesis of arbitration of profit, in accordance with **Precedent Judgments nº 9101-006.829; 9101-006.506; 9101-006.189; 9101-005.429.**

2nd proposal for a precedent statement

The proposal is intended to pacify the position that, since the tax assessment activity is binding and obligatory, under the terms of **article 142**, sole paragraph, of the **National Tax Code**, arbitration is not an option given to the Tax Authority, but an obligation when the hypotheses set out in article 47 of **Law n° 8.981/1995** .

In this sense, Carf has ruled that if the **Tax Authority** improperly applies the legislation to the specific case, failing to carry out the arbitration when it would be mandatory for the correct tax assessment, it would incur a material defect, which cannot be remedied in the course of the administrative process. This is because changing the system for calculating **IRPJ** and **CSLL** does not imply merely adjusting the amounts in demand, but rather correcting an error made by the Tax Authority when it issued the tax assessment - which is not permitted.

It should also be noted that articles 145, item III and 149 of the National Tax Code deal exhaustively with the cases in which the tax assessment can be reviewed by the **Tax Authority**, and do not list, among them, errors in the application of the legislation. Allowing a tax assessment to be reviewed in order to change the calculation system adopted in the assessment of **IRPJ** and **CSLL**, from real profit to arbitrated profit, would imply an undeniable change in the legal criteria adopted by the Administrative Authority in the assessment exercise, which is expressly prohibited by article 146 of the National Tax Code.

Statements approved by the **2nd Panel** of the CSRF

2nd Proposal for a precedent statement

The amounts paid to non-employee directors as profit sharing or profit sharing are subject to social security contributions.

The 2nd proposed Precedent approved by the 2nd Panel of the CSRF establishes that amounts paid to non-employee directors as profit sharing or profit sharing are subject to social security contributions, as decided in **Precedent Judgments n° 9202-011.036; 9202.010.258; 9202-009.919.**

According to Carf's understanding, **Law n° 8212/1991** would have exempted amounts paid as profit-sharing from social security contributions only when the participation was granted under the terms of Article 2 of **Law n° 10101/2000** , i.e. when the profit-sharing payment was negotiated with workers linked to the companies as employees.

Therefore, although it is formally called profit-sharing, the remuneration paid to statutory directors does not fall within the scope of Law 10.101/2000, and labor rules do not apply to them, so that these amounts are subject to social security contributions.

8th proposal for a precedent statement

It is unacceptable to maintain the arbitration based on the Land Price System (SIPT), when the Bare Land Value (VTN) is calculated without taking into account the property's agricultural suitability. Once the arbitrated value has been rejected, and the taxpayer has acknowledged a higher VTN than that declared in the Rural Property Tax Return (DITR), that value should be adopted.

The 8th proposed Precedent approved by this Panel consolidates Carf's understanding that it is impossible to maintain the arbitration based on the **SIPT** when the **VTN** is calculated without taking into account the property's agricultural suitability. Once the arbitrated value has been rejected, and the taxpayer has acknowledged a **higher VTN** than that declared in the DITR, this value must be adopted. This opinion was handed down in **Precedent Judgments n° 9202-010.828; 9202-009.042; 9202-007.109; 9202-005.436.**

As you know, article 14 of **Law n° 9.393/1996** allows that in the event of an undeclared or undervalued property, ex-officio entries are made taking into account the values provided by the States and Municipalities - through the **SIPT**, provided that the criteria set out in article 12, item II, of **Law n° 8.629/1993** are observed, among which is the agricultural suitability of the property.

In cases where the agricultural suitability of the land that makes up the assessed property is not taken into account, the Precedent aims to establish the position that arbitration based on the **SIPT** should be ruled out, given that its assessment did not provide the level of certainty required by **Law n° 8.629/1993**. In this case, since the taxpayer has submitted an appraisal report, the value confessed in the report should be used for the purposes of adjusting the basis for calculating the additional tax, since the positive difference between the value of the report and the declared value is confessed and incontrovertible.

Statements approved by the **3rd Panel** of the CSRF

1st proposal for a precedent statement

Credits may be used for freight costs incurred in the acquisition of inputs that are not subject to the non-cumulative PIS/Pasep and Cofins contributions, provided that these services, which are recorded independently of the inputs acquired, have actually been taxed by these contributions.

The 1st proposal for a Precedent approved by the 3rd Panel of the CSRF reflects the Panel's understanding of the possibility of using credits on freight service expenses when purchasing inputs that are not subject to the non-cumulative **PIS/Pasep** and **Cofins** contributions, provided that these services, which are recorded independently of the inputs purchased, have actually been taxed by these contributions. This understanding is reflected in **Precedent Judgments n° 9303-014.478; 9303-014.428; 9303-014.348.**

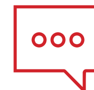
This understanding revisits the position previously adopted, which denied the appropriation of the credit, on the grounds that freight on the acquisition of inputs could only be appropriated as part of the cost of acquiring the input itself, so that if the input was not taxed, there would be no need to talk about a freight credit.

Currently, Carf has consolidated its understanding that freight paid for the transportation of inputs not subject to PIS and **Cofins** is an autonomous operation in relation to the acquisition of these inputs. This is because they are separate from untaxed inputs. Therefore, freight for transporting inputs that are not subject to **PIS** and **Cofins** taxation generates the right to a non-cumulative credit, as long as the legal requirements are met, i.e. taxation and separate accounting of the freight purchased..

Statements approved by the **3rd Panel** of the CSRF

3rd proposal for a precedent statement

For the purposes of article 3, IV, of Law n° 10637/2002 and article 3, IV, of Law n° 10833/2003, expenditure on leasing cargo or passenger transportation vehicles does not generate non-cumulative PIS/PASEP and COFINS credits.



The 3rd proposed Precedent approved by the 3rd Panel of the CSRF consolidates the understanding that, for the purposes of the provisions of article 3, IV, of Law n° 10.637/2002 and article 3, IV, of Law n° 10.833/2003, expenses with renting cargo or passenger transportation vehicles do not generate non-cumulative PIS/Pasep and Cofins Contribution credits. The issue is discussed in **Precedent Judgments n° 9303-014.415; 9303-014.369; 9303-013.956.**

According to Carf's position, the leasing of vehicles for the transportation of cargo or passengers does not fall within the scope of item IV of article 3 of Law n° 10637/2002, which refers to rentals of buildings, machinery and equipment, paid to the legal entity, used in the company's activities. According to **COSIT** Answer to Advance Tax Ruling Request **n° 1/2014**, vehicles are not machines for the purposes of tax legislation, since **Law n° 10.637/2002** itself, when it wishes to refer to vehicles, does so, making it clear that one of the terms, for tax purposes, does not cover the other.

Therefore, even though it can often be argued that the vehicle is machinery or equipment, for the purposes of applying item IV of article 3 of **Law n° 10637/2002**, the vehicle cannot be considered to be covered by this provision.

Tax
Department

Igor Nascimento de Souza

Érica Akamine

Paula Gracio Kilzer Gomes

Arthur Novelli Caldeira

SOUZA OKAWA
ADVOGADOS