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Changes in PIS/COFINS, ICMS and International Shipments rules

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RFB Normative Ruling 2,121/2022

RFB Normative Ruling No. 2121/2019 was published in the Federal Official Gazette of December 20, 2012, consolidating the rules on the calculation, collection, inspection, taxes paid and administration of the Contribution to PIS/Pasep, the Contribution to the Financing of Social Security (Cofins), the Contribution to PIS/Pasep-Import, and Cofins-Import. Such Normative Ruling replaces RFB Normative Ruling No. 1,911/2019, which until then consolidated the complex rules on these contributions. Below are some relevant topics regulated in the new Normative Ruling on said contributions:

- **Art. 26, XII** – For the purposes of determining PIS and COFINS, the amounts related to ICMS tax highlighted in the fiscal document are excluded from the tax basis. The amounts of ICMS tax highlighted in fiscal documents relating to sales revenues made with suspension, exemption, zero fees or not subject to the levy of the contributions may not be excluded.
  - The STF's decision in RE 574706 (Issue 69) was executed.
  - Although the non-levy of the contributions on this portion is recognized, the article 171, II establishes that "the ICMS tax levied on the sale by the supplier" may be included in the tax basis of the PIS and COFINS credits

- **Art. 170** – deals with the calculation of the basic credits of the contributions and excludes from the tax basis the portions of the acquisition value of items not subject to the payment of PIS and COFINS, "such as":
  - The ICMS tax when charged by the seller of goods or provider of services as a tax substitute (ICMS-ST)
  - The Excise Tax levied on the sale of the good by the supplier
  - The amount of insurance and freight borne by the buyer not subject to the payment of contributions

- The purpose of this provision is to prevent the calculation of PIS and COFINS credits on amounts that are not part of the tax basis for the debt of the contributions, that is, only the amount taxed by the supplier gives rise to the purchaser's credit right

- This determination is contrary to the provisions set forth in article 3, § 1 of Laws 10,637/2002 and 10,833/2003, according to which the tax basis for PIS and COFINS credits is the purchase value of goods for resale or use as input, which includes **ICMS-ST, IPI**

- The issue has been submitted to the Superior Court of Justice regarding ICMS-ST, with decisions favorable to taxpayers, rendered by the First Panel of Judges (AgInt in REsp 1967683 / RS), and against, rendered by the Second Panel of Judges (AgInt in REsp 1937431 / SC)

- The dispute remains without a definitive solution, and is reinforced by the new Normative Ruling 2,121/2022

- **Arts. 176 and 177** – The concept of inputs is updated, in accordance with the STJ case law, making reference to the essentiality and relevance of the goods or services considered for the production or manufacturing process of goods for sale or the provision of services. The concept of inputs includes, but it is not limited to:
  - Expenses resulting from a legal requirement, as long as they result from legal or non-statutory regulations, excluding the situations in which the

expenditure derives from the execution of contracts or collective agreements (it is necessary to interpret the rule in accordance with the recent Response to Consultation 45/2022, according to which, *"for an item to be considered input under the criterion of relevance, as imposed by law, the condition that it is required of the acquiring legal entity by the* ***specific legislation of its area of activity*** *may not be disregarded, that it is essential so that the good or service produced or rendered by it can be made available for sale or provision of services, and that it meets the requirements for crediting established by the governing legislation")*

- Freight in the transfer of inputs and goods in progress between establishments of the same legal entity
- Replacement goods and services used in the maintenance of fixed assets used in any stage of the production process of goods for sale or the rendering of services whose use implies an increase in the useful life of the fixed assets of up to one year

- Numerous expenses were excluded from this concept of inputs, among which those related to:
  - Trade
  - Packaging used in the transport of the finished product
  - Goods and services used in research and prospecting of mines, deposits and wells of mineral and energy resources that do not produce goods for sale or inputs for the production of such goods
  - Transportation services of finished products carried out in or between establishments of the legal entity
  - Goods and services used, applied or consumed in the administrative, accounting and legal activities of the legal entity
- Some of the prohibitions are contrary to decisions of the Administrative Tax Council, and the controversy and legal uncertainty about the subject remains.

- **Art. 188** – The taxpayer is required to keep separate accounting records or spreadsheets according to the criteria used to calculate the credit on expenses with fixed assets, in view of the different possibilities defined in art. 3, §1, III, and §14 of Laws 10,637/02 and 10,833/03 (depreciation and amortization charges or 1/48 of the purchase value)

- **Art. 104** – Reference to PERSE and the reduction to zero of PIS and COFINS levied on revenues from activities carried out by the events sector under the Program

- **Art. 163** – It specifies that the initial 5-year term for using the PIS and COFINS credits corresponds to the first day of the month subsequent to that in which the acquisition, return, or expenditure that allows the credit to be calculated occurred. Until then, the beginning of the term corresponded to the date of the credit constitution

- **Art. 180** – Credit calculated on depreciation or amortization charges related to machinery, equipment, buildings, and improvements is no longer limited to the period after May 1, 2004, as decided by the STF (Issue 244). The thesis established is that article 31 of Law 10,865/2004 is unconstitutional, on the grounds of offense to the principles of non-cumulativeness and isonomy, in that it prohibits the crediting of contributions to PIS and COFINS relating to fixed assets acquired up to April 30, 2004

- **Art. 188** – The taxpayer is required to keep separate accounting records or spreadsheets according to the criteria used to calculate the credit on expenses with fixed assets, in view of the different possibilities defined in art. 3, §1, III, and §14 of Laws 10,637/02 and 10,833/03 (depreciation and amortization charges or 1/48 of the acquisition value)

- **Art. 238** – It takes into consideration the sales of goods of national origin to the Manaus Free Trade Zone as exports for REINTEGRA application purposes, in accordance with STJ Precedent 640

- **Art. 273** – Tax basis for PIS-import and COFINS-import on the import of services will be the amount paid, credited, delivered, used or remitted abroad

before the withholding of the Corporate Income Tax (IRPJ), plus the amount of the contributions, excluding the Service Tax (ISS), mentioned in the previous Normative Ruling. The change is supported by the SEI OPINION No. 4891/2022/ME

- **Art. 370** – It reproduces the tax rates applicable on the revenue from the sales of petrochemical naphtha, ethane, propane, butane, refinery condensate and gas streams – HLR – refinery light hydrocarbons to be used as inputs in the production of ethene, propene, butene, butadiene, orthoxylene, benzene, toluene, isoprene and paraxylene, in accordance with Law no. 11,196/2005, as amended by Law no. 14,374/2022, clarifying that the benefit ends in 2025

Increase in ICMS Tax rates

- Based on article 155, §2, of the Federal Constitution, the Federal Supreme Court decided in 2021, in RE 714.138 (Issue 745) that operations with electricity and telecommunication services may not be subject to a tax rate higher than the one applied to operations in general

- In view of this precedent, the National Congress approved, on 06/23/2022, the Improvement Act no. 194/2022 (LC 194), which, for ICMS tax levy purposes, considered as essential the fuels, the natural gas, the electric power, besides the communication and collective transport services, prohibiting the application of tax rates in a percentage higher than the one fixed for the operations in general

- The limitation of the ICMS tax rate percentage for essential products and services, which until then were subject to a higher tax burden, implied a significant reduction in the revenue of the States and Distrito Federal, which, in principle, would be compensated by the Federal Government, in accordance with article 14 of Improvement Act 194/2022

- Considering that said article 14 was VETOED by the President of the Republic, under the argument of a possible financial unbalance, seeking compensation for the reduction of the ICMS tax rate, many States have adopted measures

to increase, as early as 2023, the basic tax rate. Currently, the States that have signaled this change are the ones listed below:

New internal tax rates	From	To	Law	Published in the Federal Official Gazette
Acre	17%	19%	Improvement Act no. 422	12/27/2022
Alagoas	17%	19%	Law no. 8,779/22	12/21/2022
Amazonas	18%	20%	Improvement Act no. 242/2022	12/29/2022
Bahia	18%	19%	Law no. 14,527/22	12/22/2022
Maranhão	17%	20%	Law no. 11,867/22	12/23/2022
Pará	17%	19%	Law no. 9,755/22	12/16/2022
Paraná	18%	19%	Law no. 21,308/22	12/13/2022
Piauí	18%	21%	Improvement Act no. 269	12/08/2022
Rio Grande do Norte	18%	20%	Law no. 11,314/22	12/24/2022
Roraima	17%	20%	Law no. 1,767/22	12/30/2022
Sergipe	18%	22%	Law no. 9,120/22	12/20/2022
Tocantins	18%	20%	Executive Order no. 33/2022	12/30/2022

- However, the VETO to article 14 was overturned on 12/21/2022, and the National Congress enacted the original text, which assures to the States the financial compensation for the reduction of the tax rate applicable in operations with essential products and services indicated in article 32-A of Improvement Act 87/1996

- It is possible to question if the increase of the average standard (modal) tax rate is still necessary, since the Federal Government will have to compensate the States and the Distrito Federal, and the transfer to factual and legal taxpayers is no longer necessary

RFB Normative Ruling 2,124/2022

On 12/21/2022, RFB Normative Ruling 2,124/2022 was published (republished in Federal Official Gazette on 12/23/2022) to amend RFB Normative Ruling 1,737/2017, which establishes the **tax treatment and customs control procedures applicable to international shipments**, and SRF Normative Ruling 611/2006, regarding the Simplified Declaration on Imports and Exports. Among the changes, the following is shown:

- Introduction to the concepts of:
  - Suitcase or postal bag (any closed, ID-controlled receptacle in which shipments are transported)
  - Designated Operator (organization designated by a member country or territory of the Universal Postal Union (UPU) as its official Post Office)
  - Non-designated Operator (foreign operator other than the designated operator with whom ECT exchanges items)
- Extension to ECT of the obligations established in art. 12, until then imposed only on the courier company, including:
  - Provide the information regarding the import operations of the international shipments, in the RFB's own systems, within the period of up to:
    - 48 hours before the expected time of arrival in the Country of the transporting vehicle, in the case of postal shipments
    - 4 hours before the expected time of arrival in the Country of the transporting vehicle, in the case of express shipments
  - Register Customs Clearance Form (DI) for Taxable shipments:
    - With advance payment of the Import Tax (II) made by the receiver, or on his behalf, to a third party
    - With suspected irregularities, including in the non-invasive inspection phase

- That require treatment by agencies or entities of the Federal Government, responsible for specific controls applicable to foreign trade

- Possibility of summarily returning the package to its origin in case of arrival at the bonded warehouse where the shipment treatment will be made without the provision of advance information or without its due sanitation within 5 days from the arrival of the shipment

- Imposition of penalties provided for in article 107 of Decree-Law 37/1996 to the courier company or ECT in case of failure to provide information in the form and time regulatory

- Waiver from providing information in case of shipments exclusively of documents, letters, postcards and printed matter (cleared without formalization of customs clearance)

- Total value limit increase (FCA) of the operations, from USD100,000 to USD 150,000, for importation by a legal entity of goods for resale or industrialization process, subject to customs clearance processed through Siscomex Shipment

- Determination of the performance of customs clearance of importation of international shipments by the courier company or the ECT, based on:
  - Customs Clearance Form of Shipment (DIR) registered in Siscomex Shipment
  - Simplified Customs Clearance Form (DSI) registered in the Siscomex Import for shipment, whose sum of the value of goods under the sale conditions of the **International Commercial Terms Free Carrier (Incoterm FCA)*** does not exceed Published in the Federal Official Gazette USD 3,000.00, or the equivalent in another currency, to which:
    - The simplified taxation system (RTS) shall be applied, when the customs clearance does not meet the requirements of performance based on DIR or
    - The common import system, when the international shipments are destined to an **individual**

- DI, registered under the common import system for international shipments destined to **legal entities**

- Possibility of determination of return to the origin, by the Tax Auditor, of an international shipment that cannot be submitted to inspection

- Repeal the following provisions:
  - **art. 19, § 1, II, and art. 73, I** (procedures related to customs clearance of international shipments made by ATA Form)
  - **art. 21, § 3** (II reduction for the goods listed in the Sole Addendum of MF Directive 156/1999)
  - **art. 31, § 2, and art. 83, § 2** (Coana's duties, regarding the clearance by the courier company qualified in the special authorization mode or by ECT)
  - **art. 32, II and § 2** (deadlines for customs clearance of international shipments based on the RTS)
  - **art. 35, §§ 4 and 5** (specifications in the DIR register)
  - **art. 74** (limits for DSE registration in temporary export situations)
  - **art. 81, §§ 2 to 4** (procedures for the qualification of courier companies)
  - **art. 82** (limit for clearance based on Simplified Tax Note (NTS))

* The use of the incoterm FCA in the new rules indicates that the seller completes its obligations and terminates its responsibility when it delivers the goods, cleared for export, to the carrier or other person indicated by the buyer, at the place indicated in the country of origin. Thus, the value of the transport to the buyer is not considered in the value limit for the use of DSI

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