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BRAZIL

Brazil Issues $42 Million in Tax Assessments to E-Commerce Firms

by William Hoke

Brazil's federal revenue service (RFB) has issued assessments for social contribution taxes totaling BRL 142 million (around $41.7 million) to two e-commerce companies and a consulting firm.

In an April 16 statement, the RFB said one e-commerce company's tax notice for underpaid Program of Social Integration (PIS) contributions and Contribution for the Financing of Social Security (COFINS) liabilities was for BRL 90 million and included penalties and interest. The notice to the second e-commerce company, also for PIS and COFINS, was for BRL 52 million. The names of the companies were not disclosed. The RFB didn't provide any details about the liability of the consulting firm.

Estevan Leal, a tax lawyer with Bichara Advogados, said taxpayers have the option of determining their PIS and COFINS liabilities under either the cumulative or the noncumulative regime. Under the cumulative regime, tax is calculated by applying a combined rate of 3.65 percent on monthly gross revenues, with no credits allowed. Leal said the noncumulative regime, which was the method used by the two e-commerce companies, is very similar to a VAT and is calculated at a combined rate of 9.25 percent. Specified expenses, including rent, energy costs, raw material inputs, and depreciation, can be taken as credits against the tax liability.

"The confusion started when the legislation allowed credits over 'inputs used in the production of goods' without defining clearly what 'inputs' meant," Leal said in an email. "Because of this lack of a clear definition, taxpayers and tax authorities have been discussing extensively in administrative and judicial courts the definition of input for PIS and COFINS purposes."

While the RFB's position is that only materials that are directly linked to production and are subject to physical contact qualify as inputs, taxpayers argue that any expense that is necessary to the production process as a whole is creditable, Leal said.

Leal's colleague, Francisco Lisboa Moreira, said the RFB has always maintained a restrictive interpretation of the concept of inputs. "According to this interpretation, only the items directly applied or consumed in the productive process of goods, such as raw material, intermediate products, and packaging material, could give right to credits of the contributions," he said.

Leal gave as an example a food producer that was assessed for having claimed credits for cleansing material at the site of its production activities. He said the Superior Court rejected the RFB's position that cleansing materials are not related to the production process, even though those materials are not directly applied in the product. "Without the cleaning materials, the [Court determined that] food and employees could be contaminated," Leal said. "After many years of discussions, the consensus that is being formed in both administrative and judicial courts is that all expenses that are necessary to the production process — even if such expenses are not directly employed in the production and if, without such expenses, the product would have its quality reduced if compromised — can be eligible for PIS and COFINS credits."

Moriera said although the Superior Court on February 22 put an end to the controversy by issuing a decision (Special Appeal No. 1,221,170) with binding effect on other judicial and administrative cases on the matter, the analysis of whether an expense is allowed as a credit must still be established on a case-by-case basis.

Leal said tax practitioners, lawmakers, and government representatives have been discussing a reform to PIS/COFINS law intended, among other things, to reduce the complexity involved in calculating liabilities for the two taxes, along with the amount of resulting tax litigation. ■