

## REIMBURSEMENT OF OVERPAID TAXES – LIMITATION PERIOD – BRAZIL'S SUPREME COURT

The decision of Brazil's highest court, the Supreme Federal Tribunal (*Supremo Tribunal Federal* – STF), on the limitation period for claiming reimbursement of overpaid taxes was published on October 11, 2011.

The case concerns article 3 of Complementary Law 118 of February 2, 2005 (CL 118/2005). Although article 3 ostensibly interprets article 168(I) of the National Tax Code, the real effect is to establish a limitation period of five years for taxpayers to claim reimbursement of overpaid and mistakenly paid taxes that are self-assessed (income tax, Social Contribution on Net Profit – CSLL, Social Integration Program contributions – PIS, Social Security Financing Contributions – COFINS, etc.). The legislator's purpose in enacting article 3 was to set aside the Superior Court of Justice's (*Superior Tribunal de Justiça* – STJ) well-settled position that the limitation period for reimbursement of overpaid and mistakenly paid taxes was "5+5": five years *after* expiry of five-year limitation period applicable to assessment of the tax by the tax authorities. Article 4 of CL 118/2005 provides that article 3 applies retroactively.

In deciding appeal RE 566.621, the full panel of the STF held that:

- the application of CL 118/2005 to actions filed prior to the date the legislation came into effect is unconstitutional;
- retroactive application of CL 118/2005 is unconstitutional, although the five-year limitation period applies to requests for reimbursement or set-off of overpaid or mistakenly paid taxes made after the legislation came into effect (i.e. on or after June 9, 2005).

This second point is included in the digest of the judgment, even though the question was not raised in the appeal (which dealt only with the application of CL 118/2005 to an action filed on June 2, 2005), and only four of the eleven judges on the panel concurred in the decision on this point.

The STF's decision goes contrary to the position adopted by the STJ, which since 2009 has held that five-year limitation period under CL 118/2005 applies only in cases where the taxes were paid after June 8, 2005 (Appeal RESP 1.002.932 – SP)

Even before the judgment in appeal RE 566.621 was published, the STJ began to apply the five-year limitation period to actions filed after June 8, 2005.

The STF's judgment should have similar repercussions at the administrative level, especially in the Administrative Tax Appeals Council (*Conselho Administrativo de Recursos Fiscais – Carf*), which had stayed judgment in all cases involving this issue until the STF's decision was rendered, pursuant to its internal regulations.

In view of the STF's decision, we recommend that taxpayers review their claims for reimbursement or set-off or overpaid taxes to determine if they are affected by the new limitation period.

This newsletter is merely informative, presenting only a general overview of the subjects. Thus, it is not a legal opinion.

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