

TAX NEWSLETTER

NESTA EDIÇÃO

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LAW NO. 11,941/09 AND RFB NORMATIVE INSTRUCTION NO. 949/09

Law No. 11,941/09, published in the Brazilian Official Gazette on May 28, 2009, converted into law Provisional Measure No. 449/08, with certain restrictions, and made important changes to the legislation governing corporations and taxation. On June 17, 2009, the Brazilian Federal Revenue Service (*Receita Federal do Brasil*– RFB) issued Normative Instruction No. 949/09, regulating the Transition Tax Regime (RTT).

This newsletter highlights the changes made by Law No. 11,941/09, particularly in comparison with the former Provisional Measure, and describes the main features of Normative Instruction No. 949/09.

1. PAYMENT OF TAX DEBTS IN ONE OR MORE INSTALLMENTS

Law No. 11,941/09 significantly modified the terms and conditions for the payment of tax debts (in one or more installments) that existed under Provisional Measure No. 449/08. Some of the main changes are described below:

1.1 DEBTS COVERED

Tax debts (including debts for social security contributions) owed by individual or corporate taxpayers, which became due on or before November 30, 2008, can be paid in a lump sum or in installments, in up to 180 months. The debt can be for any tax administered by the RFB, including:

- Tax debts owed by taxpayers who benefit, or not, from a court order suspending the collection of such debt, which have not previously been registered under a program for payment in installments; and
- Tax debts that have previously been registered for payment in installments but have not been paid in full, even when registration under the installment program has been cancelled because of the taxpayer's failure to pay (this includes the so-called installment programs REFIS, PAES, PAEX, ordinary installment plan of tax debts provided for under Law No. 8,212/91 and ordinary installment plan of other tax debts provided for under Law No. 10,522/02).

1.2 GENERAL RULES –

DEBTS THAT HAVE NOT PREVIOUSLY BEEN REGISTERED FOR PAYMENT IN INSTALLMENTS

The taxpayer may select the number of installments, benefitting from the following reductions (which are not cumulative with any other reductions provided for by law):

NUMBER OF MONTHLY INSTALLMENTS	REDUCTION OF PENALTIES ON ASSESSMENT AND LATE PAYMENT OF TAX	REDUCTION OF NON-COMPLIANCE PENALTY	REDUCTION OF INTEREST	REDUCTION OF LEGAL CHARGES (ATTORNEY FEES IN JUDICIAL PROCEEDINGS)
Lump Sum	100%	40%	45%	100%
Up to 30	90%	35%	40%	100%
Up to 60	80%	30%	35%	100%
Up to 120	70%	25%	30%	100%
Up to 180	60%	20%	25%	100%

Tax debtors may also make lump sum payments during the installment program to pay down their debt, and benefit from greater reductions as a result, as long as the lump sum payment is equal to at least 12 monthly installments.

The amount of the reduction in penalties, interest and legal charges shall not be included in the calculation of the taxable bases of the corporate income taxes (IRPJ and CSLL) and of the social contributions on gross revenues (PIS and COFINS).

1.3 GENERAL RULES – DEBTS THAT HAVE PREVIOUSLY BEEN REGISTERED FOR PAYMENT IN INSTALLMENTS

- On electing the payment of the tax debt under the terms of Law No. 11,941/09, the taxpayer must definitively withdraw from the prior installment program (REFIS, PAES, PAEX, and ordinary installment programs of tax debts provided for under Laws No. 8,212/91 and No. 10,522/02);
- The taxpayer must also recalculate, as of the date of the application for payment under Law No. 11,941/09, the amount of the original consolidated tax debt at the time of the previous installment program, together with legal charges, in accordance with the applicable legislation;
- In the case of a tax debt that has benefited from a second installment plan under the REFIS, PAES or PAEX programs, the taxpayer must consider the amount of the tax debt under the first installment plan;
- The taxpayer must then calculate all installments paid under the previous program, corrected to the date of the application for payment under Law No. 11,941/09, using the same method for updating the amount of the debt; and
- The taxpayer must then pay the outstanding amount of the debt, benefitting from the following reductions (which are not cumulative with any other reductions provided for by law):

PREVIOUS INSTALLMENT PROGRAM	REDUCTION OF PENALTIES ON ASSESSMENT AND LATE PAYMENT OF TAX	REDUCTION OF NON-COMPLIANCE PENALTY	REDUCTION OF INTEREST	REDUCTION OF LEGAL CHARGES (ATTORNEY FEES IN JUDICIAL PROCEEDINGS)
REFIS	40%	40%	25%	100%
PAES	70%	40%	30%	100%
PAEX	80%	40%	35%	100%
Ordinary legislation	100%	40%	40%	100%

The reductions above apply regardless of the number of installments the taxpayers chooses (up to 180 monthly installments), and the amount of the reduction in penalties, interest and legal charges is not included in calculation of the taxable bases of the IRPJ, CSLL, PIS or COFINS.

In order to determine whether it is more advantageous to pay tax debts in a lump sum or in installments under Law No. 11,941/09, taxpayers should compare the reductions in penalties, interest and legal charges under the new legislation with their previous installment program. They should also consider the rates used to update the amount of the installments under each type of installment plan.

1.4 RULES APPLICABLE TO BOTH CASES

(ALL TAX DEBTS, WHETHER PREVIOUSLY REGISTERED UNDER AN INSTALLMENT PROGRAM OR NOT)

- Taxpayers have until November 30, 2009 to elect the payment of tax debts under Law No. 11,941/09. The option also applies to tax debts paid when rules provided for under Provisional Measure No. 449/08 were in force.
- Taxpayers who opt for payment in installments are not required to provide security for payment or submit a list of their assets to the RFB unless property has already been attached in a tax collection action.
- Taxpayers should consider the minimum permitted value of installments, considering their particular circumstances.
- Law No. 11,941/09 does not expressly provide for the rates at which the installment amounts should be updated. The bill to convert Provisional Measure No. 449/08 did contemplate that installments should be adjusted monthly by the long-term interest rate (TJLP), or by 60% of the SELIC interest rate. However, the President vetoed this provision in the final version of Law No. 11,941/09, on the grounds that it was not appropriate for the government to grant yet another benefit in addition to those already provided for under Law No. 11,941/09. Usually, federal tax debts are updated by the SELIC.
- Another attractive feature of the installment plan under Law No. 11,941/09 is that tax losses (including losses for the purpose of calculating CSLL) can be used to pay tax debts.
- Taxpayers should also consider the effects of the rules on confession of debts and withdrawing from judicial actions concerning debts included in the installment plan under Law No. 11,941/09, as well as the rules on cancellation of the installment plan.
- The requirements and conditions for payment in one or more installments and other rules on the plan will be issued jointly by the Attorney-General of the National Treasury and the Secretary of the RFB in July 2009.

2. TRANSITION TAX REGIME (RTT)

2.1 DONATIONS AND SUBSIDIES FOR INVESTMENT

Provisional Measure No. 449/08 provided that amounts received by legal entities as donations or subsidies for investment must be:

- Recognized as income;
- Excluded from the taxable basis of the IRPJ (actual profit method) and of the CSLL; and
- Recorded in a specific profit reserve account, under the entity's net equity, becoming taxable only when used for a different purpose.

Law No. 11,941/09 maintains these provisions, but clarifies, in Article 18, Paragraph 3, that if in the taxation period in which the amounts are excluded from the calculation of the taxable bases of the IRPJ and CSLL the taxpayer has (i) an accounting loss or (ii) a net accounting profit less than the amount of donations and subsidies, with the result that there are no net profits to be allocated as donations or subsidies in a profit reserve account, the

amount of donations and subsidies should be recorded in the profit reserve account in subsequent taxation periods.

Law No. 11,941/09 also provided that the above treatment is not transitory, like the RTT, but applies only while the related governmental tax incentive programs are in force.

No other significant change to the RTT was made by Law No. 11,941/09. However, RFB Normative Instruction No. 949/09 introduced regulations on the RTT, as described below.

2.2 TRANSITION TAX ACCOUNTING CONTROL (FCONT)

RFB Normative Instruction No. 949/09 created the Transition Tax Accounting Control (*Controle Fiscal Contábil de Transição* – FCont) which must be used by legal entities that pay income tax under the actual profit method, and which are also subject to the RTT, when an adjustment of the accounting records for tax purposes is to be made under the terms of the RTT.

Basically, FCont requires that the taxpayer maintains its accounting records in accordance with the accounting methods and criteria in effect on December 31, 2007 (i.e. prior to the amendments to Law No. 6,404/76 (the Brazilian Corporations Law) made by Law No. 11,638/07 and Law No. 11,941/09).

RFB Normative Instruction No. 949/09 also provides that corporate taxpayers subject to the RTT must:

- Maintain its accounting records according to the current accounting methods and criteria ("corporation legislation records"); and
- Maintain its accounting records to the accounting methods and criteria in effect on December 31, 2007, by means of the FCont ("tax legislation records").

Adjustments for the difference between the results for in each period under each set of records must be made in the Actual Profit Tax Calculation Book (LALUR).

It should also be noted that:

- Adjustments for premiums on the issuance of debentures and with respect to donations and subsidies for investments are not made in the Fcont, but directly in the LALUR;
- the FCont must be submitted in digital format by November 30, 2009, using the application that will be made available by the RFB on October 15, 2009.

2.3 APPLICATION OF THE RTT TO LEGAL ENTITIES WHICH ADOPT THE PRESUMED PROFIT METHOD FOR THE CALCULATION OF IRPJ AND CSLL

In the case of corporate taxpayers which pay IRPJ and CSLL under the presumed profit method and adopt the RTT, the taxable basis of the IRPJ and CSLL must be adjusted by excluding or adding, as the case may be, the difference between taxable income calculated according to the corporation legislation records (i.e. under the accounting methods and criteria provided for under the amendments to the Brazilian Corporations Law) and taxable income calculated according to the tax legislation records (i.e. methods and criteria applicable for the purposes of the RTT, those in effect as of December 31, 2007).

The adjustments may be recorded in a statement of calculations. Normative Instruction No. 949/09 does not provide for any additional formalities.

2.4 APPLICATION OF THE RTT IN CALCULATING PIS AND COFINS

Normative Instruction No. 949/09 provides that the taxable basis of the PIS and COFINS must be adjusted by excluding or adding, as applicable, the difference between taxable

revenues calculated according to the accounting methods and criteria provided for under the Brazilian Corporations Law, as amended, and taxable revenues calculated according to the tax legislation.

The Normative Instruction also states that the RTT is applicable to the calculation of PIS and COFINS credits to which taxpayers can be entitled under the non-cumulative system, in which case the FCont should be used to demonstrate the calculation of the credits.

3. FEDERAL ADMINISTRATIVE TAX PROCEEDINGS – SPECIAL APPEAL TO THE SUPERIOR CHAMBER OF TAX APPEALS

Provisional Measure No. 449/08 had made various changes to Decree No. 70,235/72, which governs administrative tax proceedings at the federal level. Most of these changes were revoked on the conversion of the Provisional Measure into Law No. 11,941/09, which now permits a Special Appeal, to be filed either by tax authorities or by the taxpayer, only when the decision which is appealed interprets tax legislation differently from the interpretation given by another Chamber, Chamber panel, special panel or the Superior Chamber of Tax Appeals (*Câmara Superior de Recursos Fiscais* – CSRF).

Provisional Measure No. 449/08 also permitted appeals to the CSRF in the following cases, which are no longer in force, as from the entering into force of Law No. 11,941/09:

- (i) Special Appeal – by the prosecutor for the National Treasury, when the Chamber, Chamber panel or special panel issued a non-unanimous decision that is contrary to the law or the evidence; and
- (ii) Voluntary Appeal – by the taxpayer, against decisions issued by the Chamber, Chamber panel or special panel in favor of automatic appeals by the prosecutor of the National Treasury.

The provision for these appeals was revoked on the grounds that it was necessary to (a) reduce the length of administrative proceedings and (b) unify the interpretation of tax rules so as to reduce the number of tax disputes.

The possibility of a Special Appeal continues to exist, however, when the decision which is appealed from departs from the interpretation adopted by another Chamber, Chamber panel, special panel or the Superior Chamber of Tax Appeals itself.

4. SOCIAL SECURITY CONTRIBUTIONS – TEMPORARY CONTRACTING OF MANPOWER

In general, Law No. 11,941/09 maintained the provisions under Provisional Measure No. 449/08 which were introduced with the purpose of harmonizing social security legislation with the rules applicable to other federal taxes administered by the RFB.

One of Law No. 11,941/09's innovations was to change Article 31, Paragraph 1, of Law No. 8,212/91, and permit the set-off of amounts of social security contributions withheld by companies that contract service companies which supply workers against social security contribution debts owed by any of the service provider's establishments.

Previously, contributions which were withheld in this manner could only be set off against debts owed by the specific establishment which supplied the manpower, and amounts withheld in excess could only be reimbursed by the service provider, upon a specific (and usually time-consuming) process.

This change in the legislation could affect the offset of social security contribution debts with credits arising out of contributions withheld prior to the coming into force of Law No. 11,941/09.

5. SET-OFF OF DEBTS RELATED TO ESTIMATED MONTHLY PAYMENTS OF THE IRPJ AND CSLL

Law No. 11,941/09 vetoed one of the most controversial provisions of Provisional Measure No. 449/08, which prohibited the set-off of debts related to the estimated monthly payments of the IRPJ and CSLL with credits resulting from the overpayment of taxes and contributions administered by the RFB.

Corporate taxpayers which had filed this type of offset request before the RFB (with or without simultaneously filing a judicial lawsuit), despite the restriction contained under Article 29 of Provisional Measure No. 449/08 (which had modified, amongst other provisions, Article 74 of Law No. 9,430/96) can now consider withdrawing their administrative applications and/or judicial proceedings, considering their particular circumstances.

6. COMMERCIAL LEASING

Articles 40 and 41 of Provisional Measure No. 449/08 (which modified Laws No. 6,099/74 and No. 8,894/94) provided that commercial lease transactions in which the sum of lease payments amounted to more than 75% of the cost of the leased asset were to be treated as "credit transactions", for the purpose of the levy of the Tax on Financial Transactions – Credit Transactions (IOF/Crédito).

These provisions were vetoed in Law No. 11,941/09. In any event, in practice, the aforementioned provisions were not applied while Provisional Measure No. 449/09 was in force, since no regulations were issued to determine how the IOF/Crédito would apply to commercial leases, or the rate at which this tax would apply.

7. THE CONCEPT OF "AFFILIATED COMPANIES"

Law No. 11,941/09 maintains the definition of affiliated companies (*sociedades coligadas*) introduced by Article 36 of Provisional Measure No. 449/08, which amended Article 243 of the Brazilian Corporations Law. Under the new definition, companies will be "affiliates" if one has a "significant influence" over the other, in the form of entitlement or actual exercise of the right to take part in decisions on the financial or operational policy of this other company, without controlling it, or of holding 20% or more of voting capital of the other company, without controlling it.

The only change Law No. 11,941/09 made on this matter was to restrict the scope of the application of this new definition of "affiliated companies" to the purposes contemplated in the Brazilian Corporations Law. For other purposes provided for under special legislation, the definition of "affiliated companies" provided for under Article 1,099 of the Brazilian Civil Code applies (which was similar to the definition under Article 243 of the Brazilian Corporations Law prior to its amendment). This latter definition provides that one company is affiliated to another if the second holds 10% or more of its capital, without controlling it.

8. CALCULATION OF PIS AND COFINS

Article 3, Paragraph 1, of Law No. 9,718/98, which defined "gross revenues", equivalent to the taxable basis of the PIS and COFINS, as "the total revenue earned by the legal entity, regardless of the type of activity it engages in and the accounting classification it adopts" was revoked by Article 79, Item XII, of Law No. 11,941/09. This followed decisions rendered by the Brazilian Supreme Court, which had repeatedly found that Article 3, Paragraph 1, of Law No. 9,718/98 was unconstitutional.

As a result, after Law No. 11,941/09, PIS and COFINS only levy on the gross revenues earned by taxpayers subject to the provisions of Law No. 9,718/98. However, the revocation of Article 3, Paragraph 1, of Law No. 9,718/98 does not affect revenues subject to the PIS and COFINS under the so-called non-cumulative systematic, as provided for under Law No. 10,637/02 and No. 10,833/04, respectively, as amended.

O presente informativo tem por fim comentar as principais mudanças recentemente ocorridas na Legislação Tributária. Surgindo dúvidas, os profissionais estarão à disposição para esclarecimentos adicionais.

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