

Philanthropic donations should be tax deductible

16.06.2020 3 min read

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Tax legislation prohibits deduction of “donations” and “noncompulsory contributions” in general, except for deductions of up to 2% of operating income in donations to not-for-profit civil entities.

In the midst of so much bad news, it's like a breath of fresh air to discover that the pandemic has awakened a feeling of solidarity in our society that has inspired good actions which themselves act as an inspiration. According to studies, in Brazil, donations to fight covid-19 in the first two months of lockdown exceeded BRL 5 billion. Even governments have asked the private sector for help, as the

State of São Paulo did in March. Another piece of good news is the attention that the press, digital media, and civil society organizations have given philanthropic initiatives, publishing details on the names of benefactors and the value of their contributions.

Philanthropic donations should be celebrated, but they need encouragement too. The natural way to do that – a way that has proven effective in other countries – is to offer broad tax exemptions.

In addition to the debate over the application of gift tax to donations in some states, the big tax question around philanthropic giving is currently whether donations made during the pandemic can be deducted in calculating the corporate income taxes IRPJ (*Imposto de Renda da Pessoa Jurídica* or *Legal Entities Income Tax*) and CSLL (*Contribuição Social sobre o Lucro Líquido*, or *Social Contribution on Net Profit*). While recognizing that there are exceptions, in our view the answer should in general be “yes”, for a number of reasons.

Brazilian tax legislation prohibits deduction of “donations” and “non-compulsory contributions” in general, except for deductions of up to 2% of operating income in donations to not-for-profit civil entities. This provision should not be read literally, however. A reasonable interpretation is that the limit on deductions applies only to donations that can be considered to be entirely discretionary gifts by a company, made without expectation of return of any kind, to a recipient that is unrelated to the business. This is not the case of donations made to fight the pandemic.

According to the general rule on deductibility, expenses will be deductible if they are necessary to the conduct of the company's business and the maintenance of the company's “productive source”. With this said, it cannot be denied that the aim of covid-19-related donations was and is to improve the economic scenario, because the quicker effective action can be taken, the quicker the economy will recover from the severe blows dealt by the pandemic. These donations actually are related to companies' productive source, and the social function of businesses, which is expressly recognized

both in the Civil Code and the Brazilian Corporations Law.

But even leaving that argument aside (and without any intention to diminish the noble intention behind the good actions by so many private companies), there can be no doubt that associating a business's name to the cause of fighting covid-19 can only strengthen the donor's brand and reputation with its commercial partners, its customers, and society in general, especially in the current scenario.

The extent to which donations have been reported in the various media also creates a positive pressure to make further financial contributions to fighting the pandemic, as a commercial necessity resulting from the new reality faced by businesses. For this reason, widespread reporting of donations by companies ensures that the disbursements can be deducted as advertising expenses, on which there is no limit under tax law, as interpreted by the courts. According to the precedents, to be deductible, advertising expenses must not constitute a "mere liberality". There is no question of liberality when a donation can be shown to have generated publicity that adds value to the donor's brand, even if that publicity is a spontaneous effect of disclosure in the social media.

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