

PIS/COFINS tax on revenue from leasing movable and immovable property and the Supreme Federal Court's recent ruling

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Authors

Cristiana Moreira

Vivian Casanova

Carolina Andrade

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Recently, Brazil's highest court, the Supreme Federal Court (STF – *Supremo Tribunal Federal*) issued a joint decision in appeals RE 599.658 and RE 659.412. Both are "general repercussion" appeals, which means that the STF's ruling binds all lower courts and administrative instances. The STF ruled that "it is constitutional to levy PIS/COFINS on revenues from movable or immovable property, when it constitutes the taxpayer's business, given that the economic result of the transaction coincides with the concept of revenue from sales or gross revenue, taken as the sum of revenues from conducting business (article 195(I), 1988 Federal Constitution)."

At first glance, it might seem that the impact of the STF's decision would alarm companies in the real estate sector, which lease immovable properties of all kinds, such as land, buildings, and residential and commercial spaces.

However, in order to understand whether decision has any practical effects for the real estate sector, the timeline covered by the two cases must be considered.

In Appeal RE 599.658, the action was filed when Provisional Measure 1212/1995 was in effect, while in Appeal RE 659.412, the action was filed in February 2005, when Law 9718/1998 was in force (as it stood at the time).

The provisions challenged in the two actions dealt specifically with the calculation of "cumulative" or cascading PIS/COFINS, which attached to the sales revenue (*faturamento*) of legal entities in the private sector, which was understood to be their gross revenue.

In deciding the appeals, therefore, the STF had to determine (a) whether revenue earned by companies from the lease of movable and immovable property fell within the concept of gross revenue, and was therefore subject to cumulative PIS/COFINS; and (b) whether the fact that leasing was "typical" of the taxpayers' business was sufficient for the tax to attach, or whether the activity of leasing had to be formally included as a corporate purpose in the taxpayer's incorporating documents.

By a majority decision, the opinion of Reporting Justice Alexandre de Moraes prevailed, and the court held that if a legal entity regularly engages in the activity of leasing movable or immovable property, then it constitutes a "typical" activity, and the revenue derived from it falls within the concept of gross revenue for the purposes of cumulative PIS/COFINS. In the STF's view, even before Constitutional Amendment 20/1998, the concept of gross revenue covered all income from companies' business activities, whether or

not those activities were expressly included in their corporate purposes, and gross revenue was therefore not limited to income from the sale of goods and the provision of services.

There is a substantive as well as a temporal limitation to the implications of the STF's decision: in 2014, Law 12.973 was enacted, which expressly includes revenue from companies' main activity or object in the definition of gross revenue, in addition to the product of the sale of goods and the provision of services in general.

In practice, therefore, the STF's decision did not bring about an effective change for companies operating in the real estate sector, since they have been subject to PIS/CONFINS on revenues from real estate leases since Law 12.973/2014 came into force.

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Cristiana Moreira



Vivian Casanova



Carolina Andrade