BMA ADVOGADOS

A new position on assessment penalties in tax cases dealing with goodwill?

13.01.2022 3 min read

Authors

Vivian Casanova

Carolina Andrade

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The Covid-19 pandemic had a significant effect on judgments in tax cases at the administrative level, as the work of the Administrative Tax Appeals Council (CARF – Conselho Administrativo de Recursos Fiscais) came to a halt. Virtual judgment sessions began in 2020, but only for cases involving amounts up to BRL 1 million, and even then the parties (either the taxpayer or the tax prosecutors) could ask for their case to be removed from list for virtual judgment.

As a result, appeals involving significant issues and large tax debts remained at a standstill.

As the pandemic wore on, various directives were issued to allow CARF to continue its work: the monetary limit for virtual judgment sessions was increased; parties were only allowed to withdraw their case from the virtual judgment list for good reason; and appeals that were withdrawn had to be rescheduled for judgment in the next two virtual sessions.

The pandemic also saw the elimination of the casting vote in CARF's decisions, by Law 13.988, in April 2020. The casting vote held by president of judgment panels in CARF and in CARF's second instance chamber, the CSRF (Câmara Superior de Recursos Fiscais), meant that in the event of a tie, cases were almost always decided in favor of the tax authorities, since the president of judgment panels is a member of the Federal Revenue Service of Brazil. Under the new rule introduced by Law 13.988, the interpretation most favorable to the taxpayer will prevail in the case of a tie. The result has been a change in the positions taken by CARF and the CSRF on a number of issues.

In a recent decision, for example, the CSRF set aside a doubled assessment penalty (150% of the assessed tax), which should apply only where the tax authorities find evidence of tax evasion, fraud or conspiracy, as provided for in articles 71, 72 and 73 of Law 4502/64.

Regardless of the limited circumstances in which doubled assessment penalties apply, the tax authorities have applied the fine in cases where they have disregarded tax planning transactions, even without evidence of fraud or evasion, despite other negative consequences of doubled penalties, such as the laying of charges for tax crimes.

Until recently, in most cases the CSRF upheld the doubled assessment penalty, because of the casting vote.

On September 8, 2021, in a case where the tax authorities had disallowed goodwill amortization, the CSRF's 1st Panel decided to set aside the doubled assessment penalty that the tax authorities had applied on the grounds that the taxpayer did not have a business reason for its corporate reorganization, which was (allegedly) carried out solely to make the goodwill deductible.

According to the reporting councillor, the mere absence of a business purpose for the transaction, without any allegation of illegality in the goodwill itself, does not constitute fraud for the purposes of the doubled assessment penalty. The reporting councillor also stressed that at the time the corporate reorganization was carried out, the case law was contradictory, with no clear indication that such transactions were illegal, which must have influenced the taxpayer's decision.

The other members of the judgment panel agreed that the doubled penalty should be cancelled, and highlighted that the transaction itself was a type of transaction provided for by law, without any illegality, nullity or defect that could serve as evidence of tax evasion or fraud.

The CSRF's decision did not address the tax assessment itself, which had been upheld in at an earlier judgment session.

This is an important precedent by the CSRF, which in the past usually upheld doubled assessment penalties in cases dealing with goodwill. We will be watching upcoming decisions by CARF and the CSRF to see if the decision marks the beginning of a new trend.

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Vivian Casanova

Carolina Andrade