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Brazil's constitutional court concludes judgment on exclusion of state ICMS in calculating federal PIS/COFINS

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On March 15, 2017, Brazil's constitutional court, the Supreme Federal Court (STF – *Supremo Tribunal Federal*) ruled that it was unconstitutional for the federal social contributions PIS (Social Integration Program) and COFINS (Social Security Financing Contribution), which attach to gross revenues, not to exclude amounts of the state value-added tax, the ICMS, from taxable revenue. That judgment left open two important questions: the date from which the STF's decision would have effect, and whether the amounts of ICMS to be excluded are the amounts effectively paid, or the amounts of ICMS stated on invoices issued for goods.

On May 13, 2021, the STF answered those questions, by a solid majority of 8 to 3. Its decision will apply prospectively, from the date of judgment on the merits (March 15, 2017), except where taxpayers had brought action prior to that date challenging the constitutionality of including ICMS in the calculation of PIS/COFINS, in which case they will benefit from the decision with respect to the period prior to March 15, 2017. The court also held that the amount of ICMS to be excluded in calculating PIS/COFINS is the amount shown on invoices, not the amount effectively paid.

Although the decision is a defeat for the federal government, the outcome is not as bad as it could have been. If the STF had ruled that its decision had retroactive effect, the resulting loss to the federal coffers was estimated to be as high as BRL 245 billion.

The STF's decision is binding on all lower courts and the federal administration. The repercussions of the decision in lawsuits brought by taxpayers will need to be explored, and taxpayers should take steps to ensure that they receive the full benefit of the STF's decision.

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