

Shopping centers do not have legal personality and shouldn't be taxed as if they do

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The co-owners of the shopping center are the effective beneficiaries generated by operating their common asset, and therefore they are legally liable for the taxes attaching to the economic return from their enterprise

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It is common for the owners of shopping center units, who also own an undivided interest in the shopping center's common areas, to organize as a condominium. Generally speaking, condominiums do not engage in commercial activity or distribute profit: their purpose is to care for the co-owners' interests, which includes acting on behalf of co-owners in receiving payment of rent for the private areas of the condominium.

Condominiums do not have legal personality and are treated as legal entities simply for the purpose of requiring them to enroll in the federal tax register, the CNPJ (*Cadastro Nacional de Pessoa Jurídica* – National Register of Legal Persons). For tax purposes, condominiums do not have income or even revenues, and therefore are not subject to taxation except for taxes associated with hiring employees and service providers.

The Federal Revenue Service of Brazil (RFB – *Receita Federal do Brasil*) has been issuing tax assessments to shopping center condominiums for the corporate income taxes IRPJ and CSLL and the gross revenues contribution PIS and COFINS on “operating income” from the lease of commercial units. The RFB contends that shopping center condominiums are an association for business purposes – essentially a partnership or company – as provided for in article 981 of the Civil Code, which provides services to the co-owners in the form of receipt of rent and distribution of profit.

On April 6 of this year, the 2nd instance of CARF, the federal Administrative Tax Appeals Council (*Conselho Administrativo de Recursos Fiscais*), cancelled a tax assessment issued against a shopping center, on the grounds that the taxpayer was improperly identified.

The decision by CARF's 2nd instance chamber, the CSRF (*Câmara Superior de Recursos Fiscais*), points out that the shopping center is not simply a building condominium, but a condominium pro indiviso, or a property held in undivided co-ownership, and the two are distinct concepts in the Civil Law. The tax authorities may not disregard the distinction in order to tax amounts received and paid over to the co-owners, as the RFB attempted to do in the tax assessment.

Since the condominium is composed of undivided interests, the co-owners

do not own specified individual units, but are all owners of a common asset that generates income originating in the owners' exercise of their property rights. The CSRF considered that it was entirely legitimate to form a condominium, which is not a distinct legal entity, for the purpose of organizing and sharing the expenses involved in managing the common property, and receiving and administering payments to the co-owners.

The CSRF also rejected the argument that the condominium was a business association within the meaning of article 981 of the Civil Code, since none of the co-owners was required to contribute assets or services to achieve common business objectives: the only asset used for commercial purposes was the asset they own in common.

The CSRF also took the position that article 121 and article 126(III) of the National Tax Code (CTN – *Código Tributário Nacional*) does not give the tax authorities the power to attribute legal personality to a condominium pro indiviso, making it subject to tax obligations independently of its owners. On the facts of the case, the co-owners of the shopping center were the effective beneficiaries of the income generated by operating their common asset, and therefore they have legal liability for the taxes attaching to the economic return from their enterprise. There was no evidence that the co-owners had failed to pay taxes on the revenues paid over by the condominium, or that the co-owners had used the condominium in an abusive or fraudulent manner.

The CSRF's judgment was, in fact, a tie, and so the outcome most favorable to the taxpayer prevailed, as provided for in article 19-E of Law 13.988/2020 [LRO: Lei 10.522 no original]. Thus, although the decision is an important precedent, the tie on the CSRF's judgment panel shows that the question is not yet settled. We will be keeping a close eye on the CSRF's decisions on this matter, especially in view of the fact that the constitutionality of article 19-E has been challenged (Constitutional Challenges ADI nos. 6415, 6399 and 6403).

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