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Outlook for 2024: Will the courts decide the big tax issues?

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From the tax perspective, 2023 was a busy year. The long-awaited tax reform was approved (although regulations are still pending), and new rules were issued to make tax benefits subject to tax, allow delinquent federal taxpayers to pay overdue taxes without penalties, and limit offset of amounts of tax recovered through the courts against tax owed.

In the courts, some old disputes were resolved, and some new debates raised, with decisions establishing a new interpretation of how res judicata applies to tax matters; on when the mechanism (DIFAL) for dividing state VAT in transactions where the seller and the end consumer are in different states came into effect; on how state VAT, known as ICMS (*Imposto sobre Mercadorias e Serviços*) applies to the transfer of goods between branches of the same company; on fines imposed when taxpayers' offsets are rejected by the tax authorities; and, last but not least, on whether tax subsidies are subject to the corporate income taxes, IRJP and CSLL (they are).

2024 is likely to be no different, given the other important issues now before the Supreme Federal Court (STF – *Supremo Tribunal Federal*, Brazil's highest court on constitutional issues) and the Superior Court of Justice (STJ – *Superior Tribunal de Justiça*, the highest court on nonconstitutional issues) in cases where the courts' decisions will bind all lower instances.

The tax cases before the STF and the STJ have the potential to cause an enormous impact – running into the billions – especially on the federal government's coffers.

According to the legislation establishing the federal budget for 2024, known as the 2024 Budgetary Guidelines Law (*Lei das Diretrizes Orçamentárias de 2024*) the government expects a loss of BRL 812.4 billion in connection with tax issues now before the STF[1]. One of the issues that is expected to have the greatest impact involves contributions to the Social Integration Program (*PIS – Programa de Integração Social*) and to Social Security Financing (*COFINS – Contribuição para o Financiamento da Seguridade Social*).

The disputes that have attracted the most attention from taxpayers are the "spin-off issues" from the STF's decision excluding ICMS from companies' calculation of PIS and COFINS. One of those disputes is over whether the municipal services tax, ISS (*Imposto sobre Serviços*), should be included when calculating PIS and COFINS, which apply to gross revenues. If the amount of ISS payable is excluded from gross revenue, the loss is estimated to be over BRL 100 billion.

Taxpayers are hopeful that the STF will rule that ISS should be excluded when calculating PIS and COFINS, since some of the Justices have voted in favor of the taxpayers.

In the STJ, tax cases represent a potential loss of BRL 80.4 billion. Here, the big issue is contributions, imposed by law, to sector entities created to support training and other initiatives. The question is whether companies are entitled to calculate these sector contributions (currently about 5.8%) on an amount that is capped at 20 times the minimum monthly salary (currently BRL 1412, so sector entity contributions would be capped at about BRL 1638 per employer), or whether the sector contributions are calculated on the basis of the company's entire payroll. So far, two of the Justices on the STJ's panel have issued opinions unfavorable to taxpayers.

Since the Supreme Federal Court's and the Superior Court of Justice's decisions will be binding in all cases presenting similar issues,
taxpayers should assess whether they should take steps to protect their right to recover amounts of taxes overpaid in the past.

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NOTE

[1] The Federal Revenue Service of Brazil – RFB estimates both the total loss in annual revenue and taxes to be refunded, so this number reflects the maximum impact on the federal treasury.

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