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Private Ruling No. 74/2019 – WHT, PIS, COFINS and CIDE upon software license fees

The Federal Revenue Service of Brazil ("RFB") recently issued Private Ruling ("SC") COSIT 74/2019 with its view on the taxation of remittances abroad of software license fees. RFB's position in connection with the application of withholding income tax ("WHT") and PIS / COFINS-Import was the one expected (based on previous precedents); however, the position regarding the levy of CIDE upon such transaction was somehow surprising.

In the case analyzed, the Taxpayer, a Brazilian legal entity, explained that it had a cost-sharing agreement with its parent company in the United States for the development of some administrative activities, which encompassed granting access to certain software and technology systems.

The Taxpayer argued that the remittances to the parent company were reimbursements of expenses, carried out in accordance with Ruling 8/2012 (which deals with the requirements for intercompany arrangements to be treated for tax purposes as cost sharing arrangements). Accordingly, the Taxpayer asked RFB to confirm its conclusion that the underlying transactions would not be services and, thus, would not be subject to WHT, CIDE and PIS / COFINS-Import.

Under SC 74/2017 RFB presented some comments regarding the nature of cost-sharing agreements, including concepts drawn from the OECD Guidelines, as well as the characteristics set out in the mentioned SC 8/2012. However, RFB took the view that the remittances abroad carried out by the Taxpayer should be treated as remuneration for the licensing of software, which would be used in the company's core activities.

Therefore, RFB concluded that the amounts paid by the Taxpayer should be characterized as royalties arising from the license to use and to commercialize software.

As regards the WHT, RFB followed the position already stated in previous rulings (e.g. SC 2/2019, SD 381/2017, SC 342/2017, and SD 18/2017) to conclude that the remittance abroad of software license fees would have the nature of royalties for tax purposes and, therefore, would be subject to WHT at the rates of 15% or 25%.

RFB also confirmed that PIS / COFINS-Import do not levy upon the remittance abroad of software license fees, provided that it is possible to identify that the relevant amounts actually refer to software license fees and not to service fees (same position was adopted by RFB under SC

381/2017, SC 342/2017, SC 316/2017, SC 99001/2016 and SC 71/2015).

Further, RFB stated that software license fees would be deemed royalties subject to the levy of CIDE.

The conclusion was based on the general rule of levy of CIDE upon royalties and disregarded the fact that Article 2, paragraph 1-A of Law 10,168/00 expressly exempts software license fees from CIDE, unless there is transfer of technology.

On this matter, Private Rulings 18/2017 and 342/2017 stated that software license fees are only subject to CIDE when there is transfer of technology, delivery of source code and/or of the necessary knowledge to change it.

Considering that there is no information on whether the case analyzed under SC 74/2019 involved or not technology transfer, RFB's position seems to be inconsistent with tax legislation and with its on previous manifestations on the matter.

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