Unconstitutional inclusion of the ICMS in the PIS/Cofins taxable basis

By André Hazan da Fonseca
ACT Appraisals, Consulting and Taxes

On March 20th, the Brazilian Supreme Federal Court (Supremo Tribunal Federal - STF) unanimously decided that the taxable basis of the social contributions known as PIS and Cofins on imports is unconstitutional.

For those not familiar with the Brazilian tax legislation, it might seem odd that the taxable basis of the taxes included not only the value of the imported good, but also the amount of the State Sales Tax (ICMS) and of the social contributions themselves.

Nevertheless, this is a very common tactic used by the authorities in most Brazilian taxes, to unobtrusively broaden the total tax burden. The difference in the case of PIS and Cofins is that the Constitution of Brazil (art. 149, §2nd, item III, "a") specifically determines that the taxable basis for social contribution on imports shall be the customs value of the imported asset.

In the Oil & Gas industry, many types of assets have suspended federal import taxes, including PIS and Cofins, due to the REPETRO regime. The unconstitutionality affects the assets which cannot be covered by the special regime and those which the company opts not to include in REPETRO due to the urgency to have it in the platform.

This decision represents, on average, a reduction of around 6 percent of the import taxation on assets not covered by REPETRO, depending on the applicable Federal Excise Tax (IPI) rate.

At a first glance, this may not seem a very significant reduction, but considering that, on average, a drilling platform requires the import of USD 1 million per month in non-REPETRO goods, the accrued amount of undue tax over the last five years may represent serious money: according to an estimate from the Procuradoria Geral da Fazenda Nacional (PGFN), the Treasury's Attorney-General Office, the impact of this decision would amount to BRL 34 billion, for the period between 2006 and 2010, not considering inflation adjustments.

This is why the PGFN is pleading to prevent the decision from having a retroactive effect. The Supreme Court has not yet ruled on the request. Should it be granted, only the taxpayers that have filed lawsuits before the res judicata (final judgment) will be entitled to reclaim the undue taxes paid during the last five years.

Therefore, it is crucial that the companies affected by this decision file the lawsuit before this process ends. The judicial measure for claiming the undue taxes is called *"Ação de Restituição de Indébito"*, and is only applicable for undue taxes which have already been paid.

For future imports—upon which the Federal Tax Authorities are still applying the unconstitutional taxable basis—it is possible to file a preventive "Writ of Mandamus", with the option of judicially depositing the value arbitrated by the tax authority, to avoid delay penalties in case of defeat. This judicial measure enables taxpayers to obtain the suspension of the tax, allowing the imported asset to enter the country, while the taxation is still being judicially discussed. Another advantage is the mitigated consequences in an eventual loss, since no defeated party's legal fees are due in the Mandamus process. ■