

# Taxation

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## Federal taxes New due dates

Provisional Measure No. 447, published on November 17, 2008, has established new due dates for certain federal taxes and will apply to triggering events occurred as from November 1, 2008. Although the chart attached to this newsletter shows the major changes introduced by this Provisional Measure, a careful reading of said legal document is still required. Page 2.

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### STF to rule on important tax matters

The STF recognizes the general repercussion of the disputes involving: (i) ISS assessment on movable property lease agreements; (ii) inclusion of ISS in the tax base of the PIS and COFINS contributions; and (iii) the 30% limit for setoff of tax losses and negative bases of IRPJ and CSL. Page 5.

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### ATTENTION: Deadline for implementation of the SPED

Companies should be prepared to adopt the SPED, which must be implemented by **January 2009**. Page 3.

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### Benefit for Brazilian product exports to the US extended

The program that reduces the import duty rate levied on primary and manufactured products originating from developing countries was extended up to December 31, 2009. Page 3.

### Federal District approves amnesty

On November 4, the Federal District Government initiated REFAZ III, which is aimed at recovering tax and non-tax credits through reductions in default interest and in fines. Page 3.

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### Fine relating to magnetic files

Taxpayers that adopt the electronic data processing system (Normative Ruling 86/2001), but fail to submit the magnetic files as required, have been imposed fines of questionable lawfulness. Page 5.

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### Federal Revenue Office not to levy PIS/COFINS-Imports on services rendered abroad

The Federal Revenue Office reinforced its stand that no PIS/COFINS-Imports should be levied on amounts remitted abroad for payment of expenses arising from services provided outside Brazil. Page 4.

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### State of São Paulo reopens period for adhesion to the PPI for ICMS

On November 11, 2008, the State of São Paulo published Decree No. 53671, which reopens **until December 30, 2008** the period for Tax on Circulation of goods and Services (ICMS) taxpayers to adhere to the Installment Payment Incentive Program (PPI) created by State Decree 51960/2007. The new Decree further contemplates the possibility of using accumulated ICMS credits toward payment of debts included in the PPI.

#### Tax Reform

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### IOF on exchange transactions reduced to zero

Decree 6613/2008 reduced to a zero rate the Tax on Financial Transactions (IOF) levied on foreign exchange transactions relating to foreign investments in fixed-income securities, in Equity Investment Funds (FIP's), on dividends, interest on equity and foreign loans. A more in-depth analysis of the changes introduced by Decree 6613/2008 may be found in Attachment to *Biblioteca Informa* Newsletter No. 2031 of October 19-25, 2008.

TAXATION is a monthly newsletter prepared by the tax team of PINHEIRO NETO ADVOGADOS, comprising 109 members, being 12 partners, 60 associates and 37 trainees.

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## RELEVANT LEGISLATIVE CHANGES

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### Federal taxes - New due dates

Provisional Measure No. 447, published in the Official Gazette on November 17, 2008, with effects applicable to triggering events occurred as from November 1, 2008, has established new due dates for certain federal taxes.

Although the chart below shows the major changes introduced by said Provisional Measure, a careful reading of said legal document is still required:

Taxes	Vencimento anterior	Novo vencimento
PIS, PASEP and COFINS	Last business day of the second ten-day period of the month following the month in which the triggering event occurred.	Twenty-fifth day of the month following the month in which the triggering event occurred. <sup>1</sup>
IPI	Last business day of the fifteen-day period following the month in which the triggering event occurred.	Twenty-fifth day of the month following the month in which the triggering event occurred. <sup>2</sup>
IRRF	Last business day of the first ten-day period of the month following the month in which the triggering event occurred.	Last business day of the second ten-day period of the month following the month in which the triggering event occurred. <sup>3</sup>
INSS <sup>4</sup>	Up to the 10 <sup>th</sup> day of the month following the reference month.	Last business day of the second ten-day period of the month following the reference month.

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<sup>1</sup> When this day is not a business day, the due date will be moved back to the immediately preceding business day. This new due date applies to all taxpayers, except for financial institutions and the other legal entities listed in article 22, paragraph 1 of Law 8212/1991.

<sup>2</sup> When this day is not a business day, the due date will be moved back to the immediately preceding business day. This new due date does not apply to transactions involving products classified under code 2402.20.00 of the Mercosur Common Nomenclature (NCM), which will continue to have as their due date the third business day of the ten-day period following the ten-day period in which the triggering event occurred.

<sup>3</sup> Does not apply in the case of income earned by persons resident or domiciled abroad, of payments made to non-identified beneficiaries, of interest on equity and financial investments, of prizes awarded in competitions and draws (as well as of profits arising from these prizes), of the fines or advantages set out in article 70 of Law 9430/1996, and of yield and capital gains paid by real estate investment funds.

<sup>4</sup> Social security contributions intended for Social Security **(a)** payable by the company, levied on compensation paid, owed or credited, in any way, to insured employees, self-employed workers and individual taxpayers at the company's service, as well as on the compensation arising from the services provided to the company by cooperative members (through work cooperatives); **(b)** withheld by companies retaining outsourced services, also under the temporary work system; and **(c)** which must be withheld and collected by the company, relating to individual taxpayers at its service.

## ATTENTION: Deadline for implementation of the SPED

The Public Digital Bookkeeping System (SPED) has been created to (i) promote the integrated operation of the federal, state and municipal tax authorities, (ii) streamline and harmonize the procedures necessary for compliance with ancillary tax and accounting obligations, and (iii) provide for a speedier and more effective investigation and identification of tax crimes.

Under tax law, there are two types of SPED to be adopted by companies: the SPED-Fiscal or Digital Tax Bookkeeping (EFD) and the SPED-Accounting or Digital Accounting Bookkeeping (ECD).

The SPED-Fiscal consists basically of replacement of the Register of Entries, Register of Exits, Register of Inventory, Register of the Tax on Manufactured Products (IPI) and Register of the Tax on Circulation of Goods and Services (ICMS) with digital files for integration

of the information provided to the federal, state and municipal tax administrations. In practice, with the adoption of the SPED-Fiscal, the current Integrated System of Information on Interstate Transactions involving Goods and Services (SINTEGRA) will be terminated. The deadline for implementation of the SPED-Fiscal is **January 2009**.

The SPED-Accounting, in turn, consists of the digital version (instead of a physical version) of the Daybook and its ancillary documents, the Ledger and its ancillary documents and the books comprising the Daily Interim Balance Sheets, Balance Sheets and entry forms evidencing the entries made therein. Except for companies subject to differential tax and economic monitoring, the deadline for implementation of the SPED-Accounting is also **January 2009** for the other legal entities taxed on actual profits.

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## Benefit for Brazilian product exports to the US extended

SECEX Circular No. 70, published on October 30, 2008, made public the extension **up to December 31, 2009** of the United States Generalized System of Preferences (GSP).

GSP is a program that contemplates partial or total reduction in the import duty levied on a variety of primary and manufactured products originating from developing countries.

Currently, 3,379 Brazilian products are listed as eligible for the preferential tariff treatment under the program (100% import duty reduction).

The main products benefiting from the GSP were electrical materials, wood and auto parts (the complete list may be found at: [http://www.mdic.gov.br/arquivos/dwnl\\_1215802772.pdf](http://www.mdic.gov.br/arquivos/dwnl_1215802772.pdf)).

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## Federal District approves amnesty

The Third Program for Recovery of Tax and Non-Tax Credits of the Federal District (REFAZ III) commenced on November 4<sup>th</sup>. This program seeks to encourage taxpayers to settle tax and non-tax debts held with the Federal District Government. The taxes targeted by the benefit are: Tax on Circulation of Goods and Services (ICMS), Tax on Services (ISS), Urban Land and Building Tax (IPTU), Tax on Ownership of Automotive Vehicles (IPVA), Inter-Vivos Real Estate Tax (ITBI), Estate Tax (ITCD), *Simples Candango* (tax assessment

regime for micro enterprises), various fees and ancillary tax fines.

Consolidated debts relating to Tax on Circulation of Goods (ICM) and ICMS arising from voluntary reporting or *ex-officio* assessments with triggering events occurred up to December 31, 2006 and debts relating to the other taxes arising from voluntary reporting or *ex-officio* assessments with triggering events

occurred up to December 31, 2007 are eligible for REFAZ III.

Consolidated balances of installment payments approved and subsequently cancelled *ex-officio* by the competent authority (REFAZ and REFAZ II) may also benefit from this initiative, provided that they refer to triggering events occurred up to December 31, 2007 and do not originate from ICM or ICMS.

The reduction in default interest and in fines, including default fines, imposed on the debts, will be implemented in the following proportions as from the effective date of the program:

Reduction	Payment Condition
90%	if paid in full by the last business day of the following month
80%	if paid in full by the last business day of the second following month
65%	if paid in full by the last business day of the third following month
45%	if paid in full by the last business day of the fourth following month
35%	if paid in up to 36 monthly and successive installments, provided that the option for installment payment is made by the last business day of the fourth following month

The program requires that the taxpayer expressly relinquish and waive any right to action, opposition or appeal, in the administrative and judicial spheres, in connection with the debt to be settled under the program.

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## Tax Reform

Federal representative Sandro Mabel has made public his report in the latest session of the special commission. This report has introduced some new items in relation to the original Federal Government bill. However, the core idea of simplifying the tax system by creating the Federal Value Added Tax (IVA-F) to replace some social contributions, harmonizing the Tax on Circulation of Goods and Services (ICMS) and putting an end to the so-called tax war, was maintained. The

matter is to be voted by the commission and, if approved, may be put up for a vote at the House of Representatives plenary session still this year. Despite Governor José Serra's resistance to the bill, President Lula has declared that government supporters should be called to vote and approve the text.

We will report on any new developments on the matter in the next Taxation issue.

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## TAX LAW AT THE COURTS

### Federal Revenue Office not to levy PIS/COFINS-Imports on services rendered abroad

The Federal Revenue Office reinforced the stand that no Profit Participation Program Contribution on Imports (PIS-Imports) and Social Security Financing Contribution on Imports (COFINS-Imports) will be levied on amounts paid, credited, used, delivered or remitted abroad to cover payments of expenses ensuing from services rendered abroad with results in the country in which they were retained.

Although there are some precedents in this respect, most of the former precedents referred to

services provided abroad as a result of product export transactions.

Recent decisions No. 314/2008 and No. 325/2008 have confirmed the broader stand of the Federal Revenue Office, ratifying that no PIS-Imports or COFINS-Imports will be levied on any kind of service (including, for instance, legal services relating to lawsuits abroad) rendered abroad with results abroad, even if the service taker is located in Brazil, on the grounds that these cases do not fall under the events set out in article 1, paragraph 1, II of Law 10865/2004.

## STF to rule on important tax matters

According to the procedural rules in place, there is a possibility that the Federal Supreme Court (STF) will no longer decide appeals that do not have a general repercussion, *i.e.* those that do not deal with issues that are important to society at large from an economic, political, social or legal perspective.

When entertaining Extraordinary Appeals Nos. 592.905, 592.616 and 591.340, the STF has recently recognized that the issues addressed in each such appeal have general repercussion. These appeals address respectively: (i) the assessment of the Tax on Services (ISS) on movable property lease agreements; (ii) the inclusion of ISS in the tax base of the Profit Participation Program Contribution (PIS) and Social Security Financing Contribution (COFINS); and (iii) the 30% limit instituted by Laws 8981/1995 and Law 9065/1995 for setoff

of tax losses and negative bases of the Corporate Income Tax (IRPJ) and the Social Contribution on Profits (CSL).

In view of the above, considering that such issues will be decided by STF, it rests with the taxpayers, individually, to consider whether to dispute these issues in the Judiciary. If they decide to resort to the Judiciary, they should do so before an STF finding in said Extraordinary Appeals, as the STF may exceptionally change the effective date of its determination for the sake of legal security or in the public interest (as it happened recently in similar events).

This warning is important because the STF may exceptionally change the effective date of its determinations, for the sake of legal security or in the public interest, only in connection with the taxpayers with lawsuits in progress.

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## COMMENTED TAX LAW

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### Fine related to magnetic files

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Federal Revenue Office (SRF) Normative Ruling No. 86 of October 22, 2001 establishes that legal entities adopting electronic data processing systems to record transactions and economic or financial activities, to make accounting entries or to prepare tax or accounting documents, must keep at the disposal of the tax authorities the digital files and systems during the statutory period so as to provide the federal inspection authorities with full access to tax and accounting information of the taxpayer.

Article 12 of Law No. 8218 of August 29, 1991 ("Law 8218/1991"), as worded by Provisional Measure No. 2158-34 of July 27, 2001 ("MP 2158-34/2001"), established the penalties to be imposed for submission of magnetic files in a form other than as required, with omissive or incorrect information, and for late submission, on the following terms: (i) a fine equal to 0.5% of

the gross income of the legal entity in the period, for failure to observe the form for presentation of the magnetic files; (ii) a fine equal to 5% of the transaction value, for provision of omissive or incorrect information, limited to 1% of the gross income in the period; and (iii) a fine equal to 0.02% of the gross income in the period, per day of delay, for untimely delivery of the magnetic files, capped at 1% of the gross income.

In our view, the penalties imposed by article 12 of Law 8218/1991 are unlawful and unconstitutional for the following reasons: first, when imposing the penalty for mere failure to comply with an ancillary obligation (submission of magnetic files with incorrect information or on an untimely basis), the Law uses as a parameter the taxpayer's gross income, which is an economic figure totally disproportionate to the infraction committed. That being so, in view

of the absence of a relation between the penalty imposed and the seriousness of the infraction, article 12 of Law 8218/1991 constitutes a clear violation of the principle of proportionality, guaranteed under the Federal Constitution and set out in article 2, VI of Federal Law 9784/1999 (Federal Law on Administrative Proceedings), which bars imposition of penalties exceeding the scope strictly necessary to meet the public interest.

Moreover, failure to comply with a merely formal obligation (submission of information to the tax authorities in magnetic format) cannot trigger different penalties, depending on the equity of the violating taxpayers. It is inadmissible to charge a greater fine to a taxpayer just because its gross income for the period is higher than that of the other taxpayer, when considering that both taxpayers committed the same infraction with respect to submission of information to the tax authorities. To admit imposition of fines in reliance on this parameter is tantamount to affording different treatment to taxpayers in the same situation, thereby violating the principles of tax equality and equal treatment before the law, as contemplated by article 150, II of the National Tax Code (CTN) and article 5, main section of the 1988 Federal Constitution.

Additionally, in view of their clear disproportionate nature, the fines set out in article 12 of Law 8218/1991 ultimately take on a clearly confiscatory character, to the extent that they absorb an expressive portion of the income or property of the taxpayer, thus serving as a revenue collection tool. As admitted by the higher courts, penalties cannot be onerous to the point of expropriating the taxpayer's assets, but should rather be strictly proportionate to the infraction committed, which is not the case of the fines dealt with above.

Finally, it should be noted that the fine for delay in the submission of magnetic files increases daily and, therefore, the fine is not imposed as a result of the delay in and of itself, but rather for

the lengthy of delay. When taking into account the lengthy of the delay, the fine provided by the law loses its punitive nature and takes on a **character of interest payments**, which is inadmissible under the Brazilian legal system. As a matter of fact, this multiple penalty implies *bis in idem*, which is repealed under Brazilian legislation and case law. In practice, the tax authorities would be charging several daily fines for late submission of the magnetic files, as if the purported infraction ("delay in submitting the magnetic files") could be committed several times.

Notwithstanding the above arguments, the decisions in the administrative sphere have been unfavorable to a vast majority of taxpayers. This happens essentially because the Administrative Tribunals limit themselves to applying the criteria imposed by article 12 of Law 8218/1991, overlooking the merit of the case (proportionality, reasonableness, equality, confiscation, etc.), particularly by reason of the constitutional nature of the arguments expounded.

However, although the issue of lawfulness and constitutionality of these fines is still incipient at the Brazilian courts, their annulment in court stands very good prospects of success, particularly in view of the decisions of the higher courts which, in other events, dismissed fines (i) calculated over amounts unrelated to the infraction committed (*i.e.* income; turnover), in keeping with the principle of proportionality and reasonableness; (ii) imposed unequally on taxpayers in the same situation, on the grounds of violation of the principle of tax equality; (iii) having a clearly confiscatory nature, disproportionately expropriating the taxpayers' equity; or (iv) having the nature of interest payments, instead of a punitive and disciplinary character.

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