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Indirect Tax Alert

News from EY Americas Tax

Brazilian tax authorities issue guidance on exclusion of state VAT from PIS and COFINS tax basis

Brazil's tax authorities (RFB) issued Normative Instruction (IN) No. 1,911/2019, regulating the calculation, inspection, collection and administration of PIS/Pasep and COFINS (Social Security Contributions on Sales), as well as PIS/Pasep-Import and COFINS-Import contributions (Social Security Contributions on Imports).

While IN 1,911/2019 streamlines the guidance for all of the social contribution provisions, taxpayers should carefully analyze the provisions of IN 1,911/2019, as they may contradict the positions of the courts. IN 1,911/2019 went into effect on 15 October 2019. The RFB may rely on it to challenge/audit Brazilian companies' operations. Therefore, companies should review the IN 1,911/2019 provisions and determine how their day-to-day business may be affected.

Calculation of the exclusion of ICMS (State VAT) from PIS and COFINS tax basis

Article 27 of IN 1,911/2019 affirms the understanding of "COSIT" Consultation Solution No. 13/2018, which clarifies that the ICMS (State value-added tax (VAT)) amount excluded from the PIS and COFINS tax basis is the amount collected, not the amount reported on the invoice.

IN 1,911/2019 creates a split on the PIS and COFINS tax basis calculation between the administrative and judicial branches. The courts have ruled that the ICMS amount on the invoice, not the ICMS amount collected, should be excluded from the PIS and COFINS tax basis calculation. The Supreme Court will weigh in on this issue in approximately two months.

PIS and COFINS credits over ICMS

Article 8, paragraph 3, II of IN 404/2004 included ICMS in the PIS and COFINS credit calculation. IN 1,911/2019, however, excludes the ICMS amount from the PIS and COFINS credit calculation.

In this context, IN 1,911/2019 does not mention the ICMS collected from the previous transactions, only the ICMS entered on the invoice, which differs from the treatment of ICMS in the PIS and COFINS tax basis calculation.

Definition of the input for credit purposes

Article 171 of IN 1,911/2019 addresses "inputs used in the production or manufacture of goods or products," whose cost taxpayers may claim as a credit.

Article 172 of IN 1,911/2019 provides cases in which taxpayers may claim a credit for the PIS and COFINS collected. In general, if certain goods or services are related to the production of goods or provision of services, taxpayers may claim a credit for the PIS and COFINS collected on the purchase of the goods or services used in the production process or provision of other services. For instance, personal protective equipment (PPE) is mandatory for certain manufacturing processes. In this case, taxpayers may claim a credit for the PIS and COFINS collected on the purchase of the PPE.

IN 1,911/2019 does not allow taxpayers to claim a credit for the PIS and COFINS collected on the purchase of the packaging used in the transportation of a finished product or the amount collected on the purchase of transportation services if the finished product is transported between establishments of the same legal entity.

The position in IN 1,911/2019 is contrary to the position taken by the courts. The courts have not limited the input concept to the goods consumed in the production process. According to the courts, the "input" concept also considers the indispensability or importance of a certain item – good or service – for the development of the economic activity performed by the taxpayer. This less-restricted input concept has been verified in several decisions of the federal regional courts.

Consolidation of rules and repeal of others

IN 1,911/2019 supersedes 53 Normative Instructions published between 2002 and 2015. Among the revoked Normative Instructions incorporated into IN 1,911/2019 are:

- IN 758/2007, which established procedures for qualifying for the Special Regime of Incentives for Infrastructure Development (REIDI)
- IN 882/2008, which established the suspension of contributions (PIS and COFINS, PIS-Import and COFINS-Import) on the gross revenue from sales in the domestic market or on the import of oil destined for shipping, port and maritime support

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