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Bzl tax environment – litigation-driven uncertainty persists, but more favorable to companies

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Tax framework still defined by judicial disputes

We hosted an event this week with Eduardo Katz and Reinaldo Engelberg, partners at the Mattos Filho law firm, to discuss the evolution of taxation on retailers in Brazil. Since 2024, the Brazilian tax landscape has remained heavily marked by judicial disputes, particularly around the interpretation and enforcement of new legislation. In recent quarters, we have extensively covered the sector's tax challenges, notably the debate on the taxation of state tax incentives under Law #14,789/23. A few conclusions: (i) while presumed tax credits have generally maintained favorable court precedents—especially for credits generated prior to the new law; (ii) negative tax credits, linked to base reductions, have faced increased scrutiny following the STJ's (Brazil's Superior Court of Justice) Theme 1182 ruling, which set stricter conditions for their use; and (iii) on the PIS/Cofins tax front, the exclusion of these contributions from presumed credits has seen some favorable decisions, albeit to a lesser extent than the exclusion of income tax on presumed credits. Overall, we have observed retailers gradually reducing—or entirely avoiding—provisions for income tax on state subsidies, supported by more favorable recent rulings from Brazilian courts.

Presumed tax credits with more favorable decisions for taxpayers by Brazilian courts

Law 14,879 introduced a major shift: under the new framework, all subsidies are taxable, with a compensating tax credit offered in return. In practice, this has significantly increased the tax burden for companies and sparked widespread litigation aimed at excluding these revenues from federal tax bases (IRPJ, CSLL, PIS, and Cofins). But the legal conflict involving presumed tax credits is intense, with Brazil´s IRS closely examining how these benefits are granted and utilized. Subsidies that involve mandatory contributions to state development funds are being challenged by Brazil´s IRS, which claims they constitute indirect repayments of ICMS (state-level tax). A recent STJ decision ruled out the taxation of presumed ICMS tax credits under corporate income tax (IRPJ) and the social contribution on net profits (CSLL), even after the enactment of Law 14,789/2023. This law, proposed by the Finance Ministry, aimed to standardize the taxation of all ICMS-related tax benefits, eliminating most of the tax shield. In a solo ruling, Justice Gurgel de Faria aligned with the Federal Public Prosecutor's Office and lower court rulings, reinforcing the view that federal taxation on presumed ICMS credits (which accounts for most of the ICMS benefits for retailers, such as GMAT, Vulcabras and part of Azzas´ benefits) violates the constitutional principle of federalism. This is the STJ's first statement on the topic following the new legislation, which had sparked legal uncertainty and prompted new lawsuits. Legal experts see this decision as a step toward stabilizing taxpayer expectations, particularly for companies with existing court decisions or those pursuing administrative remedies.

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Negative credits and the lack of a definitive ruling

One key area of conflict is the so-called “negative tax credit,” which refers to tax benefits stemming from reductions in the tax base. The STJ, in its ruling on Theme 1182, determined that negative tax credits aren’t equivalent to presumed tax credits, and thus must comply strictly with existing laws. While the court did not rule that negative tax credits are entirely inadmissible, it imposed stringent conditions for their application. In response, Brazil´s IRS has begun scrutinizing the spread of such tax credits across companies, challenging their use and even issuing tax assessments. It argues that since negative tax credits arise from exemptions or reductions, they should have a neutral fiscal impact, unlike presumed credits, which involve specific state-granted incentives and require credit reversals. This legal tension has reached the Administrative Council of Tax Appeals (CARF), with some favorable decisions for companies, especially considering negative credits that are similar to presumed credits, such as Lei da Moda.

Regional divergence and PIS/Cofins tax controversies

Treatment of PIS/Cofins credits is another flashpoint. While many courts have ruled favorably for taxpayers on presumed credits, outcomes remain inconsistent, with CARF emphasizing proof of economic benefit and project execution. States such as Ceará and Piauí have reclassified incentives as presumed tax credits to bolster legal certainty, reducing potential federal disputes, but this has not eliminated risks. The patchwork nature of rulings means that jurisdictional differences and the framing of credit structures can materially impact litigation outcomes, creating an uneven playing field across regions and company profiles.

Looking ahead – high-stakes judicial milestones

The coming quarters could see pivotal legal developments, with the STJ expected to select a leading presumed credit case for a binding ruling. Although current jurisprudence for presumed credits favors taxpayers (success rates of ~70% in ICMS cases, ~55% in PIS/Cofins), a partial reversal is possible under the new legislative framework. Any adverse shift would likely be modulated to protect those relying on previous rulings, but companies that opted not to provision for liabilities could face retroactive exposure. As the courts increasingly focus on the substance over the label of tax credits, detailed documentation and justification of incentive structures will be key to sustaining benefits and avoiding material tax contingencies.

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