Legal Bulletin
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Distribution of Foreign Audiovisual Works in Brazil – Arguments against the Levy of CIDE on the Transfer of Funds to Non-Residents

The Brazilian Administrative Council of Tax Appeals ("CARF") – the appellate body within Brazil's administrative tax system – decided recently that the Contribution for the Intervention in the Economic Domain ("CIDE") would apply over payments or credits made to non-Brazilian residents related to the distribution of foreign audiovisual works in Brazil.

Such precedent is unlawful and significantly increases the tax burden on the activity of distribution of foreign audiovisual content in Brazil.

The Brazilian Constitution provides for several types of CIDEs, each to be instituted and regulated by federal laws with the purpose of stimulating the development of a specific sector or activity of the Brazilian economy, considered a priority to the country.

Law No. 10,168/00 introduced a specific type of CIDE to foster technological and scientific development/research in Brazil. Such contribution – reviewed by CARF in the administrative decision referred to above – is levied from the Brazilian payer at a 10% rate on any amounts paid, credited, delivered, employed or remitted to non-residents for (i) the use of rights or agreement that entail transfer of technology, (ii) royalties of any title, or (iii) technical services, administrative assistance services and similar (the latter two taxable events were introduced later by Law No. 10,332/01).

As clarified by Article 10 of Decree No. 4,195/02 (which regulated the above laws), said CIDE is levied only on amounts paid, credited, delivered, employed or remitted to non-Brazilian residents as royalties or consideration that relate to (i) the providing of technology; (ii) the rendering of technical assistance, including technical assistance services and specialized technical services; (iii) technical services, administrative assistance services and similar; (iv) assignment and license for use of trademarks; and (v) assignment and license for exploitation of patents.

The distribution agreement of an audiovisual work– which is a license issued by the rights holder of the work to allow the Brazilian party to explore it, generally with certain limitations – does not entail any of the above taxable events of CIDE.

Payments to the rights holder for this copyright license certainly do not involve transfer of technology nor technical services, technical assistance, administrative assistance and the like (taxable events of CIDE pursuant to the law). Neither do they give rise to "payment of royalties of any title", as explained below.

Brazil follows the system known as *Droit d'Auteur* and not the copyright system (where the term "royalties" are acceptable to designate related payments). In Brazil, the term "royalties" applies exclusively to consideration paid for the use of patents, industry or commerce trademarks, technical and scientific assistance, including the transfer of technology, but never for the use of works protected by copyright.

A distorted concept of royalty is contained in Article 22 of Law No. 4,506/64, which states that income resulting from the use of works protected by copyright is classified generally as royalties, except when received by the own author or creator of the work. We consider this provision to be inapplicable here for several reasons, namely:

São Paulo
Av. Brig. Faria Lima, 2601
12th floor - 01452-924
São Paulo, SP - Brazil
Phone. +55 11 3555 5000

Rio de Janeiro
Praia de Botafogo, 440
15th floor - 22250-908
Rio de Janeiro, RJ - Brazil
Phone. + 55 21 3503 2000

Brasília
SCN - Quadra 4 - Bloco B
6th floor - 70714-900
Brasília, DF - Brazil
Phone. + 55 61 2109 6070

contato@levysalomao.com.br

i) Law No. 4,506/64 does not relate to CIDE, but exclusively to the income tax; this law was actually enacted many years before CIDE was even created;

ii) absolute inaccuracy of the rule when using the term "royalties" to refer to remuneration related to copyrights, which, as mentioned, does not have the nature of "royalties" in Brazil; pursuant to Articles 109 and 110 of the National Tax Code, the tax law must respect the definition, content and reach of the figures regulated by Private Law, even though it may define their tax effects and treat one figure as another **for specific tax purposes** clearly and expressly defined by the law (which was not done for purposes of CIDE);

iii) even the CIDE regulations (Article 10 of Decree No. 4,195/02, mentioned above) expressly state that, apart from payments for the provision of technology and for technical services, technical or administrative assistance and similar, royalty payments subject to CIDE are only those that relate to the "assignment and license for **use of trademarks**" and the "assignment and license for **exploitation of patents**", which is clearly not the case of copyrights;

iv) the rule in question also lacks clarity, particularly in the context of collective works such as audiovisual ones, where authorship is shared among more than one person (Article 5, VII, "h" and 16 of Law No. 9,610/98); and

v) even if said rule applied, payments related to the distribution of audiovisual works could not be treated as royalties when made to the own author/creator of the work and the definition of who is the author/creator of an audiovisual work may vary depending on the jurisdiction.

An additional reason why the aforementioned CIDE is illegal when levied over the distribution of audiovisual works in Brazil is that such activity is already subject to the so-called Contribution for the Development of the Brazilian Audiovisual Industry ("CONDECINE"). This tax is generally applied at a rate of 11% over the payment, credit, employment, remittance or delivery of funds to producers, distributors or intermediaries overseas in connection to the exploitation of foreign audiovisual works or its acquisition or import at a fixed price (Articles 32, sole paragraph and 33, paragraph 2 of Provisional Measure No. 2,228-1/01).

Charging of both CIDE and CONDECINE would therefore result in double taxation, violating principles and provisions of the Brazilian tax legislation. As CONDECINE is also a type of CIDE, another contribution of the same nature cannot be levied on the same taxable event. The same administrative court (*Conselho de Contribuintes*, now CARF) has already rendered prior decisions upholding that CIDE levied on royalties cannot be applied when the transaction is taxable by CONDECINE (i.e., Decisions Nos. 301-3475, published on 11.12.08 and 302-38763, published on 10.5.07).

For all the above, CARF's recent decision to charge CIDE on payments related to the distribution of foreign audiovisual works in Brazil is illegal and Highest Brazilian Courts are yet to rule on this matter. Firms of the audiovisual industry that have been subject to the payment of CIDE could therefore challenge such decision and the charge of this tax before Brazilian courts based on the solid arguments discussed above.

Simone Lahorgue Nunes
slahorgue@levysalomao.com.br

Isabela Schenberg Frascino
ifrascino@levysalomao.com.br