NEWSLETTER No. 87

DECEMBER 2021

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SUMMARY

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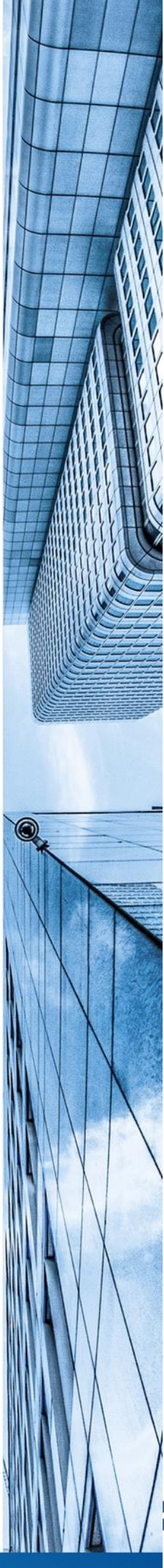

CVM CALLS FOR PUBLIC HEARING ON DRAFT RESOLUTION TO STRENGTHEN THE PROHIBITION OF INSIDER TRADING INVOLVING REAL ESTATE INVESTMENT FUNDS

On December 14, 2021, the Superintendency of Market Development (SDM) of the Brazilian Securities Commission (CVM) announced Public Hearing SDM 08/2021 ("Notice"), involving the draft of a resolution to promote alterations in CVM Instruction 472/2008, which covers the establishment, administration, functioning, and public offering of shares and disclosure of information by real estate investment funds (*fundos de investimento imobiliários* – FIIs) ("Draft").

The Draft has the aim of including in the applicable regulations the prohibition of trading shares of FIIs with the purpose of obtaining personal advantage or advantage for another party by someone who has had access to relevant information about the expected value of those shares before that information is disclosed to the market. In other words, the CVM intends to forbid insider trading of the shares of FIIs.

The wording of the Draft is in line with the provisions of CVM Resolution 44/2021 (which deals with the disclosure of relevant information involving listed corporations), to establish the presumptions applied by the CVM in accusations of insider trading.

In this respect, the Draft describes the following presumptions:

(i) a person traded shares of the fund or assets referenced to them relying on possession of relevant information about the fund not yet disclosed to the market ("presumption of use");

(ii) the officers or employees of the fund's portfolio manager who carry out tasks related to that portfolio had access to relevant information not yet disclosed to the market regarding the fund and relied on that information to engage in trading of the fund's shares ("presumption of access");

(iii) the officers or employees of the fund's administrator had access to relevant information not yet disclosed to the market regarding the fund and relied on that information to engage in trading of the fund's shares ("presumption of access");

(iv) a person with a commercial or professional relationship or a relation of trust with the fund, and had relevant information about the fund not yet disclosed to the market, engaged in trading of the fund's shares relying on that privileged information ("presumption of relevance");

(v) a service provider after concluding the rendering of services to the fund, in possession of relevant information about the fund not yet disclosed to the market, took advantage of that information to engage in trading of the fund's shares in the period of three months after concluding the services; and

(vi) a representative of the investors in the fund who concluded the representation in possession of relevant information about the fund not yet disclosed to the market took advantage of that information to engage in trading of the fund's shares in the period of three months after concluding the representation.

The presumptions identified above are relative and will have to be analyzed together with other elements indicating whether or not the trading was illicit.

Suggestions and comments to the proposed alterations will be accepted by the SDM until February 11, 2022, by means of e-mail at the address "audpublicaSDM0821@cvm.gov.br".

More information, as well as the entire contents of the Notice and Draft, can be found at the site of the CVM (www.gov.br/cvm).

STJ DECIDES ABOUT REDIRECTING TAX COLLECTION IN CASES OF IRREGULAR DISSOLUTION OF COMPANIES

On November 24, 2021, in judging Special Appeal no. 1.377.019/SP, the First Section of the Superior Tribunal of Justice (STJ, the highest court for non-constitutional matters) expressed the following position: "The redirection of a tax collection suit, when involving irregular dissolution of the debtor company or the presumption of such occurrence, shall not be authorized against a partner or third party who although exercising powers of management at the time of the tax generating event, did not commit acts in excess of powers or violation of the law, articles of association or bylaws, regularly withdrew from the company, and did not cause its subsequent irregular dissolution, according to Art. 135, III, of the National Tax Code."

As a general rule, established in *Súmula* [statement of consolidated position] 430 from the STJ, the default of a tax obligation by a company does not by itself generate the joint and several liability of the managing partner, administrator, controlling shareholder or other person with management authority ("manager"). The simple failure to pay the tax also does not configure secondary liability of such persons, as set forth in Art. 135 of the National Tax Code. For this to occur, it is necessary for the manager to have acted with excess of powers or violation of the law or the company's articles of association or bylaws.

As stressed by the reporting judge in her guiding opinion, this conclusion is a corollary of the autonomous assets of the company, since according to Art. 49-A of the Civil Code, the company's assets are separate from the assets of its partners, members, founders or administrators.
In this scenario, the First Section of the STJ considered that the liability for the tax debt must rest with the person or persons who committed the acts that generated the responsibility. If a former partner did not contribute to the irregular dissolution of the company, he cannot be held liable for this fact.

In this ruling, reservations were made for cases of fraud, simulation and analogous illegal acts involving the irregular dissolution of the debtor company, along with the situations in which managing partner that left the company acted, at the time, with excess of powers or violation of the law or the company's articles of association or bylaws.

More information, along with the full text of the decision of Special Appeal no. 1.377.019/SP, can be found at the site of the STJ (www.stj.jus.br).