NEWSLETTER No. 120

SEPTEMBER 2024

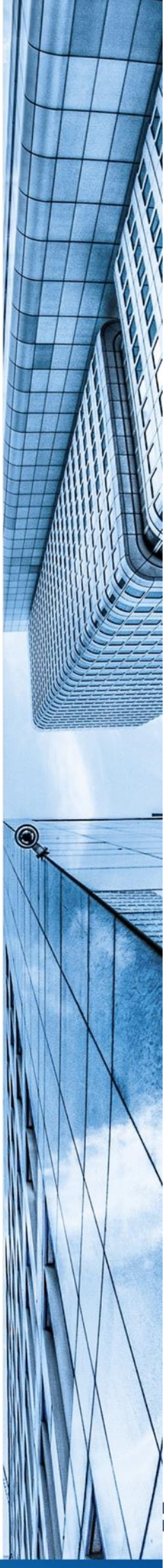
São Paulo
Rua Gomes de Carvalho, n° 1507
2° andar – Vila Olímpia
04547-005 – São Paulo – SP
+55 (11) 4210-4010

Rio de Janeiro
Rua Joana Angélica, n° 228
Ipanema
22420-030 – Rio de Janeiro – RJ
+55 (21) 2523-5960

moreira menezes, martins
ADVOGADOS

SUMMARY

NEWSLETTER No. 120 | SEPTEMBER 2024



STJ RULES THAT INCOME TAX DOES NOT APPLY TO TRANSFERS OF INVESTMENT FUND QUOTAS DUE TO INHERITANCE AFTER DEATH

On August 29th, 2024, a decision was published from the 1st Panel of the Superior Court of Justice (STJ), partially granting the Appeal No. 1,968,695/SP ("REsp No. 1,968,695"). The ruling recognized that Income Tax Withheld at Source ("IRRF") does not apply to the transfer of investment fund quotas due to inheritance after death when the heirs, without requesting the redemption of the quotas, submit a request for the transfer of the quotas, opting to maintain the values declared in the last Personal Income Tax Return ("DIRPF") of the deceased.

REsp No. 1,968,695 originated from a preventive writ of mandamus seeking recognition of the clear and certain right not to incur Income Tax Withheld at Source (IRRF) on the transfer of investment fund quotas due to inheritance after death. This arose because, upon the opening of her father's estate, the petitioner requested the transfer of the quotas held by the deceased at the value stated in his last Personal Income Tax Return (DIRPF). At that time, the financial institution managing the investment fund informed her of the IRRF incidence.

Regarding the matter, Reporting Justice Gurgel de Faria emphasized that the STJ has already decided that the taxable event for income tax is the acquisition of economic or legal availability of income, proceeds of any nature, or wealth increases.

The Reporting Justice noted that, in this context, two scenarios could constitute the taxable event for Income Tax: (i) the existence of capital gain, due to the appreciation of the quotas; or (ii) wealth increase, due to the financial returns provided by the investment fund. Both scenarios were not present in the case under review by the STJ.

It was highlighted that the legislation provides two options for the valuation of assets and rights subject to property transfer due to inheritance, bequest, or as an advance on the legitimate portion: (i) at market value or (ii) at the value stated in the DIRPF of the deceased or donor.

Specifically regarding this rule, the Federal Supreme Court (STF), in the judgment of Extraordinary Appeal No. 1,425,609/GO ("RE No. 1,425,609"), recognized its constitutionality, understanding that there is no double taxation, as IRRF applies exclusively when the transfer of assets is carried out at market value.

In the case analyzed by the 1st Panel of the STJ, however, the Reporting Justice noted that the quotas were being transferred to the heirs directly due to the death of the owner and were valued according to the last DIRPF of the deceased, not at market value.

In the words of the Reporting Justice, "there is no legal provision stricto sensu determining the incidence of IRRF on the mere transfer of investment fund quotas — of any type — due to inheritance after death, when the heirs choose to adhere to the value stated in the deceased's last assets declaration. The tax only applies if the transfer is made at market value and there is a positive difference relative to the acquisition value."

It was also noted that, in accordance with the principle of legality in tax matters, the tax can only be demanded from the taxpayer when there is a precise alignment between the factual situation and the legal hypothesis of incidence. In other words, the administrative authority can only require payment of the tax when the typical description occurs.

For this reason, the Reporting Justice found the attempt to interpret the legal norm expansively — to include the term "redemption" as encompassing the scenario of transferring assets by inheritance without capital gain, particularly in relation to a closed-end investment fund—to be unfounded.

Finally, the Reporting Justice noted that the Declaratory Interpretative Act ADI/SRFB No. 13/2007 ("Act No. 17/2007") is illegal in the part where it provides for the incidence of IRRF on the transmission of financial investments by inheritance, without linking it to the existence of capital gain. This is because, as a secondary normative source, Act No. 17/2007 does not have the authority to create a tax incidence hypothesis different from that explicitly provided by law.

For these reasons, the 1st Panel of the STJ, unanimously, partially granted REsp No. 1,968,695, in accordance with the vote of the Reporting Justice.

Further information, as well as the full text of the decision, can be found on the STJ website (www.stj.jus.br).

CVM ANNOUNCES RULES FOR PORTABILITY OF SECURITIES INVESTMENTS

On August 26th, 2024, the Securities and Exchange Commission (CVM) issued Resolution CVM No. 210/2024, which establishes the rules and procedures for the transfer of securities investments. Additionally, Resolution CVM No. 209/2024 was published, which makes specific amendments to other regulations of the agency to align them with the new provisions of Resolution CVM No. 210/2024.

Both resolutions aim to simplify and facilitate the movement of securities investments. Resolution CVM No. 210/2024 was preceded by a Regulatory Impact Analysis (AIR) and Public Consultation SDM No. 02/2023, during which market participants had the opportunity to submit suggestions and comments on the topic.

Included in the CVM's 2024 Regulatory Agenda, Resolution CVM No. 210/2024 outlines the rules and procedures applicable to custodians, intermediaries, central depositories, registration entities, and portfolio managers of securities. It covers the reception and processing of securities transfer requests, as well as any associated rights and obligations.

In this regard, the regulation defines "portability" as the transfer of securities and any associated rights and obligations between the aforementioned institutions, at the request of the investor or their representative, carried out without changing ownership.

Among the new features introduced by Resolution CVM No. 210/2024, the following stand out:

(i) digital interface for portability requests: custodians, intermediaries, and central depositories will be required to provide a digital interface for portability requests, accessible exclusively through a password, electronic signature, or similar identification mechanism.

Among its functionalities, the digital platform must allow investors to track their requests, providing information on progress, processing stages, and estimated timelines for the completion of the requested transfer.

It is important to note, however, that investors can still submit portability requests via physical documents or other alternative means if they prefer, provided that such documents are made available by the custodian, intermediary, or central depository. In this case, the investor must acknowledge their awareness of the existence of the digital interface and their choice not to use it;

(ii) option to choose the point of portability request: with the issuance of Resolution CVM No. 210/2024, investors will be able to make a portability request (ii.1) to the originating custodian or intermediary (i.e., the entity from which the security is being transferred); (ii.2) to the destination custodian or intermediary (i.e., the entity to which the security is being transferred); or (ii.3) to the central depository, which will forward the request to both the originating and destination custodians.

Previously, portability requests had to be made exclusively to the originating custodian or intermediary. In this regard, the Public Consultation Notice SDM No. 02/2023 notes that CVM found, through a sample in the Regulatory Impact Analysis, that Brazil was the only case where portability requests were handled in this manner.

According to CVM, this change is expected to produce positive effects on the speed and smoothness of the process due to the alignment between the client's interests and those of the destination intermediary, as it assumes that both parties are interested in ensuring that the portability proceeds quickly and without obstacles;

(iii) escalation of deadlines: according to Resolution CVM No. 210/2024, the deadline for completing a portability request will depend on the operational complexity of each security. In this regard, the regulation sets a list of deadlines for the transfer of securities, ranging from two to nine business days.

For example, securities subject to centralized deposit systems must be transferred within up to two business days, while investment fund shares must be transferred within up to nine business days;

(iv) provision of quantitative data: Resolution CVM No. 210/2024 requires custodians and originating intermediaries to provide the CVM and self-regulatory entities with quantitative data on the count of portability requests, aggregated by calendar year.

In this regard, institutions must provide the following data: (iv.1) the number of requests made directly to the originating custodian or intermediary; (iv.2) the number of requests made to the central depository and destination custodian or intermediary, and subsequently communicated to the originating custodian or intermediary; and (iv.3) the number of requests canceled, fulfilled within the regulatory deadline, fulfilled in full or in part within an extended deadline, and requests fully or partially refused; and

(v) serious infractions: finally, Resolution CVM No. 210/2024 defines the following actions as serious infractions: (v.1) repeated failure to comply with the deadlines established for completing the portability request; (v.2) actions or omissions that unjustifiably prevent or delay the processing of the portability request; (v.3) failure to provide the digital interface by custodians, intermediaries, and central depositories, as mentioned in item '(i)' above; and (v.4) non-compliance with the provisions of Article 12 of the Resolution, which requires that, in the case of a portability request made to the destination custodian or intermediary, the originating custodian or intermediary must obtain the investor's validation of the portability request, preferably through their digital interface for portability requests.

Resolutions No. 209/2024 and No. 210/2024 will come into effect on July 1, 2025.

Further information, as well as the full text of Resolution No. 210/2024, can be found on the Securities and Exchange Commission's website (www.gov.br/cvm).